THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

Case No.: 2013-CP-10-7133
Appellate Case No.: 2015-01328

Donna Douglass,.....Appellant,

v.

Berkshire on St. Ives,
Berkshire Property Advisors, LLC,
BVF North Cove, LLC, and
The Berkshire Group,.....Respondents.

AMENDED RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Donna Douglass,

Plaintiff,

v.

Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group,

Defendants.

IN THE COURT OF COMMOM PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-10-7133

ORDER

FILED
2015 APR 27 PM 12:24
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court upon Defendants' Motion for Summary Judgment. A hearing was held on April 8th, 2015 whereby Jerry Wigger represented Plaintiff and James Brogdon represented Defendants. After carefully considering the applicable law, arguments of counsel and supporting memoranda submitted by the Parties, I hereby GRANT Defendants' Motion for Summary Judgment as to all of Plaintiff's claims.

STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "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 non-moving party." *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). However, "[i]t is not sufficient [to defeat a motion for summary judgment] that one create an inference which is not reasonable or an issue of fact

RMDJ/1

that is not genuine." *Shuler v Tuomey Reg'l Med. Ctr.*, 313 S C 225, 437 S E 2d 128, 129 (Ct. App. 1993). "In order to resist a motion for summary judgment, the non-moving party must come forward with specific facts showing genuine issues necessitating trial." *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 565 S.E.2d 98, 100 (Ct. App. 1995).

LAW

"'The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty.'" *Larrimore v. CP&L*, 340 S.C. 438, 444-45, 531 S.E.2d 535, 538 (Ct. App. 2000) (quoting *Israel v. Carolina Bar–B–Que, Inc.*, 292 S.C. 282, 289, 356 S.E.2d 123, 128 (Ct. App. 1987), *cert. denied*, 293 S.C. 406, 360 S.E.2d 824 (1987) (citation omitted)). To recover for injuries caused by a dangerous condition, "a 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." *Wintersteen v. Food Lion*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). Generally, landowners are under no duty to warn invitee's of open and obvious conditions. *Larimore*, 340 S.C. 438, 445, 521 S.E.2d 535, 539 (Ct. App. 2000).

"[U]nder South Carolina's doctrine of comparative negligence, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant." *Bloom v. Ravoira*, 339 S.C. 417, 422, 529, S.E.2d 710, 712-13 (2000) (citing *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991)). "In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." *Id.* (citations omitted).

RMOJ/2

FACTS

This case arises out of an alleged trip and fall that occurred on January 6, 2011 in a stairwell at an apartment complex owned by Defendants in North Charleston, South Carolina. Plaintiff testified in her deposition that a burned out light in the stairwell created the darkness that caused her fall, and there were no lights burned out during her previous visits to the 700 building. Plaintiff also testified that she was aware the light was out before her fall and chose to traverse the dark stairwell. In addition, Plaintiff testified that she did not know (1) when the light went out, (2) what caused the light to go out, (3) whether the light outage had been reported to Defendants, or (4) whether a representative of Defendants noticed the light was burned out. Plaintiff submitted no evidence indicating Defendants' possessed actual or constructive notice of the light outage and, in fact, argues that notice is not required because Defendants' created the condition by placing the light in the stairwell and failing to replace the light bulb prior to it burning out. Plaintiff submitted no evidence relating to industry standard or any alleged building code violations to support her theory. Defense counsel argued, and the Court agrees, that such a theory is nonsensical as it is impossible to anticipate with any degree of accuracy when a light bulb may burn out, and to create such a standard would be to treat Defendants as the insurers of Plaintiff's safety.

FINDINGS

1. The condition that caused Plaintiff's fall was a burned out light bulb.
2. Despite Plaintiff's contention, Defendants did not create the condition of a burned out light bulb.
3. Under South Carolina law, Plaintiff was required to prove Defendants had actual or constructive notice of the condition that caused her injury. Plaintiff produced no

RMOT/3

evidence that Defendants' possessed actual or constructive notice of the burned out light bulb at the time of Plaintiff's fall.

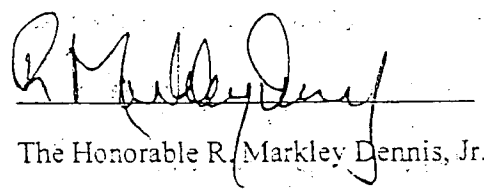
4. Without notice, Defendants did not owe Plaintiff a duty to warn of or remedy the lighting condition that Plaintiff claims caused her fall. As a result, Plaintiff's causes of action against Defendants must fail as a matter of law.

5. As an alternate ground, Plaintiff bears greater than fifty-percent (50%) of the fault for causing her fall by assuming the risk of traversing the dark stairwell despite recognizing the danger associated with doing so prior to her fall. As a result, Plaintiff's causes of action against Defendants must fail as a matter of law.

IT IS THEREFORE ORDERED:

Defendants' Motion for Summary Judgment is hereby GRANTED.

AND IT IS SO ORDERED.



The Honorable R. Markley Dennis, Jr.
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
April 23, 2015

FMSJ 4

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS Case No. 2013-CP-10-7133
Donna Douglas Plaintiff, **Berkshire on St. Ives, et al** Defendants.	)	ORDER

FILED
2015 MAY 29 AM 9:22
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before me upon Motion for Reconsideration, filed 5/7/2015, by Plaintiff, by and through counsel. After fully considering said Motion, this Court finds no need for oral argument in this matter and therefore the Motion to Alter or Amend and for Reconsideration is denied;

AND IT IS SO ORDERED!

R. MARKLEY DENNIS, JR.
Presiding Judge

Charleston, South Carolina

May 26, 2015

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Donna Douglass,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 13-CP-10-7133
	)	
Berkshires on St. Ives, ,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on April 8, 2015, before The Honorable R. Markley Dennis, Jr., in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Jarrel L. Wigger, Esq.
Appearing for Plaintiff

James E. Brogdon, Esq.
Appearing for Defendant

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
P O Box 901
Johns Island, South Carolina 29457
dgarrison@sccourts.org

1 THE COURT: Douglass versus
2 Berkshire. Motions for summary judgment, I
3 think.
4 MR. BROGDAN: Yes, sir, Your Honor.
5 How are you today?
6 THE COURT: I'm great. How are
7 you, sir?
8 MR. BROGDAN: Doing well, sir. I
9 e-mailed over a memorandum for my Motion ---
10 THE COURT: I have it. It is
11 incorporated for purpose of review should
12 that become necessary. You are entitled to
13 rely on it.
14 MR. BROGDAN: Thank you, Judge, may
15 it please the court?
16 THE COURT: Yes, sir.
17 MR. BROGDAN: Your Honor, this is a
18 premises liability case ---
19 THE COURT: If you could, for the
20 record, identify yourself and the party or
21 parties that you represent.
22 MR. BROGDAN: James Brogdan for the
23 defendants.
24 THE COURT: Thank you. Excuse me
25 for interrupting 111.

1 MR. BROGDAN: This is a premises
2 liability case that arose out of an accident
3 that happened in January of 2011 at an
4 apartment complex in North Charleston.
5 THE COURT: Right.
6 MR. BROGDAN: The plaintiff was a
7 pizza delivery lady.
8 THE COURT: (Affirmative nod), I
9 read your memo.
10 MR. BROGDAN: Your Honor, in her
11 deposition she concedes what caused her --
12 or claims that what caused her to fall was a
13 light being out in the stairwell. There is
14 no evidence whatsoever that any of the
15 defendants, the owners, property manager or
16 representative had any knowledge of that
17 light being out. Without that knowledge,
18 it's our position that under Winterstein,
19 although that's a foreign substance case,
20 notice is required.
21 If you're not going to require
22 notice in a situation of a light bulb being
23 out, you're essentially asking the
24 landowners, whether that be an individual
25 homeowner of an apartment complex, to be the

1 insurer of every guest's safety.
2 Beyond that, Your Honor, even beyond
3 the notice issue this was an open and obvious
4 condition. The plaintiff conceded that she
5 realized that the light was out before she
6 proceeded up the stairway -- stairwell, and
7 was careful because of that reason.
8 Therefore, there is no duty to warn.
9 I am not real sure how you warn in a
10 situation like this, when a light goes out.
11 I don't know that it is something that -- we
12 all know there is no way to predict from a
13 notice standpoint when a light bulb will go
14 out. It's just not something that science
15 allows us to do.
16 THE COURT: Okay.
17 MR. BROGDAN: For those reasons we
18 ask that our summary judgment be granted.
19 THE COURT: Thank you, Mr.
20 Brogdan. Mr. Wigger?
21 MR. WIGGER: Your Honor, may I hand
22 up my memo?
23 THE COURT: Absolutely. You filed
24 one -- or is this the original?
25 MR. WIGGER: It is the original,

1 Your Honor.
2 THE COURT: I will be happy to --
3 it's incorporated as well.
4 MR. WIGGER: Yes, sir, and I just
5 got Mr. Brogdan's yesterday.
6 THE COURT: Okay. That's no
7 problem.
8 MR. WIGGER: Your Honor, we took
9 the deposition of the property manager or the
10 maintenance supervisor and he admitted that
11 lighting was a safety issue. He said that
12 the only way that they check lighting is for
13 a resident or an employee to respond to that.
14 He admitted that they knew how long it took
15 for light bulbs to burn out, but that they
16 didn't check them. It's a scintilla case.
17 THE COURT: I tried one of these,
18 just recently. They ended up settling
19 because, I think, I threatened at the half
20 what I was going to do. Very similar. It
21 was a snakebite. A fellow walks down a path
22 on Daniel Island and all the lights were out.
23 There was a snake. He was bitten. His suit
24 was that the lights were out. Okay. I
25 agree.

1 saying is that there's a method to use
2 reasonable preventive measures. All they
3 have to do is change them out before they
4 burn out. They know what the hours is
5 because they buy the light bulbs.
6 THE COURT: Really?
7 MR. WIGGER: Yes, sir.
8 THE COURT: Well, I've got news
9 for you. Maybe you haven't had the same
10 problems that I have. I've bought light
11 bulbs and they burn out a heck of a lot
12 sooner than one would think.
13 I appreciate your position, you've
14 briefed it, it's covered. I'm granting the
15 summary judgment. Thank you, sir.
16 Two reasons. Number one, I don't
17 think that there is a duty to maintain a
18 constant supervision notwithstanding I
19 understand what you're saying. Secondly,
20 clearly if somebody goes and walks in a place
21 that there are lights out, knows that the
22 lights are out, sees that the lights are out,
23 that is -- that is what I was going to do
24 with the fellow walking down a dark place in
25 the middle of a s15m. Sorry, you kinda -- I

1 know that is talking about assumption of the
2 risk and I know that's been succumbed, but
3 there's no question your client's negligence
4 is greater than any negligence on the part of
5 the defendants. Primarily, I don't think
6 that there's a duty, but you can throw that
7 one in too. It's the second one that I've
8 had today. I'll throw that in as well.
9 MR. BROGDAN: Thank you, Judge.
10 (HEARING CONCLUDED)
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25

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on April 8, 2015, before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Deborah Garrison
Deborah Garrison

Charleston, South Carolina
July 24, 2015

In The Matter Of:

Donna Douglass vs

J.E.M. Restaurant, et al

Donna Douglass

December 11, 2012

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Mini-Script

1 STATE OF SOUTH CAROLINA
2 COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

COPY

3
4 DONNA DOUGLASS,
5 Plaintiff,
6 vs. CASE NO. 2012-CP-10-229
7 J.E.M. RESTAURANT GROUP, INC., d/b/a PIZZA HUT, JEM
PIZZA GROUP, LLC and JEM PIZZA DELIVERY, LLC,
8
Defendants.
9
10
DEPOSITION OF: DONNA DOUGLASS
11
DATE: December 11, 2012
12
TIME: 10:00 a.m.
13
LOCATION: Nexsen Pruet, LLC
14 205 King Street, Suite 400
Charleston, SC
15
TAKEN BY: Counsel for the Defendants
16
17 REPORTED BY: Patricia L. Thompson,
Registered Professional Reporter
18
19
20
21 A. WILLIAM ROBERTS, JR. & ASSOCIATES
Fast, Accurate & Friendly
22
Charleston, SC (843) 722-8414 | Hilton Head, SC (843) 785-3263 | Myrtle Beach, SC (843) 839-3376
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25

1 APPEARANCES OF COUNSEL:

2

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DONNA DOUGLASS:

4

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9 ATTORNEYS FOR THE DEFENDANTS
J.E.M. RESTAURANT GROUP, INC.,
10 d/b/a PIZZA HUT, JEM PIZZA GROUP, LLC
and JEM PIZZA DELIVERY, LLC:

11

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12 BY: MOLLY HUGHES CHERRY
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13 Charleston, SC 29401
(843) 577-9440
14 mcherry@nexsenpruet.com

15

16 Also Present:

17 Melissa Benson-Eckert
Tonya Wright

18

19

20

21 (INDEX AT REAR OF TRANSCRIPT)

22

23

24

25

1 STIPULATION

2 It is stipulated by and between Counsel
3 that this deposition is being taken in accordance
4 with the South Carolina Rules of Civil Procedure,
5 Rule 30; that all objections as to Notice of this
6 deposition are hereby waived; that all objections
7 except as to form are reserved until the time of
8 trial; and that the deponent waives reading and
9 signing of this deposition.

10 * * * * * * * * * * *

11 DONNA DOUGLASS

12 being first duly sworn, testified as follows:

13 EXAMINATION

14 BY MS. CHERRY:

15 Q. Good morning, Miss Douglass. My name
16 is Molly Cherry, and we met earlier this morning.
17 Do you understand that I am here today
18 representing your former employer in a lawsuit that
19 you have filed?
20 A. Yes, ma'am.
21 Q. And do you understand that your
22 deposition is being taken today?
23 A. Yes, ma'am.
24 Q. Do you understand that your testimony
25 is under oath?

A. Yes, ma'am.
Q. Have you ever been deposed before?
A. I don't know what you mean.
Q. Have you ever done this process before?
A. Yes, ma'am.
Q. You have?
A. Uh-huh.
Q. How many times?
A. Once.
Q. When was that?
A. I want to say maybe in July.
Q. Of this year?
A. Uh-huh.
Q. And what was the purpose for that deposition?
A. I'm pretty sure it was the workmen's comp.
Q. And was your testimony in that workmen's compensation deposition in July true and accurate?
A. Yes, ma'am.
Q. To your knowledge is there anything in that testimony that you gave that you need to modify in any way?
A. There is -- I think there was like

1 two -- you want me to explain or just --
2 Q. Sure.
3 A. There was one of them when she asked me
4 what doctor did I go to, like -- she asked me what
5 doctor I went to in a certain time frame, and I
6 couldn't remember at the time when it was or where
7 he was. Because when she asked me she gave me the
8 address, but she actually gave me my address of the
9 doctors.
10 But what happened, I had a colonoscopy,
11 and I had it at the Rutledge Towers. And I really
12 don't know the doctors' names because you don't
13 know who do them. They just come in. They just
14 come do it. It was a lady that I seen, but it was
15 a man that did it. They put me to sleep.
16 Q. Anything else in your testimony from
17 your worker's comp deposition that needs to be
18 changed?
19 A. I'm not really sure. I can't really
20 remember.
21 Q. Now, the rules for your deposition here
22 today are generally the same that they were for
23 your worker's compensation deposition. I'm going
24 to be asking you a series of questions, and we have
25 a court reporter who is taking down my questions

1 and your answers. Okay?
2 A. Okay.
3 Q. And so it's going to be important that
4 you let me finish my question before you answer,
5 and I will try to be careful to let you finish your
6 answer before I ask my next question. Okay?
7 A. Yes, ma'am.
8 Q. That makes it a little easier for the
9 court reporter to take everything down that is
10 being said.
11 A. Yes, ma'am.
12 Q. If you do not understand a question
13 that I ask, you need to let me know. Okay?
14 A. Yes, ma'am.
15 Q. If you answer my question I will assume
16 that you understood it. Okay?
17 A. Okay.
18 Q. And you're doing a great job answering
19 audibly right now, but you want to be careful when
20 you answer my question to answer it with a word,
21 such as yes or no or okay, so that the court
22 reporter can take down what you say. Okay?
23 A. Yes, ma'am.
24 Q. Sometimes it's hard. People will say
25 "uh-huh" as opposed to "yes," and then when we're

1 reading the transcript it's difficult to determine
2 what you said. Okay?
3 A. Okay.
4 Q. Is there any reason that your ability
5 this morning to testify accurately would be
6 negatively impacted? Lack of sleep? Medication?
7 Anything like that?
8 A. No.
9 Q. Are you on any medication this morning?
10 A. No, ma'am.
11 Q. I don't think we will be here too long
12 today, but if at any point in time you need to take
13 a break, you let me know and we can do that. Okay?
14 A. Yes, ma'am.
15 Q. Have you ever been convicted of a
16 crime?
17 A. Yes, ma'am.
18 Q. What?
19 A. Conspiracy. Failure to stop for a blue
20 light.
21 Q. The conspiracy conviction, tell me
22 about that.
23 A. I was with some people that robbed a
24 place.
25 Q. When was that conviction?

1 A. 1990.
2 Q. And then the failure to stop for the
3 blue light?
4 A. The same thing.
5 Q. Was that --
6 A. It was all at one time.
7 Q. Any other convictions other than that
8 one?
9 A. I have like personal bounced checks.
10 I don't know if that's a felony. I don't know. It
11 was my checks that bounced at the bank.
12 Q. Do you remember when that occurred?
13 A. I'm not really sure, ma'am. I don't
14 know the date.
15 Q. Have you ever filed for bankruptcy?
16 A. No, ma'am.
17 Q. Have you ever been a party to a
18 lawsuit? Meaning a plaintiff in a lawsuit or a
19 defendant in a lawsuit other than this action and
20 your worker's comp action?
21 A. You're talking about like an automobile
22 accident? Yes, ma'am, automobile.
23 Q. Tell me about the automobile accident.
24 A. I got -- a lady run the red light and
25 hit me.

1 Q. When was that?
2 A. November -- November -- I think 2009 or
3 maybe 2010. I'm not really sure what year.
4 Q. And did you file a lawsuit?
5 A. Yes, ma'am.
6 Q. Were you represented by counsel, an
7 attorney in that lawsuit?
8 A. Yes, ma'am.
9 Q. Who was that?
10 A. Wigger.
11 Q. Jerry Wigger?
12 A. Yes, ma'am.
13 Q. The same attorney who is representing
14 you in this action?
15 A. Yes, ma'am.
16 Q. Did Mr. Wigger represent you in your
17 worker's comp action?
18 A. Yes, ma'am.
19 Q. What was the outcome of the lawsuit you
20 filed with regard to the auto accident? Did you go
21 to trial? Did you resolve it?
22 A. They resolved it.
23 Q. How did it resolve?
24 A. They just paid me for injury and pain.
25 Q. How much were you paid?

1 A. 27,000.
2 Q. How about did you file a lawsuit
3 against anyone pertaining to the accident where you
4 injured yourself on January 6th last year in the
5 St. Agnes apartments?
6 A. It wasn't St. Agnes apartments that I
7 fell in.
8 Q. Where did you fall?
9 A. I fell in Berkshire apartments.
10 Q. So in the Berkshire apartments did you
11 file a lawsuit related to that fall?
12 A. Yes.
13 Q. Who did you sue?
14 A. I'm not really sure. I don't know.
15 Q. What is the status of that lawsuit? Is
16 it still pending?
17 A. Still pending.
18 Q. Do you have an attorney in that
19 lawsuit?
20 A. Yes, ma'am.
21 Q. Who is that?
22 A. Wigger.
23 Q. Have you had your deposition taken in
24 that case?
25 A. No, ma'am.

1 Q. Do you know when that lawsuit was
2 filed?
3 A. I'm not really sure of the exact date.
4 I don't know.
5 Q. And has your worker's comp action been
6 resolved?
7 A. Yes, ma'am.
8 Q. Were you given any impairment rating?
9 A. What do you mean?
10 Q. Are there any restrictions on your
11 ability to work?
12 A. No, ma'am.
13 Q. Have you been released to return to
14 work?
15 A. Yes, ma'am.
16 Q. What was the outcome or the resolution
17 of your worker's comp claim?
18 A. Can you explain that to me.
19 Q. How was your worker's comp matter
20 resolved? Did you have a hearing?
21 A. No. They just settled it.
22 Q. And do you remember what the terms of
23 the settlement were? Did you receive any money?
24 A. Yeah. I received some money.
25 Q. How much did you receive?

1 A. I want to say 2,500, I think.
2 Q. Have you ever served in the military?
3 A. No, ma'am.
4 Q. I'm going to hand you a document and
5 ask you -- this is a judgment that I found online.
6 Do you see up here it's got the name
7 Donna Douglass? Have you ever lived on Marseilles
8 Drive?
9 A. Uh-huh.
10 Q. So is this judgment against you?
11 A. Yeah. That's the title loan place.
12 Q. So have you paid this judgment?
13 A. No. I know I was paying on it.
14 Q. And when you say "title loans," title
15 to what? A vehicle?
16 A. No. It was some property.
17 Q. What property?
18 A. It was like just some property that --
19 just like some property that I had.
20 Q. But what? Real estate property?
21 A. No.
22 Q. What kind of property?
23 A. Just like my -- you get a loan on your
24 stuff. Like TVs and stuff.
25 MS. CHERRY: I'm going to mark this as

1 Exhibit 1 to your deposition.
2 (Defendant's Exhibit Douglass 1,
3 transcript of judgement, marked for identification.
4 BY MS. CHERRY:
5 Q. Other than this judgment that we've
6 marked as Exhibit 1, Miss Douglass, have you ever
7 had any other judgments against you?
8 A. What do you mean in "judgments" against
9 me?
10 Q. Well, this document --
11 A. I got doctor bills.
12 Q. Doctor bills from --
13 A. MUSC. You know, one time before I was
14 hit when I was driving a Pizza Hut car. When I was
15 delivering somebody hit me head on, and I didn't
16 pay that doctor bill either.
17 I told Chad -- I think he was the
18 manager at the time. I told him and -- no. Amber.
19 And I went to the hospital because somebody hit me
20 head on. I was delivering pizza, and Pizza Hut
21 didn't even do anything. So I went to the doctor
22 for myself, you know. But that's a doctor bill.
23 And my colonoscopy I paid -- they give
24 you -- because the insurance at Pizza Hut don't pay
25 anything. I was paying on it, and they didn't pay

1 anything.
2 Q. Did you have health insurance when you
3 worked at Pizza Hut?
4 A. Yes. I had health insurance, but they
5 didn't pay anything. They only paid a thousand
6 dollars, and that's it.
7 Q. When was the auto accident that you
8 referenced?
9 A. Head on?
10 Q. Yes.
11 A. Ma'am, I'm not really sure. I'm not
12 really sure of the date. I can't really remember
13 when it was.
14 Q. Was it five years ago? Ten years ago?
15 Two years ago?
16 A. It probably was in '08, I want to say
17 now. I'm not really sure about the year now.
18 Q. Miss Douglass, did you do anything to
19 prepare for your deposition today?
20 A. I don't understand what you're saying.
21 Q. Did you do anything to prepare for
22 today, for this process today? Did you review any
23 documents? Did you speak with any doctors? Did
24 you review a diary? Did you do anything to prepare
25 for today?

A. No, ma'am.

Q. Do you have any social network sites, like a Facebook page?

A. Facebook page? No.

Q. Do you understand what I mean when I say "social networking?" Like Facebook, Twitter.

A. I don't have Facebook. I don't have Twitter. I don't have My Space. I don't have -- I play a game online.

Q. But do you have any social networking sites where you type things about yourself or what is going on with your life?

A. I have a Yahoo account, but I don't type about my life.

Q. Is your Yahoo account an email account?

A. Uh-huh.

Q. Are you married?

A. I'm going through a divorce.

Q. From whom are you being divorced?

A. Wilbert Desaussure.

Q. How long have you and Mr. Desaussure been married?

A. We were married for like three years but separated for two years.

Q. Other than Mr. Desaussure have you --

A. Been married? Uh-huh.

Q. Who else?

A. I married Dwight McKelvie.

Q. Could you tell his name.

A. D-W-I-G-H-T. M-c-K-E-L-V-I-E.

Q. And how long were the two of you married?

A. Me and Dwight was married -- I married him young. I think we were married for like five years.

Now, Wilbert Desaussure, me and him been together for like 14 years, just not married. And I married Rodney Douglass. We were married maybe about four years maybe. That's it.

Q. Do you have any children?

A. No, ma'am.

Q. Where do you live?

A. I live at 8422 Preakness Drive in North Charleston, South Carolina.

Q. And how long have you lived there?

A. Probably going on maybe about two years.

Q. Who lives with you at that address?

A. My sister and me and my boyfriend.

Q. What is your sister's name?

1 A. Tonya Wright.
2 Q. And what is your boyfriend's name?
3 A. Justin Myers.
4 Q. Where did you live before Preakness?
5 A. 5209 Marseilles Drive.
6 Q. And how long did you live there?
7 A. I'm not sure. Probably about five or
8 six years.
9 Q. Do you have any relatives over the age
10 of 17 who live in Charleston County?
11 A. Over? Yes.
12 Q. Tell me their last names.
13 A. Seals, Wrights, Howards, Morgans.
14 Q. Can you spell the last one.
15 A. Morgan. Caples.
16 Q. C-A-P-L-E-S?
17 A. Yes, ma'am.
18 Q. How about Justin Myers; does he have
19 any family over the age --
20 A. He's not from here.
21 Q. Where is he from?
22 A. He's from Florida.
23 Q. How about Mr. Desaussure; does he have
24 any family over the age of 17 in Charleston County?
25 A. Yeah.

1 Q. What are their last names?
2 A. Desaussures and Johnsons. That I know
3 of. Now, that's all the names I know.
4 Q. How about Dwight; does he have any
5 relatives over the age of 17 in Charleston County?
6 A. I'm not even sure. He's not even from
7 here.
8 Q. Where is he from?
9 A. He's from Connecticut, and he's
10 deceased.
11 Q. And then Rodney Douglass. Does he
12 have --
13 A. He's not even from here. He's from
14 Texas.
15 Q. Does Mr. Douglass live here?
16 A. No. He was in the military. I met him
17 in the military.
18 Q. And does Mr. Desaussure live here?
19 A. Yes, he does.
20 Q. Where did you grow up, Miss Douglass?
21 A. North Charleston.
22 Q. Did you go to school in North
23 Charleston?
24 A. Yes, ma'am.
25 Q. Did you go to high school?

A. I went -- I was a special ed. student.

Q. Did you get like a GED or degree or anything?

A. You just -- they just give you a paper just saying you been in school.

Q. What was your first job out of school?

A. I worked at McDonald's.

Q. Can you walk me through your employment history since --

A. I can do the best of my knowledge.

Q. Sure.

A. I worked at a temp service, Hammes, for a few years. I got a job working through Hammes at a place called Palmetto Wire, and I worked at St. Francis Hospital as a dietician. I worked at Energy Resource. I work at LKQ. I worked at Pizza Hut, Thoroughly Cleaning and Master Core, Holiday Inn.

I can't remember any more. Some of them jobs I worked through the temp, like St. Francis, Palmetto Wire.

Q. How about Westaff; did you ever work at Westaff?

A. Oh, yeah. That's a temp service.

Q. Westaff is?

1 A. Yes, ma'am. I worked some temps
2 through there, too. American Port Services.
3 Q. Tell me, Miss Douglass, what is the
4 longest you've ever worked at any of these jobs?
5 A. I worked at PBC, too, Palmetto Bridge
6 Construction. Probably about -- I worked at Pizza
7 Hut off and on since '93, but like some months --
8 I worked on the bridge. I worked on the bridge.
9 I don't remember what year I worked until it
10 finished. I think I was probably there about three
11 years. And I worked at Clean & Classy. That's a
12 laundromat. I don't think I told you that.
13 I worked at Clean & Classy for a couple of years.
14 I'm not really sure. And Energy
15 Resource, I worked there too. The job closed down.
16 Palmetto Wire, I worked there for a couple of
17 years, and I left there to go to Energy Resource
18 for more money.
19 Q. Have you ever been terminated from any
20 job before Pizza Hut?
21 A. Terminated? LKQ. Clean & Classy
22 because new owners bought it. I think that's all I
23 remember. I know I been laid off a few of them
24 because the job closed down or they didn't have any
25 work.

1 Q. Why were you terminated from LKQ?
2 A. Because of -- there is -- I guess he's
3 like -- he wasn't my manager. He was my manager's
4 manager. I don't know who he was. His name was
5 Waggs.
6 My manager had put me through doing the
7 counter work and Waggs -- you know, he said a bunch
8 of negative stuff to me, like my accent. Because
9 my husbands were black. He said that I had sounded
10 like a nigger and I can't be up front. So he put
11 me in the yard, which I was working. And you have
12 to pick up the parts and put them in the vehicles,
13 and he said I wasn't working fast enough. So he
14 fired me.
15 Q. What is LKQ?
16 A. It's a parts -- auto parts.
17 Q. And then why were you terminated from
18 Clean & Classy?
19 A. The new owners bought it. And at the
20 time it was fixing to switch over and the old -- he
21 said when they bought it run it like you would run
22 it if Mr. Bush owned it. That's the old manager.
23 So I had washed this regular customer's
24 cushions, her lawn cushions, and they tore up in
25 the machine. The way that Mr. Bush told us to do

1 it, if you damage somebody's clothes we have to pay
2 for them. So they said you have to call the
3 customer and say, you know, I washed your cushions
4 and I tore them. They tore up in the machine.
5 What can I do to replace them? Do you want me to
6 go buy them or would you like to give me the money?
7 So I called the lady and I told her
8 just like I said. And when the new owners come in
9 he was like -- like swearing -- like cussing at me
10 in front of a lot of people, and we walked outside.
11 And then he was telling me to look at him in his
12 F-ing eye, and I didn't want to look at him, at his
13 face, when he's cussing at me. So I just looked
14 down. And he said that I should never have called
15 the customer, and he fired me.
16 Q. Did you think that was inappropriate
17 for him to cuss?
18 A. You know, yeah. He was cussing me.
19 Like I said, I didn't cuss -- I never cussed him
20 and I never disrespected him. So you know . . .
21 Q. Do you think it's disrespectful to
22 cuss?
23 A. It all depends. It depends if people
24 are cussing you or they're cussing at a group. And
25 at that location there was no cussing there, you

1 know.
2 Q. Have you ever cussed at a job before?
3 A. When I worked at Pizza Hut everybody
4 cussed in Pizza Hut. I mean, the only one person
5 that I can think of that never cussed, that I never
6 heard them swear in Pizza Hut was a lady named
7 Miss Elaina. I don't know her last name. But she
8 was the only lady. But she made many a comments to
9 everybody there -- the store managers, all of them
10 -- about a quarter for a cuss word. And the only
11 time that I ever really cussed from there like we
12 were talking in a group or whatever. You know,
13 sometimes -- I mean, everybody cussed there.
14 Q. Well, that wasn't really my question,
15 Miss Douglass. My question was whether you had
16 ever cussed at work.
17 As I understand it, you're saying you
18 have cussed at work before; is that correct?
19 A. Yeah. I'm just saying that yeah; if I
20 cussed it was in along with a group. But if your
21 employers are cussing too, you just pick up the
22 habit and you just cuss too. But every one of my
23 jobs -- I never cussed at my jobs besides Pizza Hut
24 because everybody cusses in there, you know.
25 Q. Do you think it would be inappropriate

1 to cuss in front of customers?
2 A. Yeah; directly in front of them. Like
3 if they're in the counter and I sitting there
4 cussing, I think it's rude. I mean, it would be
5 rude if somebody did it, you know.
6 (Defendant's Exhibit Douglass 2, SC
7 Employment Security Commission - Notice of Appeal
8 to Appeal Tribunal, marked for identification.)
9 BY MS. CHERRY:
10 Q. Miss Douglass, I'm going to hand you
11 what we've marked as Exhibit 2. This is actually a
12 document I got from your attorney.
13 There is some spots that have been
14 blacked out, but that's personal identifying
15 information. But I wanted to ask you: This looks
16 like it's an appeal from you with regard to an
17 application for unemployment benefits.
18 A. Uh-huh.
19 Q. And there is a reference about the
20 employer cursing you and then coming outside. It
21 seems to relate to what you were talking about with
22 Clean & Classy; is that correct?
23 A. Yes. This is Clean & Classy.
24 Q. Do you see on this box down here where
25 it says: Plaintiff's initials? Are those your

1 initials?
2 A. Uh-huh.
3 Q. And is that your signature at the
4 bottom of this document?
5 A. Yes.
6 Q. Why did you refuse to look at him and
7 turn your head?
8 A. Because he was shouting at me and
9 yelling at me.
10 Q. Do you think it's inappropriate to yell
11 in the workplace?
12 A. He was yelling at me outside.
13 Q. Well, do you think it's inappropriate
14 to yell in the workplace at someone?
15 A. Not really.
16 Q. So I understand your testimony, you
17 think it's acceptable for an employee to yell at
18 another employee in the workplace?
19 A. Well, I been yelled at many a times in
20 the workplace by managers.
21 Q. How about one employee yelling at
22 another employee; do you think that's appropriate?
23 A. Like I said, it all depends on the way
24 that you work with other workers, how they treat
25 you. You just have to get used to . . .

1 Q. What was the outcome of your
2 application for unemployment insurance against
3 Clean & Classy?
4 A. I don't even -- I don't remember.
5 Q. When did you start working for Pizza
6 Hut?
7 A. When did I start back the last time?
8 Q. Yes.
9 A. Now, I want to say it was in 2008.
10 I'm not really sure of the year, though.
11 Q. And do you remember who hired you?
12 A. Sean.
13 Q. Pardon me?
14 A. Sean.
15 Q. Did you have an employment contract
16 when you were hired?
17 A. I don't understand what you mean.
18 Q. Did you sign an employment agreement?
19 A. I didn't sign anything, because he just
20 pulled my application up from the last time when I
21 worked.
22 Q. And I just want to understand if you
23 have any written agreement, written contract, with
24 Pizza Hut regarding your employment.
25 A. I don't -- I'm not really sure what

1 you're talking about.
2 Q. Well, Miss Douglass, one of your claims
3 in this lawsuit is for breach of contract, and so I
4 want to make sure I understand what contract you
5 are claiming was breached. I just want to know if,
6 to your knowledge, you had any written contract
7 with Pizza Hut.
8 A. I can't answer that question because I
9 don't understand it.
10 Q. To your knowledge did you have any
11 employment contract, written or oral, with Pizza
12 Hut?
13 A. Then again, I don't understand what
14 you're coming at me with.
15 Q. What restaurant location did you work
16 at for Pizza Hut?
17 A. North -- the address is on 7480 Rivers
18 Avenue, North Point.
19 Q. And was that where you worked from 2008
20 until your termination?
21 A. Yes, ma'am.
22 Q. How much were you making at Pizza Hut
23 at the time of your termination?
24 A. At the time that it ended?
25 Q. Yes.

1 A. It had just went down a couple of
2 months before to 4.85 when you're on the road, and
3 you get -- I can't remember. I think it was --
4 I can't remember how much it was to run. I don't
5 know if it was a dollar. It was 1.25 a run, and
6 then you get tips.
7 Q. How much did you make in tips each
8 week?
9 A. On a slow day I wouldn't -- I would
10 make no less just in tips 60, 70 dollars. That's
11 on a slow day.
12 Q. Do you file tax returns?
13 A. Yes, I do.
14 Q. Did you file one in 2011? Last year.
15 A. Yes, I did.
16 Q. How about the year before that, 2010?
17 A. I'm pretty sure I did.
18 Q. Do you have copies of those tax
19 returns?
20 A. I'm not sure. I don't know.
21 Q. Did you file them yourself or did --
22 A. I filed them myself on a computer. And
23 I don't never print them off, so -- I use a Web
24 site.
25 Q. You indicated that you had insurance

1 through Pizza Hut. That was health insurance?
2 A. It was health and dental insurance.
3 They took it off your check.
4 Q. Did you have any other benefits at
5 Pizza Hut?
6 A. Like what?
7 Q. Any other benefits. Life insurance.
8 Was anybody else on your health insurance?
9 A. Yes. I put my husband on there.
10 Q. Mr. Desaussure?
11 A. Yes, ma'am.
12 Q. Who was your supervisor at Pizza Hut?
13 A. When?
14 Q. Let's say in 2010.
15 A. There was a bunch of them. Some of
16 them I can't even remember their names. There was
17 a Richard. There was a Paula. There was Alicia.
18 Richard, Paul, Alicia, Joshua. I can't even
19 remember all of them, ma'am. I know there was
20 quite a bit of them.
21 Q. Who was your supervisor at the time you
22 were terminated?
23 A. I think Pam was taking over. There was
24 an Anthony too. I do remember that one now.
25 Q. Were you ever written up while you

1 worked at Pizza Hut?

2 A. The only time I got written up is when

3 Miss Kim took over. I can remember one --

4 I remember she -- I had talked to her. She talked

5 to me one time about an incident, and she wrote it

6 up. I think I was written up maybe three times or

7 maybe four times.

8 Q. And all of those were by Miss Kim?

9 A. Yes, ma'am.

10 Q. Do you know when Miss Kim became the

11 manager?

12 A. I can't really remember. Probably

13 maybe in 2010. It had to be 2010. I'm not really

14 sure what year.

15 (Defendant's Exhibit Douglass 3,

16 Written Documentation of Evant, 7/10, marked for

17 identification.)

18 BY MS. CHERRY:

19 Q. I'm going to hand you what has been

20 marked as Exhibit 3, Miss Douglass, and ask you if

21 you recognize this document.

22 A. I remember that one.

23 Q. Is this your signature at the bottom of

24 this page?

25 A. Yes, ma'am.

1 Q. And over to the right it looks like it
2 says: Kim Ickman. Is that the Miss Kim, the
3 manager?
4 A. Yes, ma'am.
5 Q. So did Miss Kim write you up in July?
6 A. This incident, particular incident,
7 happened before July. And we had talked about the
8 incident when she came in, and then I guess I had
9 got written up again because I reported -- it's
10 another incident that happened; and what she did --
11 she had already talked to me about this one
12 incident, you know, verbally. And then it was like
13 when she wrote me up again she just brought this
14 same incident up and just went ahead and documented
15 this one -- giving me this one. But she had
16 verbally already talked to me about this one.
17 And so I explained it to her, and she
18 said she understood what it was. And I just went
19 ahead and signed it.
20 Q. And so tell me what happened that
21 Miss Kim spoke to you about this event that's
22 documented.
23 A. I had called Kim -- I had called Kim.
24 And I was actually in the hospital visiting my
25 grandfather, and I guess I must have lost service

1 and the phone hung up. But I was trying to tell
2 her that the people -- they're not closing the
3 WingStreet down correctly. And they have to close
4 it down because it costs the company a lot of
5 money, because if they don't change the bottom out
6 it clogged the -- the stuff gets clogged in the
7 line. And they wasn't closing it down.
8 And Kim -- I tend to talk loud when
9 something is bothering me, and that's something
10 I've been doing for many years. Because I have a
11 loud voice, you know. And Kim thought I was
12 yelling at her. I was trying to tell her that I
13 was not yelling. When I get overexcited or
14 whatever I talk loud. And she thought I was
15 yelling, but I wasn't yelling.
16 Because, you know, it gets -- I was
17 getting aggravated. You know, two hours to get the
18 thing when it shouldn't take that long. And that's
19 why our fryer kept messing up, because the people
20 was improperly -- you know, they wasn't trained,
21 you know, to do it. Because I usually -- I was one
22 of the drivers that worked all the time. And I was
23 always working. And it was just a night that I
24 wasn't -- two nights that I was off that I would
25 come back and the WingStreet would be jammed.

1 Q. So when Miss Kim spoke to you about
2 this, did she tell you that if you raised your
3 voice or spoke loudly or hung up on a member of
4 management that you would be terminated?
5 A. No, she didn't. She just told me
6 don't -- she said like don't disrespect -- she
7 thought I was disrespecting her, and I told her
8 that I wasn't disrespecting her, that I talk loud.
9 And a lot of people know that I speak loud. They
10 know that, you know. But she said disrespecting,
11 but I never disrespect the management or the
12 employees. I always helped them, and they know
13 that.
14 Q. Do you think it would be inappropriate
15 to be disrespectful to a manager or another
16 employee?
17 A. Yeah, it would be, but I know that I
18 didn't do it.
19 (Defendant's Exhibit Douglass 4,
20 Written Documentation of Event, 7/20/10, marked for
21 identification.)
22 BY MS. CHERRY:
23 Q. I'm going to hand you what has been
24 marked as Exhibit 4, Miss Douglass, and ask if you
25 recognize this document.

A. I recognize that one.

Q. What is this write-up about?

A. This write-up is about one of the drivers they used to always get me to go pick up. They would always get you to go pick up. I didn't understand why this one. And I had talked to her about this one too and told her that I was going to get the paper. Because I have a learning disability and I can't write and spell. So I said I was going to get somebody to write a letter with this.

Because I also had to go pick up coworkers on my runs and pick them up and bring them to work because they didn't have a ride. And this has been going on ever since I started working there. And they don't even live in the area. You know, like they can -- if I'm delivering downtown -- for example, if I'm delivering downtown they'll probably get you to go all the way to Meeting Street down here to pick somebody up out of the area to bring them to work because they don't have a car.

Q. Let me ask you, Miss Douglass, if you'll look at Exhibit 3 on the Comment section. Did you write that?

1 A. Yep. I wrote that one.
2 Q. And so on this Comment section you
3 didn't write anything, did you?
4 A. No. I didn't write, but I was going to
5 get my sister -- I was going to get my sister or
6 somebody to write it for me because I wanted it
7 explained, you know, that this is something we all
8 do. All drivers go and pick up other people and
9 bring them to work while they're on the clock.
10 After they do their runs they go pick them up.
11 Q. And so this write-up is dated July 20th
12 of 2010; correct?
13 A. Yes, ma'am, but I got all these
14 together.
15 Q. So on this write-up that we've marked
16 as Exhibit 4, after you received it -- it's dated
17 July 20th, 2010. Did you ever submit any written
18 response to this write-up?
19 A. I can't remember if I did or if I
20 didn't.
21 Q. And is that your signature --
22 A. Yes.
23 Q. -- down at the bottom. And over to the
24 right where it says "Signature of Manager" it looks
25 like it says "Kim;" is that correct?

A. Yeah.

Q. So Miss Kim gave you this write-up as well?

A. Yes, ma'am.

Q. As I understand it, you disagree with this write-up?

A. Yes, ma'am, I do.

Q. But you received a copy of that write-up; correct?

A. No. You don't get no copies.

Q. Well, let me ask you this, Miss Douglass. I got this document from your attorney. How did he get it?

A. I don't know how he got it because I didn't get it.

Q. It was handed to you to sign; correct?

A. When she writes you up you sign it and you give it back to her. You don't ever get no copy.

Q. What I'm trying to clarify is you knew you were being written up for this; correct?

A. I got -- I didn't know that I was getting written up until the day that she gave me the other two.

(Defendant's Exhibit Douglass 5,

1 Written Documentation of Event, 7/21/10, marked for
2 identification.)
3 BY MS. CHERRY:
4 Q. I'm going to hand you what we've marked
5 as Exhibit 5, Miss Douglass, and ask you if you
6 recognize this document.
7 A. I recognize it.
8 Q. And what is this write-up for?
9 A. This one right here is a write-up for
10 Anthony Gardner, the dishwasher that works at Pizza
11 Hut. That's my husband's cousin by marriage. And
12 one night we were off work -- because I came off
13 delivery and I caught Kristin and her boyfriend
14 smoking weed outside by the shed, which I reported
15 it to one of the managers. And I told them that I
16 pulled up and I smelled it when I got out of my
17 car, and there was only the two people out there.
18 Anthony explained him and another
19 little boy named Greg that was out there -- we were
20 already off work. Because I take Anthony home.
21 And they were outside. We were in the Walmart
22 parking lot. We were outside talking after hours.
23 We were already off. And I explained to Anthony --
24 because Anthony is mentally retarded. They were
25 talking about they were going to Kristen's house

1 for a party.

2 So I explained to Anthony: Don't go

3 over there. I'm going to tell your mom if you go

4 over there, because no telling what is going to

5 happen. You go to jail if they bust the house or

6 whatever, you know, because the girl is known for

7 smoking weed and stuff.

8 So I didn't even know -- like I said,

9 this wasn't even on the clock. This was off the

10 clock, off Pizza Hut's property. And I was telling

11 my husband's cousin that. And the little boy went

12 back -- the Greg boy went back and told Kristen

13 that I was spreading this rumor to him. And I

14 wasn't spreading it. I was talking to my husband's

15 cousin to tell him not to go over there.

16 And then when Kim wrote me up and she

17 asked me about the incident, I told her the same

18 thing that I'm telling you. And she was like: Are

19 you sure that Kristen is smoking weed on the job?

20 And I told her: Yeah. I'm positive. I know that

21 she was. And I didn't say this on the job.

22 And she was like: Well, if I give her

23 a drug test what would happen? And I told her --

24 I said: If you give her a drug test and she fails

25 it, I quit. And she never did. She never gave the

1 girl a drug test.
2 Q. And is that your signature at the
3 bottom of this write-up?
4 A. Yes.
5 Q. And then off to the side that's Kim's
6 signature again?
7 A. Yes, ma'am.
8 Q. So in July of 2010 Miss Kim gave you
9 three written write-ups; correct?
10 A. Yes, ma'am.
11 Q. I want to go back to Exhibit 4. In the
12 description of the event it says that you took
13 Anthony on a delivery.
14 Do you see that? Is Anthony the same
15 Anthony that's your husband's cousin?
16 A. Yeah; that worked there.
17 Q. And you just mentioned that you take
18 Anthony home.
19 A. Yes. Well, I take him home sometimes,
20 and sometimes he'll tell me -- he'll usually catch
21 the bus or ride his bike. But they have told me to
22 go get Anthony from Remount Road.
23 Q. Who is "they?"
24 A. Whoever the managers -- whoever the
25 manager is working. They will tell me at the time,

1 certain specific ones. Sometimes you go pick up
2 the cooks, you know.
3 Q. Did Kim tell you to do this?
4 A. Not Kim. Like I said, it -- I really
5 didn't see Kim. It was the other manager.
6 Q. Did Anthony go on any deliveries with
7 you?
8 A. No. I just picked him up.
9 Q. Did Miss Kim ever counsel you about
10 anything else at work?
11 A. No. This is all that she talked to me
12 about besides the write-up -- the write-up that I
13 got on the 24th or the 23rd. Whatever day it was.
14 Q. So do you know in July of 2010 how long
15 Miss Kim had been your manager?
16 A. Ma'am, I don't know when Kim got there.
17 I don't know when she got there. I just know that
18 she wasn't there in November when I got in the car
19 accident. She wasn't there.
20 Q. Do you mean November the year before?
21 A. 2009. I know she wasn't there.
22 Q. So at least from July of 2010 until
23 your termination Miss Kim was your manager; is that
24 correct?
25 A. Yes, ma'am.

1 Q. And in fact was Miss Kim the one who
2 terminated you?
3 A. Yes, ma'am.
4 Q. Now, when were you terminated?
5 A. Maybe July the 23rd, 24th. Something
6 like that. January. I'm sorry. January.
7 Q. And what were you doing at the time you
8 were terminated?
9 A. What was I doing?
10 Q. Yes.
11 A. I was delivering pizza, but I also
12 helped do everything else. I made pizza. I was
13 always doing something. When I walked in that
14 Pizza Hut door I helped them make pizzas if they're
15 backed up. I help them cut pizzas. I wash dishes.
16 I did prep. I answered the phone. I busted tables
17 down. So, you know, I always was helping all the
18 helpers.
19 Q. Why were you terminated?
20 A. Pretty much I think they terminated --
21 they didn't really have a reason to terminate me.
22 I think they terminated because I kept asking to go
23 to the workmen's comp doctor for my ankle.
24 Q. When you say they didn't have a reason,
25 who do you mean by "they?"

1 A. The management inside the Pizza Hut.
2 Because, you know, they really didn't. I did my
3 job. I did -- I helped everybody in the store.
4 Everybody was pleased to work with me, all my other
5 managers. I never had a problem with them.
6 They always -- when they needed
7 something they always called me to come to work.
8 I had more hours than any other driver that was in
9 there.
10 Q. So tell me, then, what happened that
11 led to your termination.
12 A. I kept asking to go to the doctor.
13 Like I said, I fell down the steps, and they told
14 me three weeks for my ankle -- to try to stay off
15 of it. And I went to work because we were short of
16 drivers. I just kept going to work trying to help
17 out. And I kept telling them I needed to see a
18 doctor. I told Richard. Richard said that he was
19 going -- he didn't really know what he could do,
20 that he would have to call Kim to find out.
21 So I finally called Kim, and she said
22 that I had to go to the doctor and mail the bill --
23 to mail the bill to the Pizza Hut and they would
24 pay it. And I told them I didn't have money to pay
25 the bill. So I really think it narrows down that

they just fired me because I wanted to go to the doctor.

Q. Now, as I understand it, Kim told you to go to the doctor and have the doctor mail the bill to Pizza Hut.

A. Yeah. She told me to go to the doctor and mail the -- what doctor is going to mail a bill?

Q. Do you remember when that conversation with Kim was?

A. I'm not really sure when it happened. I'm not really sure of the dates that it happened.

Q. Let me ask you about the accident. Tell me what happened. As I understand it, you said you hurt yourself at work.

A. I was delivering -- we were pretty busy that night, and I had like five runs. I had four or five runs. I went ahead and took my run. I was going on my last one. I was going up the stairs up to the guy's apartment building. And they have three floors of stairs. And I delivered the pizza and on the way back -- it was real dark. The lights were out on the center piece of the stairs. The stairs is like wood.

So when I was coming down I don't know

1 if -- I just couldn't see the stairs, and I fell.
2 And when I fell I must have been stepping down, and
3 I rolled my ankle over.
4 Q. Which ankle?
5 A. My right ankle.
6 Q. After you did that did you seek medical
7 treatment?
8 A. I called -- I called -- you know,
9 something like maybe if you fall, you know,
10 sometimes -- you know, you fall. You're younger,
11 running, and you fall and just get back up. You'll
12 be okay.
13 So I waited for a little while because
14 I had a tingling in my ankle, but I called Myesha
15 when I fell. Because my phone was in my apron.
16 Because I always wore the apron for the waitresses,
17 and I keep my phone and my money in there. So I
18 called Myesha.
19 Q. Who is Myesha?
20 A. She was an assistant manager or maybe a
21 shift manager. She was one of them.
22 Q. And what did you tell Myesha?
23 A. I told Myesha that I just fell down the
24 stairs. And she was like just asking me was I
25 okay, and I said: Well, I don't know. My ankle is

1 bothering me. I have a lot of pain in my ankle.
2 She was like: Do you want to call EMS?
3 And I said: Just give me a minute. Let me sit up
4 and see if I can manage.
5 So I sit up and the tingling was still
6 there. So I said: I'm going to drive back to
7 Pizza Hut. So I got in my car and I drove back to
8 Pizza Hut.
9 Q. And was Myesha at Pizza Hut?
10 A. Myesha was at Pizza Hut. She came and
11 met me at the car.
12 Q. And then what did you do?
13 A. I went inside. And I already had my
14 shoe off because I kicked it off because it was
15 swelling in my tennis shoe. So I took my shoe off
16 and walked in Pizza Hut, and Myesha and Richard
17 looked at it and gave me some ice. I told them I
18 needed to go to the doctor, but I didn't want to
19 drive myself to the doctor because I didn't know
20 what they were going to do.
21 So I was waiting on my sister and
22 Justin to come up to Pizza Hut to get me. And like
23 I said, they were real busy. They only had me and
24 another driver. And they asked me -- they said:
25 Donna, can you please drive me to another order?

1 And I said: I'll drive you, but I can't get out of
2 the car. I couldn't get out of the car to take the
3 pizza up there, but I don't mind helping y'all out,
4 you know.
5 So I drove Myesha to a house to deliver
6 a pizza. Because like I said, they were already
7 late. So I drove her back, and then that's when my
8 sister and my fiance was already there. And I went
9 to Trident.
10 (Defendant's Exhibit Douglass 6,
11 Trident Medical Center - General Instructions,
12 marked for identification.)
13 BY MS. CHERRY:
14 Q. I'm going to hand you what I've marked
15 as Exhibit 6, Miss Douglass, and ask if you
16 recognize this document.
17 A. Yes, ma'am.
18 Q. And is that your signature on the
19 second page of this document?
20 A. Yes, ma'am.
21 Q. And were these instructions you
22 received from Trident Medical Center after you went
23 there on January 6th?
24 A. Yes, ma'am.
25 Q. It looks like you were diagnosed with a

1 sprained right ankle. Do you see that?
2 A. Yes, ma'am.
3 Q. After you went to Trident Medical
4 Center on January 6th did you go back to work at
5 Pizza Hut?
6 A. Yes, because they didn't give me no
7 doctor's excuse.
8 Q. Did you go back to Pizza Hut on
9 January 6th, or did you go back the next day?
10 A. I can't really remember. I think I was
11 off -- I can't remember.
12 Q. After going to Trident Medical Center
13 on January 6th did you seek any other medical
14 treatment for your ankle?
15 A. No, ma'am. Because the one medical
16 paper they give me, they said to go to the doctor
17 in three weeks, and it will be swelled up for about
18 three weeks.
19 Q. Did you go back to the doctor after
20 three weeks?
21 A. No, ma'am. I was trying to get to go
22 to another doctor, to an orthopedic doctor. Some
23 kind of doctor.
24 Q. Now, during that three week time period
25 were you able to walk at all?

A. I was still walking, but I was having problems with the swelling.

Q. Did anyone at Pizza Hut ever tell you not to go to the doctor?

A. They just said that I needed -- she just said I had to go to the doctor and pay for it or get them to mail them a bill. But pretty much if you don't have insurance and -- I tried to explain to Kim the insurance only pays a thousand dollars.

(Defendant's Exhibit Douglass 7, Charleston Bone & Joint Daily Progress Note, 3/4/11, marked for identification.)

BY MS. CHERRY:

Q. Miss Douglass, I'm going to hand you what has been marked as Exhibit 7 and ask is that your signature at the bottom of this page?

A. Uh-huh.

Q. Do you recognize this document?

A. Yes, ma'am.

Q. What is this?

A. This is my doctor from -- the bone doctor.

Q. When did you first go see the bone doctor?

1 A. I'm not really sure, ma'am.
2 Q. If you look at the bottom of this, this
3 is dated March the 4th of 2011. Do you see that?
4 A. Uh-huh.
5 Q. Miss Douglass, do you have any record
6 of seeing a doctor between January 6th, this date
7 that you went to Trident Medical Center, and March
8 4th?
9 A. Yeah. I went to -- finally after I
10 called -- I had got a paper in the mail, a letter
11 in the mail after January -- sometime in January.
12 Like maybe February. I had got a letter and a card
13 to call for workmen's comp, and I called the number
14 and I set it up myself. I had the card. And they
15 told me to go to like of one of them urgent care
16 places.
17 Q. Who did you get a letter from?
18 A. I don't know. It was from workmen's
19 people.
20 Q. Do you have a copy of that letter?
21 A. I'm not really sure. But I got a
22 letter in the mail, and they said that it's a
23 medical card, a medicine card.
24 Q. And you don't remember who you got that
25 from?

A. Huh-uh.

Q. Now, what we've marked as Exhibit 7 looks like -- where it says "Diagnosis," it looks like it says: Ankle sprain.

Do you recall if that was the diagnosis, that you had sprained your ankle?

A. At that time that's what they said it was.

Q. Then it looks like it says "Work Status," that you were unable to return to work until May 1st of 2011. Do you see that?

A. Uh-huh.

Q. So at least as of March 2011 the doctor said you can't work between March and May; is that correct?

A. Uh-huh.

Q. Did you perform any work between --

A. No.

Q. -- March and May 1st of 2011?

A. No.

Q. Could you?

A. No.

(Defendant's Exhibit Douglass 8, Charleston Bone & Joint Daily Progress Note, 4/5/11, marked for identification.)

1 BY MS. CHERRY:
2 Q. I'm going to hand you what we've marked
3 as Exhibit 8. Miss Douglass, do you recognize this
4 document?
5 A. Uh-huh.
6 Q. Is that your signature at the bottom?
7 A. Uh-huh. Yes.
8 Q. And this is dated April 5th of 2011;
9 correct?
10 A. Uh-huh.
11 Q. And if you look here under Work Status
12 it says: Unable to return to work until April
13 20th, 2011. Do you see that?
14 A. Uh-huh.
15 Q. When you received this document were
16 you performing any work?
17 A. No, ma'am.
18 Q. Were you able to do any work --
19 A. No, ma'am.
20 Q. -- as of April 5th, 2011?
21 A. No.
22 Q. So Miss Douglass, at this point on
23 April 5th, 2011 you were no longer employed at
24 Pizza Hut; correct?
25 A. Yes, ma'am.

1 Q. Do you mean yes, you were, or --
2 A. No. I was fired.
3 Q. But just so I understand, based on this
4 document, even if you had still been employed at
5 Pizza Hut, this doctor is saying you can't work?
6 A. I couldn't go to work.
7 (Defendant's Exhibit Douglass 9,
8 Charleston Bone & Joint Daily Progress Note,
9 5/3/11, marked for identification.)
10 (Short recess taken.)
11 BY MS. CHERRY:
12 Q. I'm going to hand you what we've marked
13 as Exhibit 9. Miss Douglass, is that your
14 signature at the bottom of this document?
15 A. Yes, ma'am.
16 Q. And it looks like this is dated May 3rd
17 of 2011. And if you look on the work status,
18 Miss Douglass, it says: Unable to work until -- it
19 looks like it says "six-week postop," which I think
20 might mean "operation."
21 Did you have an operation on your
22 ankle?
23 A. No.
24 Q. Did you have any surgery on your ankle?
25 A. No.

1 Q. Did you have any discussions with any
2 of the doctors about surgery on your ankle?
3 A. I don't understand. I didn't have one.
4 He said he was going to do something for it, but I
5 don't know why I didn't get one.
6 Q. Tell me what treatment you received for
7 your sprained ankle.
8 A. He gave me some shots in my ankle.
9 Q. Did you go to his office for the shot?
10 A. Yes, ma'am.
11 Q. And did he give you a bill when you
12 went to his office for the shots, Miss Douglass?
13 A. Did he give me a bill? No.
14 Q. Did he send you a bill?
15 A. No.
16 Q. Did you pay him when you went to the
17 doctor's office for that shot?
18 A. No. The workmen's people did it.
19 Q. How about if we go back to this exhibit
20 at Trident Medical Center on January 6th.
21 Did you get a bill from Trident Medical
22 Center after you went on January 6th?
23 A. Yes, ma'am.
24 Q. Did you pay Trident Medical Center on
25 January 6th?

1 A. No. I didn't pay them because my
2 lawyer was the one that get all the bills from that
3 date.
4 Q. On the date of the accident on January
5 6th of 2011 you didn't have an attorney then, did
6 you?
7 A. No. They mailed me the bill.
8 Q. So Trident Medical Center mailed you a
9 bill after they treated you?
10 A. Yes, ma'am.
11 Q. I just wanted to make sure. Did you
12 pay them when you went on January 6th?
13 A. I didn't pay them because when -- when
14 I first went in I told them I fell at work when I
15 first get checked in, and then when I was checking
16 out somehow the young lady didn't put it was a work
17 injury. And they were real crowded. And when I
18 went to the other end they were like: Well, if
19 they change it over I would have to go all the way
20 back around and get billed again to get reentered.
21 They couldn't just change it. So I just left it
22 like that.
23 Q. But on January 6th you didn't pay
24 Trident Medical Center?
25 A. No. I didn't pay them.

1 Q. As I understand it, you personally
2 haven't paid any of these doctors.
3 A. No.
4 (Defendant's Exhibit Douglass 10,
5 Charleston Bone & Joint Daily Progress Note,
6 6/7/11, marked for identification.)
7 BY MS. CHERRY:
8 Q. I'm going to hand you what we've marked
9 as Exhibit 10 and ask if you recognize this
10 document.
11 A. Yes, ma'am.
12 Q. Is that your signature at the bottom?
13 A. That's mine.
14 Q. This document is dated June 7th of
15 2011. Do you see that?
16 A. Yes, ma'am.
17 Q. Under Work Status it says: Unable to
18 return until -- it looks like it says "after
19 surgery." Do you see that?
20 A. Uh-huh. Yes, ma'am.
21 Q. So it looks like to me as of June of
22 2011 that the doctor hasn't released you to work;
23 is that correct?
24 A. Yes, ma'am.
25 Q. So as of June of 2011 had you performed

1 any work? Worked for anybody?
2 A. After June 11th?
3 Q. No. Up to June 11th. Between January
4 and June 11th.
5 A. No, ma'am.
6 Q. Could you physically work?
7 A. No, ma'am.
8 Q. At what point, Miss Douglass, did your
9 physician release you to return to work?
10 A. I don't remember. Because he wanted me
11 to come and get that surgery and deposition for the
12 surgery. I don't know what I had a deposition for,
13 to tell you the truth.
14 Q. Do you know what happened to the
15 surgery? Did you tell the doctor you didn't want
16 it?
17 A. I never told him I didn't want it.
18 Q. Do you have any issues with your ankle
19 now?
20 A. It still bothers me when it gets cold.
21 Q. I wanted to ask you -- you mentioned
22 Myesha was the person you called at Pizza Hut --
23 A. Uh-huh.
24 Q. -- when you fell on January 6th.
25 A. Uh-huh.

1 Q. Are you related to Myesha?
2 A. No.
3 Q. Are you related to anybody else at the
4 Pizza Hut restaurant other than Anthony?
5 A. Only Anthony.
6 Q. And you mentioned when you got back to
7 the Pizza Hut that you were waiting on, you said,
8 your sister and your fiance to come pick you up.
9 A. Uh-huh. Yes.
10 Q. Who was your fiance?
11 A. I call him my boyfriend. My boyfriend.
12 I call him my fiance, but Justin.
13 Q. Are you two engaged to be married?
14 A. No. I just say that. That's better
15 than saying "boyfriend."
16 Q. Why is it better?
17 A. I'm not getting married.
18 Q. So as I understand it, after the
19 initial accident on January 6th you did go back to
20 work at Pizza Hut; correct?
21 A. Yeah. I went back to work, but I'm not
22 really sure how many days it was.
23 Q. And you said you were terminated around
24 January 23th or 24th.
25 A. Somewhere around there.

1 Q. And before you started telling me about
2 your accident I was trying to find out what
3 happened on the day that you were terminated. Can
4 you tell me what led up to your termination.
5 A. What led up to it? Like I said, you
6 know, they was just trying to find a reason to let
7 me go. Because she was trying to say that I was
8 cussing. But like I said, everybody in Pizza Hut
9 cussed. But that lady, Miss Elaina, she's the only
10 one that -- you never heard her cuss.
11 Q. And if I recall correctly, you said
12 Miss Kim was the one who terminated you.
13 A. Yes, ma'am.
14 Q. Why did Miss Kim tell you you were
15 being terminated?
16 A. Why did she tell me?
17 Q. Yes.
18 A. She told me that I was yelling the F
19 word. I was running around the store yelling the F
20 word, and that's what she said.
21 (Defendant's Exhibit Douglass 11, SC
22 Employment Security Commission Unemployment
23 Insurance Division - Discharged for Case Fact
24 Finding, marked for identification.)
25

1 BY MS. CHERRY:
2 Q. And just so I understand, were you
3 yelling?
4 A. I wasn't yelling. When I came in from
5 a delivery through the back door -- when I first
6 walked in the door I seen the top oven and the
7 bottom oven and some pizzas on fire that was in the
8 oven. It's quite a big oven. And the oven was
9 backed up. It was like the guy on the table making
10 the pizzas was steadily putting them in. He was
11 putting them in there so much that the pizzas were
12 like falling off, and they didn't have nowhere to
13 go.
14 So when I first came in the back door I
15 took my jacket sleeve and I started automatically
16 pulling the pizzas, and one of the other managers
17 came around there and she was helping me. And I
18 was like -- I can't actually really remember what I
19 said, but I did not yell. I said: This don't make
20 no sense. I said: This doesn't make any sense for
21 the oven to be backed up like this. This is like a
22 40-minute backup, you know.
23 And then that's when Miss Spring came
24 around from the back side. And I was like: Y'all
25 got enough people in here. Usually we don't never

1 have enough people. They never have enough people
2 to work in that Pizza Hut. That day they had a lot
3 of people in there, and it was weird for the oven
4 to be so backed up.
5 My thing is you don't serve a customer
6 a burnt pizza. They were paying for the pizza.
7 They want quality. They wanted to cut the pizza
8 and send that pizza. And I went on the run and
9 come back, and they told me to go home.
10 Q. Who was the pizza maker? What was his
11 name?
12 A. I'm not really sure. I don't know how
13 long that boy been there.
14 Q. How about the other manager that you
15 said came and helped pull pizzas out? Who was
16 that?
17 A. Coletta. That was the one who was
18 coming around the side. And like I said, Spring
19 was in the back. I don't know where she was.
20 Q. So when you came in the pizza maker was
21 there, Coletta was there, and then Spring --
22 A. Come around the back.
23 Q. So it was the four of you who were
24 there?
25 A. And then the waitress been in the

1 window. The waitress was standing at the window
2 trying to get her dine-in pizza.
3 Q. What was that waitress's name?
4 A. Her name is Estel.
5 Q. Was anybody else around?
6 A. That was it.
7 Q. What about Kim; was Kim there?
8 A. Kim wasn't even there.
9 Q. You mentioned before when you get --
10 I can't remember if you said "frustrated" or
11 "excited" that you'll talk loud.
12 A. Yeah. I mean, I talk loud. It's not
13 like that I'm yelling, you know. I maybe talk
14 loud, but I still don't remember saying the F word.
15 You know, I just don't remember saying the F word.
16 Q. Do you think you might have been
17 talking loud when you saw the burnt pizzas?
18 A. I might have been talking loud, but
19 when I went out there I asked -- I mean, whenever
20 all this happened, you know -- and I spoke to Estel
21 one day when I seen her and I asked her because she
22 was standing there. She said she didn't even know
23 what was going on, and she was standing right
24 there. She didn't hear me.
25 Q. You said you don't remember using the F

1 word.
2 A. No.
3 Q. Let me ask you this: If you had used
4 the F word -- I realize you say you don't remember.
5 But if you had, would that have been inappropriate
6 to use the F word?
7 A. I'm pretty sure no, because we all use
8 it. We all in there cussing. It's not just --
9 I mean, it's everybody in Pizza Hut cusses.
10 Q. Just so I understand, in your mind it
11 doesn't matter whether you use the F word or not.
12 You shouldn't have been fired for --
13 A. I pretty sure that the reason they
14 fired me is because I wanted to go to the doctor.
15 And I know some other people that done got in car
16 accidents -- and not even their fault -- and they
17 done got fired from being in the accident or maybe
18 getting hurt on a job, you know.
19 Q. Who were those people?
20 A. Just some other people. You know,
21 I can't really recall their names. It's been a
22 couple of years. But I just know a few other ones.
23 I heard a few other ones, rather. Put it like
24 that.
25 Like I said, I think it all boils down

1 that I got let go because I did my job. I did
2 everything they asked me. Some of the managers
3 they brought in didn't even know what they were
4 doing. Kim just put them in there. They didn't
5 even -- work from yard working and coming in there
6 and making pizzas.
7 I taught Spring a lot of stuff, and
8 that poor girl didn't know anything. I felt that
9 it was all on account of me wanting to go to the
10 doctor. And I actually didn't fall -- it wasn't my
11 fault. I mean, I wish that I didn't fall. I don't
12 like to get hurt.
13 (Defendant's Exhibit Douglass 12,
14 one-page handwritten note, 1/24/11, marked for
15 identification.)
16 (Defendant's Exhibit Douglass 11,
17 Summon and Complaint, marked for identification.)
18 BY MS. CHERRY:
19 Q. I'm going to hand you what we've marked
20 as Exhibit 11.
21 As I understand it, Miss Douglass, you
22 applied for unemployment benefits after you were
23 terminated from Pizza Hut; correct?
24 A. Yes, ma'am.
25 Q. And I want to ask if you recognize your

1 statement in the middle of this document. No. 3
2 says: Claimant's statement.
3 A. Yeah.
4 Q. And here in your statement you said
5 that you said "darn," that you did not use the F
6 word.
7 A. Yeah. I didn't use no -- I just don't
8 recall or remember using the F word. Like I said,
9 even if I did -- even if I did -- even if I did say
10 it, you know, because I was upset, you know -- you
11 know, it's something that we all do. We all have
12 cussed in there. And that's the truth. Everybody
13 cusses in there. Even Kim cusses.
14 Q. How about you say in your statement
15 that you have never received any written or verbal
16 notice prior to termination.
17 A. Because I had probably forgot about the
18 other ones that, really, they wouldn't -- there
19 really wasn't anything to them. Taking Anthony on
20 a run. I mean, she said I took Anthony on a run.
21 I picked Anthony up. We always do that. You asked
22 to pick them up. I shouldn't be written up for
23 that. And when I called her and told her about the
24 fryer, why should I be written up? She said I was
25 yelling. And like I already told Spring, I talk

1 loud, and she knows I talk loud.
2 And the other situation with the girl
3 with the weed situation. You know, just because I
4 told somebody off the clock and they get -- it
5 wasn't back -- at the time I even told Kim to ask
6 other workers if they ever heard that come out of
7 my mouth. No, they didn't.
8 Q. I'm going to hand you what we've marked
9 as Exhibit 12, Miss Douglass, and ask you if this
10 is the statement you gave.
11 A. Yes, ma'am.
12 Q. And that's your handwriting?
13 A. Yes, ma'am.
14 Q. Now, you mentioned that you told Kim to
15 check with the other workers about whether you
16 cussed.
17 A. No. I didn't tell her to check.
18 I said I told Kim to check with other workers about
19 the rumor on that write-up.
20 Q. On the write-up?
21 A. On the write-up, about me spreading
22 rumors about the young lady, which I know that I
23 didn't. I just told my husband's cousin. I didn't
24 go around -- because I don't spread rumors, you
25 know.

1 Q. Are you aware that Kim identified five
2 people who heard you use the F word?
3 A. No. I don't know. I don't know.
4 Q. Are you aware that Carlotta said you
5 used the F word?
6 A. I'm aware Carlotta said that and said
7 -- told Kim that.
8 Q. How are you aware of that?
9 A. Because Kim had called on the phone and
10 she asked me, and I told her that I don't remember
11 cussing, that I was -- you know, I was upset.
12 I mean, especially -- like I said, both
13 of the ovens -- all the time I been working there
14 since '93 the oven never been backed up like that,
15 especially when you have seven or eight people in
16 the store.
17 Q. Well, if Carlotta said you did use the
18 F word, is there any reason Carlotta would not be
19 truthful?
20 A. I don't know. I don't know her.
21 I don't know.
22 Q. How about if the pizza baker said you
23 used the F word; would there have been any reason
24 for him --
25 A. To tell you the truth, I don't even

1 know why any of them is even making an issue of the
2 cussing. Because like I said, every one of them --
3 all the names she probably give is all the ones
4 that cussed and nobody ever got fired since I been
5 in there cussing.
6 Kim, the area coach, used to cuss the
7 managers. That's why a lot of them quit.
8 Q. Were you cursing at Spring?
9 A. No; I wasn't cussing. You know, it's a
10 difference when you cuss in a sentence than it is
11 as you directly cussing somebody. And no, I did
12 not directly -- even if I did I would not have
13 directly cussed her out or whatever. I wasn't
14 that, you know, upset with her or whatever. I was
15 just upset with the people of they're not doing
16 their jobs in there.
17 Q. Let me ask you this: If you had cussed
18 at Spring, would that have been inappropriate?
19 A. No, because we all cuss. And I just --
20 like I said, I just think it is the bottom line to
21 come up with y'all -- with Pizza Hut firing me.
22 And it's just a big issue now because I got hurt.
23 And you know, I lost my job. And I did my job.
24 I just pointed out I feel that --
25 I pointed out because I got hurt and that I cussed,

1 and it was a big issue that I cussed that
2 particular day, when we all cussed.
3 Q. How about if you used the F word loudly
4 enough for customers to hear; would that be
5 inappropriate?
6 A. I personally don't think the customers
7 heard it. If the server didn't hear me cuss and
8 didn't know what was going on -- and she stated to
9 me that she was -- and she was at the counter
10 waiting on her pizza.
11 Q. I understand, Miss Douglass, that you
12 don't believe any customers heard you, but I'm
13 asking you if a customer heard you -- just
14 hypothetically, if a customer heard you or any
15 other employee yelling the F word at work --
16 A. I don't know, because I never been --
17 I don't know. Many of them customers done heard
18 people cuss in there and called in to report on the
19 store managers. And that never happens. The only
20 thing they do is get a free pizza. The employee
21 don't never get fired.
22 Q. Is it your position that you cannot be
23 fired for cussing at work?
24 A. If everybody is doing it and it's even
25 down to your store manager and even down to your

1 area coach is cussing -- you know, why should you
2 fire somebody if your area couch should be the
3 leader to teach you not to curse? Why does she
4 come in there and cuss, you know?
5 Q. Have you ever sued another employer for
6 wrongful termination or retaliatory termination
7 saying that you were terminated for having made a
8 worker's comp claim?
9 A. I don't understand. I don't
10 understand.
11 Q. Have you ever brought another lawsuit
12 like this one that we're here about today? Have
13 you ever brought another lawsuit like that against
14 another employer?
15 A. Westaff.
16 Q. Why did you sue Westaff?
17 A. Because they never replaced me on
18 another job.
19 Q. What do you mean they never replaced
20 you on another job?
21 A. It was a temporary job. And I was
22 fixing to get hired to the job that I was working
23 on -- because you got to work by the hours. And I
24 got hurt on the job, so they pulled me off the job.
25 And they told me I would work in the office until

1 the day that my doctor released me.
2 Well, my doctor released me, and when
3 he released me they never found me work.
4 Q. I'm going to hand you what we've marked
5 as Exhibit 13, Miss Douglass, and ask if you
6 recognize is that the lawsuit you filed against
7 Westaff?
8 A. Yes, ma'am.
9 Q. Let me ask you this: When I asked you
10 at the beginning of your deposition if you had ever
11 been a party to a lawsuit, why didn't you tell me
12 about this?
13 A. Because I don't -- like I said,
14 I really don't understand. I know sometimes I
15 don't understand it because I have a learning
16 disability, and I don't really understand some of
17 the things that you give me.
18 Q. Do you understand what it means to be a
19 plaintiff in a lawsuit?
20 A. No.
21 Q. Do you understand what it means to
22 bring a lawsuit against someone?
23 A. Do I understand what it is to bring it?
24 Yeah. To get, you know, what is fair if they do
25 you wrong.

1 Q. So when I'm asking if you are a party
2 to a lawsuit, I'm asking if you've ever brought a
3 lawsuit against someone.
4 A. Okay. Well, I don't really -- I don't
5 understand what -- I don't understand what you're
6 saying. I just told you that it was Westaff.
7 I just told you that.
8 Q. And I'm asking if there are any more.
9 A. Only Westaff.
10 Q. What was the outcome of your lawsuit
11 against Westaff?
12 A. They just settled with me.
13 Q. What were the terms of the settlement?
14 A. I'm not really sure, because I think
15 they told me not to say anything about that.
16 Q. Did you receive any money from Westaff?
17 A. Then again, I'm not really sure what I
18 can say because I'm not supposed to talk about it.
19 Q. I am going to assume that there was a
20 confidelity agreement pertaining to your
21 resolution, but just on the record I'm reserving my
22 right to follow up with your counsel. I would like
23 to know the terms that you resolved this with.
24 A. Okay. I don't know what you're saying.
25 You'll have to talk to the lawyer.

1 Q. Yes. I'll follow up with your lawyer.
2 I'm just putting this on the record.
3 Now, as I understand it, when you
4 worked at Westaff you fell; is that correct?
5 A. No, it's not.
6 Q. Tell me how you were injured at work at
7 Westaff.
8 A. We were loading rail cars, and we had
9 to stand on a pallet in order to cut the bags.
10 Well, there is this young man on the
11 forklift have to go on the other side of it. And
12 what he do, he gets real close to it and lifts the
13 bag up and then he tilts the bag. I'm sorry. He
14 lifts the bag up of like powders -- I can't
15 remember what it was, but it was like powder. And
16 he lifts the bag over the hopper so it can go on
17 the rail car.
18 Well, one person have to stand on the
19 pallet. Well, the guy put it up there and I cut
20 the bag. The hopper that it falls into broke and
21 it throw -- it pushed the -- the stuff came out of
22 the bag real heavy. So when it comes out it just
23 falls down.
24 Well, it threw it against the side that
25 I was on and it pushed me off the pallet. The

1 hopper broke and it fell towards me, and my foot
2 went into the pallet and I fell. You know, because
3 it hit the pallet. The pallet stacks up four high.
4 Q. So you fell?
5 A. Yeah. I fell because the hopper fell
6 on me.
7 Q. And what did you injure?
8 A. I injured -- I can't remember. I think
9 it was my left ankle. I think. My left -- it
10 might have been my right.
11 Q. If you look at your Complaint at the
12 second page, it actually says -- Paragraph 7. It
13 says that you injured your right ankle.
14 A. I got both of them.
15 Q. So your right ankle is the ankle that
16 you injured in your fall at Pizza Hut as well;
17 correct?
18 A. Yes, ma'am. But it's not -- it's the
19 bottom -- I hurt the bottom of my ankle underneath
20 my bone at Westaff. Because my foot got jammed
21 into the pallet. When I fell at Pizza Hut the top
22 part was hurting, not the bottom.
23 Q. As I understand it, Jerry Wigger
24 represented you in your lawsuit against Westaff;
25 correct?

1 A. Yes.
2 Q. And he's representing you in this
3 lawsuit against Pizza Hut; correct?
4 A. Yes, ma'am.
5 Q. When did you first begin applying for
6 jobs after your termination of employment at Pizza
7 Hut?
8 A. I put a few applications in when I was
9 first -- when I first got fired I put a few
10 applications in online, and then I was still
11 putting applications on. But one cleaning lady
12 told me that she would hire me, but I have to get
13 released from the doctor. I've got to be able to
14 climb stairs and stuff, and she would hire me.
15 Q. Who was that cleaning lady?
16 A. A Pamela -- I don't know her last name.
17 Q. And when did she say she would hire
18 you?
19 A. She told me that she would hire me when
20 I get released from the doctor, but in the meantime
21 I went and put applications in to Goodwill.
22 Q. When did you start work for Goodwill?
23 A. In September.
24 Q. What are you doing for Goodwill?
25 A. I don't work for Goodwill no more.

1 I don't work for Goodwill no more. Because they
2 had me work in the Holiday Inn, and the business
3 had got slow. Goodwill sends you to different
4 places to work. I worked at Holiday Inn, and it
5 got slow. So I left there and went to MasterCorp.
6 Q. What were you paid when you were
7 working at Holiday Inn?
8 A. 8.50 an hour.
9 Q. Did you have any benefits working at
10 the Holiday Inn?
11 A. Yeah. You have to work 90 days to get
12 the benefits, but I didn't really work because,
13 like I said, business had got slow.
14 Q. Your job with MasterCorp, is that
15 through Goodwill as well?
16 A. No.
17 Q. What are you doing at MasterCorp?
18 A. I clean vacation homes.
19 Q. And what are you being paid there?
20 A. I get paid by the house.
21 Q. How much do you get paid per house?
22 A. Different prices. Two bedrooms is $25
23 and three bedrooms is $55. Different prices. You
24 get paid by the house. Sometimes I'm a supervisor.
25 If I'm supervisor I make $10 an hour.

1 Q. Do you have any benefits with
2 MasterCorp?
3 A. Yeah. Insurance?
4 Q. Yes.
5 A. Yeah. And you have a 401(k) plan, but
6 I didn't fill that out.
7 Q. When did you start working at
8 MasterCorp?
9 A. I started working at MasterCorp --
10 I'm not really sure what month, but I know 2011.
11 Q. And you're currently employed there?
12 A. No. I went to M&M Cleaning. It's
13 closer to home. MasterCorp is in Edisto, and
14 that's a good distance.
15 Q. So when did you start working at M&M
16 Cleaning?
17 A. When did I start working at M&M
18 Cleaning? I'm not really sure. I was at
19 MasterCorp for a couple months. Almost a year.
20 I just started at M&M.
21 Q. What are you making at M&M?
22 A. I make a hundred dollars a house.
23 Q. And do you have benefits there?
24 A. No, ma'am.
25 Q. Are you eligible for benefits after a

1 period of time?
2 A. No, ma'am. It's pretty much like you
3 work for yourself. You have to do your own taxes
4 and stuff.
5 Q. Have you been employed anywhere else
6 since your termination from Pizza Hut?
7 A. No.
8 Q. You've listed a number of witnesses in
9 this lawsuit. One person is Myesha, and I think
10 you've talked about Myesha and who she was.
11 When was the last time you spoke with
12 Myesha?
13 A. I ain't talked to Myesha in --
14 I haven't talked in Myesha for a long time.
15 I mean, since I left there.
16 Q. Do you have any contact information for
17 Myesha?
18 A. No. I don't have her contact
19 information.
20 Q. If you needed to get in touch with her,
21 how would you do it?
22 A. I don't know how to get in contact with
23 her.
24 Q. To your knowledge, is she still
25 employed at Pizza Hut?

1 A. I guess so. I don't know.
2 Q. You list Richard as a witness. When
3 was the last time you spoke with him?
4 A. Since he worked at Pizza Hut.
5 Q. When was that?
6 A. That was -- I don't know when he got
7 fired -- or when he quit. I think he quit.
8 I don't know when.
9 Q. Do you know why he quit?
10 A. The last I heard that he quit with
11 others within Pizza Hut that was telling me about
12 it is the way Kim talked to him.
13 Q. Do you have any contact information for
14 Richard?
15 A. No. I don't even know his last name.
16 Q. You list Kim as a witness.
17 A. I think my -- when I had talked to my
18 attorney's paralegal, she might have messed up the
19 name. It should have been Estel.
20 Q. And Estel was the waitress who was
21 there --
22 A. She was a waitress.
23 Q. When was the last time you spoke with
24 Estel?
25 A. I talked to her maybe about a week

1 after that I got let go. I seen her in the
2 Walmart. She was in Walmart and I seen her, and
3 she was -- I asked her, you know, and she told me
4 that she didn't even know -- I said they said I was
5 yelling, and she was like she didn't hear me. She
6 had to ask Spring and them what was going on.
7 Q. Do you have any contact information for
8 Estel?
9 A. No. I know where she lives at, but I
10 don't go to her house like that. I just don't go
11 to people's houses. I don't hang with her like
12 that.
13 Q. Where does she live?
14 A. Somewhere off Dunlap.
15 Q. If you needed to get in touch with
16 Estel, how would you do it?
17 A. I don't know. I don't know because I'm
18 just not going to go to her house.
19 Q. Was Richard at work the day you were
20 terminated?
21 A. No.
22 Q. Was Myesha at work the day you were
23 terminated?
24 A. She came in there.
25 Q. Was she there --

1 A. I'm not really sure if she was there or
2 not, because I really didn't go to the front.
3 I cash in on the back. My cashier for the drivers
4 is on the back, so I never went up front. I stayed
5 in the back where the ovens are.
6 Q. You list Annette Hill as a witness.
7 Who is she?
8 A. I don't -- I guess a former employee.
9 Q. Was Miss Hill working on the day that
10 you were terminated?
11 A. No.
12 Q. What do you expect Miss Hill's
13 testimony to be as a witness?
14 A. Actually I don't know.
15 Q. Do you have any contact information for
16 Miss Hill?
17 A. No.
18 Q. Have you spoken with Miss Hill?
19 A. No.
20 Q. How about Joshua Votta? Who is that?
21 A. I think that he's one of our store
22 managers. I think that's his last name. I'm not
23 really sure.
24 Q. Was Joshua present on the day that you
25 were terminated?

1 A. No, but I'm pretty sure all them people
2 can tell you about the cussing that goes on in
3 there.
4 Q. Do you have any contact information for
5 Joshua?
6 A. No.
7 Q. Have you spoken with Joshua?
8 A. No, not since he got fired.
9 Q. When did Joshua get fired?
10 A. I'm not really sure.
11 Q. How do you know he was fired?
12 A. I don't even know if he was fired or he
13 quit. I don't know. I don't know what none of
14 them people's -- if they're there or they're not
15 there. I haven't been in Pizza Hut, so I don't
16 know who is still there and who is no.
17 Q. You list Tina Guillermo as a witness.
18 Who is that?
19 A. Probably a former employee. I'm not
20 really sure.
21 Q. Was Tina at work the day you were
22 terminated?
23 A. No.
24 Q. Have you spoken with Tina?
25 A. No.

1 Q. Do you know Tina?
2 A. No.
3 Q. Do you have any contact information for
4 Tina?
5 A. No.
6 Q. Do you understand when I say "contact
7 information" I mean an email address, a telephone
8 number, a street address?
9 A. No.
10 Q. Any way to get in touch with these
11 people.
12 A. No.
13 Q. How about Tammy Fogle? Who is that?
14 A. I know she used to be one of my
15 managers.
16 Q. Have you spoken with Miss Fogle?
17 A. No. I don't know. I mean, I know her,
18 but I don't speak to her.
19 Q. Was Miss Fogle present on the day of
20 your termination?
21 A. No.
22 Q. Does Miss Fogle know anything about
23 your termination?
24 A. No.
25 Q. How about Tina; does Tina know anything

1 about your termination?
2 A. No.
3 Q. How about Joshua?
4 A. No. Joshua doesn't even know I'm fired
5 unless he went by there.
6 Q. How about Annette Hill; does she know
7 anything about your termination?
8 A. No.
9 Q. Do you have any contact information for
10 Tammy Fogle?
11 A. No.
12 Q. There is a Lana Nuccio.
13 A. That's -- I don't know people by their
14 last name. I just know by the first name. I don't
15 know if that's the older lady that I said that
16 doesn't cuss that said she was going to take a
17 quarter out for everybody that cussed. I think
18 that's her.
19 Q. Was she at work on the date you were
20 terminated?
21 A. No. She works morning shifts.
22 Q. Have you spoken to her?
23 A. No.
24 Q. Does she know anything about your
25 termination?

1 A. I can't tell you that. Because she was
2 still working after I got terminated. I'm pretty
3 sure that -- news gets around.
4 Q. Do you have any contact information for
5 her?
6 A. No.
7 Q. How about Dane Owen? Who is that?
8 A. I guess a former employee.
9 Q. Do you have any contact information for
10 him?
11 A. No.
12 Q. Have you spoken with him?
13 A. No.
14 Q. Do you know him?
15 A. No.
16 Q. Does he know anything about your
17 termination?
18 A. No.
19 Q. Are there any other witnesses that
20 you're aware of who may provide testimony in your
21 case who know something about your employment, your
22 termination?
23 A. I'm not really sure. I don't know.
24 Q. To your knowledge have any of these
25 individuals you've listed as witnessed filed a

1 lawsuit against Pizza Hut?
2 A. To my knowledge, I have no clue.
3 Q. To your knowledge have any of them been
4 represented by Jerry Wigger before?
5 A. I don't know. No.
6 MS. CHERRY: Let's take a break for
7 just a minute. I may be done, Miss Douglass.
8 Okay?
9 (Short recess taken.)
10 MS. CHERRY: Nothing further.
11 (Deposition concluded at 12:00 p.m.)
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1 CERTIFICATE OF REPORTER

2

3

4 I, Patricia L. Thompson, Registered
5 Professional Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby certify
7 that the foregoing transcript is a true, accurate
8 and complete record.

9

10 I further certify that I am neither related
11 to nor counsel for any party to the cause pending
12 or interested in the events thereof.

13

14 Witness my hand, I have hereunto affixed by
15 official seal this 11th day of December 2012 at
16 Charleston, Charleston County, South Carolina.

17

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20

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22

23

24 Patricia L. Thompson
Registered Professional Reporter
My Commission Expires
25 October 19, 2015

1 I N D E X

2

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DONNA DOUGLASS

4

5

6

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9

(NO INFORMATION REQUESTED.)

10

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STATE OF SOUTH CAROLINA) 2011-CP-10-1399 MAGISTRATES COURT

COUNTY OF CHARLESTON)

TRANSCRIPT OF JUDGMENT

CASE NUMBER: 2010-CI-69-3544

JUDGMENT AGAINST	ATTORNEY
NAME: DONNA DOUGLASS ADDRESS: 5209 MARSEILLES DR APT A N CHAS SC 29418	
JUDGMENT IN FAVOR OF	
NAME: LOCAL LOANS ADDRESS: 4365 DORCHESTER RD STE 106 N CHAS SC 29405	
DAMAGES AND COST	

FILED
2011 FEB 23 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

AMOUNT OF JUDGMENT ..... $ 965.00

INTEREST ..... $

ATTORNEY FEES ..... $

COST ..... $

TOTAL ..... $ 965.00

JUDGMENT RENDERED DECEMBER 1, 20 10

MAGISTRATE

EXECUTION AGAINST PROPERTY

TO THE SHERIFF OF CHARLESTON COUNTY:

The above judgment was docketed in the office of the Clerk of the Court of Common Pleas, County of Charleston, the _____ day of _____, 20 _____.

THEREFORE, WE REQUEST YOU, that you satisfy the said judgment out of the personal property of the said judgment debtor within your County, or if sufficient personal property cannot be found, that out of the real property in your County belonging to such judgment debtor on the day when the said judgment was so docketed in your County, or at any time thereafter, in whose hands soever the same may be, and duly return this execution, according to law, to the Clerk of the Court of Common Pleas for the County of Charleston.

WITNESS, _____ Clerk of the Court of Common Pleas of Charleston County, this _____ day of _____, 20 _____.

Plaintiff or Plaintiff's Attorney

(R-10/01)

DEFENDANT'S EXHIBIT
12-1-12
Douglas PT
PENGAD 800-631-6989

CHARLESTON COUNTY
SOUTH CAROLINA

Judge David W. Coker
Magistrate

NORTH AREA MAGISTRATE'S COURT

843.202.6610
Fax 843.202.6620
Lonnie Hamilton, III Public Services Bldg.
4045 Bridge View Drive
Post Office Box 60037
North Charleston, SC 29419-0037

NOTICE

Enforcing a Judgment

Enclosed are documents necessary to enforce the judgment you obtained in Magistrate's Court. The Transcript of Judgment may be recorded immediately in the Clerk of Court's office at:

Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, S. C. 29401
(843) 958-5000

There is a ten ($10.00) dollar filing fee for this. When the judgment is filed, the Credit Bureau also receives notice of the judgment. The recorded judgment will remain valid and enforceable for a period of ten (10) years and accrues interest at the rate of 14% from the date of judgment.

An Execution Against Property Order may be filed with the Charleston County Sheriff's Department thirty (30) days after the hearing. The losing party is allowed this time to appeal and this time must expire before filing with the Sheriff's Department. If any appeal is filed, the Execution cannot be filed until the appeal is heard and decided.

The Sheriff's Department will determine if there is any property that can be seized and auctioned at public sale to pay this dept. There is a twenty five ($25.00) dollar filing fee at the Sheriff's Department.

If further information is needed, you may contact the Civil Division of the Sheriff's Department located at:

100 Broad Street
Charleston, SC 29402
(843) 958-2110

THERESA BERGER
Notary Public, S.C.
My Commission Expires March 17, 2015

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
P.O. Box 995, Columbia, South Carolina 29202

Dist 5/16/03

Notice of Appeal to Appeal Tribunal

Claimant's Name: DONNA DOUGLAS Social Security Number: [redacted]-9453

Claimant's Address: 1151 BERKELEY STREET #-D NORTH CHARLESTON SC 29406

Date of Birth: 08/09/1973 (Month/Day/Year) Date of Initial Claim: 04/13/2003 (Month/Day/Year) Telephone: 843-745-0973

Employer's Name: [redacted] Telephone: [redacted]

Employer's Address: [redacted] IT PLEASANT SC 29464

On 05/14/03 I received a claims examiner's determination mailed 05/12/03 from which I appeal and hereby apply for a hearing on the following grounds: I DISAGREE WITH ID#01 DEC# 01---I WAS NOT TERMINATED FOR IMPROPER ACTIONS IN CONNCETION WITH MY WORK. I WAS TERMINATED AFTER THE EMPLOYER CURSED ME INSIDE THE BUILDING AND THEN TOOK ME OUTSIDE AND CONTINUED TO CURSE ME. WHEN HE TOOK ME OUTSIDE IT WAS SO EMBARRASSING BECAUSE THERE WERE A LOT OF PEOPLE OUT THERE .
HE TOLDME THAT I WAS TO "LOOK INTO HIS F-------ING EYES WHEN HE SPOKE TO ME". WHEN I REFUSED TO DO THAT AND TURNED MY HEAD , HE TOLD ME THAT I WAS TERMINATED. I DID NOT DO ANYTHING IMPROPER. I HAD BEEN WORKING AT THIS JOB SINCE 2000 AND THIS MAN HAD JUST TAKEN OVER THIS BUSINESS 4 DAYS BEFORE HE TERMINATED ME . AND I REQUEST AN APPEAL ON THESE GROUNDS.

If appeal is untimely, state the reason:

I know that I must continue to file my claim for each week of unemployment until I receive the Appeal Tribunal's or Commission's decision, until I return to work, or until my claim is exhausted. If I win the appeal, I know I can only be paid for those weeks that I have claimed timely.

X (Claimant's Initials)

(If it appears necessary to subpoena witnesses or documents, the Local Office representative should assist claimant and attach them to this form at the time of transmittal to the Central Office.)

SUBPOENA ☐ YES ☒ NO

MAY 16 2003
BENEFIT DIVISION

Appellant: CLAIMANT

Signed By: X Donna Douglas

Title: Date: 5/15/03

Date Determination Delivered by Local Office: (Date)

Signed: Theresa (Local Office Representative)

Filed at: CHARLESTON 100 (Local Office Name and Number)

Date: 05/15/03 (Mo/day/yr)

Received By: Theresa Fey (Local Office Representative)

DEFENDANT'S EXHIBIT 2 12-1-12 Dougl. 1097

PENGAD 800-631-6989

WRITTEN DOCUMENTATION OF EVENT

Name: Donna

Date: 7/10

Description of event: Donna called "Tina" Area Mgr. on her cell phone one day and she started screaming about the wings fryer not getting cleaned properly at night. Then she hung up. I talked to Donna 2 days later and told her she had never call & scream at me again and hang up. Next time Donna decide to any mgt. person Donna may be terminated

Any further infractions will result in further disciplinary action up to and including termination.

Comments: I don't recall any of this on the night that I spoke with Donna. The Discount "Buffet" talk, the call times

Signature of Employee

Signature of Manager

DEFENDANT'S EXHIBIT 3 Douglass PI

PENGAD 800-631-6989

WRITTEN DOCUMENTATION OF EVENT

Name: Donna

Date: 7/21/10

Description of event: Mgt. (Kim & Paulas) Rivers Ave Pizza that have brought to my attention that Donna spreads Rumors and talks Bad about Crew & Mgt to other Crew & Mgt. making for a hostile work environment between Crew & mgt.
Next time Donna spreads Rumors or talks about Crew or Mgt. Donna will be Terminated.

Any further infractions will result in further disciplinary action up to and including termination.

Comments Donna says that should we Drug Test Kristin - and she passes ~~she will~~ Donna will quit.

Signature of Employee

Signature of Manager

DEFENDANT'S EXHIBIT 125 Douglass PC

General Instructions

Trident Medical Center
Emergency Department
9330 Medical Plaza Drive, Charleston, SC 29406 843-847-4000
01/06/2011 20:50

Patient: DOUGLASS, DONNA W

Thank you for visiting the Trident Medical Center-Emergency Department.
You have been evaluated today by Griffith, Wendy, PA for the following condition(s):

Sprained right ankle.
Fall on same level by tripping.
Acute pain in right lower extremity (ankle). Difficulty walking.

INSTRUCTIONS

Wear elastic wrap (Ace wrap) as directed until better. Wear post-op shoe until better. You may walk and bear weight as tolerated.

Your Current Medications: Your current home medications have been reviewed by the ED/UC physician and physician assistant. No changes in your current home medications are recommended at this time.
CONTINUE TAKING THE FOLLOWING MEDICATIONS:
None.

Prescription Medications:
Ibuprofen 600mg tablets: take 1 tablet orally every 8 hours as needed for pain. Dispense 30. No refills.

Ultram 50 mg tablets: take 1-2 orally every 6 hours as needed for pain. Dispense twenty (20). No refills. Generic substitute OK.

Follow-up with:
DAVID JASKWHICH MD, ORTHOPEDICS, (843)797-5050, 2880 TRICOM STREET, NORTH CHARLESTON, 29406.
Follow up as needed. Call for the next available appointment.

Understanding of the discharge instructions verbalized by patient.

You have been given the following additional information:
MECHANICAL FALL
SPRAIN:ANKLE [w/ x-ray]
ACE WRAP
MEDICATION: IBUPROFEN [Adult]
MEDICATION: ULTRAM

Crisis Phone Numbers for Patients/Family Members:

DEFENDANT'S EXHIBIT
12-11-12 6
Douglass PI
PENGAD 800-631-6989

If you or your family experiences an emotional or behavioral health crisis, the following numbers are staffed 24-hours a day to provide support.

-- **Mobil Crisis Line:** 1-843-414-2350

-- **Palmetto Lowcountry Behavioral Health:** 1-877-947-3223 or 1-843-747-5830

Patient Signature

2233

01/06/2011

Hospital Representative

Charleston Bone & Joint
ROPER ST. FRANCIS PHYSICIANS

To:	
Fax:	
Date: 3-4-11	

CHARLESTON BONE & JOINT, P.A.

Daily Progress Note

Phone: (843) 853-3474
Fax: (843) 853-3500

☐ Robert B. W. Lowery, M.D. ☒ Keith D. Merrill, M.D.
☐ Brian G. Ralph, D.P.M. ☐ Jeffrey R. Armstrong, D.P.M.
☐ Harry P. Rudolph IV, M.D.

Return to Work Recommendations

Name: Donna Douglas	DOB: 8-9-73
Company:	Claim #:
Injury Date:	Follow Up Appointment

- o Initial Treatment
- o Follow-up Treatment
- o Work Related
- o Non Work Related

Diagnosis [illegible]

Treatment	Work Status	Physical Ability
o Wound Care	o Return to regular duty on:	o Restricted standing, walking
o Suture Removal	o Return to modified duty on	o Restricted climbing, bending , stooping
o X-Rays		o Limit use of R / L hand / arm
o Lab Work	(o) Unable to return until 5/1/11	o No work around moving machinery
o Meds Prescribed		o Driving Yes / No
o Other	o Discharge from current care on	o Alternate Position Sit , Stand, Walk
		o Weight Lifting Restrictions __0-15 , __16-35, __ 35-50
		o No Overhead Work
		o Keep dressing clean and dry
		o Other

Return for Follow-up with Dr. _____ on _____ at _____

Instructions _____

Physicians Signature [illegible] Date: 3/4/11

I Herby Authorize my attending physician to release any information or copies thereof acquired in the course of my examination treatment for the above identified injury to my employer or representative. I understand that returns to work recommendations are made based on medical evaluations.

Employee Signature [illegible] Date: _____

DEFENDANT'S EXHIBIT 12-11-29 Douglass PT

Robert Lowery, MD • Keith Merrill, MD • Harry Rudolph, MD
Jeff Armstrong, DPM, ATC • Brian Ralph, DPM
255 East Bay Street, Charleston, South Carolina 29403
Phone: (843) 8 Fax: (843) 853-3500

Charleston Bone & Joint
ROPER ST. FRANCIS PHYSICIANS

To: Jerry Wigger Attorney
~~Fax~~ P: 553-9800 F: 553-1648
Date: 4-5-11

CHARLESTON BONE & JOINT, P.A.

Daily Progress Note

Phone: (843) 853-3474
Fax: (843) 853-3500

☐ Robert B. W. Lowery, M.D. ☐ Keith D. Merrill, M.D.
☐ Brian G. Ralph, D.P.M. ☐ Jeffrey R. Armstrong, D.P.M.
☐ Harry P. Rudolph IV, M.D.

Return to Work Recommendations

Name: Donna Douglass	DOB: 8/9/73
Company:	Claim #:
Injury Date:	Follow Up Appointment 4/19/11 2:30pm

- o Initial Treatment
- o Follow-up Treatment
- o Work Related
- o Non Work Related

Diagnosis: [illegible]

Treatment	Work Status	Physical Ability
o Wound Care	o Return to regular duty on:	o Restricted standing, walking
o Suture Removal	o Return to modified duty on	o Restricted climbing, bending, stooping
o X-Rays		o Limit use of R / L hand / arm
o Lab Work	o Unable to return until 4/20/11	o No work around moving machinery
o Meds Prescribed		o Driving Yes / No
o Other	o Discharge from current care on	o Alternate Position Sit, Stand, Walk
		o Weight Lifting Restrictions __0-15, __16-35, __35-50
		o No Overhead Work
		o Keep dressing clean and dry
		o Other

Return for Follow-up with Dr. _____ on _____ at: _____

Instructions _____

Physicians Signature [signature] Date: 4/5/11

I Herby Authorize my attending physician to release any information or copies thereof acquired in the course of my examination treatment for the above identified injury to my employer or representative. I understand that returns to work recommendations are made based on medical evaluations.

Employee Signature [signature] Date: 4/5/11

Robert Lowery, MD • Keith Merrill, MD • Harry Rudolph, MD
Jeff Armstrong, DPM, ATC • Brian Ralph, DPM
255 East Bay Street, Charleston, South Carolina 29403
Phone: (843) 853-3474 Fax: (843) 853-3500

PENGAD 800-631-6989
DEFENDANT'S EXHIBIT
12-11-18
Douglass PT

Charleston Bone & Joint
ROPER ST. FRANCIS PHYSICIANS

To: Terry Wigger Attorney
Fax: ~~853-3500~~ 851-9044
Date: 5-3-11

CHARLESTON BONE & JOINT, P.A.

Daily Progress Note

Phone: (843) 853-3474
Fax: (843) 853-3500

- ☐ Robert B. W. Lowery, M.D.
- ☐ Keith D. Merrill, M.D.
- ☐ Brian G. Ralph, D.P.M.
- ☐ Jeffrey R. Armstrong, D.P.M.
- ☐ Harry P. Rudolph IV, M.D.

Return to Work Recommendations

Name: Donna Douglass	DOB: 8/9/73
Company:	Claim #:
Injury Date:	Follow Up Appointment

- o Initial Treatment
- o Follow-up Treatment
- o Work Related
- o Non Work Related

Diagnosis: R/O Muscle Injury

Treatment	Work Status	Physical Ability
o Wound Care	o Return to regular duty on:	o Restricted standing, walking
o Suture Removal	o Return to modified duty on	o Restricted climbing, bending, stooping
o X-Rays		o Limit use of R / L hand / arm
o Lab Work	o Unable to return until 6 weeks post op	o No work around moving machinery
o Meds Prescribed		o Driving Yes / No
o Other	o Discharge from current care on	o Alternate Position Sit, Stand, Walk
		o Weight Lifting Restrictions __0-15, __16-35, __35-50
		o No Overhead Work
		o Keep dressing clean and dry
		o Other

Return for Follow-up with Dr. _____ on _____ at _____

Instructions _____

Physicians Signature [signature] Date: 5/3/11

I Hereby Authorize my attending physician to release any information or copies thereof acquired in the course of my examination treatment for the above identified injury to my employer or representative. I understand that returns to work recommendations are made based on medical evaluations.

Employee Signature [signature] Date: _____

Robert Lowery, MD • Keith Merrill, MD • Harry Rudolph, MD
Jeff Armstrong, DPM, ATC • Brian Ralph, DPM
255 East Bay Street, Charleston, South Carolina 29403
Phone: (843) 853-3474 Fax: (843) 853-3500

DEFENDANT'S EXHIBIT
12-11-09
Douglass P1
PENGAD 800-631-6989

Charleston Bone & Joint
ROPER ST. FRANCIS PHYSICIANS

CHARLESTON BONE & JOINT, P.A.

Daily Progress Note

Phone: (843) 853-3474
Fax: (843) 853-3500

☐ Robert B. W. Lowery, M.D. ☒ Keith D. Merrill, M.D.
☐ Brian G. Ralph, D.P.M. ☐ Jeffrey R. Armstrong, D.P.M.
☐ Harry P. Rudolph IV, M.D.

To:	
Fax:	851-9044 Jerry W. atty
Date:	6/7/11

Return to Work Recommendations

Name: Donna Douglas	DOB: 8-9-73
Company:	Claim #:
Injury Date:	Follow Up Appointment

- o Initial Treatment
- o Follow-up Treatment
- o Work Related
- o Non Work Related

Diagnosis [illegible]

Treatment	Work Status	Physical Ability
o Wound Care	o Return to regular duty on:	o Restricted standing, walking
o Suture Removal	o Return to modified duty on	o Restricted climbing, bending, stooping
o X-Rays		o Limit use of R / L hand / arm
o Lab Work	o Unable to return until [illegible]	o No work around moving machinery
o Meds Prescribed		o Driving Yes / No
o Other	o Discharge from current care on	o Alternate Position Sit, Stand, Walk
		o Weight Lifting Restrictions __0-15, __16-35, __35-50
		o No Overhead Work
		o Keep dressing clean and dry
		o Other

Return for Follow-up with Dr. _____ on _____ at _____

Instructions _____

Physicians Signature [signature] Date: 6/7/11

I Herby Authorize my attending physician to release any information or copies thereof acquired in the course of my examination treatment for the above identified injury to my employer or representative. I understand that returns to work recommendations are made based on medical evaluations.

Employee Signature [signature] Date: 6/7/11

Robert Lowery, MD • Keith Merrill, MD • Harry Rudolph, MD
Jeff Armstrong, DPM, ATC • Brian Ralph, DPM
255 East Bay Street, Charleston, South Carolina 29403
Phone: (843) 853-3474 Fax: (843) 853-3500

PENGAD 800-631-6989
DEFENDANT'S EXHIBIT
12/2/11 12 10
Douglas PT

OCB-1020C
8/99
08122

SOUTH CAROLI EMPLOYMENT SECURITY COMMISS N

UNEMPLOYMENT INSURANCE DIVISION
DISCHARGED FOR CAUSE
FACT FINDING

384221

Effective Date 1/23/20 12 26
Type of Claim
New x Add ____
Trans ____ Rein ____
Cont ____ ENTERE
BYE 1/24/2012 dhipp 02/28/2

L O No 100

CLAIMANT'S NAME Donna Douglass

SOCIAL SECURITY NUMBER [redacted] - 9 4 5 3

1 Most recent BONA FIDE employer (Name of Company) JeM Pizza Delivery LLC

Address of Company PO BOX 22246 Charleston SC 29413 Telephone No of Company 843-958-8660

Name of individual at Company to contact for more information ____

2 Dates of employment with this company beginning 10/23/1998 ending 01/23/2011

Hours worked from 4 00 pm to 12 30 am or which shift ____ for 5 days per week

Ending salary $ 7 25 per hr Occupation Delivery Driver

3 CLAIMANT'S STATEMENT

a I was discharged by (Name of Person) Kim Title Area Coach

because (Include reason for discharge on that particular day) I was terminated on January 23 2011 from my position as a delivery driver The reason for termiantion was due using profanity On January 23, 2011, I came off of a delivery run one of tha pizza in the oven was on fire I put my hand in my jacket to get the pizzas out and I stated "this does not make no darn sense for the oven to be back up " The assistant manager Spring Brooks stated that I said fuck I stated to Spring that I did not use that work I said darn I have never receive any written or verbal notice prior to termiantion My time and attendance was not an issue

SC E ... Comm.
FEB 22 2011
Received Benefits Div

b If you were discharged for violation of a company rule please explain rule and violation
I am not aware of the company's policy

c Has your employer ever warned you about the condition causing your discharge? Yes ☐ No ☒
If "Yes " when were you warned (Dates) and by whom?

d Did you discuss your discharge with your employer? Yes ☐ No ☒ If "Yes " with whom
What were the results of this discussion?

4 CLAIMANT'S CERTIFICATION I certify that the information stated herein is true I understand that the Law prescribes penalties for false statements for the purpose of securing benefits to which I am not entitled

CLAIMANT'S SIGNATURE Donna DATE 2/16/2011

Validated by
Istanley
02/23/2011 06:19:44

DEFENDANT'S EXHIBIT
2/16/12 11
Douglas P1

53

5 INTERVIEWR'S STATEMENT Emplc . Reply received? Yes, ☒ No ☐ (If "Y ' all the employer's allegations not covered in claimant's initial statement must be presented to the claimant for rebuttal in item 7 If "No " of information was not adequate was employer contacted to obtain adequate information?

Yes ☒ No ☐ If "No " give a date of attempt(s) to contact and explain

INTERVIEWER'S SIGNATURE Tatesha Abra DATE OF REPORT 2/16/2011

BENEFIT DEPARTMENT

FEB 22 2011

Received Benefits D

54

NAME Donna Douglas SOCIAL SECURITY # [redacted] - 9 4 5 3

6 EMPLOYER'S STATEMENT (ALSO USE FOR REBUTTAL OF CLAIMANT'S STATEMENT)

TELEPHONE _____ IN PERSON _____

EMPLOYER S SIGNATURE OR NAME OF INDIVIDUAL CONTACTED

TITLE OF INDIVIDUAL CONTACTED

2/16/2011
DATE

7 REBUTTAL OF EMPLOYER REPLY I have never use profanity out loud in front of customers Since Kim became manager we have been through nine store managers A lot of people has been terminated by Kim or either quit withing six months I have no further comments

Phone
CLAIMANT S SIGNATURE

February 16, 2011
DATE

3a CLAIMANT S STATEMENT CONTINUED (USE ONLY IF ADDITIONAL SPACE IS NEEDED FOR FACT-FINDING STATEMENTS)

SCE, Unemployment Comm.
FEB 22 2011
Received Benefits Div

Phone
CLAIMANT S SIGNATURE

S

5a INTERVIEWERS STATEMENT CONTINUED

I Ran in off A Run, the Oven was back up, Both Spring was going to Oven to get A Burning Pizza Front in it. I Started helping, then I was upset I Know I ~~Cursed~~ Said that this doesn't made No Sense. That the Ovens was backed up this got to be a 40 min back up: Dont Remember if I Cursed Because I made me mad that the Order was already late and burned. And they had enough inside help to get them (orders Ready).

Donna Douglass
Jan 24, 2011

FEB 01 2011

SOE

FEB 22 2011

Received Benefits Div

DEFENDANT'S EXHIBIT
Douglass 12
12-11-12 PT
PENGAD 800-631-6989

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CASE NO. 02-CP-10-866

DONNA DOUGLASS,
Plaintiff,

vs.

WESTAFF, INC.,
Defendant.

2002 FEB 26 AM 10: 20
CLERK OF COURT
BY

SUMMONS
WRONGFUL TERMINATION

TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and requested to answer the Complaint in this action of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscriber at his office, 8086 Rivers Avenue, N. Charleston, SC 29406, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded in the Complaint.

02-1450

JARREL L. WIGGER
Davidson, Bennett & Wigger
8086 Rivers Avenue
North Charleston SC 29406
(843) 553-9800
Attorney for the Plaintiff

Charleston, South Carolina
26 day of February, 2002

DEFENDANT'S EXHIBIT
Douglass 13
PENGAD 800-631-6989
4/21/12 DI

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CASE NO. 02-CP-10-8166

DONNA DOUGLASS,
Plaintiff,

vs.

WESTAFF, INC.,
Defendant.

COMPLAINT
JURY TRIAL REQUESTED

2002 FEB 26 AM 10: 30

TO THE ABOVE-NAMED DEFENDANT:

The Plaintiff complaining of the Defendant alleges as follows:

ONE: The Plaintiff is a citizen and resident of Charleston County, South Carolina.

TWO: The Defendant, Westaff, Inc., is, upon information and belief, a government entity operating under the laws of the State of South Carolina.

THREE: The parties, matters and all things and matters hereinafter alleged are within the jurisdiction of this Court.

FOUR: Approximately ten (10) months prior to termination, Plaintiff and Defendant corporation, its agents and employees, entered into a contract whereby the Defendant employed the Plaintiff to begin work at that time for an indefinite term.

FIVE: Thereafter, Plaintiff entered on the performance of the contract of employment and received regular and frequent raises which resulted in a final hourly wage of $8.00.

FOR A FIRST CAUSE OF ACTION
RETALIATORY DISCHARGE

SIX: The Plaintiff reiterates the allegations contained in the above paragraphs.

SEVEN: On or about January 22, 2001, Plaintiff, during the course of her employment, injured her right ankle/foot when she slipped and fell getting off of a pallet due to a powdery substance on the floor.

EIGHT: Following the accident, Plaintiff reported the on-the-job injury to her supervisor and began receiving medical treatment and workers' compensation benefits.

NINE: The Plaintiff's doctor placed Plaintiff on light duty work status after the injury.

TEN: The Plaintiff's doctor released her to return to work on March 16, 2001.

ELEVEN: The Plaintiff returned to her job on March 16, 2001; however, she was told by Defendant there was no position for her.

TWELVE: The Plaintiff was fired on March 16, 2001.

THIRTEEN: Plaintiff's termination, in fact, was retaliatory in nature for the Plaintiff's workers' compensation claims and the arbitrary and irrational reason given was a pretext, all in violation of the S.C. Code of Laws, §41-1-80, as amended.

FOURTEEN: Plaintiff's institution of a workers' compensation claim was a substantial factor in bringing about her discharge.

FIFTEEN: The acts and conduct of the Defendant set forth above constitute a clear violation of public policy and was conducted in bad faith.

SIXTEEN: Due to the acts of the Defendant, its agents and employees, Plaintiff is entitled to back wages, interest on those back wages and bonuses from the date of her termination to the present date.

SEVENTEEN: By reason of such wrongful and retaliatory discharge by the Defendant, its agents and employees, Plaintiff has been damaged in such an amount to be determined by the trier of fact.

WHEREFORE Plaintiff prays for judgment against the Defendant for back wages from the date of discharge, pre-judgment interest, reinstatement of her position of employment, punitive damages, reasonable attorneys fees, the costs of this action and such other and further relief as this Court deems just and proper.

JARREL L. WIGGER
Davidson, Bennett & Wigger
8086 Rivers Avenue
North Charleston SC 29406
(843) 553-9800
Attorney for the Plaintiff

Charleston, South Carolina
26 day of February, 2002

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	))	IN THE COURT OF COMMON PLEAS CASE NO. 02-CP-10-_____
DONNA DOUGLASS, Plaintiff, vs. WESTAFF, INC., Defendant.	))))))))	**INTERROGATORIES**

TO THE ABOVE-NAMED DEFENDANT:

The Plaintiff hereby requires the Defendant within forty-five (45) days after service hereof, to answer the Interrogatories hereinafter set forth in accordance with the South Carolina Rules of Civil Procedure Rule 33(b). These Interrogatories shall be deemed to continue until time of the trial of this case pursuant to Rule 33(b).

ONE: List the names and addresses of the persons known to the party of counsel to be a witness concerning the facts of this case and indicate whether or not written or recorded statements have been taken. If so, indicate who has possession of such statements.

TWO: Set forth a list of any prepared documents in the possession of the party that relate to the claim of the defense in this case. If you will, supply them without the necessity of a motion. Please attach copies to your answer.

THREE: List the names and addresses of all insurance companies which have liability insurance coverage relating to the claim. Give the number(s) of the policy or policies involved and the amount(s) of the liability coverage. and the policy number.

FOUR: List each person known to the parties of counsel who will be a witness concerning the facts of this case and set forth a summary sufficient to inform the other party of the important facts known or observed. Such witness shall provide a copy of any written or recorded statements taken from such witness.

FIVE: List specifically, in detail, each reason Plaintiff was terminated.

SIX: List each and every employee, with address and phone number, dismissed, terminated or discharged from Defendant Westaff, Inc. for the last three years and for each name, indicate which individuals had filed or claimed a work related injury while employed with the Westaff, Inc.

SEVEN: List each and every person, with addresses and phone numbers, who was employed in any capacity by the Defendant from a period beginning two (2) years prior to Plaintiff's termination date and ending six (6) months after Plaintiff's termination date, and include each person's job title.

JARREL L. WIGGER
Davidson, Bennett & Wigger
8086 Rivers Avenue
North Charleston SC 29406
(843) 553-9800
Attorney for the Plaintiff

Charleston, South Carolina
26 day of February, 2002

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	))	IN THE COURT OF COMMON PLEAS CASE NO. 02-CP-10-_____
DONNA DOUGLASS, Plaintiff, vs. WESTAFF, INC., Defendant.	))))))))	**REQUEST TO PRODUCE**

TO THE ABOVE-NAMED DEFENDANT:

The Plaintiff, by and through her undersigned attorney, requests the Defendant to produce for inspection a copy of the following described documents and items in possession, custody and/or control of the Defendant, its attorneys and/or other representatives or agents pursuant to South Carolina Rules of Civil Procedure:

ONE: All statements, whether written, recorded or transcribed, taken of any parties or witnesses of the facts of this case.

TWO: Copies of all insurance policies owned by the Defendant that relate to this matter or in the alternative, the front page of such policies showing the amount and type of coverage.

THREE: Copies of all documents and reports relating in any way to the matters referred to in the Complaint.

FOUR: Copy of Plaintiff's personnel file with Defendant.

FIVE: Copy of Plaintiff's workers' compensation file as a result of Plaintiff's injury of 1/22/01.

SIX: Any and all documents that Defendant plans to utilize in its defense of this case.

JARREL L. WIGGER
Davidson, Bennett & Wigger
8086 Rivers Avenue
North Charleston SC 29406
(843) 553-9800
Attorney for the Plaintiff

Charleston, South Carolina
26 day of February, 2002

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	))	IN THE COURT OF COMMON PLEAS CASE NO. 02-CP-10-_____
DONNA DOUGLASS, Plaintiff, vs. WESTAFF, INC., Defendant.	))))))))	**REQUEST TO ADMIT**

TO THE ABOVE-NAMED DEFENDANT:

The Plaintiff requests the Defendant admit the following:

ONE: Admit that prior to termination, Plaintiff's physician placed the Plaintiff on light duty status.

TWO: Admit that Plaintiff performed her work duties under the light duty status for approximately two (2) months prior to her termination.

THREE: Admit Plaintiff was terminated from employment due to the fact she filed a workers' compensation claim for injuries received during the course of her employment.

FOUR: Admit Plaintiff was terminated from employment without cause.

JARREL L. WIGGER
Davidson, Bennett & Wigger
8086 Rivers Avenue
North Charleston SC 29406
(843) 553-9800
Attorney for the Plaintiff

Charleston, South Carolina
26 day of February, 2002

Copy and Index

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF
COMMON PLEAS FOR THE
NINTH JUDICIAL CIRCUIT

- - -

DONNA DOUGLASS Plaintiff, vs. BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC, AND THE BERKSHIRE GROUP Defendants,	:	CIVIL ACTION NO. 2013-CP-10-07133

GREGORY MORAN

DATE TAKEN: MONDAY, APRIL 6, 2015
TIME BEGAN: 10:34 A.M.
TIME ENDED: 11:17 A.M.
LOCATION: THE WIGGER LAW FIRM, INC.
8086 RIVERS AVENUE, SUITE A
NORTH CHARLESTON, SOUTH CAROLINA

REPORTED BY: DEIRDRE J. WEYER, RPR
EVERYWORD, INC.
P.O. BOX 1459
COLUMBIA, SOUTH CAROLINA 29202
803-212-0012

1 off a work order.
2 Q And who would submit a work order?
3 A It could be a resident. It could be an
4 employee.
5 Q Okay. And would they call you or would
6 they call an office? Or how would they submit that
7 work order?
8 A They could call the office. They could
9 tell someone that's out on the grounds. That's
10 basically how it would happen at that time.
11 Q So if someone were to see a light out and
12 they called the office, how would you get knowledge
13 about going to fix that light?
14 A Whoever received the call would do a work
15 order.
16 Q And they would give that work order to
17 you; is that right?
18 A We'd just go on the computer and look at a
19 list of work orders.
20 Q And is that something you would do on a
21 everyday basis, look at work orders?
22 A Every morning.
23 Q Every morning?
24 A Well, throughout day, but in the morning's
25 the big one.

1 specific light bulb, the time that they last could
2 vary; is that right?
3 A Correct.
4 Q Besides reports from residents or anyone
5 else who happened to be or y'all just making rounds
6 through the property and noticing a light being out,
7 are there any other procedures that you use to check
8 lights?
9 A Yes. The property's divided into sections
10 and everyone's responsible for their own section.
11 And they would tape up the photocell, because it's
12 daylight, and check the light. Do a light check.
13 Q And how often was that done?
14 A There wasn't a set time. Maybe once a
15 month. Every so often.
16 Q Do you know who was responsible for the
17 700 building of Phase I?
18 A Not at that time.
19 Q Sitting here today, do you have any reason
20 to believe that the light checks that you just
21 mentioned were not done around the time of the
22 accident?
23 A Were not done?
24 Q Do you have reason to believe they were
25 not done around the time of the accident?

1 saw them, right?
2 A Yes. That's our best resource.
3 Q The residents?
4 A Yeah.
5 Q Do you recall any residents ever telling
6 you that there was problems with the lighting before
7 January 6th, 2011, at the 700 building, Phase I?
8 A No.
9 Q Are there other lights around the
10 buildings as well?
11 A Yeah. That light -- that whole inside
12 light well has 16 lights, divided by three -- three
13 floors, there's six on each floor.
14 Q In this case, do you know whether or not
15 it was all the lights or just one that was out?
16 A I wouldn't know.
17 Q Would it be unusual for more than one or
18 two of the lights to be out at the same time?
19 A No.
20 Q Bear with me for one minute.
21 Do you have any knowledge how long the
22 light was out in the stairwell of the 700 building of
23 Phase I before Miss Douglass's alleged accident on
24 January 6th, 2011?
25 A No.

1 A Other than an outside ramp or a different
2 toilet -- higher toilets. Something like that.
3 Q Okay. What about if a visitor is there
4 visiting one of the apartment complex residents, do
5 they have the ability to request any changes to be
6 made?
7 A No, not if they don't have a lease.
8 Q In fact, if they did start making
9 alterations to the property, would that be considered
10 a trespass?
11 A Some violation. Some kind of a violation.
12 Q Okay. Sure. I mean, you wouldn't want
13 somebody coming up and changing your sprinkler
14 systems or moving bushes or changing light bulbs or
15 anything like that, right?
16 A Right.
17 Q So would it be fair to say then -- or
18 would it be a fair characterization to say that a
19 visitor has no ability to make changes when they come
20 onto the property?
21 A I would say that's fair to say.
22 Q Yeah. Now, would you agree also as your
23 job as a maintenance person there are some things
24 that are safety related and some things that are
25 aesthetically related?

1 Q And you can't delegate to a resident to
2 fix that, can you?
3 A Not at all.
4 Q Okay. So some safety issues cannot be
5 delegated to residents. Is that fair to say?
6 A Correct.
7 Q Is lighting a safety issues?
8 A Always.
9 Q Okay. And is it fair to say you can't
10 delegate a safety issue regarding lighting to one of
11 the residents?
12 A No, but we can ask them to report.
13 Q Right. But if you see a lighting issue,
14 that's your responsibility to fix, right?
15 A Correct.
16 Q Okay. Have you ever read any of the
17 building codes that are applicable to those
18 apartments regarding lighting issues?
19 A No.
20 Q And you were asked about doing things to
21 prevent this situation. You guys when you -- do you
22 buy the light bulbs or does the company just send
23 them to you?
24 A I buy them.
25 Q Okay. And you know what the life of those

1 bulbs is generally, right?
2 A Generally.
3 Q Sometimes they burn hot?
4 A Yep.
5 Q But is there an expected life expectancy
6 within any of the bulbs that you buy?
7 A I think on that page it tells you how many
8 hours you can expect.
9 Q Right. Is it fair to say there's no
10 system in place -- or there was no system in place in
11 2011 to replace the bulbs prior to the time that they
12 burned out?
13 MR. BROGDON: Object to the form.
14 THE WITNESS: We wouldn't replace them
15 until they burned out.
16 BY MR. WIGGER:
17 Q Right. You would wait till they burned
18 out before you replaced them, right?
19 A Yes.
20 Q So there was no system in place to replace
21 them prior to the time they burned out, was there?
22 A No.
23 Q Right. So what you had was a situation
24 where you knew that the lighting would burn out at
25 some point and then you would wait until it was

1 Q And I'm not even talking about
2 Donna Douglass's situation. I'm asking you in
3 general. You had a situation set up where you waited
4 until the light burned out, you knew it was a safety
5 issue, yet you waited till it burned out before
6 replacing it, right?
7 A I just -- I don't replace light bulbs that
8 are still lit.
9 Q Yeah. Now, as maintenance folks in the
10 apartment complex, you guys knew visitors came to the
11 apartment complex, right?
12 A Always.
13 Q And have you ever seen any pizza delivery
14 people come to the apartments?
15 A Every kind of delivery service comes in.
16 Q Sure. Chinese food, people delivering
17 furniture. All kind of stuff, right?
18 A Right.
19 Q So you can anticipate those types of users
20 for your facilities, right?
21 A Umahum.
22 Q Is that right?
23 A Yes.
24 Q So it's fair to say that Miss Douglass was
25 an anticipated user of y'all's facilities --

1 A Yes.
2 Q -- as a pizza delivery driver, right?
3 A Correct.
4 Q Okay. Now, if Miss Douglass comes at
5 night, you wouldn't expect her to go find the office,
6 then find a maintenance person to try to get a light
7 bulb changed prior to the time that she traversed the
8 stairs, would you?
9 A No.
10 Q I mean, that's just common sense. She's
11 there delivering pizza. She's going to try to get in
12 and get out, right?
13 A Right.
14 Q And there wouldn't be anybody there for
15 her to find anyway, right?
16 A No.
17 Q Sure.
18 (Moran Exhibit Number 1 was marked for
19 identification.)
20 BY MR. WIGGER:
21 Q Mr. Moran, I'm going to show you what's
22 been marked as Exhibit 1. Do you know if that's the
23 stairway that we have been talking about as far as
24 Donna Douglass's situation goes?
25 A This is the outside of the building.

1 A Something like that, yes.
2 Q What about any overhead lighting, is there
3 any overhead lighting on this particular stairway?
4 A No.
5 Q How about any lighting down below? Any
6 lighting that would illuminate this area?
7 A The landscaping? No.
8 Q And is that designed that way or is it
9 something that lights were burned out?
10 A What do you mean, "lights were burned
11 out"?
12 Q I'm just asking is this a accurate picture
13 of the way these stairways always are, or is it that
14 dark because the lights were burned out?
15 A It's not -- it doesn't look as dark as
16 this picture.
17 Q Yeah?
18 A The picture's darker than it looks.
19 Q Yeah. Where would other lighting be, if
20 any, relative to this picture?
21 A The next floor up above these
22 (indicating).
23 Q Okay. So on the next landing there would
24 be two lights kinda equivalent to these two lights
25 down here?

1 A There's three floors would be that way.
2 Q Okay. Is it fair to say there's no direct
3 light that comes down on the particular stairway
4 itself?
5 A Well, there's a light up here that would
6 shine down to it (indicating).
7 Q Okay. So when you're pointing, you're
8 pointing up north of where the stairway goes to --
9 A Right here's the floor (indicating). It's
10 going to be right (indicating).
11 Q Okay. So there's a light up in this area
12 somewhere (indicating)?
13 A And they all have their own door light.
14 That's their own private light to turn on at their
15 front door.
16 Q For the -- like, the residents?
17 A Right.
18 Q Yeah. Now, looking at this picture, does
19 it look like the light that would have been up here,
20 north, is out?
21 A I couldn't say because I'm not seeing that
22 floor that well. This picture is darker than I would
23 imagine it to be though.
24 Q Yeah. Are you familiar with any of the
25 building codes regarding rise and run of stairways?

1 A No. Whatever the code was when they built
2 that building, I would assume that's how it was
3 built.
4 Q Do you know if the rise and run is
5 consistent on this particular stairway?
6 A Yes.
7 Q Is that because you've actually measured
8 it or --
9 A No. We're always repairing stairs.
10 Q Yeah? Why are the stairs always be being
11 repaired?
12 A Because they're about 30 years old.
13 Q And they're made out of wood?
14 A Pressure-treated wood.
15 Q So the wood sometimes becomes misshapen or
16 disfigured?
17 A Yeah. People moving damage them from time
18 to time.
19 Q Now, every time a light bulb is changed,
20 do you guys make an entry on the maintenance log?
21 A No.
22 Q Is that one of those things that just if
23 you come across it, you change it out and it's --
24 A It's changed.
25 Q So even if we have the Berkshire records,

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2013-CP-10-7133

DONNA DOUGLASS, Plaintiff, -versus- BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC AND THE BERKSHIRE GROUP, Defendants.	DEPOSITION OF: DONNA DOUGLASS

C O P Y

DATE: Tuesday, November 11, 2014

TIME: 9:57 a.m.

LOCATION: Wigger Law Firm, Inc.
8086 Rivers Avenue
North Charleston, SC 294406

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter

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Mount Pleasant, SC 29464
SpectrumAAA@gmail.com
843.849.0133

1 A. I haven't speak to them at all.
2 Q. Okay. So you didn't speak with
3 anybody who lived there after the accident; is that
4 right?
5 A. No, sir.
6 Q. Okay. And didn't call and report the
7 accident after it happened; is that right?
8 A. No, sir.
9 Q. Okay. Do you recall on your previous
10 trips to that building whether or not there was any
11 lighting?
12 A. Do I recall?
13 Q. Yeah, was it -- this instance, you said
14 there was -- it was dark, right?
15 A. Yes, sir.
16 Q. Okay. Was it dark in the other
17 instances where you went before this accident?
18 A. No, sir. There was light out there.
19 The light -- I mean, the light was working, the
20 particular 700, it -- the light wasn't -- the light
21 was out.
22 Q. Okay. Do you know when that light went
23 out?
24 A. I couldn't tell you, sir.
25 Q. Okay. Do you know how -- what caused

1 the light to go out?

2 A. I couldn't tell you that either.

3 Q. Okay. Do you know whether or not

4 anyone ever reported the lighting problem to the

5 property manager or anyone who owned the property?

6 A. No, sir. I just deliver, and I just

7 worked there for business, for pizza.

8 Q. Okay. Have you ever spoken with --

9 with anyone who lives at those apartments who told

10 you that, yes, that light frequently goes out and

11 that they had told the property owners or property

12 manager about that problem?

13 A. No, sir.

14 Q. Besides the person who you delivered

15 the pizza to on that night, have you spoken with

16 anyone who lives there since this accident?

17 A. No, sir. I don't know nobody who lives

18 there.

19 Q. Okay. Had you made any other

20 deliveries that day or that night?

21 A. I made other deliveries that night.

22 Q. Okay. How many did you make? Do you

23 know?

24 A. I couldn't tell you, sir.

25 Q. Okay. The first person you called,

STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT

COUNTY OF CHARLESTON

COPY

DONNA DOUGLASS,

Plaintiff,

vs. CASE NO. 2012-CP-10-229

J.E.M. RESTAURANT GROUP, INC., d/b/a PIZZA HUT, JEM PIZZA GROUP, LLC and JEM PIZZA DELIVERY, LLC,

Defendants.

DEPOSITION OF: DONNA DOUGLASS

DATE: December 11, 2012

TIME: 10:00 a.m.

LOCATION: Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: Patricia L. Thompson,
Registered Professional Reporter

A. It had just went down a couple of months before to 4.85 when you're on the road, and you get -- I can't remember. I think it was -- I can't remember how much it was to run. I don't know if it was a dollar. It was 1.25 a run, and then you get tips.

Q. How much did you make in tips each week?

A. On a slow day I wouldn't -- I would make no less just in tips 60, 70 dollars. That's on a slow day.

Q. Do you file tax returns?

A. Yes, I do.

Q. Did you file one in 2011? Last year.

A. Yes, I did.

Q. How about the year before that, 2010?

A. I'm pretty sure I did.

Q. Do you have copies of those tax returns?

A. I'm not sure. I don't know.

Q. Did you file them yourself or did --

A. I filed them myself on a computer. And I don't never print them off, so -- I use a Web site.

Q. You indicated that you had insurance

1 BEFORE THE

2 SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

3 WCC FILE NO. 1103149

4

5 DONNA DOUGLASS,) DEPOSITION OF

6 Claimant,) DONNA DOUGLASS

7 -versus-)

8 JEM PIZZA DELIVERY, LLC,)

9 Employer,)

10 -and-)

11 THE PMA INSURANCE GROUP,)

12 Carrier-Defendants.)

13 ----------

14

15

16 DATE: Thursday, June 28, 2011

17 TIME: 9:05 a.m.

18 LOCATION: Wigger Law Firm, Inc.
8086 Rivers Avenue, Suite A
19 North Charleston, South Carolina 29406

20 REPORTED BY: Janice D. Hayward, RMR
NCRA Registered Merit Reporter
21 CAROLINA REALTIME LLC
P.O. Box 80397
22 CHARLESTON, SC 29416

23

24

25

1 Q Can you spell that for me?
2 A D-e-s-a-u-s-s-u-r-e.
3 Q Okay. And how long were you married?
4 A For about a year and a half.
5 Q Any kids?
6 A No kids.
7 Q How far did you go in school?
8 A I finished school with the special ed
9 program.
10 Q Okay. A high school program?
11 A No, I had to go to a special school in the
12 city.
13 Q Okay. What was the name of it, do you
14 recall?
15 A I don't remember the name of it.
16 Q Okay. But you said it was a special
17 education school?
18 A Um-hum.
19 Q Did it have like a grade that you
20 completed?
21 A No, it's just, you just get a paper saying
22 that you did equivalent to 12 years in school.
23 Q Okay. And do you have a learning
24 disability?
25 A Um-hum.

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2013-CP-10-7133

DONNA DOUGLASS, Plaintiff, -versus- BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC, AND THE BERKSHIRE GROUP, Defendant.	DEPOSITION OF: RICHARD KING

COPY

DATE: Friday, April 3, 2015

TIME: 9:58 a.m.

LOCATION: Wigger Law Firm, Inc.
8066 Rivers Avenue, Suite A
North Charleston, SC 29406

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter

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1 ins come in during the daytime that they would just
2 call you and tell you go check it out. Sometimes
3 service requests would be written up on it and
4 sometimes it wouldn't.
5 Q. Now, was there some kind of logbook to
6 keep track of all of the service requests?
7 A. They filed them in the individual
8 apartment residents in folders.
9 Q. What if it was for an area that wasn't
10 an actual apartment, like, if it was a common
11 area?
12 A. A common area? I don't know how
13 they filed those. It -- it should be on file,
14 though. It should be some kind of file in place
15 for that.
16 Q. But that's not something that you
17 handled?
18 A. No.
19 Q. Okay. Was there ever a time where, if
20 you were just walking through the grounds and you
21 saw something simple that needed to be fixed, you
22 would just go ahead and fix it instead of doing a
23 service repair or --
24 A. Fix it right away.
25 Q. -- replace it?

1 maintenance work is the owner of the apartment
2 complex's responsibility?
3 **A. Yes.**
4 Q. Now, Ms. Douglass says -- stated here
5 in this lawsuit that she fell down the stairs at
6 this location because of a light bulb that was
7 burned out on the stairway. Are you aware that
8 stairs kind of have their own set of regulations as
9 far as building codes and things like that?
10 **A. They should be stable at all times,**
11 **being concrete or wood. If it's wood, they**
12 **should be constantly nailed down if they're pulling**
13 **up.**
14 Q. Yeah. And kind of along the same
15 lines, there's guidelines for rails and lighting?
16 **A. Rails and lighting kind of stuff, yes.**
17 Q. Would you agree that those rules are in
18 place to make stairs safe for people to use?
19 MR. BROGDON: Object to the form.
20 **A. Yes.**
21 Q. Would you agree that part of your job
22 as doing -- or when doing maintenance work is to
23 make the area safe for people to use?
24 **A. At all times.**
25 Q. Would you agree that an unlit stairwell

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DONNA DOUGLASS,)
Plaintiff(s))
)
vs.)
)
BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE LLC and THE BERKSHIRE GROUP,)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013-CP - 10- 7133

Submitted By: Jarrel L. Wigger
Address: 8086 Rivers Avenue, Suite A
North Charleston, SC 29406

SC Bar #: 011824
Telephone #: (843) 553-9800
Fax #: (843) 553-1648
Other:
E-mail: jwigger@wiggerlawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20____-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☒ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** 12/6/13

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

DONNA DOUGLASS,
Plaintiff,

v.

BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF North Cove LLC and THE BERKSHIRE GROUP,
Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICAL CIRCUIT
CASE NO: 2013-CP-10- 7133

SUMMONS
(JURY TRIAL REQUESTED)

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and requested to answer the Complaint in this action of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscriber at his office, 8086 Rivers Avenue, N. Charleston, SC 29406, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded in the Complaint.

Jared L. Wigger
Wigger Law Firm
8086 Rivers Avenue, Suite A
North Charleston, SC 29406
Telephone: (843) 553-9800
Facsimile: (843) 553-1648
Attorney for the Plaintiff

FILED
2013 DEC -9 AM 11:29
JULIE J. ARMSTRONG
CLERK OF COURT

North Charleston, South Carolina
This 6 day of December 2013

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICAL CIRCUIT
CASE NO: 2013-CP-10- 7133

DONNA DOUGLASS,
Plaintiff,

v.

BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE LLC and THE BERKSHIRE GROUP,
Defendants.

COMPLAINT
(JURY TRIAL REQUESTED)

FILED
2013 DEC -9 AM 11:29
JULIE J. ARMSTRONG
CLERK OF COURT

TO THE ABOVE NAMED DEFENDANTS:

The Plaintiff, complaining of the Defendants, would show unto this Honorable Court as follows:

ONE: The Plaintiff is a citizen and resident of the County of Charleston, State of South Carolina.

TWO: The Defendant, Berkshire on St. Ives, upon information and belief, is a domestic corporation operating under the laws of the State of South Carolina.

THREE: The Defendant, Berkshire Property Advisors, LLC, upon information and belief, is a foreign corporation operating under the laws of the State of South Carolina and does business at One Beacon Street, Suite 1500, Boston, Massachusetts.

FOUR: The Defendant, BVF North Cove, LLC, upon information and belief, is the owner of Defendant, Berkshire on St. Ives and is a foreign corporation operating under the laws of the State of South Carolina.

FIVE: The Defendant, The Berkshire Group, upon information and belief, is a foreign corporation operating under the laws of the State of South Carolina and does business at One Beacon Street, Suite 1500, Boston, Massachusetts.

SIX: The parties, subject matter, and all events herein alleged are within the jurisdiction of this Court.

SEVEN: That the Defendants Berkshire Property Advisors and the Berkshire Group, are within the jurisdiction of this Court based upon the provisions of the Code of Laws of South Carolina, §36-2803, as amended, commonly known as the long arm statute.

EIGHT: At all times herein mentioned, the premises were in the direct operation and control of the Defendants, their agents, and employees.

NINE: At all times herein, the Defendants owed the Plaintiff a duty of care to keep the premises in a safe condition for its intended use, to inspect the premises to discover dangerous conditions, and to warn of or eliminate unreasonable risks within the area of invitation.

TEN: On or before January 6, 2011, the Defendants knew or should have known that the stairwell at building 700 was without proper lighting and created a hazardous condition for its residents and all who entered.

ELEVEN: Upon information and belief, Defendants had not placed any warning signs informing residents who lived in the units and were entering or exiting their homes or visitors to the residence of the hazardous conditions caused by inadequate lighting.

TWELVE: The absence of proper lighting was the sole and proximate cause of Plaintiff falling and the Defendants, its agents and/or employees knew or should have known that the absence of lighting constituted a danger to the individuals who lived in the units and were entering or exiting their homes and visitors present on the premises.

THIRTEEN: At all times herein, the Defendants owed a duty to remove the hazardous condition.

FOURTEEN: At all times herein, if the Defendant's could not remove the hazardous condition, they had a duty to adequately warn against the condition.

FIFTEEN: On or about January 6, 2011, the Plaintiff was delivering a pizza to a resident and as such was a business invitee on the premises.

SIXTEEN: The Plaintiff was on the premises of Building 700, delivering a pizza to Building 716 when she fell down a flight of stairs due to the lack of adequate lighting.

SEVENTEEN: Ms. Douglass could not see due to inadequate lighting when she lost her footing and fell down the flight of stairs causing injury to her right ankle and right foot and right knee.

EIGHTEEN: At all times herein mentioned, the Plaintiff was acting in a prudent and lawful manner in her conduct on the premises.

FIRST CAUSE OF ACTION
AS TO ALL DEFENDANTS
NEGLIGENCE/GROSS NEGLIGENCE
BREACH OF DUTY OF CARE

NINETEEN: That the allegations of the above paragraphs are realleged as if fully set forth herein verbatim.

TWENTY: That the Defendants by their acts and omissions were negligent, grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars, to wit:

1. In creating an unreasonably dangerous and hazardous condition.

2. In failing to keep the area of pedestrian traffic used by the Plaintiff free from safety hazards in which area Defendants knew or should have known such hazards presented danger to those persons using the area of pedestrian traffic on the Defendants' premises;

3. In then and there failing to properly maintain the premises so that there were no issues regarding a safe premises when the Defendants knew or should have known that such violations or safety issues presented a safety hazard to those persons on the Defendants' premises;

4. In failing to adequately provide proper lighting in the stairwell.

5. In then and there failing to post warning signs or give notice to invitees of the presence of dangerous conditions when the Defendants knew or should have known of the dangerous condition;

6. In then and there failing to properly maintain the Defendants' premises when the Defendants knew or should have known of the dangerous condition; and

7. In failing to warn of the dangerous conditions created by the failure to maintain adequate lighting which posed a foreseeable risk of injury to persons on the Defendants' premises when the Defendants knew or should have known of the dangerous condition.

TWENTY-ONE: All such acts of the Defendants were the direct and proximate cause of the injuries and damages the Plaintiff suffered, as are more fully set forth below, said acts being in violation of the laws of the State of South Carolina and such acts were wanton, willful, reckless, negligent and grossly negligent and were without regard for the safety of the Plaintiff and others on their premises.

TWENTY-TWO: As a direct and sole consequence of the aforesaid injuries, the Plaintiff has incurred expenses for medical care and other incidental costs. The Plaintiff has had to endure pain and suffering resulting in the loss of enjoyment of life and the pain and suffering will continue to impair the Plaintiff.

TWENTY-THREE: The Plaintiff has incurred expenses for medical care and other incidental costs. She has suffered psychological and physical pain and this pain will continue to impair Plaintiff in the future. The Plaintiff has had to endure pain and suffering resulting in the loss of enjoyment of life and the pain and suffering will continue to impair the Plaintiff.

SECOND CAUSE OF ACTION
AS TO ALL DEFENDANTS
NEGLIGENCE/GROSS NEGLIGENCE
PREMISES LIABILITY

TWENTY-FOUR: That the allegations of the above paragraphs are realleged as if fully set forth herein verbatim.

TWENTY-FIVE: That the Defendants by their acts and omissions were negligent, grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars, to wit:

1. In creating an unreasonably dangerous condition.
2. In then and there failing to keep the area of pedestrian traffic used by the Plaintiff free from safety hazards in which area presented danger to those persons using the area of pedestrian traffic on the Defendants' premises;
3. In then and there failing to properly maintain their premises so that there were no issues regarding a safe premises and that such violations or safety issues presented a safety hazard to those persons on the Defendants' premises;
4. In failing to guard the premises from the hazardous condition;
5. In failing to adequately warn of the hazardous condition;
6. In then and there failing to post warning signs or give notice to invitees of the presence of dangerous conditions;
7. In then and there failing to properly maintain the Defendants' premises;
8. In then and there failing to comply with statutes and regulations governing the Defendants' premises;
9. In failing to properly inspect the premises to remove hazardous conditions that constituted a danger to members of the public thereon;

10. In failing to take proper precautions to ensure that there existed no unreasonably dangerous conditions on the Defendants' premises;

11. In failing to keep the premises in a reasonably safe condition for business invitees who may be present thereon;

12. In failing to exercise the degree of care, caution, and prudence an owner or manager of a business would have exercised under the same or similar circumstances then and there prevailing; and

13. In failing to warn or adequately warn of the dangerous conditions which posed a foreseeable risk of injury to persons on the Defendants' premises.

TWENTY-SIX: All such acts of the Defendants were the direct and proximate cause of the injuries and damages the Plaintiff suffered, as are more fully set forth below, said acts being in violation of the laws of the State of South Carolina and such acts were wanton, willful, reckless, negligent and grossly negligent and were without regard for the safety of Plaintiff and others on their premises.

TWENTY-SEVEN: As a direct and sole consequence of the aforesaid injuries, the Plaintiff has incurred expenses for medical care and other incidental costs. The Plaintiff has had to endure pain and suffering resulting in the loss of enjoyment of life and the pain and suffering will continue to impair the Plaintiff.

TWENTY-EIGHT: The Plaintiff has incurred expenses for medical care and other incidental costs. She has suffered psychological and physical pain and this pain will continue to impair Plaintiff in the future. The Plaintiff has had to endure pain and suffering resulting in the loss of enjoyment of life and the pain and suffering will continue to impair the Plaintiff.

TWENTY-NINE: Plaintiff is informed and believes that she is entitled to judgment against the Defendants in the sum of such actual and punitive damages that a trier of fact may find, together with the costs of this action.

WHEREFORE, the Plaintiff prays for judgment against the Defendants for such sum of actual and punitive damages that a trier of fact may find, for the costs of this action, and for such other and further relieve as this Court may deem just and proper.

Signature block on the next page

Respectfully submitted

WIGGER LAW FIRM, INC.

Jarrel L. Wigger
8086 Rivers Avenue, Suite A
North Charleston, SC 29406
Telephone: (843) 553-9800
Facsimile: (843) 553-1648
Attorney for the Plaintiff

North Charleston, South Carolina
This 6 day of December, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Donna Douglass,

Plaintiff,

v.

Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group,

Defendants.

IN THE COURT OF COMMOM PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-10-7133

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT (JURY TRIAL DEMANDED)

FILED
2014 FEB 18 PM 3:42
JULIE J. ARMSTRONG
CLERK OF COURT

Defendants Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group ("Defendants"), answer Plaintiff Donna Douglass' ("Plaintiff") Complaint:

FOR A FIRST DEFENSE
(12(b)(6))

Defendants would show that Plaintiff has failed to allege facts sufficient to constitute a cause of action against these Defendants; therefore, Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

Defendants respond to the numbered paragraphs of the Complaint as follows:

1. Each and every paragraph of Plaintiff's Complaint not hereinafter specifically admitted, qualified or explained is denied.

2. Defendants are currently without knowledge or information sufficient to form a belief as to the allegations of Paragraph No. 1 and therefore deny the same and demand strict proof thereof.

3. Paragraph No. 2 is denied as stated. Defendants respond by stating that Defendant Berkshire on St. Ives represents the name of the apartment complex where the alleged

accident took place and is not a separate entity.

4. Paragraph No. 3 is denied as stated. Defendants further respond by stating that Berkshire Property Advisors is a foreign corporation organized under the laws of the State of Delaware and doing business in South Carolina.

5. Paragraph No. 4 is denied as stated. Defendants further respond by stating that Defendant BVF North Cove is a foreign corporation organized under the laws of the State of Delaware and doing business in South Carolina. Defendants further respond by stating that Defendant BVF North Cove is the owner of the property where the alleged accident took place. Defendants deny any and all allegations inconsistent herewith.

6. Paragraph No. 5 is denied as stated.

7. Paragraph No. 6 is denied as stated. Defendants admit jurisdiction is proper as to Defendant BVF North Cove and Defendant Berkshire Property Advisors. Defendants deny jurisdiction is proper as to Defendants The Berkshire Group and Berkshire on St. Ives.

8. Paragraph No. 7 is denied as stated. Defendants admit jurisdiction is proper as to Defendant BVF North Cove and Defendant Berkshire Property Advisors. Defendants deny jurisdiction is proper as to Defendants The Berkshire Group and Berkshire on St. Ives.

9. Paragraph No. 8 is denied as stated. Defendants admit that Defendant BVF North Cove owns the property and Defendant Berkshire Property Advisors manages the apartment complex. Defendants deny any and all remaining allegations inconsistent therewith.

10. The allegations of Paragraph No. 9 state a legal conclusion and, therefore, no response is required of Defendants. To the extent some response is required, Defendants deny the allegations to the extent the allegations state or imply that Defendants acted wrongly or are liable to Plaintiff or other parties to the action.

11. Paragraph No. 10 is denied.

12. Paragraph No. 11 is denied as stated. More particularly, Defendants deny there were hazardous conditions present or inadequate lighting.

13. Paragraph No. 12 is denied as stated. More particularly, Defendants deny there were hazardous conditions present or inadequate lighting.

14. Paragraph No. 13 is denied.

15. The allegations of Paragraph No. 14 state a legal conclusion and, therefore, no response is required of Defendants. To the extent some response is required, Defendants deny the allegations to the extent the allegations state or imply that Defendants acted wrongly or are liable to Plaintiff or other parties to the action.

16. The allegations of Paragraph No. 15 state a legal conclusion and, therefore, no response is required of Defendants. To the extent some response is required, Defendants deny the allegations to the extent the allegations state or imply that Defendants acted wrongly or are liable to Plaintiff or other parties to the action.

17. Paragraph No. 16 is admitted upon information and belief.

18. Defendants admit so much of the allegations of Paragraph No. 17 as allege that Plaintiff was on Defendants' premises. Defendants deny and all allegations inconsistent therewith including, but not limited to any allegations stating how the alleged accident occurred.

19. Defendants are currently without knowledge or information sufficient to form a belief as to the allegations of Paragraph No. 18 and therefore deny the same and demand strict proof thereof.

20. Paragraph No. 19 is denied as stated.

21. Paragraph No. 20 is a paragraph of incorporation that requires no response from Defendants. However, to the extent a response is required, Defendants incorporate their responses to Paragraphs No. 1 through 19 above.

22. Paragraph No. 21 (including all subparts) is denied.

23. Paragraphs No. 22, 23 and 24 are denied.

24. Paragraph No. 25 is a paragraph of incorporation that requires no response from Defendants. However, to the extent a response is required, Defendants incorporate their responses to Paragraphs No. 1 through 24 above.

25. Paragraph No. 26 (including all subparts) is denied.

26. Paragraphs No. 27, 28, 29 and 30 are denied.

27. Defendants deny the allegations contained in the Paragraph of the Complaint beginning "WHEREFORE," including but not limited to any allegations that claim Plaintiff is entitled to relief in any form from Defendants.

FOR A THIRD DEFENSE
(Comparative Negligence/Gross Negligence/Recklessness)

28. Defendants would show, upon information and belief, that any injuries or damages sustained by Plaintiff were due to Plaintiff's own negligent, careless, reckless and/or grossly negligent acts or omissions, which combined and concurred with any negligence, carelessness, recklessness and gross negligence on the part of Defendants, which are specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. Such negligent, careless, reckless and/or grossly negligent acts or omissions on the part of Plaintiff being more particularly set forth as follows:

a. in failing to observe her surroundings;

b. in failing to pay attention to where she was walking;

c. in failing to observe an open and obvious condition;

d. in failing to avoid an open and obvious condition;

e. in otherwise failing to act as a reasonably prudent person would have acted

under the same or similar circumstances; and

f. in assuming a risk she was aware of or should have been aware of;

all of which were the direct and proximate cause of any injuries or damages sustained by Plaintiff, and Defendants plead such negligence, carelessness, recklessness and gross negligence on the part of Plaintiff and would ask that this court compare the negligence or other conduct of Plaintiff and Defendants and if it is determined that Plaintiff's negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of Defendants, which is specifically denied, then Plaintiff should be totally barred from recovery, and if it is determined that Plaintiff's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of Defendants, then the amount of recovery available to Plaintiff should be reduced by the percentage of Plaintiff's own negligence, carelessness, recklessness and gross negligence.

FOR A FOURTH DEFENSE
(Plaintiff's Sole Negligence)

29. Defendants would show that the injuries and damages sustained by Plaintiff, if any, were directly and proximately caused by Plaintiff's sole negligence, for which reason Plaintiff's claims are barred.

FOR A FIFTH DEFENSE
(Negligence of Others)

30. Defendants would show that any injuries or damages sustained by Plaintiff were due to and caused by the sole negligence and acts or omissions of some persons or entities over whom Defendants exercised no authority or control, for which reason Defendants are not liable to Plaintiff in any sum whatsoever.

FOR A SIXTH DEFENSE
(Constitutionality of Punitive Damages)

31. Defendants allege that Plaintiff's claim for punitive damages violates both the

Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina constitution in one or more of the following particulars:

a. That the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of a meaningful standard and is inconsistent with due process guarantees.

b. That, even if a standard governing the award of punitive damages does exist, this standard is void for vagueness.

c. That the amount of punitive damages awarded is based upon the wealth of the Defendants in violation of their right to equal protection of the laws.

FOR A SEVENTH DEFENSE
(Failure to Mitigate Damages)

32. The Plaintiff has failed to mitigate his damages.

FOR AN EIGHTH DEFENSE
(Improperly Named Defendants)

33. Defendants would allege that The Berkshire Group and Berkshire on St. Ives were improperly named as Defendants to this action and, therefore, should be dismissed.

FOR A NINTH DEFENSE
(Lack of Personal Jurisdiction)

34. Defendants allege that the Court lacks personal jurisdiction over Defendants The Berkshire Group and Berkshire on St. Ives.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendants pray that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Couart deems just and proper.

[signature page attached]

GALLIVAN, WHITE & BOYD, P.A.

BY: _____

GRAY T. CULBREATH
JAMES E. BROGDON, III
1201 Main Street, Suite 1200
Post Office Box 7368
Columbia, South Carolina 29202
TEL: (803) 779-1833

ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina
February 17, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Donna Douglass,

Plaintiff,

v.

Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group,

Defendants.

IN THE COURT OF COMMOM PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-10-7133

CERTIFICATE OF SERVICE

FILED
2014 FEB 18 PM 3:43
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The undersigned employee of Gallivan, White & Boyd, P.A., attorneys for Defendants, does hereby certify that service of the attached Defendants' Answer to Plaintiff's Complaint in the above-referenced action was made upon all counsel of record by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 14th day of February, 2014, addressed as follows:

Jarrell L. Wigger
WIGGER LAW FIRM, INC.
8086 Rivers Avenue, Suite A
North Charleston, SC 29406

Heather Hagen

410 S.E.2d 537
306 S.C. 101
Frank Joe BAUGHMAN, et al., Appellants,
v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a Corporation, and AT & T Nassau Metals Corporation, a Corporation, Defendants, of whom AT & T Nassau Metals Corporation is Respondent.
(and 3 other cases)
No. 23399.
Supreme Court of South Carolina.
Heard Dec. 14, 1990.
Decided May 13, 1991.
Rehearing Denied Dec. 6, 1991.

Header ends here. [306 S.C. 103] Sheldon E. Bernstein, Del Rey Beach, Fla., Lawrence M. Mann, Washington, D.C.; and Frank B. Register, Jr., Lexington, for appellants.

Stephen G. Morrison, Richard H. Willis and Laura S. Campbell, Columbia, for respondent.

CHANDLER, Justice:

These actions were originally commenced by 271 plaintiffs claiming personal injury, property damage, and nuisance caused by pollution from a refinery operated by Respondent AT & T Nassau Metals Corporation (Nassau). Presently, 187 plaintiffs (Plaintiffs) remain in the case. They appeal orders granting Nassau's motions for partial summary judgment and denying their motion to set aside prior partial summary judgments.

We affirm in part, reverse in part, and remand for further proceedings.

[306 S.C. 104] FACTUAL BACKGROUND

The actions were commenced on July 11, 1985. Simultaneously with service of the Summonses and Complaints, Plaintiffs served interrogatories seeking, among other things, to discover the chemicals emitted from Nassau's plant. Nassau answered and served its first set of interrogatories. Over the next two years more than 300 depositions were taken, including one for almost every plaintiff in the case.

On June 26, 1987, Nassau served its second set of interrogatories. Interrogatory 6 asked for "any medical doctor who has diagnosed any illness or medical condition as being proximately caused by exposure to materials emanating from the Nassau facility...."

Both Plaintiffs and Nassau sought at various times to compel the other to respond or provide more complete answers to various interrogatories.

On July 22, 1987, the trial court ordered Nassau to furnish complete answers to several of Plaintiffs' interrogatories, and ordered Plaintiffs to respond to Nassau's first set of interrogatories, or provide supplemental answers thereto. This was followed by an order, dated September 29, 1987, which required Plaintiffs to answer certain of Nassau's second set of interrogatories, including Interrogatory 6, and required Nassau to provide summaries of information sought by Plaintiffs' interrogatories.

On October 12, 1987, Nassau filed the first of several motions for partial summary judgment, this on the personal injury and property damage claims of a single plaintiff, Harold Ford. Plaintiffs subsequently moved for a protective order "staying all dispositive motions until discovery is completed...." At hearings on these motions, counsel for Plaintiffs conceded that a medical expert who

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could testify to the necessary degree of medical certainty had not then been obtained, contending additional time was necessary to locate such an expert. Trial court nevertheless granted Nassau's motion on the ground that Ford had made no showing his injuries were proximately caused by Nassau.

On December 8, 1987, Plaintiffs moved to have the grant of partial summary judgment reconsidered. Nassau moved for sanctions due to Plaintiffs' failure to answer the second set of interrogatories as required by the order of September 29, [306 S.C. 105] 1987. At the hearing which followed, Plaintiffs' counsel disclosed a recently-discovered expert witness, Dr. Elaine Panitz, and submitted a letter from her, dated December 11, 1987, in which she made a preliminary assessment of the case and recommended further study. Counsel took the position that summary judgment was premature until Plaintiffs were "given the opportunity to develop this subject...."

By order dated January 27, 1988, the trial court denied Plaintiffs' motion for reconsideration and for a protective order. It granted Nassau's motion for sanctions, stating:

It is, therefore, ordered that the plaintiffs shall not be allowed any medical testimony, witnesses, documents or exhibits

Page 540

of any kind required by defendant's second set of interrogatories and not now fully disclosed in their answers to interrogatories or depositions. Plaintiffs are precluded from developing facts in the trial of the case through sources they have failed to reveal heretofore as required by my Order of September 29, 1987. The defendant is entitled to, and has been deprived of, information necessary or at least desirable to its defense, all to its prejudice.

Notwithstanding the foregoing, Nassau took Dr. Panitz's deposition on February 11, 1988. Dr. Panitz testified she had not formed an opinion concerning causation, but she did specify the type of study she thought would be appropriate.

Thereafter, Nassau moved for partial summary judgment on several additional personal injury and property damage claims. At the hearing on this motion, Nassau's counsel asserted that Dr. Panitz's testimony was precluded by the order of January 27, 1988. Counsel for Plaintiffs responded that the order did not apply to witnesses procured in the future. In a subsequent order filed on August 22, 1988, granting Nassau's motion for partial summary judgment, the trial court stated:

At the hearing a discussion was had relative to the possibility of procuring additional expert medical testimony on behalf of the Plaintiffs from Dr. Elaine Panitz of New Jersey and perhaps others. Any evidence, by deposition or otherwise, inconsistent with my Order of January 27, 1988, need not be pursued and is hereby forbidden.

[306 S.C. 106] In the meantime, on July 29, 1988, Nassau served a Request for Admissions upon each of the plaintiffs. Altogether, the requests totalled approximately 900 pages. Many required Plaintiffs to provide certain information in the event the request was denied. Within the time for responding, [1] Plaintiffs filed a motion for protective order, alleging the requests were "so voluminous and so framed that they are clearly unduly burdensome" and contending they were "not in proper form" because their effect was "nothing more than interrogatories (guised as requests for admission) seeking to ascertain knowledge of facts."

At the October 13, 1988, hearing on Plaintiffs' motion for protective order and on a motion later filed by Nassau for partial

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summary judgment on six more personal injury claims, Nassau served a Supplemental Response to Plaintiffs' Motion for Protective Order. It contended the requests should be deemed admitted for Plaintiffs' failure to respond in a timely manner. Also at that hearing, Plaintiffs' counsel, in response to the summary judgment motion, again asserted that additional time was necessary to develop Dr. Panitz's testimony. By order dated October 28, 1988, the trial court denied Plaintiffs' motion for protective order and, simultaneously, deemed Nassau's requests admitted. It also granted Nassau partial summary judgment on the six personal injury claims.

On October 24, 1988, Plaintiffs served responses to Nassau's requests for admissions. Thereafter, they moved that these responses be accepted and the deemed admissions withdrawn.

Plaintiffs also moved pursuant to Rule 54(b), S.C.R.C.P., to set aside all partial summary judgments which had been granted for lack of medical evidence of permanent injuries. The motion was based upon a notarized letter from Dr. Panitz, dated November 29, 1988, which states in part:

3. Review of Dr. Lieberman's medical records on 18 plaintiffs reveals that more than 90% have similar respiratory and neurologic complaints, and more than 80% have similar eye and skin complaints. This constellation of neurologic, respiratory, eye and skin complaints is entirely consistent with chronic exposure to volatile organic compounds (VOC).

[306 S.C. 107] 4. To investigate the issue of chronic VOC exposure, 15 of the 18 plaintiffs had preliminary serum testing for antibodies to formaldehyde, trimellitic anhydride, and isocyanates.... The existence of formaldehyde antibodies in this group of Gaston residents is clear indication of

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formaldehyde exposure. Some of the residents also have antibody titers to TMA and isocyanates.

4. [sic] In my opinion, there is considerable evidence that the Gaston residents are suffering health effects from chronic exposure to airborne volatiles emitted from uncontrolled burning of plastics by Nassau Metals. This problem may well have originated from the burning of plastic scrap in the blast furnace (1979-1984), before the pyrolysis unit came on line. Unfortunately, any residents sensitized to formaldehyde during that time period may never be able to live in the vicinity of the AT & T plant without reacting to the presumably lower levels of formaldehyde now being emitted.

Plaintiffs also relied on this letter in response to Nassau's motion, then pending, for partial summary judgment on all remaining personal injury and property damage claims.

After a hearing, the trial court denied Plaintiffs' motion to vacate the prior summary judgments, and also their motion to have the deemed admissions withdrawn and the October 24, 1988, responses substituted. Additionally, the court granted Nassau's motion for partial summary judgment on the remaining claims for property damage and personal injury. It rejected Dr. Panitz's letter as being precluded by prior orders filed on January 27 and August 22, 1988, and, alternatively, as failing to meet the "most probably" standard for receiving medical evidence of causation. Finally, the trial court granted partial summary judgment for Nassau on the nuisance claims of four plaintiffs, Floyd and Edna Busbee, and O.M. and Jacqueline Shealy.

ISSUES

We address the following:

could testify to the necessary degree of medical certainty had not then been obtained, contending additional time was necessary to locate such an expert. Trial court nevertheless granted Nassau's motion on the ground that Ford had made no showing his injuries were proximately caused by Nassau.

On December 8, 1987, Plaintiffs moved to have the grant of partial summary judgment reconsidered. Nassau moved for sanctions due to Plaintiffs' failure to answer the second set of interrogatories as required by the order of September 29, [306 S.C. 105] 1987. At the hearing which followed, Plaintiffs' counsel disclosed a recently-discovered expert witness, Dr. Elaine Panitz, and submitted a letter from her, dated December 11, 1987, in which she made a preliminary assessment of the case and recommended further study. Counsel took the position that summary judgment was premature until Plaintiffs were "given the opportunity to develop this subject...."

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4. [sic] In my opinion, there is considerable evidence that the Gaston residents are suffering health effects from chronic exposure to airborne volatiles emitted from uncontrolled burning of plastics by Nassau Metals. This problem may well have originated from the burning of plastic scrap in the blast furnace (1979-1984), before the pyrolysis unit came on line. Unfortunately, any residents sensitized to formaldehyde during that time period may never be able to live in the vicinity of the AT & T plant without reacting to the presumably lower levels of formaldehyde now being emitted.

Plaintiffs also relied on this letter in response to Nassau's motion, then pending, for partial summary judgment on all remaining personal injury and property damage claims.

After a hearing, the trial court denied Plaintiffs' motion to vacate the prior summary judgments, and also their motion to have the deemed admissions withdrawn and the October 24, 1988, responses substituted. Additionally, the court granted Nassau's motion for partial summary judgment on the remaining claims for property damage and personal injury. It rejected Dr. Panitz's letter as being precluded by prior orders filed on January 27 and August 22, 1988, and, alternatively, as failing to meet the "most probably" standard for receiving medical evidence of causation. Finally, the trial court granted partial summary judgment for Nassau on the nuisance claims of four plaintiffs, Floyd and Edna Busbee, and O.M. and Jacqueline Shealy.

ISSUES

We address the following:

I. Discovery involving interrogatories and requests for admissions; and

II. Grant of summary judgments.

[306 S.C. 108] I. DISCOVERY

A. Interrogatories

Plaintiffs contend the trial court erred in ruling that Dr. Panitz's testimony was precluded by its prior orders prohibiting the development of evidence unresponsive to Nassau's second set of interrogatories. Alternatively, Plaintiffs contend that, assuming a violation of the discovery orders, the sanction precluding Dr. Panitz's evidence was too severe. We agree.

In determining the sufficiency of responses to interrogatories, each answer must be read in the light of the question asked. 8 Wright & Miller, Federal Practice and Procedure § 2177, p. 560 (1970). Absent any specification, the interrogatory should be construed as seeking current information as of the time the question is asked and answered. Young Spring & Wire Corp. v. American Guarantee & Liability Ins. Co., 32 F.R.D. 345 (W.D.Mo.1963). There is, however, a continuing duty to supplement responses with new information concerning the identity of persons having knowledge of discoverable matters and persons expected to be called as expert witnesses. Rules 33(b) and 26(e)(1), S.C.R.C.P.; see also Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974); Briggs v. Richardson, 288 S.C. 537, 343 S.E.2d 653 (Ct.App.1986).

Here, Plaintiffs properly responded to Nassau's Interrogatory 6, which sought information concerning any medical doctor who has diagnosed illness or injury caused by materials from Nassau's plant. When Dr. Panitz's identity became known to them, Plaintiffs promptly notified Nassau. Thus, Plaintiffs did not violate the requirements of Rule 33. See Jackson v. H & S Oil Co., 263 S.C. 407, 211 S.E.2d 223 (1975).

Nor do we find a violation of the discovery orders of January 27 and August 22, 1988. These orders merely precluded any evidence not responsive to Nassau's second set of interrogatories. As noted above, Plaintiffs' answers were sufficient.

Moreover, even if there were a violation, we agree with Plaintiffs that preclusion of Dr. Panitz's testimony was not an appropriate sanction under Rule 37(b) or (d), S.C.R.C.P. The exclusion of a witness is a sanction which "should never be lightly

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invoked." Kirkland v. Peoples Gas [306 S.C. 109] Co., 269 S.C. 431, 435, 237 S.E.2d 772, 774 (1977); Jackson, supra, 263 S.C. at 411, 211 S.E.2d at 225. Where the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party. 4A Moore's Federal Practice p 37.03 [2.-4], pp. 37-78 to -79 (2d ed. 1990); Campbell v. Johnson, 101 F.Supp. 705 (S.D.N.Y.1951). No such showing has been made, or even alleged, here.

B. Request For Admissions

Plaintiffs contend their timely motion for a protective order prevented Nassau's requests from being deemed admitted pursuant to Rule 36(a), S.C.R.C.P. In the alternative, Plaintiffs contend the trial court erred in denying their motion to withdraw the deemed admissions and to substitute in their place the responses offered by Plaintiffs on October 24, 1988. Again, we agree.

A motion for protective order may be an appropriate response of a party upon whom a request for admissions is served. 8 Wright & Miller, supra, § 2259, p. 726 (1970). When

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made in good faith, as here, [2] such a motion operates to prevent the matters from being deemed admitted. Graham v. Three or More Members of Army Reserve Sel. Bd., 556 F.Supp. 669 (S.D.Tex.1983); In re City of Ridgeland, 494 So.2d 348 (Miss.1986). Otherwise, requiring a party to answer a request for admissions during the pendency of a motion for protective order "would negate the utility of such a motion...." St. Regis Paper Co. v. Upgrade Corp., 86 F.R.D. 355, 356 (W.D.Mich.1980).

Furthermore, Plaintiffs should have been permitted to withdraw the deemed admissions and file the responses of October 24, 1988. Rule 36(b), S.C.R.C.P., sets forth the test for withdrawal of an admission and, by implication, the filing of a late response. See Pleasant Hill Bank v. United States, 60 F.R.D. 1 (W.D.Mo.1973). The rule provides:

[306 S.C. 110] [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

In this case, both requirements of the test are satisfied. First, presentation of the merits will be subserved since the admissions, if not dispositive, involve key factual elements of Plaintiffs' causes of action. See Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192 (D.Conn.1976); Pleasant Hill Bank, supra. Second, since Plaintiffs' responses were filed even before the requests were ordered admitted, Nassau's defense could not possibly have been prejudiced. See Herrin v. Blackman, 89 F.R.D. 622 (W.D.Tenn.1981).

II. SUMMARY JUDGMENT

A. Personal Injury Claims

Plaintiffs contend trial court erred in granting partial summary judgment on all remaining personal injury claims and in denying their motion to set aside prior partial summary judgments. They argue, first, that Dr. Panitz's letter of November 29, 1988, in and of itself, was sufficient to overcome summary judgment and, second, that even if not, the grant of summary judgment was premature.

1. The Panitz Letter

Having already addressed trial court's ruling that Dr. Panitz's letter was precluded by the discovery orders, we consider its alternative ruling that the letter did not satisfy the legal standard for admissibility

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of expert medical testimony on the issue of causation. [3]

[306 S.C. 111] Rule 56(e), S.C.R.C.P., requires that on motion for summary judgment "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Thus, opinion testimony, including that of an expert, which would be inadmissible if testified to at trial may not properly be set forth in an affidavit. 6-Pt. 2 Moore's Federal Practice p 56.22, pp. 56-743 to -746 (2d ed. 1988); see also Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C.Cir.1977); In re Agent Orange Product Liability Litigation, 611 F.Supp. 1223 (E.D.N.Y.1985).

Our cases generally hold that, before expert testimony is admissible upon the question of the causal connection between plaintiff's injuries and the acts of the defendant, the testimony must satisfy the "most probably" rule. Armstrong v. Weiland, 267 S.C. 12, 225 S.E.2d 851 (1976); Martin v.

Mobley, 253 S.C. 103, 169 S.E.2d 278 (1969); Gambrell v. Burleson, 252 S.C. 98, 165 S.E.2d 622 (1969). The rule has been succinctly stated as follows:

It is not sufficient for the expert ... to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged.

Eubanks v. Piedmont Natural Gas Co., 198 F.Supp. 522, 526-27 (W.D.S.C.1961).

In determining whether particular evidence meets this test it is not necessary that the expert actually use the words "most probably." Gamble v. Price, 289 S.C. 538, 347 S.E.2d 131 (Ct.App.1986). It is sufficient that the testimony is such "as to judicially impress that the opinion ... represents his professional judgment as to the most likely one among the possible causes...." Norland v. Washington General Hospital, 461 F.2d 694, 697 (8th Cir.1972).

Viewed in this light, it cannot be said that Dr. Panitz's letter rises to the "most probably" level. A plain reading of the letter reveals that her opinion is within the realm of possibility only, not the required standard of probability.

[306 S.C. 112] 2. Summary Judgment Premature?

Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Watson v. Southern Ry. Co., 420 F.Supp. 483, 486 (D.S.C.1975); see also Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983); 6 Moore's Federal Practice p 56.02, p. 56-39 (2d ed. 1990); see, e.g., First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C.Cir.1988); Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230 (2d Cir.1985); Tyler v. City of Enterprise, 521 So.2d 951 (Ala.1988); Gangadean v. Leumi Fin. Corp., 13 Ariz.App. 534, 478 P.2d 532 (1970); Commercial Bank of Kendall v. Heiman, 322 So.2d 564 (Fla.Dist.Ct.App.1975); Board of Education v. Van Buren & Firestone, Architects, Inc., 165 W.Va. 140, 267 S.E.2d 440 (1980); cf. Rule 56(f),

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S.C.R.C.P. [4] Under the circumstances, we agree with Plaintiffs that the grant of partial summary judgment on the personal injury claims was premature.

First, Plaintiffs have demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of medical causation and that they are not merely engaged in a "fishing expedition." Bixler v. J.C. Penney Co., 376 N.W.2d 209 (Minn.1985); cf. Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068 (7th Cir.1978). This fact is confirmed by Dr. Panitz's letter of November 29, 1988, which indicates that Plaintiffs' illnesses[306 S.C. 113] are "entirely consistent" with exposure to toxic substances and that there is "considerable evidence" they were caused by chemicals emitted from Nassau's facility. While, as discussed earlier, the opinion expressed does not reach the degree of certainty necessary to overcome summary judgment, it does highlight the need for further testing and analysis of Plaintiffs' medical conditions.

Second, Plaintiffs were not dilatory in seeking discovery on the issue of causation, but have been reasonably diligent in pursuit

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of a qualified expert to substantiate their claims. Bixler, supra; Harrison v. Falcon Products, Inc., 103 Nev. 558, 746 P.2d 642 (1987); cf. Sitts v. United States, 811 F.2d 736 (2d Cir.1987); Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017, 1031 (5th Cir.1983) (listing factors).

We acknowledge that more than three years elapsed between the filing of these actions and the final granting of partial summary judgment as to personal injury. The delays in completing discovery, however, may not fairly be attributed solely to Plaintiffs' inaction. See George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551 (2d Cir.1977). Rather, from the beginning, discovery was dominated by Nassau's demands and Plaintiffs' efforts to respond: the taking of hundreds of depositions, including that of almost every named plaintiff; waves of interrogatories addressed to each plaintiff individually; then, requests for admissions seeking information, in addition to stipulations. Moreover, two years into the litigation, Plaintiffs had not yet received satisfactory responses to their interrogatories regarding the substances emitted from the Nassau plant, information critical to their obtaining expert opinion evidence concerning causation.

Finally, the delay in locating Dr. Panitz is tempered by the complexity of these cases and the hardship encountered in proving causation. Other courts have recognized that proof of causation is especially difficult in actions seeking recovery for prolonged exposure to toxic substances. Elam v. Alcolac, Inc., 765 S.W.2d 42, 173-74 (Mo.App.1988); [5] Ayers v. Jackson Township, 106 N.J. 557, 585, 525 A.2d 287, 301 (1987). The [306 S.C. 114] following statement by the Supreme Court of Nebraska concerning the difficulty of obtaining expert witnesses in medical malpractice actions is even more applicable to toxic tort cases:

[T]he real and obvious obstacle, by the very nature of the case--medical malpractice--was access to and availability of a qualified physician who was ready, willing, and able, in terms of time and temperament, to be a witness or affiant in [the] case. In practicality, the complexities of an action for malpractice and

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the problems of gaining information and enlisting a reliable expert witness as well as formulating and preparing a malpractice case are myriad and usually major, a situation almost a matter of judicial notice.

Wachtel v. Beer, 229 Neb. 392, 403-4, 427 N.W.2d 56, 64 (1988).

Plaintiffs acted with due diligence in the procurement of an expert medical witness in this protracted litigation. Now that they have located such an expert in the person of Dr. Panitz, the development of this evidence should not be precipitously terminated by summary judgment. Accordingly, entry of all partial summary judgments on claims for personal injury is reversed. Of course, Nassau may renew its motions once Plaintiffs have been afforded an adequate opportunity to complete discovery on the issue of medical causation. [6]

B. Property Damage Claims

Plaintiffs challenge, on the merits, entry of partial summary judgment on their claims for property damage. Trial court granted Nassau's motions on the ground that Plaintiffs presented no evidence that any alleged property damage was proximately caused by the operation of the Nassau facility.

In reviewing the grant of a summary judgment motion, we apply the same standard which governs the trial court under Rule 56(c), S.C.R.C.P.: summary judgment is proper when "there is no genuine issue as to

any material fact and ... the [306 S.C. 115] moving party is entitled to judgment as a matter of law." See 10 Wright & Miller, Federal Practice and Procedure § 2716, p. 643 (1983); SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Irby v. Richardson, 278 S.C. 484, 298 S.E.2d 452 (1982). This standard "mirrors" the standard for a directed verdict under Rule 50(a), S.C.R.C.P. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986); see also Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); see also Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing'--that is, pointing out to the [trial] court--that there is an absence of evidence to support the nonmoving party's case." Celotex 477 U.S. at 325, 106 S.Ct. at 2554, 91 L.Ed.2d at 275. The moving party need not "support its motion with affidavits or other similar materials negating the opponent's claim." Id. at 323, 106 S.Ct. at 2553, 91 L.Ed.2d at 274. (Emphasis in original).

Once moving party carries its initial burden, opposing party must, under Rule 56(e), "do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing that there is a genuine issue for trial.' " Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original). Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings. See SSI Medical Services, supra; Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct.App.1988).

In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. SSI Medical Services, supra; Standard Fire, supra. The court then applies the standard set out in Rule 56(c):

[306 S.C. 116] [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish

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the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex 477 U.S. at 322-23, 106 S.Ct. at 2552, 91 L.Ed.2d at 273.

Plaintiffs do not take issue with the trial court's conclusion that Nassau met its burden under Rule 56(c). Rather, they contend that evidence contained in answers to interrogatories and depositions was sufficient to create a genuine issue of fact concerning property damage. We disagree.

In Gray v. Southern Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971), this Court upheld the granting of an involuntary nonsuit at the close of plaintiff's case [7] where plaintiff

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had failed to present evidence of any physical damage to his property. We stated:

While proof, with mathematical certainty, of the amount of loss or damage is not required, in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation. See Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705, [(1968)] and cases therein cited.

The evidence as to the diminution of market value is, in [306 S.C. 117] our view, speculative, not only as to the amount but speculative as to the portion thereof proximately and directly resulting from the one delict on the part of the respondents complained of and proved. Accordingly, such evidence was of no real probative value in ascertaining the amount of any actual damage to the market value of appellant's property resulting from respondent's single wrongful act.

Id. 256 S.C. at 570-71, 183 S.E.2d at 444.

Plaintiffs' case suffers from a similar deficiency. Although many individual plaintiffs asserted in their answers to interrogatories and depositions that pollution from Nassau's plant had caused a diminution in the value of their property, these "bald allegations" are insufficient to create a genuine issue of fact. See Stevens v. Barnard, 512 F.2d 876, 879 (10th Cir.1975). There is a total absence of any competent evidence showing either the existence or the amount of damage to property, or that any such damage was proximately caused by the acts of Nassau. Accordingly, we affirm trial court's grant of partial summary judgment on Plaintiffs' claims for property damage.

C. Nuisance Claims

Finally, Plaintiffs contend the trial court erred in granting Nassau's motion for partial summary judgment on the nuisance claims of Floyd and Edna Busbee, and O.J. and Jacqueline Shealy. They argue summary judgment was premature before completion of discovery. This argument comes too late.

Unlike with their personal injury claims, Plaintiffs at no time asserted to the trial court that outstanding discovery should preclude summary judgment on these nuisance claims. "Generally, a contention of the opposing party that he was not given sufficient time to present matter in opposition cannot be successfully made for the first time on appeal." 6-Pt. 2 Moore's Federal Practice § 56.24, pp. 56-820 to -821 (2d ed. 1988). Having not been raised to the trial court, this issue is not preserved for appellate review. See West's S.C. Digest Appeal & Error, Key No. 169.

[306 S.C. 118] CONCLUSION

The grant of partial summary judgments on Plaintiffs' property damage claims and

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the four nuisance claims is affirmed. The partial summary judgments on all claims for personal injury are reversed and the matter remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

HARWELL, Acting C.J., and FINNEY and TOAL, JJ., JAMES E. MOORE, Acting Associate J., concur.

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1 See Rule 36(a), S.C.R.C.P.

2 The amount and form of Nassau's requests were arguably oppressive. Additionally, many of the requests called upon Plaintiffs to

provide information if denied, an improper use of this device. See 8 Wright & Miller, supra, § 2253, p. 706 (1970); Adams v. Orr, 260 S.C. 92, 194 S.E.2d 232 (1973) (purpose of request for admissions).

3 The trial court indicated the letter was defective in form because, although notarized, it was not a sworn affidavit. See Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300 (5th Cir.1988); Flowers v. Abex Corp., 580 F.Supp. 1230 (N.D.Ill.1984). We overlook this defect for two reasons. First, Nassau did not raise an objection so that Plaintiffs would have the opportunity to obtain an affidavit which technically complied. See United States v. Western Elec. Co., 337 F.2d 568 (9th Cir.1964). Second, Nassau submitted numerous unsworn letters in support of its motions for partial summary judgment. See DeCintio v. Westchester County Medical Center, 821 F.2d 111 (2d Cir.1987).

4 Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Although Plaintiffs did not file an affidavit invoking this provision, other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court. First Chicago Int'l, supra; Snook v. Trust Co. of Ga. Bank of Savannah, 859 F.2d 865 (11th Cir.1988).

5 The Elam case, in particular, vividly illustrates the complexity of proving causation in a toxic tort case, the extensive medical testing and analysis which is involved, id. at 82, 91-94, and the enormous expense incurred, id. at 193-94 & n. 74.

6 On remand, it may be advisable for the trial court to impose reasonable limitations upon the discovery, such as by establishing a cut-off date, while according it priority over other matters. See Manual for Complex Litigation, Second § 21.421 (1985).

7 Under present procedure, this is a motion for directed verdict. Rule 50(a), S.C.R.C.P.

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496 S.E.2d 33
329 S.C. 617
Hazel J. BESSINGER and Claus Bessinger, Appellants,
v.
BI-LO, INC. and Bi-Lo Store at 4391 Dorchester Road, North Charleston, South Carolina, Respondents.
No. 2783.
Court of Appeals of South Carolina.
Submitted Dec. 2, 1997.
Decided Jan. 19, 1998.

Header ends here. [329 S.C. 618] Gary A. Ling, of the Riesen Law Firm, North Charleston, for appellants.

Lisa Woodbury Caldwell, of Nelson Mullins Riley & Scarborough, Charleston, for respondents.

HUFF, Judge:

Claus and Hazel Bessinger appeal from the trial court's grant of summary judgment to Bi-Lo in this premises liability case. We affirm.

ISSUE

Whether the trial court erred in granting summary judgment to Bi-Lo.

[329 S.C. 619] FACTS

In 1994, Hazel Bessinger slipped and fell on grapes in the Bi-Lo grocery store. Mrs. Bessinger was walking to the checkout line and stated that she did not see the grapes until after she fell. She stated the grapes fell out of a vented bag in a cart, and they were dirty and mashed. Mrs. Bessinger believed the light coloring of the floor made it difficult to see the grapes. She suffered back, neck and hip injuries. Mr. Bessinger filed suit for loss of consortium.

Bruce Lauder, a Bi-Lo manager, assisted Mrs. Bessinger after she fell. Lauder also prepared an accident report concerning the incident. He inspected the area where the accident occurred fourteen minutes before the accident and did not see any grapes on the floor at that time. No other employees reported the presence of grapes.

The trial judge granted Bi-Lo's motion for summary judgment, stating the Bessingers failed to show actual or constructive notice of grapes on the floor prior to the accident.

LAW/ANALYSIS

Summary judgment is appropriate where it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Calvert v. House Beautiful Paint and Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398 (1994). In deciding whether summary judgment is proper, the court should construe all inferences arising from the evidence against the moving party. Id. Summary judgment should be granted when plain, palpable and undisputed facts exist on which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993).

Relying on Cook v. Food Lion, Inc., 328 S.C. 324, 491 S.E.2d 690 (Ct.App.1997), the Bessingers contend that Bi-Lo's method of displaying grapes in vented bags was negligent and created a dangerous condition. The facts in Cook are distinguishable from the present case because "Cook fell on a floor mat which Food Lion admittedly placed on the floor for its customers." Cook at 327, 491 S.E.2d at 691. Mrs. Bessinger slipped and fell on grapes, a classic foreign substance. Therefore,[329 S.C. 620] the Bessingers must show that the foreign substance was placed on the floor by the storekeeper or that the storekeeper had actual or constructive notice

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of its presence on the floor and failed to remove it. Gillespie v. Wal-Mart Stores, Inc., 302 S.C. 90, 394 S.E.2d 24 (Ct.App.1990).

In Simmons v. Winn-Dixie Greenville, 318 S.C. 310, 457 S.E.2d 608 (1995), the plaintiff slipped and fell on grapes in the checkout area of the grocery store. The court rejected plaintiff's argument that there was a question of liability based upon an inherently dangerous condition and foreseeable risk of harm. The court noted that the plaintiff failed to establish how the grapes were marketed, what caused the grapes to fall to the floor, and "whether any employee was aware of the grape, or how long the

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grape had been on the floor." Simmons at 311, 457 S.E.2d at 609.

In the case before us, the record is completely devoid of evidence that Bi-Lo had constructive or actual notice that the grapes were on the floor. There is no evidence that the grapes were on the floor through an act of Bi-Lo, or that any employee was aware that the grapes were on the floor, or how long the grapes were on the floor before the accident. See Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957) (no constructive notice of presence of popcorn with evidence proving merely that popcorn had been there a very few minutes); Mullen v. Winn-Dixie Stores, Inc., 252 F.2d 232 (4th Cir.1958) (applying South Carolina law) (a few mashed grapes in vicinity of plaintiff's fall insufficient to prove grapes had been on floor for any appreciable amount of time).

The Bessingers contend that Bi-Lo failed to support their motion for summary judgment. This contention was not raised to the court below. An issue must be raised and ruled on at the trial level to be preserved for appeal. SSI Medical Servs. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990).

The Bessingers claim that the lower court erred in refusing to reopen the summary judgment hearing to allow plaintiff's counsel to proffer depositions and evidence. The decision to reopen the record to allow additional evidence is a matter within the sound discretion of the trial judge. State v. Wren, 322 S.C. 103, 470 S.E.2d 111 (Ct.App.1996).

[329 S.C. 621] Upon consideration of the entire record in the light most favorable to the Bessingers, we find no evidence establishing a genuine issue of fact for trial. Accordingly, the judgment below is

AFFIRMED.

CONNOR and ANDERSON, JJ., concur.

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339 S.C. 417
529 S.E.2d 710

Marc J. BLOOM, Respondent,
v.
James RAVOIRA, Petitioner.

No. 25092.

Supreme Court of South Carolina.

Heard February 3, 2000.

Decided March 20, 2000.

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[339 S.C. 419]

James E. Lady, Todd W. Smyth, both of Haynsworth, Marion, McKay & Guerard, L.L.P., of Charleston, for petitioner.

Edward K. Pritchard, III, of Sinkler & Boyd, P.A., of Charleston, for respondent.

WALLER, Justice:

This is a negligence action arising out of an accident involving an automobile and a pedestrian. The trial court granted summary judgment in favor of petitioner James Ravoira, the driver of the automobile. Respondent Marc Bloom appealed, and the Court of Appeals reversed. We granted a writ of certiorari to review the Court of Appeals' opinion. *See Bloom v. Ravoira*, Op. No. 98-UP-416 (S.C.Ct.App. filed Dec. 17, 1998). We reverse.

FACTS

The accident occurred on Meeting Street in Charleston at approximately 6:30 p.m. on December 23, 1994. There was a misty rain falling at the time. Both Ravoira and Bloom were

[339 S.C. 420]

visiting Charleston. Bloom was staying at the Meeting Street Inn (the Inn), located on Meeting Street between Market and Cumberland Streets. At both ends of this block of Meeting Street, there are crosswalks, traffic lights, and walk/don't walk signals.

The parties deposed several witnesses. In his deposition, Bloom testified that he was in the lobby of the Inn waiting for his mother and girlfriend to come downstairs to go to dinner. Bloom was wearing jeans and a navy-colored overcoat. He explained that his car was parked in a lot directly across the street from the Inn and he was going to put a gift—a taxidermically stuffed, mounted pig—inside the car. According to Bloom, he exited the Inn and was going to cross the street. He looked to the left and then to the right. As he began to cross the street, he was struck from his left by Ravoira's car. Bloom stated that it happened fast and he never saw the car that struck him. He sustained injuries to his lower right leg and left hip.

Ravoira testified that at the time of the accident, he and his wife were driving along Meeting Street on their way to a restaurant located on Queen Street. Ravoira had his lights and windshield wipers on, and he estimated that he was traveling approximately 20 m.p.h. Ravoira explained that he was traveling slowly because his wife was looking for Queen Street. He stopped at the traffic light at Market Street. When the light turned green, Ravoira pulled forward, heard his wife yell his name, and saw something out of his peripheral vision. Then he heard a thud. After a pause, the car's windshield shattered.

Ravoira's wife Lowanda was in the passenger seat of the car and was looking for Queen Street. Lowanda testified that from the corner of her eye, she saw a person carrying something come toward her passenger window. She called out her husband's name.

She testified that the car stopped almost simultaneously with the impact and then the windshield broke.

Helena Mariella-Walrond, a guest at the Inn, testified that she was in the lobby at the time of the accident enjoying the Inn's complimentary wine and cheese hour. Helena explained that she noticed when Bloom entered the lobby because of the

[339 S.C. 421]

stuffed pig he was carrying under his arm. Helena saw Bloom get a beer and then soon after leave the lobby. According to Helena, Bloom hesitated for "a split second" and then ran across the street. Helena heard a "thump" and stated that she knew Bloom had been hit by a car. Helena also testified that when Bloom entered the street, he went in between two parked vehicles and the vehicle on Bloom's left was a sport utility vehicle.

John and Margaret Simpson were in the car traveling behind Ravoira. Margaret stated that Ravoira was traveling within the speed limit, and John estimated Ravoira's speed to be 25 m.p.h. Both John and Margaret testified that they did not notice any reckless driving by Ravoira. Both also stated that they did not see Bloom at all before the accident. Margaret testified that Ravoira's car "veered just a little," and they had to stop because the Ravoiras had stopped. Margaret then saw Bloom fall into the street. According to Margaret, there were cars parked in front of the Inn and therefore, Bloom must have entered the street from between parked cars or in front of a parked car.

Ravoira moved for summary judgment, and the trial court granted the motion. The trial court found that even if Ravoira was in some way negligent, no reasonable jury could find that Ravoira's negligence equaled, or was greater than, Bloom's negligence. On appeal, the Court of Appeals reversed holding that there were questions of material fact which precluded summary judgment.

ISSUE

Did the Court of Appeals err in reversing the trial court's grant of summary judgment?

DISCUSSION

Ravoira argues that no reasonable jury could find that Bloom's negligence was not greater than any negligence on the part of Ravoira. We agree.

Summary judgment is warranted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In

[339 S.C. 422]

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 non-moving party. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.*

Bloom alleged in his complaint that Ravoira negligently caused his injuries. To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *E.g., Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998). However, under South Carolina's doctrine of comparative negligence, a plaintiff may only recover damages if his own negligence is not greater

than that of the defendant. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991).

Ordinarily, comparison of the plaintiff's negligence with that of the defendant is a question of fact for the jury to decide. *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); *accord Brown v. Smalls*, 325 S.C. 547, 481 S.E.2d 444 (Ct.App. 1997). In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent. *Creech*, 328 S.C. at 33, 491 S.E.2d at 575 (discussing directed verdict standard); *see also Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct.App.1996) ("If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created" and a directed verdict motion is properly granted). Therefore, summary judgment is generally not appropriate in a comparative negligence case.

Under South Carolina law, Ravoira, as a driver, and Bloom, as a pedestrian, owed certain duties. Regarding pedestrian duties, a "pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked

[339 S.C. 423]

crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." S.C.Code Ann. § 56-5-3150(a) (1991). In addition, where traffic-control signals operate between adjacent intersections, "pedestrians shall not cross at any place except in a marked crosswalk." S.C.Code Ann. § 56-5-3150(c) (1991). Drivers are charged with the duty to exercise due care to avoid colliding with any pedestrian. S.C.Code Ann. § 56-5-3230 (1991).

On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party. *Koester, supra.* Nonetheless, a court "cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Hopson*, 321 S.C. at 314, 468 S.E.2d at 307 (discussing directed verdict motion). In our opinion, a verdict for Bloom is not reasonably possible under the facts of this case.

First, we note there are many facts which, even when viewed in the light most favorable to Bloom, clearly show that Bloom was negligent. For example, the undisputed facts establish that Bloom entered the street, from between two parked cars, and was struck by Ravoira's vehicle. Bloom testified that he looked left, then right, and then entered the street. However, he was struck from his left and he did not state that he looked to his left again after looking right. A disinterested witness testified that the accident occurred a split second after Bloom entered the street. Bloom and Ravoira both testified that neither one saw the other prior to impact, and the Simpsons also stated that they did not see Bloom prior to the accident. The only inference to be drawn from this evidence is that Bloom entered the street quickly and without any warning to drivers.

Moreover, although there were crosswalks and traffic signals at both corners, Bloom chose to cross in the middle of the block. Thus, by Bloom's own testimony, he breached his duties as a pedestrian. *See* S.C.Code Ann. § 56-5-3150 (1991). This breach is compounded by the fact that it was dark and rainy out, and Bloom—who was dressed in dark clothing—quickly entered the street from between two parked vehicles.

[339 S.C. 424]

Regarding Ravoira's conduct, the evidence establishes that Ravoira was driving no more than 25 m.p.h. and was not driving recklessly. His car lights and windshield wipers were on. Both Ravoira and his wife testified that only she was looking for Queen Street while Ravoira was driving.

The Court of Appeals held that genuine issues of material fact existed which prevented summary judgment in Ravoira's favor. For example, the Court of Appeals found that because Ravoira's wife was looking for Queen Street, there was a reasonable inference that Ravoira's attention was diverted and he was not keeping a proper lookout. Ravoira contends that the issues of fact highlighted by the Court of Appeals do not rise to the level of "material" issues of fact because, as a matter of law, the evidence shows that Bloom is more than fifty percent negligent. We agree.

The instant case is analogous to *Hopson v. Clary, supra.* In *Hopson,* the facts showed that the plaintiff Hopson was driving down a street and the defendant Clary was driving behind her. Hopson slowed down and pulled her car to the right. When Hopson attempted a U-turn, Clary's vehicle collided with Hopson's vehicle. *Hopson,* 321 S.C. at 313, 468 S.E.2d at 307. The trial court granted a directed verdict for Clary finding that, as a matter of law, Hopson's own negligence was greater than any potential negligence by Clary. The Court of Appeals affirmed. Specifically, the Court of Appeals found that the evidence showed that "Hopson attempted an inherently precarious maneuver without ascertaining whether she could do so safely." *Id.* at 315, 468 S.E.2d at 308.

Here, the undisputed facts establish that Bloom attempted to cross the street but did not do so in a safe, reasonable manner. Any factual issues which might exist as to Ravoira's fault in this accident cannot alter the inescapable conclusion that, as a matter of law, Bloom's fault exceeded fifty percent. Where evidence of the plaintiff's *greater* negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury. *See id.* at 314, 468 S.E.2d at 307 (where the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created).

[339 S.C. 425]

We note that our decision is no departure from the rule that summary judgment is a "drastic remedy" which should be "cautiously invoked." *Baughman v. American Tel. and Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citations omitted). Nevertheless, in the rare case where a verdict is not reasonably possible under the facts presented, summary judgment is proper. Accordingly, we find that the trial court correctly granted summary judgment and the Court of Appeals erred in reversing the trial court's decision.

CONCLUSION

We reverse the Court of Appeals' opinion which reversed the grant of summary judgment.

REVERSED.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Associate Justice R. MARKLEY DENNIS, Jr., concur.

fastcase

339 S.C. 417
529 S.E.2d 710

Marc J. BLOOM, Respondent,
v.
James RAVOIRA, Petitioner.

No. 25092.

Supreme Court of South Carolina.

Heard February 3, 2000.

Decided March 20, 2000.

Header ends here.

[339 S.C. 419]

James E. Lady, Todd W. Smyth, both of Haynsworth, Marion, McKay & Guerard, L.L.P., of Charleston, for petitioner.

Edward K. Pritchard, III, of Sinkler & Boyd, P.A., of Charleston, for respondent.

WALLER, Justice:

This is a negligence action arising out of an accident involving an automobile and a pedestrian. The trial court granted summary judgment in favor of petitioner James Ravoira, the driver of the automobile. Respondent Marc Bloom appealed, and the Court of Appeals reversed. We granted a writ of certiorari to review the Court of Appeals' opinion. *See Bloom v. Ravoira*, Op. No. 98-UP-416 (S.C.Ct.App. filed Dec. 17, 1998). We reverse.

FACTS

The accident occurred on Meeting Street in Charleston at approximately 6:30 p.m. on December 23, 1994. There was a misty rain falling at the time. Both Ravoira and Bloom were

[339 S.C. 420]

visiting Charleston. Bloom was staying at the Meeting Street Inn (the Inn), located on Meeting Street between Market and Cumberland Streets. At both ends of this block of Meeting Street, there are crosswalks, traffic lights, and walk/don't walk signals.

The parties deposed several witnesses. In his deposition, Bloom testified that he was in the lobby of the Inn waiting for his mother and girlfriend to come downstairs to go to dinner. Bloom was wearing jeans and a navy-colored overcoat. He explained that his car was parked in a lot directly across the street from the Inn and he was going to put a gift—a taxidermically stuffed, mounted pig—inside the car. According to Bloom, he exited the Inn and was going to cross the street. He looked to the left and then to the right. As he began to cross the street, he was struck from his left by Ravoira's car. Bloom stated that it happened fast and he never saw the car that struck him. He sustained injuries to his lower right leg and left hip.

Ravoira testified that at the time of the accident, he and his wife were driving along Meeting Street on their way to a restaurant located on Queen Street. Ravoira had his lights and windshield wipers on, and he estimated that he was traveling approximately 20 m.p.h. Ravoira explained that he was traveling slowly because his wife was looking for Queen Street. He stopped at the traffic light at Market Street. When the light turned green, Ravoira pulled forward, heard his wife yell his name, and saw something out of his peripheral vision. Then he heard a thud. After a pause, the car's windshield shattered.

Ravoira's wife Lowanda was in the passenger seat of the car and was looking for Queen Street. Lowanda testified that from the corner of her eye, she saw a person carrying something come toward her passenger window. She called out her husband's name.

She testified that the car stopped almost simultaneously with the impact and then the windshield broke.

Helena Mariella-Walrond, a guest at the Inn, testified that she was in the lobby at the time of the accident enjoying the Inn's complimentary wine and cheese hour. Helena explained that she noticed when Bloom entered the lobby because of the

[339 S.C. 421]

stuffed pig he was carrying under his arm. Helena saw Bloom get a beer and then soon after leave the lobby. According to Helena, Bloom hesitated for "a split second" and then ran across the street. Helena heard a "thump" and stated that she knew Bloom had been hit by a car. Helena also testified that when Bloom entered the street, he went in between two parked vehicles and the vehicle on Bloom's left was a sport utility vehicle.

John and Margaret Simpson were in the car traveling behind Ravoira. Margaret stated that Ravoira was traveling within the speed limit, and John estimated Ravoira's speed to be 25 m.p.h. Both John and Margaret testified that they did not notice any reckless driving by Ravoira. Both also stated that they did not see Bloom at all before the accident. Margaret testified that Ravoira's car "veered just a little," and they had to stop because the Ravoiras had stopped. Margaret then saw Bloom fall into the street. According to Margaret, there were cars parked in front of the Inn and therefore, Bloom must have entered the street from between parked cars or in front of a parked car.

Ravoira moved for summary judgment, and the trial court granted the motion. The trial court found that even if Ravoira was in some way negligent, no reasonable jury could find that Ravoira's negligence equaled, or was greater than, Bloom's negligence. On appeal, the Court of Appeals reversed holding that there were questions of material fact which precluded summary judgment.

ISSUE

Did the Court of Appeals err in reversing the trial court's grant of summary judgment?

DISCUSSION

Ravoira argues that no reasonable jury could find that Bloom's negligence was not greater than any negligence on the part of Ravoira. We agree.

Summary judgment is warranted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In

[339 S.C. 422]

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 non-moving party. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.*

Bloom alleged in his complaint that Ravoira negligently caused his injuries. To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *E.g., Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998). However, under South Carolina's doctrine of comparative negligence, a plaintiff may only recover damages if his own negligence is not greater

than that of the defendant. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991).

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Under South Carolina law, Ravoira, as a driver, and Bloom, as a pedestrian, owed certain duties. Regarding pedestrian duties, a "pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked

[339 S.C. 423]

crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." S.C.Code Ann. § 56-5-3150(a) (1991). In addition, where traffic-control signals operate between adjacent intersections, "pedestrians shall not cross at any place except in a marked crosswalk." S.C.Code Ann. § 56-5-3150(c) (1991). Drivers are charged with the duty to exercise due care to avoid colliding with any pedestrian. S.C.Code Ann. § 56-5-3230 (1991).

On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party. *Koester, supra.* Nonetheless, a court "cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Hopson*, 321 S.C. at 314, 468 S.E.2d at 307 (discussing directed verdict motion). In our opinion, a verdict for Bloom is not reasonably possible under the facts of this case.

First, we note there are many facts which, even when viewed in the light most favorable to Bloom, clearly show that Bloom was negligent. For example, the undisputed facts establish that Bloom entered the street, from between two parked cars, and was struck by Ravoira's vehicle. Bloom testified that he looked left, then right, and then entered the street. However, he was struck from his left and he did not state that he looked to his left again after looking right. A disinterested witness testified that the accident occurred a split second after Bloom entered the street. Bloom and Ravoira both testified that neither one saw the other prior to impact, and the Simpsons also stated that they did not see Bloom prior to the accident. The only inference to be drawn from this evidence is that Bloom entered the street quickly and without any warning to drivers.

Moreover, although there were crosswalks and traffic signals at both corners, Bloom chose to cross in the middle of the block. Thus, by Bloom's own testimony, he breached his duties as a pedestrian. *See* S.C.Code Ann. § 56-5-3150 (1991). This breach is compounded by the fact that it was dark and rainy out, and Bloom—who was dressed in dark clothing—quickly entered the street from between two parked vehicles.

[339 S.C. 424]

Regarding Ravoira's conduct, the evidence establishes that Ravoira was driving no more than 25 m.p.h. and was not driving recklessly. His car lights and windshield wipers were on. Both Ravoira and his wife testified that only she was looking for Queen Street while Ravoira was driving.

The Court of Appeals held that genuine issues of material fact existed which prevented summary judgment in Ravoira's favor. For example, the Court of Appeals found that because Ravoira's wife was looking for Queen Street, there was a reasonable inference that Ravoira's attention was diverted and he was not keeping a proper lookout. Ravoira contends that the issues of fact highlighted by the Court of Appeals do not rise to the level of "material" issues of fact because, as a matter of law, the evidence shows that Bloom is more than fifty percent negligent. We agree.

The instant case is analogous to *Hopson v. Clary, supra.* In *Hopson,* the facts showed that the plaintiff Hopson was driving down a street and the defendant Clary was driving behind her. Hopson slowed down and pulled her car to the right. When Hopson attempted a U-turn, Clary's vehicle collided with Hopson's vehicle. *Hopson,* 321 S.C. at 313, 468 S.E.2d at 307. The trial court granted a directed verdict for Clary finding that, as a matter of law, Hopson's own negligence was greater than any potential negligence by Clary. The Court of Appeals affirmed. Specifically, the Court of Appeals found that the evidence showed that "Hopson attempted an inherently precarious maneuver without ascertaining whether she could do so safely." *Id.* at 315, 468 S.E.2d at 308.

Here, the undisputed facts establish that Bloom attempted to cross the street but did not do so in a safe, reasonable manner. Any factual issues which might exist as to Ravoira's fault in this accident cannot alter the inescapable conclusion that, as a matter of law, Bloom's fault exceeded fifty percent. Where evidence of the plaintiff's *greater* negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury. *See id.* at 314, 468 S.E.2d at 307 (where the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created).

[339 S.C. 425]

We note that our decision is no departure from the rule that summary judgment is a "drastic remedy" which should be "cautiously invoked." *Baughman v. American Tel. and Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citations omitted). Nevertheless, in the rare case where a verdict is not reasonably possible under the facts presented, summary judgment is proper. Accordingly, we find that the trial court correctly granted summary judgment and the Court of Appeals erred in reversing the trial court's decision.

CONCLUSION

We reverse the Court of Appeals' opinion which reversed the grant of summary judgment.

REVERSED.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Associate Justice R. MARKLEY DENNIS, Jr., concur.

fastcase

JVR No. 1502240032, 2014 WL 7934110 (S.C.Com.Pl.) (Verdict and Settlement Summary)

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Court of Common Pleas of South Carolina, Ninth Judicial Circuit, Charleston County.

BURKE v. REPUBLIC PARKING SYSTEM INC.

2013-CP-10-01400
DATE OF INCIDENT: January 24, 2013
DATE OF TRIAL/SETTLEMENT: December 19, 2014

TOPIC:

LIABILITY:

General: Premises

Specific: Fall: Parking Garage

SUMMARY
Outcome: Plaintiff Verdict
Total: $4,005,125
Judge Reduced Award To: $3,184,100
HIGH AMOUNT: $0

LOW AMOUNT: $0

Related Court Documents:
Plaintiffs' second amended complaint: 2014 WL 7795935

Defendant Republic Parking System's answer to second amended complaint: 2014 WL 7795904

Defendant Indigo Realty Company's answer to second amended complaint and cross-claims: 2014 WL 7795939

Defendant City of Charleston's answer, affirmative defenses and motion to strike second amended complaint: 2014 WL 7795900

Verdict form (liability): 2014 WL 7795846

Verdict form (damages): 2014 WL 7795843

Defendant's motion for judgment notwithstanding the verdict, or, in the alternative, a new trial: 2014 WL 7795906

Defendant's memorandum in support of its request for setoff: 2015 WL 5612211

EXPERT WITNESSES:
Plaintiff:
Surgeon: Sakran, Joseph, M.D., Charleston, SC

Neurologist/Pain Management: White, Marshall, M.D., Sumter, SC
Plaintiff:
Structural Engineer/Civil Engineer: Campbell, Alan, P.E., Charleston, SC
ATTORNEY:
Plaintiff: Clayton B. McCullough, McCullough Khan L.L.C., Charleston, SC
Plaintiff: Jamie A. Khan, McCullough Khan L.L.C., Charleston, SC
Defendant: Roopal S. Ruparelia, Haynsworth Sinkler Boyd P.A., Columbus, SC
Defendant: Sarah P. Spruill, Haynsworth Sinkler Boyd P.A., Columbia, SC
Defendant: Stephen E. Darling, Haynsworth Sinkler Boyd P.A., Charleston, SC

JUDGE: Markley Dennis

RANGE AMOUNT: $2,000,000 - 4,999,999

STATE: South Carolina
COUNTY: Charleston

PRIMARY INJURY: Kidney: Kidney Dysfunction
Replacement: Knee; Cartilage and Ligament: Knee

SUMMARY
PLAINTIFF:
Sex: M

Age: Adult, 68

General Occupation: Retired

DEFENDANT:
Sex: O

General Occupation: Building Management

Organization Type: Republic Parking System Inc.

Defendant's Insurance: Liberty Mutual Fire Insurance Company

DAMAGES:
Compensatory Pain & Suffering: $4,005,125

Total Compensatory Award: $4,005,125

Punitive Damages: $0

Hedonic Damages: $0

Property Damages: $0

Interest: $0

Other Damages: $0

Loss of Services: $0

Comparative Negligence Percentage: 20

FACTS:

Robert J. Burke, a retired college and NBA basketball coach and consultant, reportedly suffered massive blood loss, kidney failure which required dialysis treatments, and knee injuries which resulted in knee replacement surgery and complications, among other injuries, when he tripped and fell over a raised curb inside a city parking lot managed by defendant Republic Parking System Inc. The plaintiff asserted the curb was obscured by parked cars and was virtually hidden due to low lighting conditions that were less than a tenth of the industry standard. The plaintiff claimed the defendant was negligent by, among other things, failing to warn of dangers and unsafe conditions, failing to maintain a safe and effective level of light, failing to have a safe ingress/egress passageway for pedestrians, failing to inspect and maintain the property, and failing to follow accepted industry standards and applicable building codes. The defendant denied liability, contending the plaintiff was comparatively negligent and arguing, among other things, that it owed the plaintiff no duty, as it was a contractor of the City of Charleston and had no ability to change anything about the parking lot. According to the plaintiff's attorneys, the plaintiff settled claims against the City of Charleston and a property owner prior to trial for a total of $310,000, of which $290,000 went to the plaintiff's spouse for her loss of consortium claim. The plaintiff's negligence claim against Republic Parking System Inc. proceeded to a jury trial, where jurors found both the plaintiff and the defendant negligent, with 20 percent of the negligence attributable to the plaintiff and 80 percent attributable to the defendant. Jurors awarded the plaintiff $4,005,125, which was reduced in judgment to $3,184,100 pursuant to setoffs and the comparative negligence finding.

Jury Verdict Research
COURT: Common Pleas

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406 S.E.2d 361
305 S.C. 123
Ann H. CALLANDER and Stella B. Brownlee as Personal Representatives of Paul W. Lingos, deceased, Petitioners,
v.
CHARLESTON DOUGHNUT CORPORATION and Krispy Kreme Doughnut Corporation, Respondents.
No. 23429.
Supreme Court of South Carolina.
Heard March 4, 1991.
Decided July 8, 1991.

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Header ends here. [305 S.C. 124] John D. Crumrine, Lempesis Law Firm, Charleston, for petitioners.

Dennis J. Christensen, Wise & Cole, P.A., Charleston, for respondents.

CHANDLER, Justice.

We granted certiorari to review the Court of Appeals' decision reported at 300 S.C. 317, 387 S.E.2d 695 (Ct.App.1989).

We affirm as modified.

FACTS

Petitioner, Paul Lingos (Lingos), slipped and fell in a Krispy [305 S.C. 125] Kreme Doughnut Shop when he backed up to sit on a stool, from which the round seat top was missing. He instituted this action alleging that the condition of the stool constituted a latent defect. The jury returned a verdict for $30,000.

Court of Appeals reversed and remanded for a new trial, holding that Lingos was not entitled to a latent defect instruction, there being "no evidence that the broken stool could not have been discovered by a reasonably careful inspection." It failed, however, to address Krispy Kreme's contention that this holding mandated a directed verdict in its favor.

ISSUE

The sole issue is whether the condition of the stool constituted a latent defect.

DISCUSSION

A latent defect is one which an owner has, or should have, knowledge of, and of which an invitee is reasonably unaware. Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979); Bruno v. Pendleton Realty, 240 S.C. 46, 124 S.E.2d 580 (1962). It is one which a reasonably careful inspection will not reveal. See Land v. Franklin National Insurance Company, 225 S.C. 33, 80 S.E.2d 420 (1954); 26A C.J.S. Defect.

Here, Lingos testified that he backed toward the stool while talking to a counter person. Although Krispy Kreme was crowded, no evidence was presented that this condition affected his ability to discover the missing seat top had he turned to look. Accordingly, we agree with the Court of Appeals that latent defect was erroneously charged.

However, we reject Krispy Kreme's contention that a finding of no latent defect mandates a directed verdict in its favor.

The traditional "no duty to warn of the obvious" rule has been modified in many jurisdictions to hold that an owner is liable for injuries to an invitee, despite an open and obvious defect, if the owner should anticipate that the invitee will nevertheless encounter the condition, or that the invitee is likely to be distracted. See, generally, 62 Am.Jur.2d Premises Liability § 146-157; 62A Am.Jur.2d, Premises Liability § 504; Annotation 35 A.L.R.3rd 230, § 4(a). See, also, Guidry v.

fastcase

Continental Oil Co., 640 F.2d 523 (5th Cir.1981); Williams [305 S.C. 126] v. Boise Cascade Corp., 507 A.2d 576 (ME 1986); Shaffer v. Mays, 140 Ill.App.3d 779, 95 Ill.Dec. 83, 489 N.E.2d 35 (1986); Tribe v. Shell Oil Co., Inc., 133 Ariz. 517, 652 P.2d 1040 (1982); Southern Railway Co. v. ADM Milling Co., 58 N.C.App. 667, 294 S.E.2d 750 (1982).

Jurisdictions adopting this view follow the Restatement (Second) of Torts § 343(A) (1965) which provides:

Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. (Emphasis supplied).

We hereby adopt Section 343(A) of the Restatement (Second).

Comment (f) to § 343(A) points out that an owner may be required to warn the invitee, or take other reasonable steps to

Page 363

protect him, if the "possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, ... or fail to protect himself against it." Restatement (Second) Torts § 343A, comment (f) at 220-221 (1965).

Here, Krispy Kreme's owner/manager admitted the stool top had been missing for over two months. Moreover, he was unable to explain why a warning sign, previously placed on the stool, had been removed prior to Lingos' accident. Finally, he conceded that many of his regular customers were senior citizens who customarily backed up to the stools in order to sit down.

The trial court, upon remand, shall instruct the jury in accordance with this opinion.

AFFIRMED AS MODIFIED.

GREGORY, C.J., and HARWELL, FINNEY and TOAL, JJ., concur.

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491 S.E.2d 690
328 S.C. 324
Margie M. COOK, Appellant,
v.
FOOD LION, INC., Respondent.
No. 2620.
Court of Appeals of South Carolina.
Reheard June 3, 1997.
Decided Aug. 11, 1997.
Rehearing Denied Sept. 19, 1997.
Certiorari Denied May 15, 1998.

Header ends here. [328 S.C. 325] Eric J. Davidson and Jarrel L. Wigger, Charleston, for appellant.

Charles R. Norris and Craig E. Burgess, Charleston, for respondent.

HEARN, Judge:

In this negligence action, Margie M. Cook appeals the order of the trial judge granting a directed verdict in favor of Food Lion. We reverse and remand.

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[328 S.C. 326] Facts

On February 9, 1991, Cook tripped and fell on a floor mat near the exit of Food Lion as she was leaving the store. Thereafter, Cook brought a negligence action against Food Lion alleging the floor mat was "improperly placed" and was not "flush with the floor."

After hearing arguments of counsel, the trial judge granted Food Lion's motion to exclude any evidence regarding the tendency or proclivity of Food Lion's floor mats to wrinkle on occasions previous to Cook's accident. Cook then proffered the testimony of several witnesses. First, Martha Cantrell, who was a cashier at Food Lion at the time of the accident, testified the floor mats sometimes wrinkled or crumpled when people would kick them. She did not, however, see the mats wrinkle on the day of the accident.

Next, Joseph Gokey, a bagger for Food Lion, testified by deposition that he had previously seen the floor mats in a wrinkled or bent position, and that the mats became twisted "a lot." He stated, "They tended, you know, situate around to [sic]--sometimes they would be kicked or stomped on where the doors were would [sic] catch them and as they were closing they'd bring the mats into the doors." He testified he had straightened the mats out "a few times" when they became wrinkled. He further testified he would trip on the mats when he brought in shopping carts from outside and "the buggies would catch up on the rug when you come [sic] around the corner."

Randall Horne, who was also a bagger for Food Lion at the time of the accident, testified by deposition that he had seen the mats become wrinkled, that he had straightened out the mats and had seen other Food Lion employees straighten out the mats, and that they wrinkled "pretty often." He further testified he had seen people stumble on the mats. Finally, Cook herself testified she tripped on a floor mat which had become wrinkled.

The trial judge directed a verdict in favor of Food Lion on the issue of liability, holding that Cook presented no evidence Food Lion had notice on the date of the accident that the mats had become wrinkled.

[328 S.C. 327] Discussion

Cook argues the trial judge erred in excluding the testimony concerning the tendency of the floor mats to wrinkle and in directing a verdict in favor of Food Lion. She argues the present case is factually distinguishable from a classic slip-and-fall case, and thus the trial judge's reliance on

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"foreign substance" cases is misplaced. We agree.

A merchant is not an insurer of the safety of his customers, but rather owes them the duty to exercise ordinary care to keep the premises in a reasonably safe condition. Denton v. Winn-Dixie Greenville, Inc., 312 S.C. 119, 439 S.E.2d 292 (Ct.App.1993). This includes the duty to keep the aisles and passageways in a reasonably safe condition. Moore v. Levitre, 294 S.C. 453, 365 S.E.2d 730 (1988).

A customer who seeks to recover for injuries sustained as a result of a fall caused by a foreign substance on a storekeeper's floor must prove either that the foreign substance was placed on the floor by the storekeeper or that the storekeeper had actual or constructive notice of its presence on the floor and failed to remove it. Gillespie v. Wal-Mart Stores, Inc., 302 S.C. 90, 394 S.E.2d 24 (Ct.App.1990). The customer can establish the storekeeper's constructive knowledge of the dangerous condition by showing that the foreign substance had been on the floor for a sufficient time and that the storekeeper would have discovered and removed it had the storekeeper used ordinary care. Id. In the present case, the trial judge, relying on a foreign substance case, found that Cook had not established that Food Lion had either actual or constructive notice of a dangerous condition.

Cook did not, however, fall on a foreign substance. Rather, Cook fell on a floor mat which Food Lion employees admittedly placed on the floor for its customers. To prove negligence, the plaintiff must show either that the defendant or defendant's employees created the condition, or that the defendant had "notice" of it. Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988); Gillespie, 302 S.C. at 91, 394 S.E.2d at 24. In the present case, Food Lion's employees created the allegedly dangerous conditions by placing the

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mats by the exit doors. Thus, it was [328 S.C. 328] not necessary for Cook to show that Food Lion employees had notice that the floor mats were wrinkled or bunched immediately prior to Cook's fall. [1] Moreover, the testimony of the tendency of the floor mats to wrinkle was directly relevant to the issue of whether a dangerous condition existed in the store and should not have been excluded. See Henderson v. St. Francis Community Hosp., 303 S.C. 177, 399 S.E.2d 767 (1990) (reversing trial judge's grant of judgment non obstante verdicto where there was evidence the hospital knew of the danger caused by sweet gum trees planted near the parking lot, even though there was no testimony that the hospital knew the day of the accident that there were sweet gum balls on the sidewalk); Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 371 S.E.2d 530 (1988) (reversing trial court's grant of summary judgment in favor of defendant, where plaintiff claimed she was injured by a metal strip protruding into the store aisle but offered no evidence that the store employees knew of the protrusion prior to plaintiff's injury); Force v. Richland Memorial Hosp., 322 S.C. 283, 471 S.E.2d 714 (Ct.App.), cert. denied (Dec. 5, 1996) (reversing the trial court's grant of judgment notwithstanding the verdict where the hospital's automatic doors closed on a paramedic, injuring [328 S.C. 329] her arm. The court rejected the traditional slip-and-fall analysis and held the hospital had notice that, without frequent inspection, the doors would become unsafe.). Thus, we hold the trial judge erred in excluding Cook's proffered testimony.

Viewing the evidence in the light most favorable to Cook, Cook's testimony indicated she tripped on a wrinkled floor mat. [2] The testimony of her other proffered witnesses indicated the mats had a tendency to wrinkle, creating a dangerous condition, and that Food Lion was aware of the tendency. Thus, we hold the trial judge erred in granting a

directed verdict in favor of Food Lion. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOWELL, C.J., and CONNOR, J., concur.

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1 For similar cases, see Sears, Roebuck & Co. v. Daniels, 299 F.2d 154 (8th Cir.1962) (Where plaintiff fell on merchant's wrinkled floor mat, court held that the jury could find that the condition of the mat was created by defendant merchant or its employees. Court distinguished the case from cases where a foreign substance is spilled on the floor by a customer without the knowledge of the management. Court held that it is not a necessary element of negligence to show that a storekeeper had knowledge of the hazardous or defective condition when that condition was created by the storekeeper or its employees.); Bergeron v. Employers-Commercial Union Cos., 306 So.2d 367 (La.Ct.App.1975) (Plaintiff fell on the upturned floor mat in defendant's store. Even though the store owner and its employees testified they did not know the rug was turned up on one of its edges, the court held that "if the defendant-store had employed proper procedures for the placement and replacement of the mat after cleaning, as well as a visual examination thereof, the store owner or its employees would or should have known of the hazardous condition of the mat."); Kosnar v. J.C. Penney Co., 6 Wis.2d 238, 94 N.W.2d 642 (1959) (Plaintiff fell on a wrinkled floor mat. The Wisconsin Supreme Court distinguished the case from a "foreign substance" case because the hazardous condition was created by the storekeeper who placed the mat. Court held the plaintiff did not have to show notice to the storekeeper who created the dangerous condition.)

2 Because we take Cook's testimony that she slipped on a wrinkled floor mat as true in determining whether the trial judge properly granted a directed verdict, causation is not an issue in this case.

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325 S.E.2d 69
284 S.C. 208
Irene DYER, Appellant,
v.
Eldon MOSS, Respondent.
No. 0354.
Court of Appeals of South Carolina.
Heard Nov. 21, 1984.
Decided Jan. 3, 1985.

Header ends here. [284 S.C. 209] James C. Alexander, Greenville, for appellant.

David L. Moore, Jr. and John R. Devlin, Jr., Greenville, for respondent.

[284 S.C. 210] GOOLSBY, Judge:

This is an appeal by Irene Dyer from the order of the trial court granting the respondent Eldon Moss summary judgment in an action for breach of an alleged oral contract. The basic question Dyer raises on appeal is whether the record shows the existence of a genuine issue of material fact so as to make inappropriate the grant of summary judgment in Moss's favor. We think not and affirm.

Dyer brought the instant action against Moss claiming Moss agreed to pay her for the expenses she incurred and the services she rendered in caring for Moss's eighty-five year old mother while she resided with Dyer from August 1975 to March 1976. Moss's mother was also Dyer's grandmother.

In her complaint, Dyer alleged Moss agreed to pay her for these expenditures and services in exchange for her agreement to withdraw an action brought by her in the Probate Court of Greenville County to be appointed committee for her grandmother. Dyer further alleged she performed her part of the agreement but Moss did not. She claims Moss owes her $15,215.04.

In his answer, Moss denied the material allegations of Dyer's complaint. He also asserted the statute of frauds claiming the action was brought to charge him upon an oral promise to answer for the debt of another in violation of Section 32-3-10(2) of the South Carolina Code of Laws (1976).

Moss later moved for summary judgment upon the ground the pleadings and Dyer's deposition demonstrated the existence of no genuine issue of material fact. Dyer submitted an affidavit in opposition to the motion. The trial court found undisputed the fact that Dyer sought to recover from Moss upon an oral promise to pay for services rendered and expenditures made by Dyer on behalf of her grandmother and it granted Moss summary judgment on the ground the contract violated the statute of frauds.

Summary judgment should be granted only when it is perfectly clear no issue of fact is involved. Koren v. National Home Life Assurance Co., 277 S.C. 404, 288 [284 S.C. 211] S.E.2d 392 (1982); Vaughn v. A.E. Green, Co., Inc., 277 S.C. 392, 287 S.E.2d 493 (1982). On motion for summary judgment, the inferences to be drawn from the underlying facts contained in the record must be viewed in the light most favorable to the party opposing the motion. See United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Gardner v. Campbell, 257 S.C. 209, 184 S.E.2d 700 (1971). The papers supporting the movant are to be closely scrutinized, whereas those of the opponent are to be indulgently treated. Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863 (1972). When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff must show the court the existence of a genuine issue of fact. Taylor v. Alston, 79 N.M. 643, 447 P.2d 523, 29 A.L.R.3d 653 (1968). In such a case, the plaintiff cannot defeat the

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defendant's motion by relying upon the mere allegations of his complaint but must disclose the facts he intends to rely on by affidavit or other proof. Cir.Ct.R. 44; 73 Am.Jur.2d Summary Judgment Section 23 at 745 (1974); see Epprecht v. Delaware Valley Machinery, Inc., 407 F.Supp. 315 (E.D.Pa.1976).

Dyer argues that the statute of frauds does not bar enforcement of Moss's oral promise because the promise was not made to answer for his mother's debt but was made either to advance some purpose of his own or as part of an original undertaking between the parties. See Campbell v. Hickory Farms of Ohio, 258 S.C. 563, 190 S.E.2d 26 (1972); Price v. Bethea, 167 S.C. 376, 380, 166 S.E. 409 (1932). She contends Moss entered into the agreement with her to halt her effort in the Probate Court to be appointed his mother's committee.

Here, however, there is a total absence of any evidence that the main purpose of the alleged promise by Moss was to end litigation or that the promise allegedly made by Moss was part of an original undertaking made in exchange for the abandonment by Dyer of her action to be appointed committee for Moss's mother. Neither in her deposition nor in her affidavit is there any evidence Dyer agreed to dismiss her action to be named committee in consideration for Moss's agreeing to pay her for the expenses she incurred and for the services she rendered in caring for [284 S.C. 212] Moss's mother. Without such evidence, there is no proof that the alleged oral agreement was outside the statute of frauds.

Accordingly, the judgment appealed from is

AFFIRMED.

SHAW and CURETON, JJ., concur.

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433 S.E.2d 871
315 S.C. 300
ENGLERT, INC., Respondent,
v.
The NETHERLANDS INSURANCE COMPANY, Appellant.
No. 2046.
Court of Appeals of South Carolina.
Submitted April 12, 1993.
Filed June 2, 1993.

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Header ends here. [315 S.C. 302] Karl L. Kenyon and Robert P. Lusk, Kenyon & Lusk, Anderson, for appellant.

Daniel T. Brailsford and J. Kershaw Spong, Robinson, McFadden & Moore, Columbia, for respondent.

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PER CURIAM:

We decide this case without oral argument, because oral argument would not aid the Court in resolving the issues. We affirm.

Since this case was decided by way of summary judgment, the trial judge had to view all facts and reasonable inferences in the light most favorable to the appellant. On appeal, this Court must take the same view of the evidence. Neither the trial court nor this Court, however, is "required to single out some one morsel of evidence ... to create an issue of fact that is not genuine." Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). In addition, affidavits in opposition to summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP.

[315 S.C. 303] The appellant defended the claim for payment on two grounds: defective materials and failure to provide a warranty conforming with the job specifications.

As to the defense of defective materials, the appellant's affidavit asserts the materials had been "rejected by the school district due to alleged defects." (emphasis added). Nowhere does the affidavit assert that the affiant knows or believes the materials were defective, or the basis for any such belief or knowledge. The only admissible fact appearing in this statement is that the school district believes or alleges the materials are defective. To the extent that the appellant relies on this statement to prove the existence of a defect, it clearly is inadmissible hearsay.

The appellant repeatedly states that the respondent has not denied the allegation of defective materials. This argument is misplaced for at least two reasons:

1. The allegation of a defect in response to the claim for payment is clearly an affirmative defense under Rule 8(c), SCRCP. The appellant, therefore, bears the burden of proof. The respondent has no need to disprove the allegation unless and until the appellant presents prima facie evidence of a defect. The affidavit is insufficient to do so.

2. The allegation of a defect is asserted as a defense only, and not as a counterclaim. Thus, the respondent is not required to deny it, because it is deemed denied under the Rules of Civil Procedure. See Rules 7(a), 8(c), and 8(d), SCRCP.

In addition, the appellant never argued to the trial judge that the respondent's failure to deny the existence of the alleged defect somehow impacted on the issues raised by the summary judgment motion. The trial judge did not rule on it; and the appellant did not file a post-trial motion to obtain a ruling. Thus, the issue is not preserved for appeal.

As to the warranty issue, the respondent's affidavit asserts that it merely supplied materials requested by a subcontractor in a telephone order, and that it had no knowledge of the job specifications and was never requested to review these specifications. [1] The appellant relies solely on [315 S.C. 304] its affidavit that the respondent knew its warranty must conform to the job specifications. [2]

We first note that the trial judge characterized this warranty/specifications issue as being based on allegations by the school district. The appellant does not challenge this characterization, thereby making it the law of this case. Thus, this "evidence" suffers from the same hearsay problems as does the evidence of defective materials.

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In addition, the trial judge held that the appellant's failure to make the job specifications part of the record precluded any reference to the specifications under the Best Evidence Rule. On appeal, the appellant does not challenge or even mention this ruling specifically. Thus, it is the law of this case.

The only argument even approaching this Best Evidence issue is the assertion that: "The general contractor certainly is competent to testify on the content of the specifications for the job." As we read the appealed order, the trial judge held that any reference to the specifications (competent or otherwise), absent their presence in the record, violated the Best Evidence Rule. The appellant's failure to challenge this ruling makes it the law of this case (right or wrong). Moreover, the affiant's status as vice-president of the general contractor, standing alone, does not make him competent to testify on the specifications. He still must have personal knowledge of the specifications before his testimony is admissible, and the affidavit does not demonstrate any such personal knowledge.

Finally, although not mentioned by the trial judge, we note the following additional defects in the appellant's affidavit:

1. It never asserts that the vice-president was personally familiar with the specifications for this construction project.

2. It never asserts that the vice-president was personally familiar with the products used to build the roof, or that he had inspected or even seen the roof as built.

[315 S.C. 305] 3. It never asserts that the vice-president was competent to give an opinion on whether the roof as built or its components did not conform to the project specifications.

4. It never specifies how the roof did not conform with the project specifications, or even which specifications it did not conform with. In particular, it never specifies whether the failure to conform resulted from problems with the materials, the construction of the roofing panels from the materials, the installation of the roofing panels, or some combination thereof. [3]

5. Assuming the affidavit sufficiently asserts that the respondent knew its warranty must conform to the project specifications, it never asserts how, when, or from whom the respondent came to know this. [4] More importantly, it never asserts that the respondent agreed to provide such a warranty.

6. It never specifies how the materials delivered by the respondent are defective. The only inference of a defect is the alleged failure of the materials/warranty to conform with the alleged but unexplained project specifications.

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The foregoing defects are an additional reason appearing in the record to affirm the appealed order. See Rule 220(c), SCACR.

In Main, supra, the buyer sued the seller for specific performance of a real estate contract. The trial judge granted summary judgment to the buyer. In affirming, our Supreme Court noted that the only evidence introduced by the seller was the testimony of her husband that the signature on the contract was not hers. It concluded that an affidavit from the seller herself, denying the signature, was necessary to create a genuine issue of fact.

In our view, the husband's testimony rejected by the Supreme Court in Main is far

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more compelling than the evidence[315 S.C. 306] presented by the appellant's affidavit in the present case. Assuming some tortured reading of the appellant's affidavit could produce any inference of a factual issue, it clearly fails the "morsel" test of Main.

Finally, the appellant argues the trial judge erred in awarding 18% interest on the judgment. The respondent concedes this was error and requests this Court to modify the judgment to provide for pre-judgment interest at the legal rate of eight and three-quarters percent pursuant to S.C.Code Ann. § 34-31-20(A) (1987). The appellant does not reply to this request.

Since the debt involved in this appeal clearly is a liquidated one, and since there is no dispute regarding the amount or the date it is due and payable, we modify the judgment to include pre-judgment interest at the legal rate of eight and three-quarters percent. See Rule 220(a), SCACR (the appellate courts may modify an appealed decision); see also J.C. White Lumber Co., Inc. v. Allen, 306 S.C. 183, 410 S.E.2d 588 (Ct.App.1991) (reversing the award of 18% based on an unsigned invoice and remanding for the entry of judgment in accordance with § 34-31-20(A)).

For all of the foregoing reasons, the appealed order is affirmed as modified.

AFFIRMED AS MODIFIED.

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1 The respondent provided a limited written warranty which specifically and conspicuously excluded all other warranties, express or implied, including any implied warranty of merchantability and any warranty of fitness for a particular purpose.

2 In a single sentence, the appellant argues the failure to give a warranty conforming with the job specifications resulted in a failure of consideration. This one-sentence argument is too conclusory to present any issue on appeal. Moreover, the appellant did not make this argument to the trial judge; he did not rule on it; and the appellant did not make a post-trial motion requesting a ruling. Thus, this issue is not preserved for appeal.

3 It is clear from the record that the respondent merely supplied materials to a subcontractor. The subcontractor used the materials to construct the roofing panels and installed them. The respondent had nothing to do with the construction or installation of the roofing panels.

4 The appellant presented no evidence from the subcontractor that it informed the respondent of the warranty requirements at the time of ordering the materials. The appellant's affidavit could be read to state that the respondent came to know of this matter from post-delivery conversations with the general contractor. The same is true of the appellant's arguments on appeal.

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350 S.C. 488
567 S.E.2d 857

Lt. J.A. FLEMING, Jr., Respondent,
v.
Boykin ROSE and James Caulder, Defendants, of whom Boykin Rose is, Petitioner.

No. 25500.

Supreme Court of South Carolina.

Heard April 3, 2002.

Decided July 22, 2002.

Header ends here.

[350 S.C. 490]

James A. Stuckey and Alexia Pittas-Giroux, both of Stuckey Law Offices, of Charleston, for petitioner.

John A. O'Leary, of O'Leary Associates, of Columbia, and John S. Nichols, of Bluestein & Nichols, of Columbia, for respondent.

Jay Bender, of Baker, Ravenel & Bender, of Columbia, for amici curiae South Carolina Broadcasters Association and South Carolina Press Association.

Chief Justice TOAL.

This Court granted Boykin Rose's ("Rose") petition for certiorari to review the Court of Appeals' opinion in *Fleming v. Rose,* 338 S.C. 524, 526 S.E.2d 732 (Ct.App.2000). Rose argues the Court of Appeals erred in reversing the trial

[350 S.C. 491]

court's grant of summary judgment on the cause of action for libel.

FACTUAL/PROCEDURAL BACKGROUND

This case arose from the investigation of a December 19, 1991, traffic accident. In the early morning hours of December 19, a car struck a van carrying four troopers and their wives home from a holiday party. Several of the troopers and their wives were injured. An investigation was ordered. However, the investigation was handled very poorly, a possible cover-up ensued, and the incident resulted in a public relations debacle for the South Carolina Department of Public Safety ("SCDPS").[1] A second investigation was conducted by Internal Affairs, SLED, solicitor Ralph Wilson, and special prosecutors Donnie Myers and Dick Harpootlian. The troopers in the van and some others involved in the cover-up were indicted,[2] and SCDPS was sued by the other driver involved in the accident. The other driver, who was a civilian, was charged with felony DUI, but the charges were later dropped.

In July 1993, Rose became director of SCDPS. Rose ordered a third investigation of the alleged cover-up and appointed Robert Ivey ("Ivey") and John Murphy ("Murphy") to head the inquiry. Ivey and Murphy interviewed 100-125 people over the approximate five month investigation. During the investigation, the investigators determined that Respondent, Lt. James Fleming ("Fleming") had been contacted by one of the troopers involved in the accident, Jerry Cobb ("Cobb"). Cobb radioed Fleming, who was his supervisor, and

[350 S.C. 492]

asked him to meet him in Georgetown. According to Fleming, the meeting began with a discussion of golf and social matters. In addition, Cobb expressed his anger that Trooper Cottingham, who was also involved in the accident, was going to receive most of the insurance money and that the people in Georgetown had collected money for the

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Cottinghams but not for Cobb and his wife. Cobb indicated he and his attorney were going to get his original statement concerning the accident back from SLED because it was false. Furthermore, Fleming testified Cobb complained that "all his supervisors in every place he had been were always bringing him to Florence over things he had done wrong and he was tired of it" and "the s—was about to hit the fan." According to Fleming's testimony, his conversation with Cobb took place on a Saturday, and on Monday, Fleming relayed the conversation to his supervisor, James Caulder ("Caulder").

The main debate concerns whether Cobb told Fleming: (1) that the van was speeding at the time of the accident; and (2) that he had lied about the speed to the initial investigating officers. This was considered vital because if Fleming had passed this information on to Caulder, the investigation could have been concluded more quickly. Ivey testified that in his interview, Fleming indicated Cobb had told him the van was speeding at the time of the accident. The interview report form indicates Fleming recalled Cobb talking about the speed of the van. Fleming testified he could not recall Cobb mentioning a specific speed, but that he could have mentioned the van was speeding. However, Fleming stated he absolutely relayed the entire conversation to his supervisor Caulder the next work day.[3]

At the close of the investigation, Ivey and Murphy issued a report to Rose. They recommended Fleming receive a five-day suspension for failing to carry out his duties as a lieutenant by not reporting the entire contents of his conversation with Cobb to his supervisor. However, this discipline was reduced to a written reprimand.[4]

[350 S.C. 493]

After the investigation was concluded, Rose and the SCDPS issued a press release. Many articles were published by various newspapers around the state based on this release. It is this release Fleming alleges is defamatory. The release provides, in relevant part: "Lt. James Fleming learned key details about the accident from ... Jerry Cobb within a few months of the accident, including the approximate speed of the van. Fleming did not report this information to his superiors."

On January 22, 1996, Fleming filed a cause of action against Rose and Caulder for libel, intentional infliction of emotional distress, and due process violations. Rose and Caulder moved for summary judgment. On September 11, 1998, the circuit judge granted summary judgment and dismissed the action, ruling that Fleming was a public official and the publication had been limited to fair comment without actual malice. Fleming and Caulder appealed. The Court of Appeals affirmed the grant of summary judgment to Caulder but reversed the grant to Rose, holding there was evidence in the record from which the jury could infer Rose acted with actual malice. *Fleming v. Rose,* 338 S.C. 524, 526 S.E.2d 732 (2000). Rose petitioned this Court for certiorari. The sole issue now before this Court is:

> Did the Court of Appeals err in reversing the trial court's grant of summary judgment to Rose, and holding the record contained sufficient evidence to send the question of whether Rose acted with actual malice to the jury?

LAW/ANALYSIS

Rose argues the Court of Appeals erred in reversing the trial court's grant of summary judgment as to the cause of action for libel. We agree.

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct.App. 1999). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and

[350 S.C. 494]

all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997).

In order to prove defamation, the complaining party must show: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm.[5] *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 506 S.E.2d 497 (1998) (Toal, J. concurring in result in a separate opinion) *(Holtzscheiter II)*. The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Id.*

A. Fault of the Publisher

Fleming, at all times at issue in this case, was a lieutenant serving as a highway patrol officer in the SCDPS. Therefore, he is a "public figure" for the purposes of defamation law. *State v. Bridgers*, 329 S.C. 11, 16, 495 S.E.2d 196, 198 (1997) ("Highway Patrol officers are `public officials.'"). When a public figure seeks to recover damages for a defamatory falsehood relating to his official conduct, the "fault" he must prove is that the statement was made with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964); *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000). Actual malice means the publisher of the statement had knowledge the statement was false or acted with reckless disregard as to whether or not it was false. *Id.* In addition, the public figure must demonstrate actual malice by "clear and convincing proof." *Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc.*, 738 F.Supp. 1499, 1506 (D.S.C.1989) (citing *New York Times v. Sulllivan); Miller v. City of W. Columbia*, 322 S.C. 224, 228, 471 S.E.2d 683, 685 (1996) ("To recover on a

[350 S.C. 495]

claim for defamation, the constitutional actual malice standard requires a public figure to prove by clear and convincing evidence that the defamatory falsehood was made with [actual malice]"); *Botchie v. O'Dowd*, 315 S.C. 126, 432 S.E.2d 458 (1993).[6]

Recently, in *Elder v. Gaffney Ledger*, this Court discussed the constitutional actual malice standard.[7]

> The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard for the truth, however, requires more than a departure from reasonable prudent conduct." There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubt as to the truth of his publication.* There must be evidence the defendant had a

"high degree of awareness of ... probable falsity."

Elder, 341 S.C. at 114, 533 S.E.2d at 902 (emphasis added by the Court) (citations omitted). Fleming has not provided clear and convincing proof that Rose "in fact entertained serious doubt as to the truth of the publication" or that Rose had a "high degree of awareness" that the press release was false.

The Court of Appeals found there was evidence in the record to indicate Rose acted with reckless disregard of the falsity of the press release. The opinion focused on two factors or "groups" of evidence to support their conclusion: (1) the testimony of Louis Fontana and Alton Morris who stated the normal policy was not to release the names of police

[350 S.C. 496]

officers involved in disciplinary proceedings; and (2) the fact that the investigation did not involve Fleming's direct supervisor, Caulder, and Caulder was not asked about whether Fleming passed on the information he received during his conversation with Cobb. *Fleming, supra.*

In regard to the first factor, the Court of Appeals should not have given such great weight to the fact that the names were not normally released. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), the United States Supreme Court held that a court could consider evidence that a newspaper departed from professional standards when deciding if the newspaper acted with actual malice. However, the Court clarified the statement by saying, "... courts must be careful not to place too much reliance on such factors...." *Id.* at 668, 109 S.Ct. at 2686. Furthermore, *Harte-Hanks* involved the *media publishers'* investigation and their failure to follow accepted media industry standards for investigating information provided by informants. The instant case involves a *police investigation*, and there is no evidence that the investigation conducted by Murphy and Ivey did not conform with police investigatory standards. Finally, although the names of officers involved in disciplinary action were normally not released, we cannot hold this constituted a violation of a "professional standard."

In regard to the second factor relied on by the Court of Appeals, we find the conclusion is not supported by the record. Caulder stated in his deposition that he was interviewed by Ivey. He stated that although he could not recall Ivey questioning him about the information Fleming conveyed to him about his conversation with Cobb, he could not say for certain Ivey had not asked him about the meeting. Ivey testified he interviewed Caulder, and Ivey's report to Rose contained a portion of the interview. Ivey stated Caulder told him Fleming reported Cobb was angry about the insurance money distributed after the accident and upset about the amount of community support another couple injured in the accident had received. Ivey also testified Caulder told him Fleming had not reported that Cobb had lied about the speed of the van.

[350 S.C. 497]

We find the facts relied on by the Court of Appeals' do not amount to "clear and convincing" proof that Rose acted with actual malice. The evidence shows Rose relied on the results and conclusions of an investigation conducted by two highly respected investigators. Rose testified he had no reason to doubt the investigation was not thorough, solid, correct, and truthful. Others involved in the press release testified "there was obviously a strong feeling that the information was correct." The evidence shows Rose relied completely on the investigation by

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Ivey and Murphy and had full faith in the veracity of their report. There is no evidence, much less clear and convincing evidence, that Rose had knowledge that the statement setting forth the findings of the investigation with regard to Fleming was false, if it was indeed false, or that he had serious doubts as to the truth of the report. Moreover, actual malice cannot be shown from Rose's failure to perform his own investigation because there were no obvious reasons to doubt the veracity of Ivey's report and no evidence that Rose was purposefully avoiding the truth.

B. Falsity and Publication

Because Fleming cannot show by clear and convincing proof that Rose acted with actual malice, there is no need for this Court to address the other elements of defamation.

CONCLUSION

Based on the above evidence, we hold the Court of Appeals erred in finding there was "clear and convincing" evidence in the record to support Fleming's claim that Rose acted with actual malice. Therefore, we REVERSE the decision of the Court of Appeals with respect to Rose, and reinstate the trial court's grant of summary judgment.

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

Notes:

1. From the record, it appears the main problem with the investigation involved the speed of the troopers' vehicle. Immediately after the accident, the driver of the van stated that although he was traveling at 70 miles per hour prior to the accident, at the time of the accident, he was driving 45 mph (the speed limit at the scene was 45). Apparently, the other troopers in the van confirmed the story at first. The initial accident report indicates the troopers' van was traveling 45 mph. However, the skid marks left at the scene, which were not examined until much later, indicated the van was traveling about 67 mph. Furthermore, at least one occupant of the van later changed his story to indicate the van was traveling around 70 mph. There was also some question as to whether the troopers had open containers of alcohol in the van.

2. These indictments were later dismissed.

3. Fleming has been adamant throughout that he never lied or misled Caulder or anyone else. He offered to take a lie detector test or truth serum, neither of which were ever administered.

4. Fleming repeatedly tried to contest the reprimand, but under SCDPS' policies, a written reprimand is not grievable.

5. As discussed below, Fleming was a public figure. Since the statement was a written defamation (libel) and concerned a public figure, Fleming is not required to show special harm or damages. *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 506 S.E.2d 497 (1998).

6. Fleming, in his brief to this Court, argues that at the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a "scintilla of evidence warranting a determination by a jury." (citing *Hill v. York County Sheriff's Dep't*, 313 S.C. 303, 437 S.E.2d 179 (Ct.App.1993) for support). In light of the federal and state cases on causes of action for libel brought by a public figure requiring "clear and convincing proof," we disagree with Fleming's characterization that he needs only to produce a scintilla of evidence that Rose acted with actual malice in order to defeat Rose's motion for summary judgment.

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7. This case was decided after the Court of Appeals issued its opinion in the instant case. However, it did not announce a new standard of proof. See *Miller v. City of West Columbia, supra.*

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348 S.E.2d 839
290 S.C. 194
Karl A. FOLKENS, Robert H. Moore, and Douglas D. Cooke, as Executors of the Estate of M. Murray McLendon, Jr., Appellants,
v.
J.W. HUNT, Jr., J.W. Hunt, R.L. Davis, W.R. Hunt, B.L. Davis, P.R. Johnson, Z.V. Smith and Michael S. Strange, individually and d/b/a J.W. Hunt & Co., a South Carolina General Partnership, Respondents.
No. 0782.
Court of Appeals of South Carolina.
Heard June 24, 1986.
Decided Aug. 25, 1986.

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Header ends here. [290 S.C. 196] Ronald E. Boston, of Turner, Padget, Graham & Laney, Columbia, R. Wayne Byrd, of Scott & Byrd, and Karl A. Folkens, Florence, for appellants.

Kirkman Finlay, Jr., Manton M. Grier and Walter W. Theus, Jr., of Boyd, Knowlton, Tate & Finlay, Columbia, for respondents.

GOOLSBY, Judge.

M. Murray McLendon, Jr., [1] individually and as a partner in Shodon Properties, brought this action alleging causes of action for accounting malpractice, fraud, intentional infliction of emotional distress, and a violation of the South Carolina Unfair Trade Practices Act. He brought this action against the partners of J.W. Hunt & Co., an accounting firm. The circuit court granted summary judgment to Hunt & Co. on all causes of action. McLendon appeals, contending that the grant of summary judgment on each cause of action was inappropriate and that the hearing judge abused his discretion in refusing to consider an affidavit submitted by him on the first day of a two-day hearing on Hunt &

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Co.'s summary judgment motion. We affirm in part and reverse in part.

Under South Carolina Circuit Court Rule 44(c), as under the new rule [see S.C.R.CIV.P. 56(c)], summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863 (1972). Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law. Abrams v. Wright, 262 S.C. 141, 202 S.E.2d 859 (1974). In ruling upon a motion for summary judgment, the hearing judge must construe all ambiguities, conclusions, and inferences arising in and from the evidence most strongly against the moving [290 S.C. 197] party. Tom Jenkins Realty, Inc. v. Hilton, 278 S.C. 624, 300 S.E.2d 594 (1983).

With these general principles in mind, we turn now to McLendon's contentions. As we do so, we view the evidence contained in the depositions, exhibits, and affidavits of record and all the reasonable inferences arising therefrom in the light most strongly against Hunt & Co.

In 1976, McLendon and Wellman formed a partnership called Shodon Properties. McLendon served as its managing partner.

The partnership agreement provided that "[a]ll capital contributions to the partnership have been and will hereafter be made by each partner in equal amounts." McLendon and

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Wellman both understood that Wellman's capital contribution would be cash in the amount of $310,000 and that McLendon's capital contribution would be a 391-acre tract of land known as Kelly Farms. Both parties considered these contributions to be of equal value.

In early 1979, Wellman told McLendon that he wanted Hunt & Co. to review the books of the partnership "due to the fact that [he] did not want to have any IRS problems ... and ... [he] wanted to make sure that everything was being handled in a businesslike fashion...." Hunt & Co. provided accounting services to Wellman personally and helped prepare Wellman's personal income tax returns for several years prior to 1979.

McLendon agreed, as a personal favor to Wellman, to have Hunt & Co. examine the partnership's books. McLendon made the arrangements to switch from the accounting firm that had previously handled the partnership's affairs.

On December 13, 1979, J.W. "Jim" Hunt, Jr., a staff accountant with Hunt & Co., went to the offices of Shodon Properties in Lake City to examine the partnership books. He remained there for two days.

On the first day Jim Hunt was in Lake City, he noticed a discrepancy between a listing of the partnership's property provided by McLendon and a listing of the property included on the partnership's general ledger land account. Kelly Farms appeared on the general ledger land account but not on the list furnished by McLendon.

Jim Hunt confronted McLendon about the discrepancy in [290 S.C. 198] the presence of McLendon's secretary, Brenda Matthews. Jim Hunt asserted that, while Wellman had contributed money to the partnership, McLendon had not made any capital contribution thereto. He pointed to McLendon's failure to deed Kelly Farms to Shodon Properties.

McLendon responded by saying that he and Wellman had agreed that Kelly Farms would represent his capital contribution.

Jim Hunt became verbally abusive and accused McLendon of owing hundreds of thousands of dollars in taxes and of filing fraudulent tax returns. He told McLendon that McLendon "could be looking at ... jail."

Jim Hunt's accusations upset and shocked McLendon. He immediately offered to deed Kelly Farms to the partnership. Jim Hunt, however, said it was too late.

In response to a telephone call from Wellman on the morning of December 15,

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1979, McLendon met later that day with Wellman, Bruce Hunt of Hunt & Co., and Jim Hunt in Columbia at Hunt & Co.'s office.

At the meeting, Hunt explained what he perceived to be the problem. Wellman expressed concern about McLendon's failure to make a capital contribution. The parties discussed the alternatives available to Wellman and McLendon and finally decided that Wellman should withdraw his capital contribution and that McLendon should pay Wellman interest thereon. Jim Hunt led the discussions and advised Wellman and McLendon regarding what they should do.

A letter agreement was later prepared on Jim Hunt's stationery. The agreement, dated February 1, 1980, was signed by both partners. It provided that the partnership would pay Wellman the sum of $440,149.32 on February 11, 1980. The amount included "the interest due to ... Wellman on the principal amounts of funds for which he had capital funds in excess of [McLendon's] capital accounts."

Shodon Properties thereafter distributed the money to Wellman pursuant to the letter agreement.

McLendon continued to work with Wellman; however, their relationship became increasingly strained. They later ended their partnership.

Before December, 1979, McLendon enjoyed good health. In 1981, however, he began to see a psychiatrist. He "started going to pieces." In fact, he withdrew from all activities and [290 S.C. 199] "just sat home." McLendon attributed this withdrawal and mental deterioration to the interruption of his relationship with Wellman and to the fact that he "[had] never, ever, been accused of being crooked or dishonest."

I.

McLendon contends that the hearing judge erred in granting summary judgment to Hunt & Co. on his cause of action for accounting malpractice. He argues there are genuine issues of material fact regarding whether Hunt & Co. rendered negligent accounting advice to him as a partner in Shodon Properties and whether this advice proximately caused disbursements to be made to Wellman from the partnership account.

In granting Hunt & Co. summary judgment on the cause of action alleging accounting malpractice, the hearing judge ruled that Hunt & Co. was obligated to raise the issue of whether Kelly Farms was contributed as an asset to the partnership, that it had raised the issue in a reasonable manner, and that, while an issue of fact existed concerning whether McLendon had contributed Kelly Farms to the partnership as a capital asset, the question of whether he made the contribution was immaterial.

As a further ground for granting summary judgment to Hunt & Co. on McLendon's accounting malpractice claim, the hearing judge found that there was no genuine issue of material fact as to the fact that, when the status of Kelly Farms was raised, Wellman was a fifty percent partner in Shodon Properties and, as a matter of partnership law, had the right to require that the equities of each partner reflect his fifty percent interest. He apparently held that Hunt & Co.'s advice concerning the status of Kelly Farms was not the proximate cause of the issuance of $440,149.32 to Wellman from the partnership account.

Generally, negligence claims are not susceptible of summary adjudication because of the many questions normally present in such cases concerning the reasonableness of a party's conduct, foreseeability, and proximate cause. 6-Pt. 2 Moore's Federal Practice p 56.17 at 56-946 (1985); see 65A C.J.S. Negligence § 251(1) at 778 (1966). Actionable negligence consists of a duty on the part of the defendant, a breach of that duty, and an injury to the [290 S.C. 200] plaintiff resulting from the defendant's breach. Winburn v. INA, 287 S.C. 435, 339 S.E.2d 142 (Ct.App.1985).

A public accountant who fails to perform in accordance with accepted professional standards may be liable in tort to his client for his negligence. 65 C.J.S. Negligence

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94 at 1052 (1966). The standard of care and the public accountant's departure therefrom must ordinarily be established by expert testimony. Kemmerlin v. Wingate, 274 S.C. 62, 261 S.E.2d 50 (1979).

The same standard of care applicable to other professionals who furnish skilled services for compensation is applicable to public accountants and that standard is reasonable care and competence. Id. In this context, reasonable care and competence means that public accountants "will render their services with that degree of skill, care,

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knowledge, and judgment usually possessed and exercised by members of that profession ... in accordance with accepted professional standards and in good faith without fraud or collusion." Annot., 92 A.L.R.3d 396, 400 (1979); cf. King v. Williams, 276 S.C. 478, 279 S.E.2d 618 (1981) (wherein the court held that the standard of care which a physician or dentist must meet is not limited to the practice or custom of the particular locality).

Specifically, a public accountant must exercise the care and competence reasonably expected of persons in his or her profession (1) to ascertain the facts on which his or her report is made; (2) to draw inferences from facts not stated in his or her report; and (3) to communicate the information so that it may be understood. C. Hawkins, Professional Negligence Liability of Public Accountants, 12 VAND.L.R. 797, 803 (1959).

In ascertaining the facts, the public accountant must make reasonable inquiry. See In re London & General Bank (No. 2), 2 Ch. 673, 682-83 (1895). In some circumstances, reasonable inquiry into the facts might well require the public accountant to ascertain the applicable law.

We do not agree with the hearing judge that the issue here is whether Hunt & Co. had an obligation to the partners to raise the question of whether Kelly Farms had been contributed as a capital asset to Shodon Properties; rather, we think the issue is simply whether Hunt & Co. committed professional malpractice in advising the partners [290 S.C. 201] that Kelly Farms was not a capital asset of the partnership without Hunt & Co. making reasonable inquiry in ascertaining the facts on which it based its advice.

We think a genuine issue of material fact exists as to whether Hunt & Co. breached its duty to render reasonable and competent services to McLendon as a partner of Shodon Properties regarding the status of Kelly Farms as a capital asset of the partnership. There is evidence that the opinion given by Jim Hunt, i.e., that Kelly Farms could not be considered an asset of Shodon Properties unless McLendon formally deeded it to the partnership, was incorrect and made without appropriate research and proper investigation.

Robert C. Crim, a Certified Public Accountant and the accountant who handled the books for Shodon Properties before Hunt & Co. undertook to examine them, testified at his deposition that he researched the question of capital contributions at the time he set up the partnership for Wellman and McLendon and that he understood from his research that property could be used "as a partner's capital contribution without transferring the title." His affidavit states that it was his "distinct understanding ... that Kelly Farms was ... McLendon's capital contribution to the Partnership", and that the property had a value of at least $310,000.

In response to a hypothetical question, Crim offered his expert opinion that the accusations Jim Hunt made against McLendon and the advice Jim Hunt gave McLendon were improper, given all Crim knew about the formation of Shodon Properties. The clear implication of Crim's testimony at deposition is that if Hunt & Co. had conducted an investigation into the origin of the partnership and had researched the law regarding partnership property it could have avoided reaching the erroneous conclusion that Kelly Farms had not been contributed by McLendon to the partnership.

The record before us contains numerous indications that Jim Hunt failed to make

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reasonable inquiry in ascertaining the facts concerning the status of Kelly Farms as a partnership asset.

For instance, Crim understood that all income produced and expenses incurred by Kelly Farms were to be transferred[290 S.C. 202] to Shodon Properties. He knew, and indeed the public records at the Williamsburg County Court House reflected, that Kelly Farms was used as collateral for a Federal Land Bank loan made to Shodon Properties. Hunt & Co. never inquired of Crim about these matters and about Crim's understanding of the intention of the partners concerning Kelly Farms.

Jim Hunt looked to record title and little else, if anything, in reaching his conclusion, even though it is generally held that whether particular property constitutes partnership property depends upon the intention of the partners. Klingstein v. Rockingham National Bank of Harrisonburg, 165 Va. 275, 182 S.E. 115 (1935). He was required to do more under the circumstances.

Regarding the hearing judge's apparent holding that Hunt & Co.'s advice concerning the status of Kelly Farms was not the proximate cause of the distribution of $440,149.32 to Wellman from the partnership account because Wellman "had a right to require that the equities of each partner in Shodon Properties reflect his fifty percent interest," this holding, as Hunt & Co. recognizes in its brief, is premised upon the assertion that Hunt had the duty to raise the issue of Kelly Farms' status as a partnership asset.

This holding, however, completely ignores the fact that Hunt & Co. had the duty to do more than that. It also had the duty, as we pointed out above, to make proper inquiry. Whether the partners would have executed the February 1, 1980 agreement and would have distributed nearly a half million dollars to Wellman but for the advice of Hunt & Co., like most questions of proximate cause [see Davenport v. Walker, 280 S.C. 588, 313 S.E.2d 354 (Ct.App.1984)], presents an issue of fact for a jury to determine.

In fact, McLendon testified that he entered into the February 1, 1980 agreement only because of Hunt & Co.'s advice and accusations. He felt he had no other choice.

Furthermore, Hunt & Co. offered no evidence that Wellman would have insisted, as he had a right to do, on a return of his capital investment and would have demanded, as he may or may not have had a right to do, that interest be paid thereon were it not for Hunt & Co.'s advice.

The hearing judge, therefore, improperly granted Hunt & Co. summary judgment on McLendon's cause of action alleging accounting malpractice.

[290 S.C. 203] II.

McLendon next argues that the hearing judge erred in granting summary judgment to Hunt & Co. on his cause of action for intentional infliction of emotional distress.

The hearing judge granted Hunt & Co. summary judgment on the cause of action alleging intentional infliction of emotional distress because he did not view Jim Hunt's conduct as meeting the standard of outrageousness that the law requires.

The tort of intentional infliction of emotional distress, or outrage, was first recognized in South Carolina in Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981). In order to recover on a cause of action alleging outrage, the plaintiff must show that

(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct ...; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as 'atrocious, and utterly intolerable in a civilized community' ...; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the

emotional distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

276 S.C. at 162, 276 S.E.2d at 778.

The question of whether a defendant's conduct may be reasonably regarded

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as so extreme and outrageous as to permit recovery is one for the court to determine in the first instance. Todd v. South Carolina Farm Bureau Mutual Insurance Co., 283 S.C. 155, 321 S.E.2d 602 (Ct.App.1984), quashed in part on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985).

Although "[c]onduct growing out of a business relationship may be so outrageous and shocking as to be actionable" [Ford v. Hutson, 276 S.C. at 166, 276 S.E.2d at 780], not all conduct involving personal interaction and causing emotional distress in a business setting may serve as a basis for an action alleging outrage. Save Charleston Foundation v. Murray, 286 S.C. 170, 333 S.E.2d 60 (Ct.App.1985). This is particularly true where the law affords another means of redress. Id.; Todd v. South Carolina Farm [290 S.C. 204] Bureau Mutual Insurance Co., supra.

We cannot say, when we view the evidence and all its inferences in the light most favorable to McLendon, that Jim Hunt's conduct here "was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and [was] 'atrocious, and utterly intolerable in a civilized community.' " Ford v. Hutson, 276 S.C. at 162, 276 S.E.2d at 778.

Moreover, Jim Hunt's conduct did not involve excessive self-help in either asserting a legal right or avoiding a legal obligation that arose out of their pre-existing legal relationship, one of three factors often present where liability for intentional infliction of emotional distress has been found. See Todd v. South Carolina Farm Bureau Mutual Insurance Co., 283 S.C. at 169, 321 S.E.2d at 610-11; cf. Bell v. Dixie Furniture Company, Inc., 285 S.C. 263, 329 S.E.2d 431 (1985) (a case where a creditor threatened a debtor in an attempt to have the debtor pay unawarded court costs in addition to a judgment obtained by the creditor in the magistrate's court).

At most, Jim Hunt defamed McLendon by making false accusations of criminal conduct. Such conduct, obviously, can give rise to a claim for slander, the usual remedy to be employed against one who publishes a falsehood about another person. Cf. Smith v. Phoenix Furniture Company, 339 F.Supp. 969 (D.S.C.1972) (words are actionable per se in South Carolina when they falsely or maliciously charge a person with the commission of a crime or distinctly imply that one has committed a crime).

We do not ignore Hensley v. Heavrin, 277 S.C. 86, 282 S.E.2d 854 (1981), a case, like the one here, in which a professional allegedly gave incorrect advice to a client and the client allegedly suffered severe emotional distress as a result. There, the complaint alleged that a physician caused a patient to suffer "extreme anguish and mental distress" as a result of being incorrectly and, according to the record of the case, recklessly advised that she had a venereal disease. Unlike this case, however, Hensley came before the Supreme Court on an order overruling a demurrer to a complaint and not on an order granting summary judgment where the court went beyond the mere allegations contained in the pleadings. Cf. Gilmore v. Ivey, 290 S.C.App. 53, 348 S.E.2d[290 S.C. 205] 180 (Ct.App.1986) (an outrage action in which the grant of summary judgment in the defendant chiropractor's favor was reversed and the case was remanded to circuit court where a material allegation of the complaint was not controverted by the deposition and exhibit relied on by the chiropractor).

The hearing judge, therefore, properly granted Hunt & Co. summary judgment on McLendon's cause of action alleging intentional infliction of emotional distress.

III.

During oral argument before this court, McLendon abandoned his appeal from the hearing judge's grant of summary judgment to Hunt & Co. on his cause of action for fraud. We therefore do not address McLendon's contentions concerning this cause of action.

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IV.

The hearing judge ruled that McLendon's cause of action for violation of the South Carolina Unfair Trade Practices Act was barred by the three-year statute of limitations prescribed by the Act. See Code of Laws of South Carolina § 39-5-150 (1976). McLendon appeals this ruling.

McLendon does not appeal, however, the hearing judge's alternative holding that no cause of action was stated under the Act.

An alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal. Kolb v. Cook, 284 S.C. 598, 327 S.E.2d 379 (Ct.App.1985). Thus, the hearing judge's ruling on this issue is the law of the case and we decline to address the statute of limitations question. See Cooper v. Tindall, 267 S.C. 196, 226 S.E.2d 888 (1976).

V.

Finally, McLendon argues that the hearing judge abused his discretion in refusing to consider an affidavit from Wellman that McLendon offered on the first day of a two-day hearing. The hearing judge refused to consider the affidavit because it was not timely served on Hunt & Co.

[290 S.C. 206] Rule 44(c) of the Circuit Court Rules provides that an adverse party may serve opposing affidavits "prior to the day of hearing." McLendon contends that, because the hearing lasted two days, his service of the affidavit on the first day of the hearing was timely and the hearing judge erred in refusing to consider it. This contention lacks merit.

The fact that the hearing on the motion for summary judgment ran over into another day was of no consequence and did not constitute a fortuitous circumstance allowing for the service of an otherwise late affidavit. To warrant consideration, an affidavit must be served on the opposing party no later than the day before the start of the hearing. Cf. State v. Hamilton, 628 S.W.2d 742 (Tenn.Cr.App.1981) (the term "prior to trial," in a rule requiring that a motion to suppress be made prior to trial, means sometime earlier than the day of the trial).

The hearing judge, therefore, properly refused to consider Wellman's affidavit.

AFFIRMED IN PART AND REVERSED IN PART.

GARDNER, J., and MENDENHALL, Acting J., concur.

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1 McLendon died during the pendency of this appeal. The executors of his estate have been substituted as the named appellants in this action.

406 S.C. 37
748 S.E.2d 625

Ralph A. FRONEBERGER and Anna M. Froneberger, Appellants,

v.

Kirkland Dale SMITH, Janel Elizabeth Smith, Euro Mortgage Bankers, Inc., and Countrywide Bank, FSB, Defendants,

Of Whom Euro Mortgage Bankers, Inc. is the Respondent.

Appellate Case No. 2011–191306.
No. 5168.

Court of Appeals of South Carolina.

Heard Oct. 3, 2012.
Decided Aug. 28, 2013.

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[748 S.E.2d 626]

Lucy L. McDow, of Rock Hill, for Appellant.

Walter Keith Martens, of Hamilton Martens & Ballou, LLC, of Rock Hill, for Respondent.

WILLIAMS, J.

[406 S.C. 41]Ralph A. Froneberger and Anna M. Froneberger (collectively, the Fronebergers) appeal the circuit court's order granting summary judgment in favor of Euro Mortgage Bankers, Inc. (Euro) on all but one of their causes of action. The Fronebergers argue the circuit court erred (1) in finding that Kirkland Smith was not Euro's actual or apparent agent, (2) in finding that Janel Smith's actions in furtherance of her husband's investment scheme were outside of her scope of employment, and (3) in improperly dismissing two of their causes of action

[748 S.E.2d 627]

against Euro that did not relate to the alleged agency. We agree and reverse.

FACTS

The Fronebergers are a married couple who own a home in Rock Hill, South Carolina. Euro is a New York corporation with its principal place of business in Melville, New York. From 2007 through 2009, Euro was licensed as a mortgage loan broker in South Carolina and employed Janel Smith as a mortgage loan officer. During this time, Mrs. Smith was the sole employee of Euro for both its North Carolina and South Carolina offices. Mrs. Smith is married to Kirkland Smith.

Until her retirement in 2008, Mrs. Froneberger was a counselor for the Catawba Mental Health Center. In March 2008, Mr. Smith was referred to Catawba for a mental health evaluation, and Mrs. Froneberger was assigned to conduct his evaluation. During this evaluation, Mr. Smith engaged Mrs. Froneberger in a discussion about her contemplated retirement. Mr. Smith explained that he was a mortgage broker for Euro and could provide Mrs. Froneberger with an investment plan to fund her retirement. During this discussion, Mr. Smith provided Mrs. Froneberger with a business card, which identified him as the branch manager for Euro's Charlotte office.

That evening, Mrs. Froneberger told her husband about her discussion with Mr. Smith and gave him Mr. Smith's business card. Mr. Froneberger then contacted Mr. Smith and made an appointment to meet Mr. Smith in Charlotte, North Carolina. On March 27, 2008, the Fronebergers traveled to [406 S.C. 42]Charlotte and met Mr. Smith at an office located in a high-rise building on Tryon Street.

At this meeting, Mr. Smith suggested an investment plan that involved the Fronebergers taking out an equity loan from Euro against their home in Rock Hill, "so that

[they] could use that money to make some investments" for Mrs. Froneberger's retirement. Mr. Smith suggested that the Fronebergers could invest their loan proceeds with a large investment bank, such as "Merrill Lynch or AIG." The investment plan was premised on the assumption that the returns from their investment portfolio would be greater than the cost of the interest on the mortgage, and the excess could be used for Mrs. Froneberger's living expenses during retirement. The Fronebergers did not make any commitments at this March 27 meeting, indicating to Mr. Smith that they needed to talk about his recommendations before making a decision.

The Fronebergers returned to Charlotte the following day and decided to go forward by applying for a mortgage refinancing through Euro. Mr. Smith and the Fronebergers were the only people present at this second meeting. Mr. Smith had the Fronebergers complete a Uniform Residential Loan Application. This form was later signed by Mrs. Smith as "interviewer" and submitted to Euro's underwriting department in New York. On April 10, 2008, Euro approved the loan application, and Mr. Smith contacted the Fronebergers to convey Euro's acceptance of their application.

On April 11, 2008, both Mr. and Mrs. Smith accompanied the Fronebergers to a meeting with a Smith Barney investment advisor to determine if Smith Barney would invest and manage the funds secured from the refinance loan. Upon arriving at Smith Barney and prior to meeting with a representative, Mrs. Smith excused herself to care for the Smiths' [406 S.C. 43]child and did not return. Mr. Smith and the Fronebergers then met with a Smith Barney representative. This representative informed the Fronebergers that Smith Barney did not "do investments with equity home loans." The Fronebergers and Mr. Smith then returned to Mr. Smith's office.

[748 S.E.2d 628]

On the way back to the office, Mr. Smith informed the Fronebergers that AIG and Merrill Lynch no longer had programs that would invest mortgage loan proceeds for clients. Immediately following this, Mr. Smith told the Fronebergers that he believed he could manage their money "about as well as" an investment bank. Mr. Smith then told the Fronebergers about several companies that he owned or operated, including his family's trucking business. During this discussion, Mr. Smith would "refer back" to Euro, but never directly told the Fronebergers that Euro had any involvement with the proposed investments.

Ultimately, the Fronebergers decided to go through with Mr. Smith's proposed investment plan, and on April 18, 2008, the Fronebergers withdrew $20,000 from their savings account and delivered these funds to Mr. Smith to invest in the trucking company. Upon receipt of these funds, Mr. Smith executed a promissory note, promising to pay the Fronebergers "the sum of twenty thousand 00/100 dollars ($20,000.00) together with interest thereon in the sum of 5% of principal one thousand dollars ($1,000.00) per month." The note identified "Kirkland Smith" as the "Borrower" and "Ralph A. Froneberger & Martina A. Froneberger" as the "Lender."

Later that day, the refinance loan from Euro was closed at a law office in Rock Hill. Both Mrs. and Mr. Smith went to the closing. However, Mr. Smith stayed in the car with the Smiths' infant child during the closing. Mr. Froneberger testified that Mrs. Smith helped with the closing, but the Fronebergers "thought she was just being helpful [and] didn't know she had anything to do with the business." After paying the closing fees and the $1,083.43 remaining balance on their previous mortgage, the closing yielded $128,432.45.

On May 7, 2008, the Fronebergers gave Mr. Smith a second payment of $20,000. Again, on June 18, 2008, the Fronebergers gave Mr. Smith a third payment for $20,000. Both of these additional payments were to be invested in Mr. Smith's [406 S.C. 44]family owned trucking business. Following each of these additional payments, Mr. Smith executed additional promissory notes. Initially, the Fronebergers received the promised payments from Mr. Smith as returns on their investments. However, beginning in July 2008, the checks from Mr. Smith began to bounce for having "insufficient funds." Shortly thereafter, the payments stopped all together. Despite repeated efforts, the Fronebergers were unable to get Mr. Smith to make further payments or return the money they had invested with him.

PROCEDURAL HISTORY

As a result of their transactions with the Smiths, the Fronebergers brought suit against Mr. Smith, Mrs. Smith, Euro, and Bank of America,[2] as successor in interest to Euro's mortgage, on June 16, 2009. The Fronebergers filed an amended complaint on December 14, 2009. The Fronebergers sought recovery against the Smiths and Euro jointly for fraud, negligent misrepresentation, conversion, and breach of the South Carolina Unfair Trade Practices Act. The Fronebergers also sought recovery against Euro for negligent hiring and retention of the Smiths, for failure to comply with the attorney preference statute as required by section 37-10-102(a) of the South Carolina Code (2002), for rescission of the mortgage transaction based on common-law fraud, and for rescission or reformation of the mortgage under the South Carolina Consumer Protection Code.

Euro timely answered both the original complaint and the amended complaint. The Smiths, who were pro se, each filed an answer to the original complaint, but they failed to timely answer the amended complaint.[3] In their answers to the Fronebergers' complaints, Mr. and Mrs. Smith admitted Mr. Smith was an employee of Euro.[4] On February

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2, 2010, the [406 S.C. 45]circuit court found the Smiths in default for their failure to respond to the amended complaint.

On November 2, 2010, Euro filed a motion for summary judgment with the circuit court. In support of this motion, Euro presented an affidavit from Lisa Vitale, Euro's president and sole stock holder, which stated that (1) Euro did not permit its employees to provide investment advice; (2) Mrs. Smith was employed as a loan originator from mid-2007 through mid-2009; and (3) Euro never employed Mr. Smith or authorized him to hold himself out as its agent. On December 16, 2010, a hearing was held before the circuit court to address this motion. On December 28, 2010, the circuit court granted the motion for summary judgment on all of the Fronebergers' causes of action against Euro, except their attorney preference claim, finding that (1) Euro was not liable for the acts of Mr. Smith under a theory of either actual or apparent authority; (2) Euro was not liable for the actions of Mrs. Smith because any actions relating to her husband's solicitation of money were outside the scope of her authority; and (3) the Fronebergers' damages arose solely from their loans to Mr. Smith and were unrelated to the mortgage loan transaction with Euro.

On January 12, 2011, the Fronebergers filed a Rule 59(e), SCRCP, motion for reconsideration, arguing that (1) sufficient evidence had been presented to preclude summary judgment as to the issues of actual or apparent agency; and (2) Euro's [406 S.C. 46]motion for summary judgment solely addressed agency and therefore should not have affected the Fronebergers' causes of

action for rescission and negligent hiring and retention. On January 20, 2011, a second hearing was held before the circuit court to address the Fronebergers' motion to reconsider. On March 10, 2011, the circuit court issued a Form 4 order denying the motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* at 122, 708 S.E.2d at 769;*see also*Rule 56(c), SCRCP. "To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." *McLaughlin v. Williams*, 379 S.C. 451, 455–56, 665 S.E.2d 667, 670 (Ct.App.2008). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid–South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct.App.2005). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, ... the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* (citation omitted).

[748 S.E.2d 630]

LAW/ANALYSISI. Agency

The Fronebergers first contend that the circuit court erred in granting summary judgment because sufficient evidence was presented to create genuine issues of material fact regarding the existence of an actual or apparent agency between [406 S.C. 47]Mr. Smith and Euro. Additionally, the Fronebergers argue that the circuit court erred in granting summary judgment based on its finding that the actions of Mrs. Smith were outside the scope of her employment. While we agree with the circuit court's treatment of the alleged apparent agency between Mr. Smith and Euro, we find sufficient evidence exists to withstand summary judgment as to the issue of an actual agency relationship between Mr. Smith and Euro. Further, we find that sufficient evidence exists in the record to withstand summary judgment on the question of whether Mrs. Smith's actions were within the scope of her employment.

A. Mr. Smith's Apparent Agency

Under South Carolina law, "[t]he elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). "Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244–45, 473 S.E.2d 865, 868 (Ct.App.1996). "Either the principal must intend to cause the third person to believe

that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* at 245, 473 S.E.2d at 868. "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.*

The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary inaction. *See Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct.App.1986) (discussing the elements of apparent agency and finding the first element may be established "by either affirmative conduct or conscious and voluntary inaction"); *Graves*, 306 S.C. at 63, 409 S.E.2d at 771 (the first element of apparent agency requires "that the purported principal *consciously or impliedly represented* another [406 S.C. 48]to be his agent." (emphasis added)). Under the first of these two scenarios, the principal makes direct representations to a third party that another has authority to act on his behalf. *See Frasier*, 323 S.C. at 244, 473 S.E.2d at 868 (apparent agency is created by "written or spoken words or any other conduct of the principal" showing consent to allow another to act on a principal's behalf). Under the second, the principal implies authority by passively permitting another to appear to third parties to have authority to act on his behalf. *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct.App.2000) ("Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf."); *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) ("[A]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal.").

In the instant case, we hold that the Fronebergers have failed to satisfy the first element of apparent agency, which requires "that the purported principal *consciously or impliedly represent* [ ] another to be his agent." *Graves*, 306 S.C. at 63, 409 S.E.2d at 771 (emphasis added).

There is no evidence that Euro, through conduct or manifestations, ever made any direct representation that Mr. Smith was an employee or agent of its company. The Fronebergers stated in their deposition testimony that no one "other than Kirkland Smith ever [told them] that he was employed by Euro Mortgage Bankers." The Fronebergers

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did not testify to having any contact with Euro's New York office and had little contact with Mrs. Smith. In fact, the Fronebergers testified that they did not even realize Mrs. Smith was an employee of Euro.[5]

Consequently, the only remaining way for the Fronebergers to establish the first element of apparent agency is to demonstrate [406 S.C. 49]Euro knowingly permitted Mr. Smith to appear to others to be its agent. *See R & G Constr.*, 343 S.C. at 433, 540 S.E.2d at 118 (requiring "acts or conduct" demonstrating a principal "has knowingly ... permitted another to appear to be his agent"). If Euro knew Mr. Smith was holding himself out as its Charlotte office branch manager, was using its office space, and was handing out business cards containing its logo but consciously decided not to stop or correct this behavior, then that inaction could serve as conduct to satisfy the first element. However, we find that the Fronebergers have failed to demonstrate evidence indicating Euro knew Mr. Smith was acting in this manner. Without knowledge of Mr. Smith's conduct, Euro cannot have permitted this behavior with conscious inaction. *See Fernander*, 278 S.C. at 143, 293 S.E.2d at 426 ([A]gency may be ... proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority *with the knowledge of the alleged*

principal." (emphasis added)). Accordingly, the record contains no evidence that Euro, by any acts or conduct, knowingly caused or passively permitted Mr. Smith to appear to be its agent.

Because this first element fails, we need not consider the remaining elements required to prove apparent agency. We find there is no genuine issue of material fact regarding an apparent agency relationship between Mr. Smith and Euro. Accordingly, the circuit court properly found Euro was entitled to judgment as a matter of law on the apparent agency issue.

B. Mr. Smith's Actual Agency

Although we agree with the circuit court's treatment of the apparent agency issue, we find that there is evidence in the record creating a genuine issue regarding an actual agency relationship between Euro and Mr. Smith, sufficient to survive a motion for summary judgment.

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." Restatement (Third) of Agency § 1.01 (2006). Generally, "[a]gency is a question of fact." [406 S.C. 50]*Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct.App.1984). " [Q]uestions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship." *Fernander v. Thigpen*, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (internal quotation marks omitted). "If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury[,]" and the grant of summary judgment is inappropriate. *Gathers*, 282 S.C. at 226, 317 S.E.2d at 752.

When ruling on a motion for summary judgment, the circuit court should examine the "pleadings, depositions, answers to interrogatories, and admissions on file, together with [any] affidavits" to determine if "there is no genuine issue as to any material fact." Rule 56(c), SCRCP; *see also Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). In the case at hand, the circuit court granted summary judgment to Euro based on its finding that it was "undisputed that Mr. Smith was never an employee of Euro." However, Mr. and Mrs. Smith both indicate in their answers to the Fronebergers' complaints that Mr. Smith was in fact an employee of Euro. These admissions in the Smiths' answers are contrary to Euro's president's affidavit submitted with Euro's motion for summary judgment.

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It is well settled in South Carolina that a party "may not rest upon the mere allegations or denials of his pleading" to defeat a motion for summary judgment. Rule 56(e), SCRCP; *see also Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct.App.1994) (stating "an adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion"). However, in the instant case, the Fronebergers are not merely relying on the allegations of their own pleadings. Instead, they point to the pleadings provided by adverse parties containing admissions that indicate the existence of an agency relationship between Mr. Smith and Euro.

The dissent argues that the Fronebergers failed to present any evidence of an agency relationship because the Smiths' answers "contain only the bare conclusion that [Mr. Smith] was an agent" while failing to provide evidence to support this conclusion. We disagree. Rule 56 of the South Carolina Rules of Civil Procedure requires the circuit court to consider [406 S.C. 51]the submitted

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pleadings, along with depositions, answers to interrogatories, admissions, and affidavits, when ruling on summary judgment. The Fronebergers directed the circuit court's attention to the Smiths' pleadings as evidence of an actual agency in both their return to summary judgment and their motion for reconsideration. We believe the admissions in the Smiths' pleadings satisfy the mere scintilla of evidence required to withstand summary judgment. [9] Accordingly, the issue of actual agency is a question for the jury. *See Gathers*, 282 S.C. at 226, 317 S.E.2d at 752 ("If there are *any* facts tending to prove the relationship of agency, it then becomes a question for the jury." (emphasis added)); *Fernander*, 278 S.C. at 142, 293 S.E.2d at 425 ("[Q]uestions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship." (internal quotation marks omitted)).

In reaching this conclusion, we do not suggest that the Fronebergers have presented sufficient evidence to establish an agency relationship at trial. Ultimately, evidence may demonstrate that Euro and Mr. Smith never entered into an agency relationship. However, given the minimal amount of discovery the parties had conducted at the time summary judgment was granted, we find the Smiths' answers created a mere scintilla of evidence that precluded summary judgment.

Utilizing the mere scintilla of evidence burden, the inconsistencies among the Smiths' answers create a genuine issue of [406 S.C. 52]material fact that precludes summary judgment.[8] Accordingly, we find the circuit court erred in concluding that the Fronebergers could not proceed under a theory of actual agency.

C. Mrs. Smith's Scope of Employment

The Fronebergers also contend that the circuit court erred in granting summary judgment based upon its finding that the actions of Mrs. Smith in furtherance of her husband's investment scheme were outside the scope of her employment with Euro.

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"The modern doctrine of *respondeat superior* makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct.App.1986). "An act falls within the scope of the servant's employment if it was reasonably necessary to accomplish the purpose of the servant's employment, and it was done in furtherance of the master's business." *Wade v. Berkeley Cnty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct.App.1998). Accordingly, "the master is liable for the torts of his servant even when the servant acts against the express instructions of his master, so long as the servant acts to further the master's business." *Id.* "What is within the scope of employment may be determined by implication from the circumstances of the case." *Id.* "Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the question be submitted to the jury." *Id.*

In the instant case, the proper question for the circuit court was whether Mrs. Smith's acts facilitating her husband's [406 S.C. 53]investment scheme were: (1) in furtherance of Euro's business and (2) reasonably necessary to accomplish the purpose of her employment. We believe that several of Mrs. Smith's actions, particularly allowing her husband access to Euro's office and signing the loan application that was submitted to Euro's underwriting office, served to further her master's business of lending money and obtaining mortgages and were reasonably necessary to accomplish the purpose of her employment. These actions were also integral in facilitating the

transaction between the Fronebergers and her husband.

The dissent argues that the circuit court properly held that the Fronebergers' damages arose solely from the investment transactions with Mr. Smith and were unconnected to the mortgage loan from Euro. However, there is evidence in the record that shows these two transactions were closely related. The Fronebergers' testified at their depositions that their sole purpose in obtaining this mortgage was to fund the investment plan provided by Mr. Smith. This contention is supported by the fact that their prior mortgage with Wells Fargo only had a remaining balance of $1,086.43 at the time they closed on the mortgage. Accordingly, we find the circuit court inappropriately concluded that Mr. Smith's investment scheme and the mortgage loan from Euro were separate and unrelated. Instead, under *Wade*, we find this determination was a question for the jury. 330 S.C. at 319, 498 S.E.2d at 688 ("Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the question be submitted to the jury.").

Based on the foregoing, we find that there are genuine questions of material fact regarding whether the actions of Mrs. Smith were within the scope of her employment that are sufficient to withstand summary judgment. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 (requiring only "a mere scintilla of evidence" to withstand summary judgment in cases applying the preponderance of the evidence burden of proof); *Wade*, 330 S.C. at 319, 498 S.E.2d at 688 ("Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the [406 S.C. 54]question be submitted to the jury."). Therefore, we find that the circuit court erred in granting summary judgment.

Due to the circuit court's errors regarding the grant of summary judgment on the existence of an actual agency with Mr. Smith and the scope of Mrs. Smith's employment, we reverse the circuit court's grant of summary judgment on the Fronebergers' causes of action for fraud, negligent misrepresentation, conversion, and breach of the South Carolina Unfair Trade Practices Act.

II. Negligent Hiring and Consumer Protection Code Claims

The Fronebergers additionally argue that the circuit court improperly dismissed

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their causes of action for (1) negligent hiring and retention and (2) rescission based upon unconscionability under Section 37-10-105 the South Carolina Code (2002) (the "Consumer Protection Code") because the circuit court provided no reasoning for dismissing these claims. Furthermore, because these causes of action are separate and distinct from agency, the Fronebergers contend that the court's ruling on agency was not dispositive on the viability of their negligent hiring and Consumer Protection Code claims. We agree.

"[A circuit] court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review." *Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 237, 536 S.E.2d 86, 88 (Ct.App.2000). "Such an order must include those facts which the circuit court finds relevant, determinative of the issues and undisputed." *Id.* at 237-38, 536 S.E.2d at 88-89 (internal quotation marks omitted). The order should also "provide clear notice to all parties and the reviewing court as to the rationale applied in granting ... summary judgment." *Id.* at 38, 536 S.E.2d at 89 (alteration in original) (internal quotation marks omitted).

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In this case, Euro moved for summary judgment on all of the Fronebergers' causes of action. However, their memorandum in support of summary judgment focuses on the nonexistence of an agency relationship between Mr. Smith and Euro. At the hearing for this motion, the Fronebergers argued to the circuit court that at least one of their causes of actions did [406 S.C. 55]not depend on the finding of an agency relationship.[9] The circuit court's order granting summary judgment on six of the seven causes of action brought by the Fronebergers does not contain specific findings or reasoning for the dismissal of any particular cause of action. Instead, the order, under a section entitled "Discussion," generally finds that there was no agency relationship between Mr. Smith and Euro and that the Fronebergers' losses arose solely from their loans to Mr. Smith and were unrelated to their mortgage transaction with Euro. With their motion for reconsideration, the Fronebergers argued that the order failed to address all of their causes of action, specifically pointing out the negligent hiring and consumer protection code claims. The circuit court denied the motion for reconsideration in a Form 4 order.

We find the circuit court has failed to provide adequate reasoning for its grant of summary judgment as to the Fronebergers' claims for negligent hiring and rescission. *See Bowen,* 342 S.C. at 237, 536 S.E.2d at 88 (stating that the circuit court "must set out facts and accompanying legal analysis" to support its grant for summary judgment). The circuit court did not discuss either the undisputed material facts or applicable law which support its grant of summary judgment in relation to Mrs. Smith's hiring and retention or the alleged unconscionable inducement regarding their loan. Neither of these claims turn on the existence of an agency relationship between Mr. Smith and Euro. The circuit court failed to provide either further findings of fact relating to these claims or more defined rationale explaining the grant of summary judgment. We therefore vacate the circuit court's grant of summary judgment for the Fronebergers' claims for negligent hiring and violation of the Consumer Protection Code and remand the matter to the circuit court for an order "identifying the facts and accompanying legal analysis on which it relied in granting Defendants' summary judgment motion" as to these two causes of action.

CONCLUSION

The Fronebergers have presented at least a mere scintilla of evidence that there was an actual agency relationship [406 S.C. 56]between Mr. Smith and Euro. Further, there are genuine questions of fact regarding whether the actions of Mrs. Smith were within the scope of her employment. Hence, the grant of summary judgment based on the court's findings that there was no agency relationship with Mr. Smith and that the acts of Mrs. Smith were outside the scope of her employment was improper. Additionally, the circuit court failed to provide adequate reasoning for its

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dismissal of the Fronebergers' claims for negligent hiring and rescission under the Consumer Protection Code. Therefore, we reverse the grant of summary judgment on the Fronebergers' causes of action for fraud, negligent misrepresentation, conversion, and breach of the South Carolina Unfair Trade Practices Act. Further, we vacate the circuit court's grant of summary judgment for the Fronebergers' claims for negligent hiring and violation of the Consumer Protection Code and remand the matter to the circuit court for an order identifying the facts and accompanying legal analysis on which it relied in granting Euro's motion for summary judgment as to these two causes of action.

Based on the foregoing, the circuit court's order is

REVERSED IN PART and VACATED IN PART and REMANDED.

PIEPER, J., concurs.

FEW, C.J., dissenting.

Kirkland and Janel Smith fraudulently and tortiously misappropriated the Fronebergers' retirement funds. There is no evidence in this record, however, that in doing so either of them acted as an agent of Euro Mortgage Bankers, Inc. Therefore, I would affirm the circuit court's order granting summary judgment to Euro.

A. Apparent Authority

The majority correctly concludes there is no evidence of agency through apparent authority. In reaching this correct conclusion, however, the majority has confused the elements of apparent authority and has misstated the first element.

"The basis of apparent authority is representations made by the principal to the third party and reliance by the third party [406 S.C. 57]on those representations." *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To analyze the existence of apparent authority, a court must focus on "the relationship between ... the principal and the third party." *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642–43, 598 S.E.2d 717, 721 (Ct.App.2004).

Based upon these general principles, our courts have required three elements be proven to establish apparent authority: "(1) that the purported principal consciously or impliedly represented another to be his agent: (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." 359 S.C. at 643, 598 S.E.2d at 721 (quoting *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991)); *see also Simmons v. Tuomey Reg'l. Med. Ctr.*, 341 S.C. 32, 46, 533 S.E.2d 312, 319 (2000) (listing the three elements).

In this case, the circuit court correctly focused on the relationship between the principal and the third party and determined that because there was no evidence Euro made any representation to the Fronebergers, they failed to satisfy the first element of apparent authority. The majority, however, has incorrectly analyzed the circuit court's ruling by repeating language our courts have used to explain and analyze the second element. The majority has used that language as support for its incorrect conclusions that "inaction could serve as conduct," and thus that the first element can be satisfied by evidence of "conscious and voluntary inaction" or that "the principal ... passively permit[ed] another to appear to third parties to have authority to act on his behalf." The majority is incorrect because the first element cannot be satisfied by inaction. Rather, to survive a motion for summary judgment as to the first element of apparent authority, the plaintiff must produce evidence of some action by the purported principal through which the principal represented to the third party that the alleged agent had authority to act on the principal's behalf.

The majority cites *Watkins v. Mobil Oil Corporation*, 291 S.C. 62, 352 S.E.2d 284 (Ct.App.1986), in support of its argument [406 S.C. 58]that the first element can be proven by "conscious and voluntary inaction" by Euro. For two reasons, I believe the majority incorrectly relies on *Watkins*. First, *Watkins* specifically states that apparent authority *cannot*

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be proven by "conscious and voluntary inaction." 291 S.C. at 67, 352 S.E.2d at 287 (stating "it is not enough simply to prove ... conscious and voluntary inaction"). Second, *Watkins* relates only to the second element of apparent authority, not the first. In framing our explanation that no evidence of apparent authority existed, we limited the discussion to the second element, specifically stating, "only the factor of reliance warrants discussion...." *Id.* Because *Watkins* specifically states apparent authority *cannot* be proven by inaction, and because the analysis in *Watkins* relates only to the second element of apparent authority, the majority's reliance on *Watkins* is misplaced.

I believe the majority has incorrectly interpreted the word "impliedly." In numerous cases, our courts have stated the first element may be satisfied by evidence showing "the purported principal ... impliedly represented another to be his agent." *See, e.g., Charleston, S.C. Registry for Golf & Tourism, Inc.*, 359 S.C. at 643, 598 S.E.2d at 721 (quoting *Graves*, 306 S.C. at 63, 409 S.E.2d at 771);*see also Simmons*, 341 S.C. at 46, 533 S.E.2d at 319 (stating "the injured patient must establish that [ ] the hospital consciously or impliedly represented the physician to be its agent"). By using the word "impliedly," however, our courts did not intend to allow proof of the first element by inaction. Rather, our courts used the word impliedly to indicate that a principal who made no express representation of authority, but who took action that amounts to an implicit representation of authority, may still be held vicariously liable under the doctrine of apparent authority.

The majority relies on cases such as *R & G Construction, Inc. v. Lowcountry Regional Transportation Authority*, 343 S.C. 424, 540 S.E.2d 113 (Ct.App.2000). The language the majority relies on, however, relates only to the second element of apparent authority. In *R & G Construction*, this court explained that reliance under the second element must be reasonable. 343 S.C. at 433, 540 S.E.2d at 118 (stating "[t]he elements of apparent agency are: ... (2) third party *reasonably*[406 S.C. 59]relied on the representation ..." (emphasis added)). Because the court's focus must be on the relationship between the principal and the third party, a proper evaluation of the reasonableness of the third party's reliance also focuses on that relationship. A court must ask whether "third persons are justified in believing the agent is acting within his authority" based on the "conduct or other manifestations of the principal's consent." 343 S.C. at 434, 540 S.E.2d at 118 (citing *Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct.App.1997)). In this context, we further explained the second element, and particularly how a court may determine whether the third party's reliance is reasonable, stating, "Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf." *Id.* (citing *Genovese*, 327 S.C. at 572, 490 S.E.2d at 611).

Genovese demonstrates that this "passively permits" language relates to the second element of apparent authority, not the first. In *Genovese*, the issue was whether the landlord's employee had authority to inform the tenant she could vacate the leased property without further obligation under the lease. 327 S.C. at 570, 490 S.E.2d at 610. We stated, "It is undisputed that [the employee] was the landlords' agent," and proceeded to consider the "extent of [the employee's] agency" under the doctrine of apparent authority. 327 S.C. at 571, 490 S.E.2d at 610. After reciting evidence supporting the existence of the first element, *id.*, we discussed the dispositive issue—whether the evidence satisfied the second element. We concluded the discussion of apparent authority by holding:

> [W]e find there is some evidence in the record ... that ... the conduct of the landlords in clothing [the employee] with so much authority to manage the property would allow

a reasonably prudent person in the tenant's position to believe [the employee] had the authority to release the tenant from her obligations under the lease.

327 S.C. at 572, 490 S.E.2d at 611. Because *Genovese* was decided based on the second element of apparent authority, not the first, the statements quoted from

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R & G Construction that cite *Genovese* for authority are correctly understood to relate to the second element.

[406 S.C. 60]The majority has also quoted other opinion excerpts that relate to analysis of the second element, and thus have no place in a discussion of a trial court's ruling on the first element. For example, the majority correctly quotes *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244–45, 473 S.E.2d 865, 868 (Ct.App.1996) for the test for analyzing the first element of apparent authority—"Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* ..."—but in continuing the quotation, the majority enters into the test for the second element—"which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." The majority further quotes *Frasier*, stating, "the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* The majority has also quoted language from *R & G Construction*, 343 S.C. at 433, 540 S.E.2d at 118, to the effect that apparent authority may be established when a principal "has knowingly ... permitted another to appear to be his agent," and the following language from *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982), "agency may be ... proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." These are correct statements of law when considered in relation to the second element, but these statements are misplaced in a discussion of the first element.

Thus, the majority's analysis of whether the Fronebergers were reasonably justified in believing Mr. Smith was an agent of Euro and whether Euro knew Mr. Smith was holding himself out as Euro's agent is also misplaced in a discussion of the first element. Further, the majority's contention that the Fronebergers could prove the first element simply by "demonstrat[ing] Euro knowingly permitted Mr. Smith to appear to others to be his agent," and its conclusion, "Without knowledge of Mr. Smith's conduct, Euro cannot have permitted this behavior with conscious inaction," are incorrect. The only issue before this court regarding apparent authority is whether the circuit court correctly found no evidence of the first element. To the extent the majority opinion suggests that the [406 S.C. 61]first element could be satisfied by anything other than evidence of action taken by Euro, the majority opinion is incorrect. [10] Analyzing the first element of apparent authority, the law requires a court to focus on the actions of the purported principal—not the inaction of the principal, not the actions of the alleged agent, and not what the third party might have inferred from the agent's actions. In this case, the Fronebergers produced no evidence of any action by Euro, and the circuit court correctly granted summary judgment on the basis of their failure to satisfy the first element.

I do not intend to suggest that a purported principal's "inaction" is irrelevant to the first element from an evidentiary standpoint. In some cases, certain inaction may assist the factfinder in understanding the significance of the purported principal's action. Thus, inaction may be relevant and admissible under Rules 401 and 402, SCRE.

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The majority asserts that if Euro knew Mr. Smith held himself out as Euro's Charlotte branch manager, used Euro's office space, and handed out business cards with Euro's logo on them, Euro could be liable if it did nothing to stop Mr. Smith. It is true that evidence of Euro's inaction in the face of this conduct is relevant, and, if the Fronebergers had offered evidence of action taken by Euro, would be admissible at trial. None of that evidence, however, satisfies the first element of apparent authority on a motion for summary judgment. Rather, the Fronebergers must offer evidence that Euro took some action amounting to an express or implied representation to them that Mr. Smith had authority to act as Euro's agent. There is no such evidence

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in this case, and thus the circuit court correctly granted summary judgment as to the first element of apparent authority.

B. Actual Authority

The majority incorrectly concludes there is evidence of agency through actual authority. Actual authority is based on the relationship between the purported principal and agent. *See* [406 S.C. 62]*Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009) (defining actual authority as authority that is "expressly conferred upon the agent by the principal"). For agency to exist through actual authority, the principal must consent to and intend for the agent to act on his behalf, and likewise, the agent must accept the authority to act on behalf of the principal. *See*Restatement (Third) of Agency § 1.01 (2006) (explaining agency arises when the principal consents "that the agent shall act on the principal's behalf and subject to the principal's control," and the agent consents to act on the principal's behalf); *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct.App.1992) ("Agency ... results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf."). The test to determine whether an agency relationship exists is whether the purported principal has the right to control the conduct of the alleged agent in the performance of his work and the manner in which the work is to be done. *Jamison v. Morris*, 385 S.C. 215, 222, 684 S.E.2d 168, 171 (2009); *Newell v. Trident Med. Ctr.*, 359 S.C. 4, 12, 597 S.E.2d 776, 780 (2004). Thus, an agency relationship based on actual authority exists when a purported principal and an alleged agent mutually consent to the principal controlling the agent in the work the agent has agreed to do on the principal's behalf.

Applying the law to the facts of this case, we must affirm the circuit court unless the Fronebergers offered evidence of a relationship between Euro and Mr. Smith that meets this test for actual authority. To determine whether this evidence exists, courts examine the relationship between the purported principal and the alleged agent. In *Newell*, for example, the court focused on the language of the hospital's bylaws in concluding no actual agency relationship existed between the hospital and a non-employee physician at the hospital. 359 S.C. at 14, 597 S.E.2d at 781. Similarly, the court in *Jamison* looked at the documents governing the parties' relationship to determine whether the purported principal had the right to control the alleged agent in its performance of alcoholic beverage sales. 385 S.C. at 222–23, 684 S.E.2d at 171–72. Here, there is no evidence of any relationship between Euro and Mr. Smith. Therefore, there can be no evidence that Euro and [406 S.C. 63]Mr. Smith mutually consented to Euro controlling him, and there is no evidence of agency through actual authority.

The majority argues the Smiths' answers are evidence of actual authority. Unless the answer is verified, or unless it is the moving party's own answer, it is not evidence that can

be considered on summary judgment. The point is proven by the opinion the majority cites for the standard to be applied to a summary judgment motion—*Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 616 S.E.2d 722 (Ct.App.2005). The majority omits from its quotation from *Miller* the key language applicable to this case—"the opponent [of summary judgment] cannot simply rest on mere allegations or denials contained in the pleadings." 365 S.C. at 220, 616 S.E.2d at 730.

Moreover, the Smiths' answers do not suffice because they contain only the bare conclusion that Mr. Smith was an agent, with no evidence to support the conclusion. *See Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct.App.1994) (stating a "conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment"). The Smiths' answers contain no evidence of any action by Euro. Thus, there is no evidence that Euro consented to Mr. Smith acting on its behalf and under its control. It makes no difference that the answers were filed by Euro's co-defendants. The answers contain no basis for a factfinder to infer that Euro and Mr. Smith mutually consented to a relationship through which Euro had the authority to control Mr.

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Smith's conduct. The majority actually defeats its own argument by observing in its section on apparent authority that there is no evidence "indicating Euro knew Mr. Smith was acting" on Euro's behalf. I would affirm the circuit court's order granting summary judgment to Euro.

The majority's reliance on the "minimal amount of discovery" conducted before the summary judgment hearing is also misplaced. By including the reference to discovery, the majority suggests the existence or non-existence of evidence sufficient to overcome a summary judgment motion depends on the extent to which additional discovery could be conducted. However, whether the party opposing a summary judgment motion has had a full opportunity to complete discovery [406 S.C. 64]is a separate legal issue than whether that party met its burden to produce sufficient evidence. The Fronebergers did not move for a continuance of the summary judgment hearing to pursue further discovery and did not argue at the summary judgment hearing or in their appellate brief they were afforded incomplete discovery. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (stating in order to delay a summary judgment ruling, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence"); *Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (refusing to consider whether "summary judgment was premature because ... discovery [was] outstanding" when appellants "took no steps to protect their interests in this regard"); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct.App.2001) (holding incomplete discovery issue unpreserved because appellant did not "move for a continuance in which to pursue further discovery"). If the need for more discovery was an issue, the Fronebergers should have requested it. Once the summary judgment question is before the court, the sole question is whether the evidence creates a question of fact for the jury.

C. Scope of Employment

Likewise, I would affirm the circuit court's finding that Mrs. Smith's actions were not within the scope of her employment. For the purposes of determining whether the doctrine of *respondeat superior* applies, an employee's tortious act is within the scope of his or her employment when it is "reasonably necessary to accomplish the purpose of his [or her] employment *and* in furtherance of the master's business." *Armstrong v. Food Lion*,

Inc., 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006) (emphasis added). This test requires the employee's actions be (1) tortious, (2) reasonably necessary to accomplish the purpose of the employment, and (3) in furtherance of the employer's business, before the actions may subject the principal to liability.

Thus, the only actions that are pertinent to determining whether Euro is liable under the doctrine of *respondeat superior* are those that were tortious. *See James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008)[406 S.C. 65]("The doctrine of *respondeat superior* provides that the employer ... is called to answer for the *tortious acts* of ... the employee, when those acts occur *in the course and scope* of the employee's employment." (emphasis added)). In this case, Mrs. Smith's only tortious actions were those related to the investment transaction. Her act of signing the mortgage loan resulted only in Euro transferring $127,647 to the Fronebergers, which caused them no harm. The Fronebergers suffered no injury until they gave Mr. Smith money, and it was the investment transaction that caused their harm. When we consider just the investment transaction, there is no evidence that Mrs. Smith's act of allowing her husband to use her office to provide investment advice was within the scope of her employment. Euro's business is mortgage lending. Euro does not provide investment advice, nor does it broker investments. Therefore, Mrs. Smith's actions that relate to the investment transaction were not reasonably necessary to accomplish Euro's business of mortgage lending and did not further Euro's business.

The majority argues, however, that Mrs. Smith's actions to obtain the mortgage loan were within the scope of her employment, and subject Euro to liability, because those actions were "integral in facilitating the [investment]

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transaction between the Fronebergers and [Mr. Smith]." It is true that the fraud on the Fronebergers could not have been perpetrated but for the loan from Euro. However, the Fronebergers' theory of Euro's liability depends on Mr. Smith and Mrs. Smith acting intentionally, not merely negligently,[4] to misappropriate their retirement funds. Therefore, to the extent Mrs. Smith's actions in obtaining the loan were part of her husband's fraud, she was necessarily acting to enable him to misappropriate the Fronebergers' money. Under the majority's theory, therefore, she was not acting in furtherance of Euro's business, but defrauding Euro by exposing it to a loan whose proceeds she [406 S.C. 66]intended to help her husband steal. By participating in the theft of the proceeds of the loan, as the majority theorizes, she was depriving Euro of a substantial component of its security. This was not "in furtherance" of Euro's business but, instead, made Euro a victim of fraud. It is simply not possible to hold Euro liable for civil damages by using its role as victim as evidence that the perpetrator of the fraud acted as its agent.

The majority asserts the circuit court erred in concluding the mortgage and investment loan transactions were separate and unrelated because that determination was a question for the jury. I disagree because the evidence in the record conclusively demonstrates the two transactions were independent. The Fronebergers retained control over the loaned money because Euro never restricted how the Fronebergers could spend it, which is demonstrated by the fact that the Fronebergers spent approximately $5,000 of the loan proceeds on personal expenses. Also, the Fronebergers received the mortgage loan after they first entrusted their money to Mr. Smith. Finally, there is no evidence the Fronebergers were obligated to give Mr. Smith any of the loaned money they received. Thus, the two transactions were distinct, and the circuit court correctly found the loans "were independent transactions,

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unconnected with their mortgage loan with Euro."

D. Conclusion

I deeply sympathize with the Fronebergers for the loss of their retirement money. The law, however, does not allow a remedy for every wrong. Here, their loss was exclusively the result of Mr. Smith's fraudulent investment scheme, not Euro's mortgage loan. Accordingly, I believe the circuit court properly granted summary judgment.

Notes:

1 The record is unclear as to whether this office was in fact the office for Euro's Charlotte branch. The Fronebergers assert that this office was the office maintained by Euro for their Charlotte branch. Euro does not deny this assertion, but instead highlights that "Mr. Smith's office was not marked with any signs, placards, or other indicia that the office was operated by Euro, and Mr. Smith did not wear any nametag or logo reflecting that he was affiliated with Euro." Throughout the Fronebergers' deposition testimony, they refer to this office as "Mr. Smith's office."

2 Bank of America was replaced by Countrywide Bank, who is the actual current holder of the Fronebergers' Mortgage, in the amended complaint.

3 Mrs. Smith also provided an untimely answer to the Fronebergers' amended complaint.

4 On three separate occasions in his answer to the Fronebergers' original complaint, Mr. Smith indicates that he acted as an agent or employee of Euro.

Answering the allegations of Paragraph 8 of the Complaint, Defendant Kirkland Smith admits that Kirkland Smith represented Euro Mortgage at the closing of the loan in Rock Hill, South Carolina.

...

Answering the allegations of Paragraph 10 of the Complaint, Defendant Kirkland Smith admits that he was an employee of Euro Mortgage.

...

Answering the allegations of Paragraph 16 of the Complaint, Defendant Kirkland Smith admits that his actions towards accomplishing the mortgage loan transaction were made in his capacity as a[sic] office manager and consultant agent of Euro Mortgage.

Additionally, Mrs. Smith provided a similar statement in her untimely answer to the amended complaint when she stated: "Responding to Paragraph 10, Janel Smith admits she was an employee of Euro Mortgage Bankers. Janel Smith is of the opinion or belief that Kirkland Smith was an employee, agent, or representative of Euro."

5. Mr. Froneberger stated, "[w]e just saw [Mrs. Smith] only as [Mr. Smith's] wife. We didn't even know that she was involved at all." Mrs. Froneberger provided a similar view when she said, "I thought [Mrs. Smith] was just [Mr. Smith's] wife just coming in talking to him in his office."

6. Additionally, the instant case is distinguishable from the case law cited by the dissent. The admissions in the Smiths' answers were before the circuit court as pleadings of Euro's co-defendants, and not in the pleadings of the party resisting summary judgment. *Cf. Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct.App.1994) (finding an affidavit submitted by the party resisting summary judgment that contained a "conclusory statement as to the ultimate issue in [that] case [was] not sufficient to create a genuine issue of fact for purposes of resisting summary judgment"). We also note that the only evidence that conflicts with the admissions in the Smiths' pleadings is a similar conclusory statement in the affidavit from Euro's president stating that Euro never employed Mr. Smith or authorized him to hold himself out as its agent.

7. The record indicates that at the time summary judgment was granted, the only discovery before the circuit court was the Fronebergers' depositions and the affidavit of Euro's president.

8. We recognize that one of the Fronebergers' causes of action is fraud, which requires a heightened standard of proof at the summary judgment stage. *See Turner*, 392 S.C. at 125, 708 S.E.2d at 770 (finding that "more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment" when fraud is the cause of action). However, because the circuit court's summary judgment order focused solely on the existence of agency and did not address the merits of the underlying fraud claim, we find it appropriate to apply the mere scintilla burden to the agency question for all causes of action.

9. Counsel for the Fronebergers stated: "There is one other, your honor, ... that's not affected by agency or apparent agency and that's the negligent hiring and retention."

10. The majority's statements that the first element may be proven by inaction, or by anything other than evidence of action taken by Euro, are also dicta because they are not necessary to the resolution of this appeal.

11. The Fronebergers' causes of action against Euro relevant to this appeal are fraud and conversion—both of which require proof of intentional conduct—and negligence. However, Euro cannot be liable for negligence because neither Euro nor Mrs. Smith owed the Fronebergers a duty of due care regarding investment of the proceeds of the loan. Therefore, the Fronebergers can recover from Euro only if they prove Mrs. Smith intentionally participated, within the scope of her employment, in her husband's fraudulent scheme.

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Eric GILL, Petitioner,
v.
STATE of South Carolina, Respondent.

No. 25344.

Supreme Court of South Carolina.

Submitted February 28, 2001.

Decided August 20, 2001.

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Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General G. Robert DeLoach, III and Assistant Attorney General David Spencer, all of Columbia, for respondent.

TOAL, Chief Justice:

Eric Gill ("Gill") appeals the circuit court judge's order denying post-conviction relief ("PCR"). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On October 6, 1977, Isabelle Mills ("Mills") was cooking hamburgers at Bert's Grill along with several co-workers. At approximately 11:00 a.m., she heard a "bang" and saw Gill comirg towards her with a gun. Gill fired the gun, killing Mills' co-worker, Bert Long ("Long"), with a gunshot wound to the head. Mills ran to the ladies room. Gill followed her and fired the gun inside the bathroom. He then entered the bathroom and fired the gun at Mills. As the two struggled over the gun, the gun fired. Mills was struck by bullets a total of three times. Kathie Faile ("Faile"), another employee of Bert's Grill who was present during the shooting, testified Gill also shot at her and one bullet hit her in the right shoulder and another hit her in the back. Despite being shot, Faile managed to get to a phone in an attempt to call for help. While Faile was making the call, Gill yanked the receiver from her hand and fled. Mills and Faile saw Gill and another man drive away from the scene.

In October 1979, Gill was found guilty of murder, grand larceny of a vehicle, armed robbery, and two counts of assault and battery with intent to kill ("ABIK"). During the penalty phase, the jury deadlocked on the question of aggravating circumstances and the judge declared a mistrial. Thereafter, the trial judge sentenced Gill to life imprisonment on the

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murder conviction, eight years on the grand larceny conviction, twenty years on the armed robbery conviction, twenty years for ABIK, and eighteen years for the second conviction of ABIK.[1] Gill appealed his convictions and sentences, but later withdrew his appeal. This Court ordered the appeal dismissed on February 15, 1980.

On June 2, 1993, and July 17, 1995, Gill filed an application for PCR and an amended application for PCR, respectively. At the PCR hearing on June 3, 1997, Gill argued his appeal was involuntarily withdrawn because he was advised by counsel he could face the death penalty if he prevailed on direct appeal. On July 16, 1997, the PCR judge issued an order of dismissal denying Gill's application for PCR on the ground Gill did not sustain his burden of proving trial counsel rendered ineffective legal representation. Gill appealed

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the PCR judge's order and filed a petition for writ of certiorari. On March 9, 2000, this Court granted certiorari. The following issues are before this Court on certiorari:

> I. Did Gill knowingly, intelligently, and voluntarily waive his right to direct appeal when counsel advised him that if he appealed and his convictions and sentences were overturned, he could receive the death penalty upon retrial?
>
> II. Did the trial court err in denying Gill's request for a jury charge on diminished capacity?
>
> III. Did the trial court err in denying Gill's motion for mistrial after the solicitor commented during closing argument on Gill's failure to present a defense?

LAW/ANALYSIS

I. Waiver of Right to Direct Appeal

Gill argues the PCR judge erred by denying his PCR application because his attorney mistakenly advised him he

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could face the death penalty if he prevailed on appeal and was retried. According to Gill, this advice caused him to involuntarily withdraw his appeal. We disagree.

A. The PCR Proceeding

In a PCR proceeding, the burden of proof is on the applicant to prove the allegations in his application. *Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000); Rule 71.1(e), SCRCP. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must demonstrate: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) he was prejudiced by his counsel's ineffectiveness. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In order to prove prejudice, an applicant must demonstrate that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

This Court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Likewise, a PCR judge's findings should not be upheld if there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

At the June 3, 1997, PCR hearing, Gill argued he received ineffective assistance of counsel because his attorney advised him to withdraw his appeal. Specifically, Gill claims his attorney advised him the State could seek the death penalty if he was retried. The PCR judge found Gill's allegation "meritless." According to the PCR judge, Gill's testimony was not credible, and Gill did not demonstrate ineffective assistance of counsel or prejudice.

Defense counsel testified at the PCR hearing he could not recall discussing the appeals process with Gill and could not recall whether an appeal was filed, but he had a vague recollection co-counsel filed a notice of appeal "just to do it." While he did not recall specifically, defense counsel testified it was "highly likely" he informed Gill that if his conviction was

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overturned on appeal, he may face the death penalty again. This advice was a correct statement of the law as discussed *infra*.

B. The Clean Slate Rule

This Court has never addressed whether a mistrial during the sentencing phase of a capital trial precludes the State from seeking the death penalty in the event of a new trial. As a general rule, a court cannot retry a defendant for an offense greater than and including the offense for which he was previously convicted. Conviction for a lesser included offense is an implied acquittal of any greater charges. Therefore, a prosecution on retrial for a greater offense than that for which the defendant was first convicted would constitute a violation of the Double Jeopardy Clause. *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); *see also Bozeman v. State*, 307 S.C. 172, 414 S.E.2d 144 (1992) (finding trial counsel ineffective for falsely informing defendant he could be convicted of murder on retrial if he appealed and succeeded in vacating his manslaughter conviction). However, in certain circumstances, the sentence imposed at the first trial does not prevent the State from seeking a greater sentence upon retrial.

For example, the general rule in capital punishment cases is that when a defendant's conviction is reversed on appeal, the original conviction is nullified and the slate is wiped clean.[2] If the defendant is convicted again on retrial, the death penalty may be validly imposed. This doctrine is known as the clean slate rule and was enunciated by the United States Supreme Court in *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896) and *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

In *Ball*, the United States Supreme Court held the constitutional guarantee against double jeopardy imposes no limitations upon the power to retry a defendant who has succeeded in getting his first conviction set aside. In *Pearce*, the question arose as to whether that same constitutional guarantee

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precluded the imposition of a harsher sentence after conviction upon retrial. The United States Supreme Court held, because the original conviction was nullified at the defendant's request, the slate was wiped clean and the sentencing court could impose any legally authorized sentence, whether or not it was greater than the sentence imposed following the first trial.

In *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the United States Supreme Court recognized a limited exception to the clean slate rule—when a jury or appellate court finds the prosecution has failed to "prove its case" for the death penalty, and a life sentence is imposed, the clean slate rule does not apply, and the State cannot seek a harsher sentence upon retrial. In *Bullington*, the jury found the petitioner guilty of murder. The trial court then conducted a sentencing hearing before the same jury, and the parties presented additional evidence in aggravation or mitigation of the punishment. The jury returned a unanimous verdict of life imprisonment. When the petitioner was granted a new trial on appeal, the State notified him of its intention to seek the death penalty. The petitioner appealed to the United States Supreme Court, and they granted certiorari to review the Double Jeopardy issue.

The United States Supreme Court held that, where the first jury returns a unanimous verdict of life imprisonment, the Double Jeopardy Clause of the Fifth Amendment bars the imposition of the death penalty on retrial. The first jury, by choosing life, impliedly decides the prosecution has not proved its case for death, and impliedly acquits the defendant of the death penalty. According to

the United States Supreme Court, the clean slate rule is inapplicable whenever a jury agrees or an appellate court decides the prosecution has not proved its case. *Id.* at 443-445, 101 S.Ct. at 1860-61; *see also Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) (holding that once the trial judge rejected the death penalty and sentenced defendant to life, there could be no further attempt to have the death penalty imposed); *Pennsylvania v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993). *But see Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) (holding the Double Jeopardy Clause does not forbid a second capital sentencing hearing where either the sentencer or the reviewing court finds evidence sufficient

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to justify imposition of the death penalty and, therefore, does not impliedly acquit the defendant on the merits).

In *Riddle v. State*, 314 S.C. 1, 443 S.E.2d 557 (1994), this Court found the Double Jeopardy Clause did not preclude the imposition of the death sentence on remand in a capital case. Relying on *Poland, supra*, the Court held that a defendant may not be retried if he obtains reversal of his first conviction on the ground the evidence was *insufficient* to convict. In *Riddle*, the petitioner appealed a third jury's recommendation that a sentence of death be imposed for his previous convictions of murder, armed robbery, and burglary. The petitioner asserted on appeal that this Court's prior decision precluded consideration of the death penalty because the concurring opinion stated that no evidence was submitted to the jury to support the aggravating circumstance. *Id.* at 4, 443 S.E.2d at 559. However, we found the relevant question in *Riddle* was whether the prior decision was based on the sufficiency of the evidence or a trial error in the admission of evidence. If the evidence was simply erroneously admitted, the Double Jeopardy Clause does not bar a retrial for sentencing. *Id.* at 5, 443 S.E.2d at 560. Because the error in *Riddle* was the admission of indictments and verdict forms from the first trial as proof of aggravating circumstances, the error was one of admission of evidence, rather than insufficiency of evidence. Therefore, we held the trial judge properly denied the defendant's motion to quash the notice of death penalty on Double Jeopardy grounds. *Id.*

The instant case does not involve a decision by the trial judge or jury that the prosecution had not proved its case because the jury was deadlocked during the penalty phase. Other jurisdictions have found the Double Jeopardy Clause does not bar the prosecution from seeking the death penalty on retrial for murder where a life sentence was imposed during the penalty phase following the first trial by operation of law due to jury deadlock. In *Martorano, supra*, the Pennsylvania Supreme Court found where a jury is deadlocked during the sentencing phase of a capital trial, there is no implied acquittal because the jury did not make a decision. Furthermore, the imposition of a life sentence by a trial judge does not operate as an implied acquittal because, under Pennsylvania's sentencing scheme, the judge has no discretion to

[346 S.C. 219]

fashion a sentence once he finds the jury is deadlocked. *Martorano*, 634 A.2d at 1070; *see also Pennsylvania v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000) (upholding the *Martorano* decision concerning jury deadlock and finding this decision did not have a chilling effect so as to constitute a *de facto* denial of defendant's right to appeal); *Kentucky v. Eldred*, 973 S.W.2d 43 (Ky.1998) (finding Double Jeopardy did not bar capital prosecution on retrial where a jury in the first trial found the presence of aggravating circumstances, but recommended life).

Gill argues the *Bullington* exception applies in this case and, therefore, his trial counsel was ineffective because he advised Gill he could be sentenced to death upon retrial. First, *Bullington* was decided in 1981 and the order dismissing Gill's appeal is dated February 15, 1980. Therefore, Gill's trial counsel did not provide incorrect legal advice because the *Bullington* exception was not available at that time.[3] Second, the *Bullington* exception is not applicable because the jury was deadlocked in this case and was unable to decide whether the death penalty was appropriate. The life sentence in this case did not amount to an implied acquittal of the death penalty as was the case in *Bullington*. Here, the jury deadlocked on the existence of aggravating circumstances. The trial judge imposed a life sentence pursuant to S.C.Code Ann. § 16-3-20(C) (Supp.2000), which states, "If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A)." In the event of a jury deadlock, the trial judge exercises no discretion and merely imposes the sentence mandated by section 16-3-20(C).

Therefore, the PCR judge's decision is affirmed because defense counsel adequately advised Gill of the consequences of appealing his life sentence, and Gill has not demonstrated either ineffective assistance of counsel or prejudice.

[346 S.C. 220]

II. Diminished Capacity

Gill argues on direct appeal the trial court erred by refusing to instruct the jury on the "diminished capacity doctrine." Even though Gill concedes South Carolina does not accept the diminished capacity doctrine, he argues it is applicable, and his conviction should be reversed because the State failed to prove malice. We disagree.

At trial, Dr. Harold Morgan, a forensic psychiatrist, testified Gill had a borderline intellectual capacity (I.Q. of 73), and he possessed an antisocial personality. As a result of these conditions, Dr. Morgan testified Gill could not formulate malice aforethought, an essential element of murder. According to Dr. Morgan, Gill had a personality disorder as a result of an absent mother and father, which resulted in Gill's inability to handle problems or think of the consequences of his behavior.

At the close of the trial, Gill's attorney asked the trial judge to charge diminished capacity, an accepted defense in several jurisdictions. The diminished capacity doctrine allows a defendant to offer evidence of his mental condition with respect to his capacity to achieve the *mens rea* required for the commission of the offense charged. 21 Am.Jur.2d *Criminal Law* § 38 (1998). In particular, the defense may be invoked to negate specific intent, where such intent is an element of the offense charged. *Id.* Diminished capacity differs from the insanity defense in that it may be raised by a defendant who has conceded to be legally sane. *Id.*

The trial judge did not err by refusing to charge diminished capacity because it is not recognized in South Carolina. Furthermore, according to this Court in *State v. Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956), a defendant is not entitled to an instruction concerning his capacity to form the requisite intent for malice aforethought when the instructions, taken as a whole, properly present elements of malice. Gill received proper jury charges on murder, voluntary manslaughter, ABIK, insanity, and self defense. These jury charges, taken as a whole, were sufficient because they

adequately presented the elements of malice as recognized by South Carolina law.

[346 S.C. 221]

III. Solicitor's Comments During Closing Arguments

Gill argues the trial court erred by failing to grant a mistrial based on the solicitor's statement during closing arguments that Gill failed to present a defense. We disagree.

During closing argument, the solicitor made the following remarks:

> Now as I sit in the courtroom and listened to testimony trying to anticipate somebody's defense, something he can hang his hat on. What is that defense in this case? I'll tell you my opinion. Of course, His Honor is in charge of the law, but in my opinion there is no defense in this case. They have failed. Mr. Fewster is a good attorney. Mr. Honeycutt is a good attorney, but they are shackled by the facts of the case. *They are limited as to what they can do in the case. What can they do to put up a defense in the case? There is no defense in this case.* October 6th, 1977, Bert Long for no justifiable reason, for no justifiable cause, for nothing that he did, was murdered. Now you can call it killed, you can call it snuffed out, I'll tell you there is no way to get around it, it was cold blooded murder. There is no other way to describe it. These two attorneys can play legal gymnastics with words and try and turn this phrase around and this phrase around, but it's murder.

(emphasis added).

Gill argues the trial judge should have granted a mistrial because the solicitor referred to Gill's failure to present a defense, which violated his right to remain silent under the Fifth and Fourteenth Amendments. It is impermissible for the prosecution to comment directly or indirectly upon the defendant's failure to testify at trial. *Johnson v. State,* 325 S.C. 182, 480 S.E.2d 733 (1997). However, even improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant. *Id.* The defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of a fair trial. *Id.* Furthermore, even if the solicitor makes an improper comment on the defendant's failure to testify, a curative instruction emphasizing the jury cannot consider defendant's failure to testify against him will cure any potential error. *Id.*

[346 S.C. 222]

Gill's argument concerning the solicitor's remarks is without merit. First, the solicitor's remarks implied Gill did not have a defense, which most likely meant he did not have a defense of insanity or self defense. Second, any prejudice caused by the remarks was eliminated by the trial judge's curative instruction to the jury, which emphasized the defendant did not have to demonstrate his innocence, and his failure to testify could not be considered during their deliberations. Finally, any error caused by the solicitor's remarks was harmless considering the overwhelming evidence of Gill's guilt.

CONCLUSION

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Based on the foregoing, we AFFIRM the PCR court's decision, Gill's sentences, and Gill's convictions.

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

Notes:

1. This was Gill's second trial. At the first trial, Gill was found guilty of murder and sentenced to death. However, his conviction and sentence were reversed by this Court in *State v. Gill*, 273 S.C. 190, 255 S.E.2d 455 (1979), because the trial judge instructed the jurors they could begin consideration of the case prior to completion so long as they confined their consideration to the jury room. The trial judge also erred by failing to find as a matter of law, for sentencing purposes, Gill's prior conviction for statutory rape was not a conviction for a crime involving the use of violence against another person.

2. *See* Anne Essaye, *Cruel and Unusual Punishment*, 75 GEO. L.J. 1168 (Feb.1987).

3. In 1980, the United States Supreme Court reaffirmed the principle the Double Jeopardy Clause does not prevent a more severe sentence at retrial. *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). *Ball, supra*, and *Pearce, supra*, were also applicable at the time of Gill's appeal.

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232 S.E.2d 336
268 S.C. 137
Robert HAMMOND, Jr., by Robert L. Hammond, his guardian ad litem, Appellant,
v.
Anthony SCOTT, a minor, and Stephen W. Dover, Defendants, of whom StephensonW. Dover is, Respondent.
Robert L. HAMMOND, Appellant,
v.
Anthony SCOTT, a minor, and Stephenson W. Dover, Defendants, of whom StephenW. Dover is, Respondent.
No. 20356.
Supreme Court of South Carolina.
Feb. 4, 1977.

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Header ends here. [268 S.C. 138] Luther M. Lee and Kenneth M. Suggs, Columbia, for appellants.

[268 S.C. 139] Donald V. Richardson, III, and Charles E. Carpenter, Jr., Richardson, Plowden, Grier & Howser, Columbia, for respondent.

[268 S.C. 140] PER CURIAM:

This action arises out of an incident in which plaintiff Robert Hammond, Jr. (Bobby), was struck in the eye by a nail thrown by Anthony Scott (Anthony), during a woodworking class taught by defendant Stephen W. Dover (the Teacher) at Hopkins Junior High School. It is a tort action, brought by Bobby against both Anthony and the Teacher, based on alleged negligence, willfulness and wantonness.

After the pleadings had been filed and depositions taken, defendant Teacher moved for summary judgment on the ground that he was 'guilty of no actionable negligence and breached no legal obligation to the plaintiffs; said motion to be based upon the pleadings, depositions, affidavits, and any other evidence that may be received by the court.' The lower court granted summary judgment to the Teacher. This appeal followed.

Upon a consideration of the motion, the lower court had before it the depositions of the plaintiff, Bobby, of the defendant, Anthony, and of the defendant Teacher, and also an affidavit by J. E. Brown, principal of the high school, regarding disciplinary procedures. Counsel for both Bobby and the Teacher were, of course, at liberty to present any other affidavits and to make any showing which might be helpful to the court in determining whether there was or was not a genuine issue of material fact, as contemplated by our Summary Judgment Rule, No. 44. The depositions were full and exhaustive. If any other potential witness has any different relevant testimony, the same has not been pointed out to the Court.

[268 S.C. 141] The following is a summary of the facts as developed in the lower court:

On November 19, 1975, the Teacher was conducting a woodworking shop class in the school. The classroom was not a conventional one, but had work benches, tools, etc. Bobby was standing approximately two feet from a large trash barrel,

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talking with another student. As Bobby turned his head, he was struck in the eye by a nail aimed at the trash barrel and thrown underhandedly by Anthony. Anthony had picked the nail up off the floor and thrown it a distance of some 15 or 20 feet in the direction of the trash barrel. Anthony said that he did not see Bobby at the time the nail was thrown. There were no ill feelings between the two, and Bobby stated that the occurrence was 'an

accident.' At the time of the incident, the Teacher was in the 'projects' room adjacent to the woodworking shop area. At the moment, he was standing with his back to the shop area, assisting other students in putting their work projects away. The Teacher did not know of the incident until after it occurred.

It appears that on previous occasions some of the students had thrown objects into the trash barrel from a few feet away. The practice was not sanctioned by the Teacher and any student caught throwing objects into the trash barrel would be called down. All of the students knew that this was a forbidden act and Anthony had been admonished once before. The Teacher had instructed the students to drop items into the trash barrel rather than to throw them at it. The negligence alleged against the Teacher is as follows:

'(a) In failing to properly supervise his students;

'(b) In failing to discipline his students to prevent them from throwing objects in the classroom;

'(c) In failing to remove Defendant, Anthony Scott, from the classroom when his misbehavior became dangerous to others;

[268 S.C. 142] '(d) In failing to warn his students of the dangers of throwing objects in the classroom.'

We agree with the lower court, which found that there was no genuine issue as to any material fact on the negligence issue; and affirm. The showing submitted would necessitate the granting of a directed verdict and there is no showing that other evidence would be available.

While the question of teacher liability has apparently never been before this Court, there is a wealth of authority elsewhere dealing with the subject. Many jurisdictions are in general agreement that a teacher can be liable for injury to students under their supervision if an injury is caused by the teacher's negligence or failure to exercise reasonable care to protect the students. Eastman v. Williams, 124 Vt. 445, 207 A.2d 146 (1965); Sewell v. London, Tex.Civ.App., 371 S.W.2d 426 (1963).

In 78 C.J.S. Schools and School Districts § 238 c, we find the following statement:

'A teacher in the public schools is liable for injury to pupils in his charge caused by his negligence or failure to exercise reasonable care. . . . The mere fact that an accident happened in which a pupil was injured does not render the teacher liable, and a teacher or principal is not liable for injuries to a pupil where he was not negligent or where his negligence was not the proximate cause of the injury.'

Applying the law to the present case, it must be determined whether the Teacher acted reasonably or unreasonably in relation to that which occurred in his classroom. There can be no doubt but that the reasonableness of the Teacher's conduct is normally a question of fact for a jury. However, given the facts before us, the only reasonable inference arising therefrom is that the Teacher acted reasonably under the circumstances and therefore was, as a matter of law, not negligent.

The gravamen of the argument of Bobby's counsel is that if the Teacher had on previous occasions dealt more sternly [268 S.C. 143] with rule infractions and disciplinary matters, Anthony might not have thrown the nail. The contention is mere conjecture short of creating a reasonable inference that the Teacher failed to perform his duty in supervising the activity of the students and classroom.

Counsel also argues that the Teacher was negligent because he was not in the classroom

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at the moment the incident occurred. We disagree. It is, of course, impossible

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for a teacher to personally supervise each student under his care every moment of the school day. This is especially true in a situation such as a woodworking class in which students are involved in numerous projects, either by themselves or in small groups. A teacher must necessarily rely, to some extent, on the responsibility and maturity of his students to conduct themselves in a proper and safe manner.

Counsel for Bobby argues vigorously that the showing made required the judge to order the case to trial before a jury. The manifest purpose of a summary judgment is to obviate delay where there is no real material issue of fact. A court should never attempt to determine contested material factual issues on a motion for a summary judgment. A court, in making its determination, must give to the party against whom summary judgment is sought the benefit of all inferences that may be drawn from the facts under consideration. There is before us, however, one of the rare cases in which summary judgment was correctly granted on the negligence issue. Bobby also sought summary judgment and apparently pretrial discovery was complete. Counsel had the right to present additional affidavits. A party cannot escape summary judgment on the mere hope that something may develop at the trial, or by remaining silent and later claiming additional facts supporting a cause of action.

We have referred to the case of Bobby versus Anthony and the Teacher. In addition, Bobby's father, Robert L. [268 S.C. 144] Hammond, has brought a companion action against the same defendants. Our ruling applies in both cases.

Having found that summary judgment was properly granted, it follows that the lower court is

AFFIRMED.

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96 S.E.2d 828
230 S.C. 478
George A. HARLEY et al., Appellants,
v.
CITY OF SPARTANBURG et al., Respondents.
No. 17250.
Supreme Court of South Carolina.
Jan. 28, 1957.

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Header ends here. [230 S.C. 479] Harry E. DePass, Jr., Simpson Hyatt, George S. DePass, Spartanburg, for appellants.

[230 S.C. 480] R. B. Paslay, T. E. Walsh, Spartanburg, for respondents.

[230 S.C. 481] OXNER, Justice.

This case involves the validity of certain proceedings wherein it was sought to annex to the City of Spartanburg an adjacent area known as Duncan Park.

Pursuant to the procedure prescribed in Title 47, Chapter I, Article 2 of the 1952 Code, relating to the extension of the corporate limits of cities and towns, a petition was filed by certain freeholders in the area proposed to be annexed, the boundaries of which were adequately described, asking that said territory be annexed to the City of Spartanburg. The petition was considered at a meeting of the City Council held on April 4, 1955. After hearing the testimony of Mrs. Ernie White, a clerk who had spent several months compiling a list of the freeholders in Duncan Park and checking same against the petition filed, and the testimony of one of the residents of Duncan Park who had also spent considerable time working on the list of freeholders, the Council found that the petition was signed by a majority of the freeholders in the area proposed to be annexed. A resolution certifying that fact to the County Commissioners of Elections was then adopted.

By direction of said Commissioners, an election was held on May 10, 1955, with the following result: In the City of [230 S.C. 482] Spartanburg the vote was 1625 in favor of and 98 against annexation, and in the area proposed to be annexed 354 voted in favor of and 321 against annexation. At a meeting of the City Council held on June 30, 1955, a resolution was adopted declaring the Duncan Park area a part of the City of Spartanburg.

This action was brought on July 16, 1955 by certain residents and freeholders of the Duncan Park area, on behalf of themselves and all others similarly situated, for the purpose of having the annexation declared invalid and enjoining the City and its officials from exercising authority or control over the said area. It was alleged in the complaint that the members of the City

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Council undertook to determine whether a majority of the freeholders had signed the petition for annexation 'when they knew or should have known that they had never compiled a correct list or determined the number of freeholders in the said area', that the finding of the City Council 'was based on mistake, ignorance and lack of proper investigation'; and that the petition had not been signed by a majority of the freeholders in the area proposed to be annexed.

The defendants demurred to the complaint. This demurrer was overruled in an order filed on August 17, 1955 and the case referred to the Master of Spartanburg County to take the testimony and report to the court his findings of fact and conclusions of law. Extended references were held by the Master in September, 1955. On December 20, 1955, he filed an excellent report in which he found that the petition presented to the City Council was signed by a majority of the freeholders in

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the area proposed to be annexed and that the annexation was valid. On exceptions by plaintiffs to this report, the case was heard by the presiding Judge of the Seventh Circuit in January, 1956. An order was filed by him on February 29, 1956 sustaining the report of the Master and dismissing the action. From this order, the plaintiffs have appealed.

[230 S.C. 483] We find it unnecessary, as did the Master and Circuit Judge, to pass upon the question as to whether the finding of the City Council that a majority of the freeholders in Duncan Park had signed the petition for annexation is conclusive. As a sustaining ground, respondents urge that such a finding is conclusive in the absence of abuse of discretion or fraud, neither of which they say is charged in the complaint. We shall assume that appellants were at liberty to show that the certificate made by the City Council to the County Commissioners of Elections was erroneous.

The first attack made upon the annexation proceedings is that the City Council failed to determine the total number of freeholders in the area proposed to be annexed and the exact number who had signed the petition. It is argued that Council should have 'tabulated and counted' and also specifically set out in its minutes the total number of freeholders and the number who had signed the petition. Appellants say that the finding made in the resolution adopted by Council is a general conclusion and insufficient.

The statute, Section 47-14 of the 1952 Code, imposes the duty upon the city or town council to determine whether the petition has been signed by a majority of the freeholders within the territory proposed to be annexed. It does not undertake to specify the method to be used in making such determination. Much is necessarily left to the discretion of the council. 29 C.J.S., Elections, § 70, p. 94. We think the City Council of Spartanburg did all that was reasonably possible to correctly ascertain the number of freeholders in the Duncan Park area. A clerk in the office of the Council worked diligently several months on this undertaking. She carefully examined the records in the offices of the auditor, the register of mesne conveyance and the probate judge and in addition spent considerable time on the ground making inquiries. She was also assisted by a number of residents familiar with the property owners in the area. After the list of freeholders was compiled, it was carefully compared with the names signed to the petition. After hearing [230 S.C. 484] the testimony, Council concluded that a majority of the freeholders had signed the petition. This conclusion necessarily involved a determination of the total number of freeholders and the number who had signed the petition. We know of no rule requiring that the totals be inserted in the minutes or in the certificate made to the commissioners of election, although it might be a good practice to do so.

We now reach the principal question in the case, namely, whether the petition for

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annexation was in fact signed by a majority of the freeholders in the area proposed to be annexed. Testimony upon this question consumed six full days before the Master, during which disputes arose as to whether certain lots were within or without the area and as to the ownership of various lots at the time the petition was filed. In several instances during the reference names were added, later removed and finally restored. There was also quite a disagreement as to the proper definition of a freeholder. Appellants contended that this term included remaindermen, those owning equitable estates and those having easements across some of the lots. Numerous deeds, trust instruments and wills were introduced in evidence which the court was asked to construe. There was also some discussion as

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to whether those owning tax exempt property should be included. The calculations made by the respective parties as to the total number of freeholders and those signing the petition would change almost from day to day.

Counsel for appellants themselves seem to have had great difficulty in determining the total number of freeholders in the area proposed to be annexed. Their calculations have varied from time to time since the commencement of the action. In their complaint they alleged that they had made a 'thorough' check and were informed and believed that there were '792 or more freeholders owning property within the area sought to be annexed.' In Exception 35 to the report of the Master they said that he should have found that there was a total of 752 freeholders. In Exception 22 on this appeal they say 'that according to the law and the evidence in the [230 S.C. 485] case there are a total of 743 freeholders.' In their brief they list a total of 736 freeholders.

There is a similar conflict in their positions at various times as to the number of freeholders who signed the petition. The Master found that the petition was signed by 368 freeholders. Exception 12 to the report of the Master is as follows: 'The Master erred in holding and finding that there were 368 valid freeholders that signed the petition for the annexation of the Duncan Park area, the error being that there were only 364 valid signers.' Exception 23 on this appeal reads: 'The Court erred in sustaining the Master's report that there are 368 valid freeholders on the petition presented to city council, the error being that there are only 358 names left unstricken on the petition.' Exception 39 on this appeal is as follows: 'The Court erred in holding that there are 368 valid freeholders on the petition, the error being that there are only 343 valid freeholders on the petition presented to city council.' Appellants say in their brief that there were only 355 valid signatures on the petition.

On this appeal it must be assumed that the petition for annexation contained the names of at least 364 freeholders. A concession by appellants to this effect in the Circuit Court is implicit in Exception 12 to the report of the Master. The Circuit Judge was, therefore, not required to examine the record for the purpose of determining whether less than 364 freeholders signed the petition, and appellants will not be permitted here to assert that there were fewer than that number. It is well settled that we cannot consider on appeal issues not presented to the Court below.

It follows that the burden is on appellants to show that there were at least 728 freeholders in the area proposed to be annexed. They set out in their brief the names of 736 persons who they claim constitute the freeholders within the Duncan Park area. This would certainly seem to be the present extent of their claim. After carefully considering the [230 S.C. 486] names on this list, we find that the following are not freeholders and must be excluded:

John Mason Carlisle and his wife Nancy Caldwell Carlisle

It appears that the Carlisles orally agreed to purchase a lot from one Milton Smith provided they could obtain a loan through

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the F.H.A. John Mason Carlisle testified that the deed was delivered to him on March 27, 1955 for the purpose of enabling him 'to start processing my loan through the F.H.A.' However, the purchase price was not paid and the deed was not recorded until April 26, 1955, or approximately 22 days after City Council acted on the petition. It is obvious from the testimony that the delivery of the deed on March 27th was a mere conditional one and was not to be effective unless the F.H.A. loan was approved and that the Carlisles did not become freeholders until April 26th. They were properly excluded by

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the Master. It is true that the Master stated during the reference that the Carlisles were conceded to be freeholders but later this was corrected and he expressly stated that respondents had made no such admission. It should be further stated that the name of Milton Smith had previously been included in the list of those who were agreed upon as property owners within the area.

Dollie Taylor

Under the trust set up by the will of H. Z. Taylor, Sr., his two daughters Ruby Fay Taylor and Dollie Taylor, were to receive an undivided one-half interest in fee simple to certain lots upon attaining the age of 21 but in the event they died before reaching this age, their interest was to go to others. In the Master's report it is stated: 'The plaintiffs concede that one of these children is still a minor and should not be included as a freeholder. They contend, however, that Ruby Fay Taylor, who has reached the age of 21 years, is a freeholder.' While there is an exception to the effect that the Master erred in holding that Dollie Taylor was not a freeholder, there is no exception to the statement of the Master that appellants conceded before him that she should [230 S.C. 487] not be included as a freeholder. It follows that she must be excluded.

L. C. Dillard, Sr.

Mrs. White testified that Dillard's property was not within the Duncan Park area. At one point in the reference one of appellants' counsel admitted 'that L. C. Dillard, Jr. and Sr. go off.' At another point he stated, 'L. C. Dillard, Jr. goes off, but L. C. Dillard, Sr. is regarded as a freeholder.' The Master concluded that appellants had failed to show that the property of L. C. Dillard, Sr. was within the area proposed to be annexed and excluded him. This conclusion is abundantly sustained by the testimony.

Billy S. Davis

On December 20, 1954 Davis agreed to buy from B. R. Cooley and his wife, Lucille Cooley, a house and lot for $8,200, making a down payment of $100. His agreement to purchase was conditioned, however, upon his being able to obtain a G.I. loan for $8,200 on the property. In the event he was unable to do so, the $100 was to be returned and the contract cancelled. It was not until April 13, 1955, or nine days after Council acted on the petition, that the sale was completed and deed delivered to the purchaser and recorded. Appellants have included all three of these parties on their list of freeholders on the theory that when Council acted on the petition on April 4, 1955, the Cooleys held the legal title and Davis the equitable title. But we think it is clear that all three cannot be counted. The most favorable view from appellants' standpoint would be to include the Cooleys, who would count as two, and exclude Davis. We think this should be done. Davis' obligation to purchase was wholly contingent. If he did not get the contemplated loan, his deposit of $100 was to be returned. Nor do we think that a vendee in an executory contract of sale who has made only a partial payment should be counted as a freeholder. While he may have an equitable interest in the property, Singleton v. Cuttino, 107 S.C. 465, 92 S.E. [230 S.C. 488] 1046, Epps v. McCallum Realty Co., 139 S.C. 481, 138 S.E. 297, his rights, as pointed out in Good v. Jarrard, 93 S.C. 229, 76 S.E. 698, 43 L.R.A.,N.S., 383, are conditioned on his compliance with the

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terms of his contract. The equitable estate may never ripen into a legal estate and the legal estate may never pass from the vendor.

The term 'freeholder' has received many definitions, Campbell v. Moran, 71 Neb. 615, 99 N.W. 498; Payne v. Fiscal Court of Carlisle County, 200 Ky. 41, 252 S.W. 127; Gill v. Board of Commissioners of Wake County, 160 N.C. 176, 76 S.E. 203, 43 L.R.A.,N.S., 293; 37

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C.J.S., p. 1373. It is apparent from the cases reviewed in Ann.Cas., Vol. 29, 1913D, commencing on page 327, that the decisions on the question who is a freeholder cannot be reconciled. This diversity of opinion extends to the question as to whether a vendee in an executory contract of sale may be considered a freeholder. An excellent discussion of this phase of the subject will be found in the leading and dissenting opinions in State ex rel. Dillman v. Weide, 29 S.D. 109, 135 N.W. 696.

We need not determine in the instant case exactly what character of estate is necessary to constitute one a freeholder. Much would depend on the intention of the Legislature in the particular statute involved. Nor do we undertake to determine whether generally the owner of an equitable estate may be considered a freeholder. It is sufficient to say that under the statute here involved the holder of an executory contract to purchase land should not be considered a freeholder. We think the better reasoned cases sustain this view. People v. Hynds, 30 N.Y. 470; In re Cohn, 84 Neb. 230, 121 N.W. 107; Daniels v. Fossas, 152 Wash., 516, 278 P. 412.

Duke Power Company

Appellants claim that Duke Power Company has an easement over some of the lots and should be included. We need not determine whether an easement of this kind constitutes a freehold estate. The Master stated in his report:

[230 S.C. 489] 'With respect to Duke Power Company, two deed references were originally given, 18-A, 227 and 18-B, 206. However, neither of these references have anything to do with Duke Power Company. Later, after this reference was closed and when the matter was being argued before me, Plaintiffs' attorneys introduced on the Excluded Sheet, a reference to a right-of-way to Duke Power Company in Deed Book 7-R, page 514. However, no deed or a copy of a deed was introduced in evidence.'

There is no exception to the ruling of the Master excluding this testimony, nor to his statement that the deed upon which appellants rely was not introduced in evidence. Under these circumstances, the Duke Power Company must be excluded.

J. W. Layton and Mrs. David Layton Duncan

Appellants contend that these two parties are owners, as tenants in common, of certain property in the Duncan Park area. The Master found that this property was outside the area proposed to be annexed. The testimony sustains this conclusion. Counsel for appellants sought to prove this issue by hearsay evidence. The Court sustained an objection and counsel for appellants stated that they would get a witness later to prove that Layton and Mrs. Duncan were freeholders, but no such witness was ever produced.

Harold A. Campbell, Elizabeth Z. Sloan, Louise L. Williams, Ann Campbell and Jack Campbell

These persons are children of Mr. and Mrs. W. A. Campbell. During the course of the reference it was agreed by all parties that Mr. and Mrs. Campbell should be counted as freeholders and they are listed in appellants' brief as Nos. 426 and 427. After the testimony was closed and the case set down for argument, appellants' counsel stated that he had recently learned that W. A. Campbell had died, leaving a will naming the children above mentioned [230 S.C. 490] among his devisees, and asked that

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the case be reopened so as to permit them to introduce the probate record pertaining to the estate of W. A. Campbell. The Master refused

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to do so, stating that Mr. and Mrs. Campbell had previously been agreed upon as constituting the freeholders representing this property and as the reference had been closed, he did not think it proper under all the circumstances to allow this additional testimony. We think the Campbell children must be excluded for two reasons. (1) There is no exception to the refusal of the Master to reopen the case and admit the probate record. (2) The question of whether the case should be reopened was addressed to the sound discretion of the Master. City Council of Greenville v. Earle, 80 S.C. 321, 60 S.E. 1117. We find no abuse of discretion.

We entertain considerable doubt as to whether certain other persons named on appellants' list are freeholders but it is unnecessary to pursue this list further. We have found that a total of 13 names must be stricken from the 736 listed in appellants' brief as constituting the freeholders in the area proposed to be annexed, which leaves the number of freeholders as 723. As previously pointed out, it must be assumed on this appeal that the petition for annexation was signed by 364 freeholders, which under the facts found are two more than necessary.

In concluding our discussion of this phase of the case, we desire to say that even if our calculation had shown that the petition was a little short of the required number, we would hesitate under the circumstances of this case to set aside the finding of the City Council, which is prima facie correct. Rawl v. McCown, 97 S.C. 1, 81 S.E. 958, 959. The possibility of a slight mistake on our part is too great. Probably no two persons would reach the identical result. As pointed out in the Rawl case, mathematical precision is improbable, if not impossible, in a case of this kind.

It is next contended by appellants that they were denied the right to be fully heard in argument. The case was argued before the Circuit Judge on January 18, [230 S.C. 491] 1956. Counsel for appellants asked that each side be allowed three hours in oral argument and two weeks in which to file a brief. The Court permitted only one hour to the side in oral argument with the right to file briefs within a week, which were to be exchanged, and each side allowed a further period of three days to reply to the brief of the other. These matters were addressed to the sound discretion of the Circuit Judge. There was clearly no abuse of discretion.

While the Court had the merits of the case under advisement, counsel for appellants moved on February 13th to recommit it to the Master to clarify and correct the record and to take further testimony as to the status of certain persons claimed to be freeholders. The Circuit Judge denied this motion. It was addressed to his discretion. Halk v. Stoddard, 62 S.C. 564, 40 S.E. 957; Farmers Bank & Trust Co. v. Southern Granite Co., 96 S.C. 106, 79 S.E. 985. We think the motion was properly refused.

All exceptions are overruled and judgment affirmed.

STUKES, C. J., TAYLOR, J., and E. H. HENDERSON, Acting Associate Justice, concur.

LEGGE and MOSS, JJ., not participating.

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399 S.E.2d 767
303 S.C. 177
Peggy O. HENDERSON, Petitioner,
v.
ST. FRANCIS COMMUNITY HOSPITAL, CRS Sirrine, Inc. and Snoddy & McCulloch Associates, Inc., Defendants, of which St. Francis Community Hospital is Respondent.
No. 23288.
Supreme Court of South Carolina.
Heard Nov. 14, 1989.
Decided Oct. 22, 1990.

Header ends here. [303 S.C. 178] D. Denby Davenport, Jr., Davenport & Yacobi, P.A., Greenville, for petitioner.

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Jack D. Griffeth, Love, Thornton, Arnold & Thomason, Greenville, for respondent.

TOAL, Justice:

In this personal injury action, Peggy Henderson, the plaintiff, received a jury verdict of $75,000 for actual damages. The trial judge granted the defendants' motions for a judgment non obstante veredicto on the grounds that the evidence was insufficient to support the jury's verdict. The Court of Appeals affirmed. We granted certiorari and find that more than one reasonable inference can be drawn from the evidence and therefore the motions for judgment non obstante veredicto should have been denied. Accordingly, the decision reported at 295 S.C. 441, 369 S.E.2d 652 (1988) is reversed.

FACTS

On January 30, 1985, Henderson visited a friend who was a patient at St. Francis Hospital. As she was walking in the hospital parking lot to her car, she stepped on an accumulation of sweet gum balls, turned her foot and fell. The sweet gum balls had fallen from a sweet gum tree planted in the parking lot. [303 S.C. 179] She fractured her wrist and sustained various bruises and abrasions.

The original parking lot of St. Francis was designed by CRS Sirrine, Inc. (Sirrine) in 1969. The sweet gum trees were planted shortly thereafter. In approximately 1982, Snoddy & McCulloch Associates, Inc. was employed to design an addition to the parking lot, which would contain several levels or tiers. A representative of Snoddy & McCulloch recommended that the sweet gum trees be removed because they produced debris which would accumulate and become a nuisance. St. Francis refused to remove the trees and a stairway was constructed next to one of the trees.

Henderson filed this action against St. Francis, Sirrine and Snoddy & McCulloch alleging negligent maintenance and negligent design of the parking lot. The jury returned a verdict against St. Francis and Sirrine. As noted above, the trial judge granted the motions for judgment non obstante veredicto and the Court of Appeals affirmed.

DISCUSSION

Henderson contends that the Court of Appeals erred in affirming the trial court's order granting St. Francis' motion for a judgment non obstante veredicto. [1] We agree.

On appeal from an order granting a motion for judgment non obstante veredicto, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing the motion. Rewis v. Grand Strand General Hosp., 290 S.C. 40, 348 S.E.2d 173 (1986); Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). A motion for judgment non obstante veredicto should not be granted if the evidence is susceptible to more than one

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reasonable inference. Felder v. K-Mart Corp., 297 S.C. 446, 377 S.E.2d 332 (1989); Graham, supra; Gallman v. American Employers' Insurance Co., 272 S.C. 369, 252 S.E.2d 124 (1979). We find that the evidence is susceptible to more than one reasonable inference and therefore reverse.

[303 S.C. 180] Although the operator of a parking lot is not an insurer of the safety of those who use the lot, reasonable care must be used by the operator to keep the premises used by invitees in a reasonably safe condition. Felder, supra; Moore v. Levitre, 294 S.C. 453, 365 S.E.2d 730 (1988); Abeles v. Great Atlantic & Pacific Tea Co., 244 S.C. 508, 137 S.E.2d 604 (1964); Bruno v. Pendleton Realty Co., 240 S.C. 46, 124 S.E.2d 580 (1962). The degree of care required must be commensurate with the particular circumstances involved, including the age and capacity of the invitee. Graham, supra. A person who visits a patient in the hospital and uses a parking lot maintained by the hospital for the use and convenience of visitors is an invitee.

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See 65 C.J.S. Negligence, § 63(130) at 907 (1966). Whether the defendant has provided reasonably safe premises is a question for the jury. Felder, supra; Moore, supra; Graham, supra.

Here, the jury determined that the hospital had failed to maintain the parking lot in a reasonably safe condition. The trial court granted the hospital's motion for judgment non obstante veredicto. The Court of Appeals affirmed the finding that Henderson failed to establish that the hospital did not take reasonable steps to remove the debris, thereby breaching its obligation to keep its premises in a reasonably safe condition. We disagree.

Viewing the evidence in a light most favorable to Henderson, more than one reasonable inference can be drawn in regard to the reasonableness of safety precautions taken by the hospital. Evidence was presented upon which a jury could base a finding that the hospital failed to keep its premises reasonably safe.

The record reflects that the sweet gum trees were planted in approximately 1971. Expert testimony revealed that gum balls are hard and round, take years to deteriorate and are dangerous to pedestrians. The hospital was specifically advised to remove the trees because they produced debris which created a nuisance and maintenance problem.

Rather than correct this dangerous condition and remove the trees, the hospital built a stairway immediately adjacent to one of the trees. In addition, the hospital failed to use a regular maintenance program. Testimony from hospital employees revealed that there was no routine for cleaning or sweeping[303 S.C. 181] the parking area and no maintenance records or schedules were kept. The only evidence of a maintenance program was testimony that the area would be cleaned by a sweeper, if no cars were parked in the area.

Therefore, the jury might reasonably have inferred from this evidence that the hospital was negligent in failing to provide reasonably safe conditions for its visitors and patients by not removing the trees or employing an adequate maintenance program when it had actual and constructive knowledge of the dangerous condition created by the sweet gum trees. Because more than one reasonable inference can be drawn from the evidence, the motion for judgment non obstante veredicto should have been denied.

For the reasons discussed above, the Court of Appeals is REVERSED and the matter is REMANDED to the Court of Appeals for consideration of the new trial motion.

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We believe the remand necessitates the following explanation. When the trial court granted St. Francis' motion for judgment non obstante veredicto, it also granted the motion for a new trial in the event the JNOV was vacated or reversed. The trial court granted the new trial motion on the same basis as that used to grant the judgment non obstante veredicto, that the verdict was "entirely unsupported by the evidence." We have now found that there was sufficient evidence to support the jury's verdict. Because the Court of Appeals found that the motion for JNOV was properly granted, it declined to consider the lower court's granting of the new trial motion. Certiorari was granted only on the issue of the JNOV. This matter is therefore REMANDED to the Court of Appeals for consideration of the lower court's granting of the new trial motion in light of this opinion.

HARWELL, CHANDLER and FINNEY, JJ., concur.

GREGORY, C.J., dissents in separate opinion.

GREGORY, Chief Justice, dissenting:

I respectfully dissent. In my view, the evidence presented by petitioner does not support a finding respondent failed to exercise ordinary care in maintaining the parking lot in a reasonably safe condition. The mere fact that sweet gum balls were present in the lot does not establish negligent maintenance. [303 S.C. 182] See Young v. Meeting

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Street Piggly Wiggly, 288 S.C. 508, 343 S.E.2d 636 (Ct.App.1986). I would affirm.

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1 Henderson has not alleged any error in the affirmance of the judgment non obstante veredicto for Sirrine.

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437 S.E.2d 179
313 S.C. 303
Don Paul HILL, Appellant,
v.
YORK COUNTY SHERIFF'S DEPARTMENT, Respondent.
No. 2081.
Court of Appeals of South Carolina.
Heard Sept. 7, 1993.
Decided Oct. 11, 1993.
Rehearing Denied Dec. 6, 1993.
Certiorari Denied June 3, 1994.

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Header ends here. [313 S.C. 304] J. Christopher Mills and W. Gaston Fairey, both of Fairey, Parise & Mills, Columbia, and Karen Zaman, of Karen Zaman & Associates, Charlotte, NC, for appellant.

Joseph C. Coleman, Columbia, for respondent.

[313 S.C. 305] SHAW, Judge:

Appellant, Don Paul Hill, brought this action in negligence against respondent, York County Sheriff's Department. From an order granting the Sheriff's Department summary judgment, Hill appeals. We reverse and remand.

Hill raises two issues on appeal. He first contends the trial judge erred in granting the Sheriff's Department summary judgment based on the absence of proximate cause where the issue had previously been disposed of in an order by another circuit judge denying summary judgment. We disagree. While the circuit court initially denied summary judgment to the Sheriff's Department, the issue of proximate cause was never addressed in that order. The trial judge in the second summary judgment hearing had additional facts presented to him and decided the motion based on the proximate cause issue, while the trial judge in the initial summary judgment motion decided the issue based on the duty of the Sheriff's Department. Accordingly, we find no error.

Hill further contends the trial judge erred in granting the Sheriff's Department summary judgment finding no proximate cause between the actions of the Sheriff's Department and Hill's injury. We agree.

It is well settled that in order to obtain summary judgment, the moving party must show that no genuine issue exists as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, all inferences from the facts in the record must be viewed in a light most favorable to the party opposing the summary judgment motion. Hamilton v. Miller, 301 S.C. 45, 389 S.E.2d 652 (1990). Additionally, even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. Id.

Viewing the evidence in a light most favorable to Hill, the record reveals as follows.[1] On September 10, 1988, Hill was arrested by deputies from the York County Sheriff's Department shortly after 10:00 p.m. while drinking alcohol in a jacuzzi at the Comfort Inn in Fort Mill, South Carolina. Hill, who was twenty years old at the time, was transported to the [313 S.C. 306] Sheriff's Department and charged with public disorderly conduct. At approximately 11:30 p.m., he and a companion were booked into the jail. Hill asserts he did not remember seeing a magistrate, but the Sheriff told him he and his companion would have to pay $68.00 each to get out of jail. A deputy drove Hill to the Comfort Inn to retrieve his bank card, took him to an automatic teller machine and then took him back to the jail. Hill's receipt indicated he withdrew $135.00 from the machine at approximately 1:30 a.m. on

September 11, 1988. Hill and his companion were released around 2:00 a.m. after paying their bonds. At the time of release, Hill and his companion, who were from out of town, had no means of transportation back to the hotel and requested assistance from an officer who told them to "just get the hell out of here." Another officer refused to transport Hill and his companion upon their request, telling them to "walk outside, go right, and keep on going straight." The Comfort Inn was located over thirteen miles from the jail. At the time of his release, Hill was wearing only a pair of

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shorts, with no shoes or shirt, had only four dollars in cash and was extremely intoxicated. He was released into a high crime area and, within a short distance from the jail, was shot in the abdomen.

Hospital records indicate Hill's blood alcohol level was .174 at approximately 3:00 a.m. A letter from a medical doctor contained in the record indicates this would translate into a level of .186 for Hill at 2:00 a.m., the approximate time of release. Former Sheriff Elbert Pope testified by way of deposition that it was an unwritten policy to keep an intoxicated prisoner for four hours minimum from the time of booking, even if he had paid the set bond prior to the running of the four hours. He further stated it would be improper to release someone intoxicated and the purpose for arresting someone for public drunkenness is to protect that person.

Police officer Cynthia Terry was assigned to investigate the shooting of Hill. By way of affidavit, she stated her investigation revealed that Hill's assailant may have shot Hill because "they were running their mouths." She further stated the area in which Hill was shot was notorious as a very high crime area and, in her opinion as a police officer acquainted with the area, "it was extremely dangerous for an intoxicated person to wander in the area after dark, even more so in the [313 S.C. 307] early hours following a Saturday night, the time of highest crime incidence."

Following the second summary judgment motion, the circuit court found the facts were insufficient to establish the element of proximate cause, essential to an action for negligence. The trial judge found the case of Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991) was distinguishable from the facts of this case and held there was no reasonable inference that Hill's injury resulted from any negligent acts by the Sheriff's Department. We disagree.

In Russell, supra, our Supreme Court reversed the decision of this court in Russell v. City of Columbia, 301 S.C. 117, 390 S.E.2d 463 (Ct.App.1989). The Supreme Court found the complaint alleged facts sufficient to state a cause of action and the circuit court therefore improperly granted a motion for judgment on the pleadings. The Russell facts are somewhat similar to the facts at hand inasmuch as they both involve the intervention of law enforcement officers with intoxicated persons. In Russell, the decedent, Wood, became intoxicated at a restaurant and was asked to leave the premises. While in the parking lot, he engaged in an altercation and received a serious wound. The police arrived on the scene finding Wood seriously injured and highly intoxicated. The complaint alleged the officers took control of the situation away from individuals trying to render aid. Although they determined some disorderly conduct had occurred, neither Wood nor the other parties wished to file charges. The officers insisted that Wood leave the premises and Wood walked alone unassisted in the general direction of a nearby railroad trestle. Wood's body was later found in a creek beneath the trestle from which he had fallen, approximately 100 feet from the scene of the investigation.

In affirming the circuit court's granting of the defendant's judgment on the pleadings, this court noted, in order to recover for negligence, a plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. We held that Russell failed to plead sufficient facts to establish the existence of a duty owed to Wood. We further held, even if the officers had such a duty, the facts alleged failed to show a causal link between the [313 S.C. 308] alleged acts of the officers and Wood's subsequent drowning in the creek. Thus, we found the complaint was fatally defective as to the necessary element of proximate cause.

The Supreme Court reversed this court's opinion in Russell holding, under common law: where there is no duty to act but an act is voluntarily undertaken, the actor assumes the duty to use due care. The Supreme Court did not address the issue of proximate cause; inferentially reversing this court on that issue also.

Proximate cause is ordinarily a question of fact for the jury. Davenport v. Walker, 280 S.C. 588, 313 S.E.2d 354 (Ct.App.1984).

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At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied. Anders v. South Carolina Farm Bureau Mutual Insurance Co., 307 S.C. 371, 415 S.E.2d 406 (Ct.App.1992).

Proximate cause is established by proof of actual and legal causation. Actual causation is proved by establishing the injury would not have occurred "but for" the defendant's negligence while legal causation is proved by establishing foreseeability. Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990). The plaintiff need not prove the actor should have contemplated the particular event which occurred, and the defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. Id.

Turning to the case at hand, we are unable to discern any significant distinguishing facts from those in the Russell case such that make this case any weaker on the issue of proximate cause. There is evidence that Hill's injury would not have occurred but for the alleged negligence of the Sheriff's Department. Further, it was foreseeable that such injury could result from the alleged negligence. While it is true that an individual was the direct cause of Hill's injury, the record includes evidence from which it could be inferred that Hill was shot because of his intoxicated condition, i.e. "they were running their mouths." We see no difference between this inference and the inference that Wood fell off the trestle because he was intoxicated. The intervening negligence of a third person will not excuse the first wrongdoer if [313 S.C. 309] such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury. Locklear v. Southeastern Stages, Inc., 193 S.C. 309, 8 S.E.2d 321 (1940). Liability exists for the natural and probable consequences of negligent acts and omissions proximately flowing therefrom. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). The test by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of attendant circumstances. Locklear, supra. The affidavit of Officer Terry indicates at least one law enforcement officer familiar with the area considered it extremely dangerous for an

intoxicated person to be wandering in such a high crime area, particularly at that time. Thus, there is a reasonable inference that law officers might foresee the injury that occurred to Hill as a result of such actions. We hold a genuine issue of fact exists as to whether any negligence of the Sheriff's Department was the proximate cause of Hill's injury.

Accordingly, the order below granting summary judgment is reversed.

REVERSED AND REMANDED.

BELL and CONNOR, JJ., concur.

407 S.E.2d 637
305 S.C. 214
HUMANA HOSPITAL-BAYSIDE,
Plaintiff,
v.
Walter S. LIGHTLE, Individually, and as Administrator of the Estate of Marlene Lightle, and Marlene Lightle,
Defendants.
Walter S. LIGHTLE is the Third-Party Plaintiff, Appellant,
v.
MAXICARE/HEALTHAMERICA, Third-Party Defendant, Respondent.
No. 23447.
Supreme Court of South Carolina.
Submitted June 14, 1991.
Decided Aug. 5, 1991.
Rehearing Denied Sept. 4, 1991.

Header ends here. [305 S.C. 215] Duke K. McCall, Jr. and Dianne S. Riley, both of Leatherwood, Walker, Todd & Mann, Greenville, for third-party plaintiff/appellant.

Stephen H. Brown, of Hill, Wyatt & Bannister, Greenville, for third-party defendant/respondent.

TOAL, Justice:

This appeal involves an insured's suit against his insurer to recover payment of insurance proceeds. The circuit court granted partial summary judgment against the insured on all causes of action, except his claim for breach of contract. We affirm.

The plaintiff in the action below was Humana Hospital-Bayside which provided services to Marlene Lightle. The Hospital instituted an action against Ms. Lightle and her husband, Walter Lightle, to collect payment for those services. Mr. Lightle is the administrator of his wife's estate and was sued both in that context and individually for the charges incurred by his wife at Humana Hospital. Mr. Lightle brought a third party action against his insurance company, Maxicare, alleging negligence[305 S.C. 216] , fraud, bad faith, and estoppel against the insurer in failing to pay his claim.

Ms. Lightle was admitted to the Humana Hospital in Virginia on April 1, 1985. At that time, she was a member of Maxicare's health maintenance organization as a dependent of Mr. Lightle who was enrolled through his employment. The HMO subscriber certificate required that the HMO be notified within 48 hours of any hospitalization for emergency services in an out-of-area hospital in order for coverage to be available. It is undisputed that Humana, located in Virginia, is an out-of-area hospital and that Ms. Lightle was hospitalized for emergency services.

Mr. Lightle testified at his deposition that the Hospital informed him that he needed to call the HMO, and while he does not remember the date on which he called, his phone bill reflects that he made the call on April 8. Ms. Lightle was admitted on April 1. It is Mr. Lightle's contention that although he did not contact the HMO within 48 hours, that he believes that the Hospital should have and did contact the HMO within 48 hours. However, he also testified that the day the Hospital informed him that they had contacted the HMO was the same day that he made his call, which his telephone bill shows to have been on April 8.

In March of 1986, the HMO paid for an amount approximately equal to the charges for the first six days of Ms. Lightle's hospitalization, which covered the emergency services she received prior to the time when they contend that she should have been transferred to one of the HMO's member facilities. Mr. Lightle contends that by virtue of this partial payment, the HMO is estopped to deny further payment.

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LAW/ANALYSIS

Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law. Garrett v. Reese, 262 S.C. 327, 329, 204 S.E.2d 432, 433 (1974). In the case at bar, there is no evidence to support any of Mr. Lightle's claims of negligence, fraud, or bad faith. Hence, there was no [305 S.C. 217] evidence from which a jury could find in his favor and summary judgment was properly granted.

Further, on appeal, Mr. Lightle fails to point to any contested issue which would support these claims. Instead he relies on a sweeping legal assertion that summary judgment is always improper on the issues of negligence, fraudulent breach of contract, bad faith and punitive damages, because these are questions of fact for the jury. This is an incorrect proposition. These issues are only proper to present to the jury when there is a genuine issue as to some material fact for the jury to consider.

The claimant alternatively contends that the HMO is estopped from denying coverage by virtue of the fact that it has extended benefits to pay for some of the charges and cannot now deny benefits for the remainder of the charges. However,

The essential elements of equitable estoppel are: (1) ignorance of the party invoking it of the truth as to the facts in question; (2) representations or conduct of the party estopped which mislead; (3) reliance upon such representations or conduct; and (4) prejudicial change of position as the result of such reliance. Crescent Co., Inc. v. Insurance Company of North America, 266 S.C. 598, 604, 225 S.E.2d 656, 659 (1976).

Mr. Lightle contends that the HMO's partial payment is the conduct which misled him and caused him to rely on them to make the remainder of the full payment. However, at the end of May, 1985, when the Hospital's bill first became due and Mr. Lightle's insurance claim was first filed, Mr. Lightle was informed that because of

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his failure to notify the HMO within 48 hours of his wife's admission, the HMO was not going to pay the Hospital's bill. The partial payment was not made until March of 1986. Hence, the conduct on which he claims to have relied did not occur until nearly a year after he allegedly began relying on it.

Finally, Mr. Lightle argues that this Court should follow North Carolina's decision in Great American Insurance Company v. C.G. Tate Construction Company, 303 N.C. 387, 279 S.E.2d 769 (1981), and ignore the 48 hour notice requirement, supplanting it with a requirement of notice within a [305 S.C. 218] time as set by the parties' "reasonable expectations." Unfortunately, this argument cannot properly be considered by the Court at this time because it pertains only to the interpretation of the contract and the breach of contract cause of action. This appeal is from the order granting summary judgment only on the claims of negligence, fraud, bad faith and estoppel. The contract action was not decided by summary judgment, but was allowed to go to trial on issues of material facts including: the exact date on which the HMO was notified and the extent to which the HMO is contractually liable for Ms. Lightle's hospital expenses for post-emergency treatment.

We recognize that there is a trend among several states to develop a relaxed interpretation of notice requirements in insurance contracts and apply a requirement of notice within a time consistent with the reasonable expectations of the parties. See

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Gottsegen, Insurance--A New Approach for the Interpretation of Insurance Contracts, 17 Wake Forest Law Review 140 (1981). However, we reserve ruling on the issue of whether the 48 hour notice requirement should be relaxed and the contract applied as only requiring notice within a reasonable time until that issue is properly before us.

Mr. Lightle has failed to assert any facts as to which there is a genuine issue so as to make summary judgment improper. He has offered no evidence or raised any issues to support his claims that the insurer was in any way negligent, fraudulent, or acting in bad faith. His assertion that the HMO's partial payment estops them from denying complete payment is based on an alleged reliance which occurred nearly a year prior to the conduct he is claiming to have relied upon. For these reasons, the judgment of the lower court is AFFIRMED.

GREGORY, C.J., and HARWELL, CHANDLER and FINNEY, JJ., concur.

fastcase

340 S.C. 438
531 S.E.2d 535

H.P. LARIMORE, Appellant,
v.
CAROLINA POWER & LIGHT and Thad Williams, Respondents.

No. 3152.

Court of Appeals of South Carolina.

Heard March 7, 2000.

Decided April 17, 2000.

Rehearing Denied July 22, 2000.

Header ends here.

[340 S.C. 441]

Eugene A. Fallon, Jr. and H. Thad White, Jr., both of Fallon Law Firm, of Florence, for Appellant.

Hugh L. Willcox, Jr., of Willcox, Buyck & Williams; and Louis D. Nettles, of Nettles, McBride & Hoffmeyer, both of Florence, for Respondents.

GOOLSBY, Judge:

H.P. Larimore brought this action against Carolina Power & Light (CP & L) and Thad Williams for injuries he received when installing vinyl siding at Williams' home. Larimore appeals the trial court's reduction of the verdict for his comparative negligence, the grant of a directed verdict to Williams, and the court's failure to give a proposed jury charge. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Williams hired Larimore to add vinyl siding to his new home that was under construction. Larimore was instructed to add vinyl siding primarily under the porches and around

[340 S.C. 442]

the eaves, gables, and vents of the home. He began work at the site on or about April 16, 1992.

On April 16, 1992, CP & L employees arrived to install underground utility lines to the home to provide it with electricity. CP & L dug a trench from the road across the property to the meter in order to bury the underground cables. The trench was 150 feet long, 2 to 3 feet deep, and 6 inches wide. Larimore was at the site when CP & L dug the trench and was aware of its presence.

After laying the underground electrical lines, CP & L employees refilled the trench with soil, and attempted to pack it down using a "ditch witch" that had been used to dig the trench. According to the specifications and procedures followed by CP & L, a mechanical tamp should have been used to compact the soil into the excavated area to prevent settling of the soil over time.

Decimus Barbot, Larimore's expert witness, testified the ditch witch was not designed to compact soil and actually compacted only the top few inches of the trench. He further testified the ditch witch does not generate enough pressure to compact soil and, in this case, where the trench was only 6 inches across and the wheel base of the ditch witch was 12 inches wide, no pressure could really be applied to the trench itself. By using the ditch witch instead of a mechanical tamp to compact the trench, the soil was subject to settling.

Several days after CP & L dug the trench, including the morning of April 20, 1992, it rained. The soil covering the trench settled several inches, forming a crust over the top of the trench, while the earth underneath settled

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even more. Larimore noticed it had rained enough to form puddles on the property.

On April 20, 1992, Larimore was standing about 8 to 10 feet from Williams' home as he walked around inspecting the gables. According to Larimore, he stepped on the dirt covering the trench as he was looking up at the gables. The trench caved in and fractured his right hip.

Larimore filed this action against CP & L and Williams seeking damages for his injuries. At trial, Williams moved for a directed verdict, asserting he did not have knowledge of a

[340 S.C. 443]

problem on the site which would pose a danger to the subcontractors. Williams asserted he was not responsible for warning Larimore of an open and obvious condition. The trial court granted Williams' motion for a directed verdict, and the matter proceeded with CP & L as the remaining defendant.

The jury returned a verdict in favor of Larimore but found that he was 50 per cent negligent. The jury also awarded Larimore $5,000 in punitive damages.

I. Reduction of Verdict for Larimore's Comparative Negligence

Larimore contends once the jury determined CP & L's conduct was reckless, willful, or wanton, it should not have been compared with his simple negligence.

The trial court instructed the jury that it could award punitive damages to Larimore if it found CP & L had committed "wanton, willful, malicious, or conscious wrongdoing."

After the jury returned its verdict of actual and punitive damages and found Larimore 50 per cent comparatively negligent, a discussion ensued among the trial court and counsel for both parties as to the proper method for calculating the reduction for Larimore's comparative negligence. At issue was whether to reduce just the actual damages or both the actual and punitive damages by 50 per cent. Larimore's counsel stated he did not believe Larimore's negligence should have any effect as far as the punitive damages award. No other objection or issue was raised concerning the jury's verdict. The trial court subsequently entered a written judgment which reduced Larimore's actual damages of $25,898.34 by 50 per cent to $12,949.17, and awarded him the full amount of punitive damages, $5,000, for a total judgment of $17,949.17. There is no Rule 59, SCRCP motion challenging the calculation of the judgment in the record on appeal.

On appeal, Larimore contends that because the jury awarded him punitive damages, in effect finding CP & L was reckless, willful, or wanton, no portion of the jury's verdict should be reduced for his simple negligence under the comparative negligence doctrine. This issue was not raised to and

[340 S.C. 444]

ruled upon by the trial court. Accordingly, it is not properly before this court for review.[1]

II. Directed Verdict as to Thad Williams

Larimore next argues the trial court erred in granting a directed verdict to Williams. We disagree.

The trial court may properly grant a motion for a directed verdict where only one reasonable inference can be drawn from the evidence.[2] In deciding a motion for a directed verdict, all inferences must be viewed in the light most favorable to the nonmoving party.[3]

Williams, as the property owner, owes a duty to those on his property commensurate with their status.[4] South Carolina recognizes

four classes of persons present on the property of another: adult trespassers, invitees, licensees, and children.[5] The level of care owed is dependent upon the class of the person present.[6] Because Larimore was a business visitor invited to enter or remain on the property for a purpose directly or indirectly connected with Williams, Larimore was an invitee.[7]

"The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the

[340 S.C. 445]

breach of such duty."[8] The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge.[9] The degree of care required is commensurate with the particular circumstances involved, including the age and capacity of the invitee.[10]

In moving for a directed verdict, Williams argued that the trench was an open and obvious condition on the property and, as such, Williams owed no duty to warn Larimore of the condition. The trial court agreed and directed a verdict in Williams' favor. Larimore does not appeal the trial court's ruling that the danger was open and obvious; hence, it is the law of the case.[11]

A landowner generally does not owe a duty to warn others of open and obvious conditions on the property.[12] Our supreme court, however, held in *Callander v. Charleston Doughnut Corp.*[13] that a landowner may still be liable for

[340 S.C. 446]

injuries suffered from an open and obvious defect if the landowner should have anticipated the harm.[14]

Larimore argues the rule in *Callander* requires submission of William's' liability to the jury in his case. We disagree.

In *Callander*, an elderly customer fell when he visited a crowded Krispy Kreme store in Charleston and backed up to sit on a stool that lacked a rounded seat cushion. Our supreme court adopted the Restatement (Second) of Torts § 343 A, which states:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.[15]

We believe *Callander* is inapposite here. In *Callander*, the owner admitted knowing of the condition for over two months and had in fact placed a sign on the broken stool warning customers of the condition. At the time of the accident, however, the sign was missing and had not been replaced. Moreover, the restaurant, open to the public at large, was often crowded and often visited by senior citizens who frequently backed onto the stools in order to sit down. Based on the owner's knowledge of the defect, the length of time the defect existed, the owner's previous warning to the patrons of the danger, the restaurant's frequent visitation by senior citizens, and the owner's knowledge that his customers frequently backed onto the stools, the supreme court concluded that a jury question existed as to whether the harm should have been anticipated by the owner.

In contrast to *Callander*, Williams had no knowledge of the defect. Despite the fact the defect was open and obvious to

[340 S.C. 447]

those on the construction site, Larimore failed to present any evidence that Williams had any knowledge of the defect's existence prior to the accident. Because Williams had no knowledge of the defect's existence, it would be impossible for him to anticipate any harm that might result from it. We do not read section 343A of the Restatement to require landowners to anticipate harm from an open and obvious condition from the moment of the condition's creation. To impose liability under such a theory would make landowners insurers of their invitees' safety; it is well-established in South Carolina that they are not.[16]

Furthermore, as previously noted, the degree of care required by a landowner is commensurate with the particular circumstances involved, including the age and capacity of the invitee. In the present case, Larimore was an experienced contractor familiar with construction sites and the way they operated. He testified he usually conducted a visual inspection of the construction site for the safety and protection of his own employees. Additionally, Larimore knew of the trench's existence and location, as he was present the day CP & L dug the trench and placed the electrical lines. Accordingly, we agree with the trial court that there is no basis to hold Williams liable as a landowner under this situation.

Larimore also claims Williams, acting as a general contractor, is liable under the theory of premises liability. In his brief, Larimore does not, however, argue any other potential theory of liability for a general contractor.[17]

[340 S.C. 448]

Under a premises liability theory, a contractor generally equates to an invitor and assumes the same duties that the landowner has, including the duty to warn of dangers or defects known to him but unknown to others.[18] A general contractor, however,

> is not liable to an invitee for an injury resulting from a danger that was obvious or that should have been observed in the exercise of reasonable care. The entire basis of an invitor's liability rests upon his superior knowledge of the danger that causes the invitee's injuries. If that superior knowledge is lacking, as when the danger is obvious, the invitor cannot be held liable.[19]

Accordingly, Williams, in both his role as landowner and general contractor, owed no duty to warn Larimore of the open and obvious defect.

III. Failure to Give Proposed Charge

Larimore contends the trial court erred in failing to charge his proposed Jury Charge No. 24, which states:

> Our courts have established a high degree of care for the utility companies in maintaining wire lines. When utility companies maintain wire lines on or over private premises, they are required to use care commensurate with the danger

[340 S.C. 449]

> to see that no injury comes to persons rightfully in proximity to them and who are guilty of no wrong.

The care required is more than mere mechanical skill; it includes foresight with regard to reasonably probable contingencies.

The trial court declined to give the proposed charge, stating, "I think twenty-four would be of a maintenance and not installation. I think we are talking about installation and not maintenance in this case."

When instructing the jury, the trial judge is required to charge only the current and correct law of South Carolina.[20]

"To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well. Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved."[21]

We find no reversible error in the trial court's failure to give the proposed instruction under the circumstances present here. At issue was not CP & L's duty to maintain power lines, but the proper procedure for their installation. Further, the charge primarily concerns the maintenance of overhead lines as opposed to underground lines. Upon reviewing the trial court's charge as a whole, we discern no prejudice to Larimore.

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

Notes:

1. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997) (issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

2. *Adams v. G.J. Creel & Sons*, 320 S.C. 274, 465 S.E.2d 84 (1995).

3. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996).

4. *See Landry v. Hilton Head Plantation Prop. Owners Ass'n*, 317 S.C. 200, 452 S.E.2d 619 (Ct.App.1994) (a landowner's duty to maintain in a reasonably safe condition his or her land depends upon the person's status while on the land).

5. *Id.*

6. *Id.*

7. *See Wilson v. Duke Power Co.*, 273 S.C. 610, 258 S.E.2d 101 (1979) (person working on premises of owner for benefit of owner is considered invitee).

8. *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 289, 356 S.E.2d 123, 128 (Ct.App.), *cert. denied*, 293 S.C. 406, 360 S.E.2d 824 (1987) (citation omitted).

9. *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991).

10. *Henderson v. St. Francis Community Hosp.*, 303 S.C. 177, 399 S.E.2d 767 (1990).

11. *See Town of Mt. Pleasant v. Jones*, 335 S.C. 295, 516 S.E.2d 468 (Ct.App.1999) (an unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct). Williams also moved for directed verdict on the grounds that if the defect were latent, Larimore failed to establish Williams knew or should have known about the defect. We need not address any issues involving this ruling, as Larimore fails to appeal any issue relating to that finding of fact. Accordingly, any issues relating to that ruling are not preserved for our review. *See* Rule 207(b)(1)(B), SCACR (no point will be considered which is not set forth in the statement of the issues on appeal); *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (issue cannot be raised for the first time on appeal, but must have been raised to

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and ruled upon by the trial judge to be preserved for appellate review).

12. *Meadows v. Heritage Village Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 409 S.E.2d 349 (1991).

13. 305 S.C. 123, 406 S.E.2d 361 (1991).

14. *Id.*

15. Restatement (Second) of Torts § 343A (1965). Comment f to section 343A states in part: "Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." Restatement (Second) of Torts § 343A cmt. f (1965).

16. *See generally Moore v. Levitre*, 294 S.C. 453, 365 S.E.2d 730 (1988) (merchant is not an insurer of its customer's safety); *House v. European Health Spa*, 269 S.C. 644, 239 S.E.2d 653 (1977) (business owner is not an insurer of an invitee's safety); *Bruno v. Pendleton Realty Co.*, 124 S.E.2d 580, 240 S.C. 46 (1962) (owner of shopping center is not an insurer of safety, but must exercise reasonable care); *Wintersteen v. Food Lion, Inc.*, 336 S.C. 132, 518 S.E.2d 828 (Ct.App.1999) (merchant is not an insurer of its customer's safety); *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 469 S.E.2d 630 (Ct.App.1996) (landlord is not an insurer of every tenant's safety).

17. These theories may include but are not limited to negligent hiring, negligent supervision, violations of OSHA regulations dealing with workplace safety, and agency principles.

18. *See Hall v. Moveable Offshore, Inc.*, 455 F.2d 633 (5th Cir.1972) (duty of general contractor is similar to that owed by owner to his invitees); *Breeden v. Hardy Corp.*, 562 So.2d 159 (Ala.1990) (general contractor is an invitor); *Souza v. Pratico*, 245 Cal.App.2d 651, 54 Cal.Rptr. 159 (1966) (an employee of a subcontractor is an invitee of the general contractor); *Thill v. Modern Erecting Co.*, 272 Minn. 217, 136 N.W.2d 677 (1965) (a general contractor in charge is regarded as the possessor of land); *Weiser v. Bethlehem Steel Corp.*, 353 Pa.Super. 10, 508 A.2d 1241 (1986) (contractors and subcontractors owe employees of subcontractors the same standard of care as a landowner owes to a business visitor); 62 Am.Jur.2d *Premises Liability* § 457 (1990) (a subcontractor is an invitee as to a general contractor).

19. *Breeden*, 562 So.2d at 160 (citations omitted). *See also Souza*, 54 Cal.Rptr. at 163 ("As a result of such invitor-invitee relationship, the general contractor exercising supervision ... owes the employees of a subcontractor a common-law duty to exercise ordinary care to provide them with a reasonably safe place to work or to warn them of dangers which are not obvious ... [but] is not liable to [the invitee] for an injury resulting from a danger which is obvious or should have been observed in the exercise of ordinary care.").

20. *McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995). *See also Fernanders v. Marks Const. of South Carolina, Inc.*, 330 S.C. 470, 499 S.E.2d 509 (Ct.App.1998) (a trial judge is required to charge only the current and correct law; ordinarily, a trial judge has a duty to give a requested instruction if it correctly states the law applicable to the issues and evidence); *Brown v. Smalls*, 325 S.C. 547, 481 S.E.2d 444 (Ct.App.1997) (a trial judge is required to charge the current and correct law applicable to the issues presented).

21. *McCourt*, 318 S.C. at 306, 457 S.E.2d at 606 (citations omitted).

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316 S.E.2d 406
281 S.C. 525
Peggy S. MAIN, Respondent,
v.
Mazie R. CORLEY, Appellant.
No. 22114.
Supreme Court of South Carolina.
Heard April 17, 1984.
Decided May 24, 1984.

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Header ends here. [281 S.C. 526] J. Wesley Crum, III, Denmark, for appellant.

J. Terry Poole, Barnwell, for respondent.

LITTLEJOHN, Chief Justice:

Plaintiff-Respondent, Peggy S. Main, (buyer) brought this action for specific performance of a contract to buy land from Defendant-Appellant, Mazie R. Corley, (seller). The trial judge granted the buyer's motion for summary judgment. This appeal followed. We affirm.

The initial parties to the contract were Mazie R. Corley who proposed to sell the real estate to buyers, Frank D. Wooldridge and Betty L. Wooldridge. The contract is regular in all respects being properly witnessed and probated in keeping with the law relative to real estate in South Carolina. The rights of purchasers, Frank D. Wooldridge and Betty L. Wooldridge, were assigned to the buyer who brings this action. The showing made by the buyer as a basis of summary judgment consisted of the contract, an affidavit of the attorney who prepared the original contract of sale, and an affidavit of a witness to the instrument. There was also evidence that the seller had previously undertaken to institute an action in court based on the contract and that installment payments had been made consistent with the contract. There was no satisfactory explanation as to what the payments were for unless to be applied to the contract. The only evidence the seller introduced was the testimony of her husband who stated that the signature on the contract was not hers.

In considering whether summary judgment was appropriate, the trial court and this court must view the evidence in the light most favorable to the party opposing the motion. Shropshire v. Jones, 277 S.C. 468, 289 S.E.2d 410 (1982). Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ. Williams v. Chesterfield Lumber Company, 267 S.C. 607, 230 S.E.2d 447 (1976).

A motion for summary judgment is akin to a motion for a directed verdict. In each instance, one party must lose as a matter of law. A motion for a directed verdict [281 S.C. 527] speaks in terms of "only one reasonable inference." A motion for a summary judgment speaks in terms of "no genuine issue as to material facts." It is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine.

It would hardly be argued that the testimony of a witness who said he saw a wreck in South Carolina would raise a factual issue if he simultaneously admitted that he was in a hospital in Boston, Massachusetts, at the time. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine. In this case, the seller did not introduce any evidence, such as an affidavit by the seller herself that the signature was not hers, that created a genuine issue of fact.

We conclude that, if there is any issue of fact involved in this proceeding, the same was not genuine and the trial judge properly granted the motion for summary judgment.

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AFFIRMED.

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NESS, GREGORY and HARWELL, JJ., and JOSEPH R. MOSS, as Acting Associate Justice, concur.

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345 S.C. 506
548 S.E.2d 223

MICTRONICS, INC., Respondent,
v.
SOUTH CAROLINA DEPARTMENT OF REVENUE, Appellant.

No. 3350.

Court of Appeals of South Carolina.

Heard April 5, 2001.

Decided June 4, 2001.

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[345 S.C. 508]

General Counsel and Deputy Director Harry T. Cooper, Chief Counsel Revenue Litigation Ronald W. Urban Jr., and Counsel of Regulatory Litigation Jeffrey M. Nelson, all of Columbia, for appellant.

George J. Morris, of Charleston, for respondent.

HEARN, Chief Judge:

The South Carolina Department of Revenue (DOR) appeals an order reversing the administrative law judge's refusal to reopen Mictronics, Inc.'s case claiming a tax exemption. We affirm.

PROCEDURAL BACKGROUND

Mictronics, Inc. (Mictronics) filed a request for a contested case hearing with the Administrative Law Judge Division (ALJD) claiming it was entitled to an exemption from the South Carolina sales and use tax. Mictronics filed a prehearing statement as directed by the administrative law judge (ALJ). On March 7, 1996, the parties were served with notice of a hearing scheduled for May 14.

Due to a conflict in his schedule, the ALJ rescheduled the hearing for May 22 by issuing an order and amended notice of hearing dated April 26. Additionally, a member of the ALJ's staff telephoned Mictronics and spoke with its president, Thomas Blocker, telling him the hearing was rescheduled. Blocker understood the hearing to be rescheduled for June 22 and made a note in his file to that effect. DOR's counsel received a similar phone call, but understood the rescheduled hearing date to be May 22.

Because of Blocker's misunderstanding about the date of the rescheduled hearing, Mictronics did not appear at the May 22 hearing. The ALJ issued an order dismissing the action with prejudice and treating Mictronics' failure to appear at the hearing as a default under Rule 23, SCRALJD. Blocker received this order of dismissal and immediately wrote the ALJ stating he had mistaken the date of the hearing. Blocker apologized for the mistake and requested the matter be reopened

[345 S.C. 509]

with a new hearing date. The ALJ denied this request.

Mictronics appealed the denial of the motion to reopen to the circuit court which issued an order remanding the case to the ALJD to make findings of fact and draw conclusions of law about whether Mictronics should be relieved of its default. Pursuant to the circuit court's order, a hearing was held before the ALJ. The ALJ treated Mictronics' request to reopen as a motion for reconsideration under Rule 29, SCRALJD, and concluded that Mictronics received adequate notice of the hearing and that its failure to attend could not be excused based on mistake, inadvertence, surprise, or excusable neglect.

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Mictronics again appealed the ALJ's order to the circuit court which reversed the ALJ's order and remanded the matter to the ALJD for a hearing on the merits. The circuit court found the ALJ abused his discretion in applying the excusable neglect standard of Rule 60(b), SCRCP instead of the good cause standard referenced in Rule 55(c), SCRCP. This appeal follows.

DISCUSSION

Mictronics appealed to the circuit court only from the denial of the motion to reopen, not the underlying dismissal. DOR now appeals from the circuit court's reversal of the ALJ's order, arguing the circuit court exceeded its authority in reversing the ALJ's order. We disagree.

Appeals from the ALJD must be conducted according to the South Carolina Administrative Procedures Act. *See* S.C.Code Ann. § 1-23-380 (Supp.2000). Section 1-23-380(A)(6) provides in relevant part:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> [345 S.C. 510]
>
> (f) *arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.*

(emphasis added). An abuse of discretion occurs when a court's decision is controlled by an error of law or is without evidentiary support. *Ledford v. Pennsylvania Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976).

The circuit court reversed the ALJ because it thought the ALJ applied the wrong standard in considering the motion to reopen. The circuit court believed the motion should be governed by Rule 55, SCRCP, rather than the more stringent standard required by Rule 60, SCRCP. We disagree.

Initially, we note the ALJD rules define default differently than the rules of civil procedure. Under Rule 23, SCRALJD, default occurs when either party fails to prosecute or defend an action. Rule 55 allows entry of default against "a party against whom a judgment for affirmative relief is sought [that] has failed to plead or otherwise defend." In this case, Mictronics was the plaintiff and not the defending party as contemplated by Rule 55. Therefore, the circuit court erred in instructing the ALJ to reconsider his order applying the good cause standard of Rule 55(c).

Although we disagree with the circuit court's logic, we agree with its result. This court may affirm for any reason appearing in the record pursuant to Rule 220(c), SCACR, and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723-24 (2000).

We find the motion to reopen falls under Rule 29(D), SCRALJD. The relevant portion of this rule reads: "Any party may move for reconsideration of a final decision of an administrative law judge in a contested case, subject to the grounds for relief set forth in Rule 60(b)(1 through 5), SCRCP. ..." The ALJ's order dismissing Mictronics' claim with prejudice was a final order. Thus, under the ALJD rules, it appears the only grounds for reconsideration are those contained in Rule 60(b), SCRCP.

No South Carolina case discusses the Rule 60(b)(1) standards as applied to Rule 29(D), SCRALJD. For that reason, we look to cases interpreting Rule 60(b) generally. Under Rule 60(b)(1), SCRCP, a party may be relieved from a final order for "mistake, inadvertence, surprise, or excusable neglect." In determining whether to grant a motion under

[345 S.C. 511]

Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party. *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct.App. 1993) (quoting Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 82 (1985)).

Here, Mictronics made an error with respect to the hearing date and immediately sought relief from the dismissal. In *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct.App.1986), this court found that a trial judge abused his discretion in refusing to grant a motion to set aside a default judgment granted after an answer was received one day late. The court there held that "where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief." 288 S.C. at 61, 339 S.E.2d at 525. This is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. *Id.; see also Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 153, 399 S.E.2d 439, 440 (Ct.App.1990) (finding sanction dismissing counterclaim too severe). We find no evidence in the record that the mistake was anything but a good faith error, as shown by Blocker's explanation coupled with his speed in asking the ALJ for relief.

Moreover, it appears that Mictronics had a meritorious defense. To establish a meritorious defense, a party is not required to show an absolute defense. *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989).

> [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978). We find Mictronics' prehearing statement outlining its tax exemption on certain subcontracts meets the standard for a meritorious defense.

[345 S.C. 512]

It appears from the record that DOR will suffer no prejudice should this case proceed for a determination on the merits. Here, DOR has no substantial stake in this windfall, and the resolution of the case on its merits has not been substantially delayed by the parties' actions. Given Mictronics' good faith mistake, its swift action to try to remedy the situation, the existence of a meritorious defense, and

the lack of prejudice to DOR, we find the ALJ abused his discretion by refusing to reopen the case. Therefore, we affirm the circuit court's order reversing the ALJ's denial of the motion to reopen and remanding the case to the ALJD for an adjudication on the merits.

AFFIRMED.

GOOLSBY and SHULER, JJ., concur.

Notes:

1. *Columbia Pools, Inc.* arose under S.C.Code Ann. § 15-27-130 (1976) which was later repealed and replaced by Rule 60, SCRCP. *See Sijon v. Green*, 289 S.C. 126, 127, 345 S.E.2d 246, 247 (1986).

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336 S.C. 89
518 S.E.2d 608

Lela PETERSON (Individually and as Administratrix of the Estate of Steve Tarver, Deceased), as Assignee of Margaret Webb Walker, Appellant,
v.
WEST AMERICAN INSURANCE COMPANY, Respondent.

No. 3003.

Court of Appeals of South Carolina.

Submitted May 11, 1999.

Decided June 1, 1999.

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[336 S.C. 91]

Glenn V. Ohanesian, of Ohanesian & Ohanesian; and O. Fayrell Furr, Jr., of Furr & Henshaw, both of Myrtle Beach, for Appellant.

James D. Brice and Jennifer E. Johnsen, both of Gibbes, Gallivan, White & Boyd, of Greenville, for Respondent.

ANDERSON, Judge:

This is an insurance case involving the question whether automobile coverage was effectively cancelled by the policy-holder

[336 S.C. 92]

in the absence of notice to the South Carolina Department of Highways and Public Transportation (the Highway Department). Lela Peterson's son, Steve Tarver, was killed while riding in a car driven by E. Michael Galloway. The car belonged to Margaret Webb Walker. Peterson sought actual and punitive damages from West American Insurance Company, Walker's insurance carrier. The circuit court granted West American summary judgment, finding Walker had voluntarily cancelled the insurance policy prior to the date of the automobile accident. Peterson appeals, arguing the cancellation was not effective in the absence of notice to the Highway Department. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Walker obtained an automobile insurance policy on November 23, 1990 from West American through the Abercrombie Insurance Agency. The policy was for the stated six-month term of November 23, 1990 to May 23, 1991.

On or about November 27, 1990, Walker gave her car to Galloway, a neighbor, so that he could repair the car. Galloway took possession of the car and never returned. On December 12, 1990, Walker reported her car stolen to the Simpsonville Police Department. Walker spoke with an Abercrombie agent on February 15, 1991 and sought to cancel her policy. West American issued a cancellation notice and sent Walker a refund check on February 25, 1991. West American designated November 28, 1990 as the policy termination date on the notice. However, the Highway Department never received a Form FR-4, Notice of Cancellation of Policy.

On April 14, 1991, Galloway wrecked Walker's car in a single-car accident in Mississippi. Galloway, who had been drinking, lost control of the car and hit a tree. Steve Tarver, a passenger in the back seat of the car, died as a result of his injuries in the wreck.

Peterson, Tarver's mother, was appointed administratrix of Tarver's estate. Prior to the appointment, Peterson's attorney informed Walker of the wreck and sought information on

[336 S.C. 93]

Walker's insurance company. Walker referred the letter to West American. West American declined coverage, asserting Walker cancelled her policy prior to the accident. Thereafter, on several occasions West American suggested Walker retain personal counsel and advised her they would not provide her with a defense.

Peterson's attorney sought the limits of the policy from West American. West American continued to refuse liability, claiming Galloway stole the car and Walker cancelled the policy prior to the accident.

Peterson brought a wrongful death action against Galloway, alleging he drove the car in excess of 100 m.p.h. while intoxicated before crashing, and a negligent entrustment action against Walker. In 1993, the Mississippi circuit court awarded a default judgment against Walker and Galloway for $544,350. South Carolina circuit court Judge McKellar enrolled the foreign judgment in South Carolina for the principal amount plus post-judgment interest of $105,231.07.

Walker assigned her claims against West American to Peterson on July 5, 1995. Peterson then sued West American for bad faith refusal to pay benefits. Peterson alleged West American failed to perform its duty to defend Walker under the terms of the policy, resulting in the default judgment; failed to properly cancel the policy under the law; and failed to pay benefits due under the policy. West American continued to refute liability, contending, among numerous defenses, that Walker properly cancelled the insurance policy prior to the accident.

West American and Peterson filed motions for summary judgment, which were heard by Judge Pyle. The circuit court granted summary judgment in favor of West American. The court found West American validly cancelled the insurance policy pursuant to Walker's request, and Peterson, who stood in the shoes of Walker, failed to establish the existence of a mutually binding contract. The circuit court subsequently denied Peterson's Rule 59, SCRCP motion. Peterson appeals.

ISSUES

I. Did the court err in failing to find the insurance policy remained in effect because West American did not notify

[336 S.C. 94]

the Highway Department that Walker's policy had been cancelled?

II. Did the court err in finding West American properly cancelled the policy in accordance with the relevant policy and statutory provisions?

III. Did the court err in finding the insurance policy was not in effect at the time of the automobile accident since the alleged negligent entrustment occurred while the policy remained in effect?

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. *See also Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997).

An appellate court reviews the granting of summary judgment under the same

fastcase

standard applied by the trial court pursuant to Rule 56(c), SCRCP: Summary judgment is properly upheld when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). *See also* 5 Am.Jur.2d *Appellate Review* § 700 (1995) ("In reviewing a grant of summary judgment, the appellate court is limited to the evidence that was before the trial court and applies the same standard of review as did the trial court.").

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman*, 306 S.C. 101, 410 S.E.2d 537. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCP; *SSI Med. Servs., Inc. v. Cox*, 301

[336 S.C. 95]

S.C. 493, 392 S.E.2d 789 (1990); *NationsBank v. Scott Farm*, 320 S.C. 299, 465 S.E.2d 98 (Ct.App.1995).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996).

LAW/ANALYSIS

I. Did the insurance policy remain in effect because West American failed to notify the Highway Department that Walker's policy was cancelled?

Peterson's first argument is two-fold: (a) whether §§ 56-10-240 and 56-10-40 of the South Carolina Code required West American to notify the Highway Department when Walker's policy was cancelled; and (b) if so, whether West American's failure to notify the Highway Department continued the policy in effect.

A. Failure to notify Highway Department of voluntary cancellation.

We hold Walker's voluntary cancellation of her insurance policy absolved West American's responsibilities under §§ 56-10-240 and 56-10-40 because these provisions apply when the insurer cancels or refuses to renew a policy, not when the insured voluntarily cancels a policy.

Section 56-10-240 provides in pertinent part:

> (A) If, during the period for which it is licensed, a motor vehicle is or becomes an uninsured motor vehicle, then the vehicle owner immediately shall obtain insurance on the vehicle or within five days after the effective date of cancellation or expiration of his liability insurance policy surrender

[336 S.C. 96]

> the motor vehicle license plates and registration certificates issued for the motor vehicle. If five working days after the last day to pay an automobile liability insurance premium ... a motor vehicle is an uninsured motor vehicle, *the insurer* shall give written notice ... within ten days after the five-day period

ends ... to the department of the cancellation or refusal to renew under the following circumstances:

(1) the lapse or termination of such insurance or security occurs within three months of issuance, provided that this subsection only applies to new policies, and not renewal or replacement policies; or

(2) the lapse or termination occurs after three months for a resident who fails one or more of the objective standards prescribed in Section 38-73-455.

(B) The department, in its discretion, may authorize *insurers to utilize alternative methods of providing notice of cancellation of or refusal to renew to the department.* The department may not reissue registration certificates and license plates for that vehicle until satisfactory evidence has been filed by the owner or *by the insurer who gave the cancellation or refusal to renew notice* to the department that the vehicle is insured.... The department shall give notice by first class mail of the cancellation or suspension of registration privileges to the vehicle owner at his last known address.

S.C.Code Ann. § 56-10-240 (Supp.1998) (emphasis added).

This provision explicitly references only an insurer's cancellation notice. The emphasized portion illustrates how the provision focuses on instances where the insurer cancels or refuses to renew a policy and provides no specific reference to an insured's decision to cancel. Thus, we find § 56-10-240 applicable when an insurer cancels or refuses to renew a policy, but not applicable where the insured voluntarily seeks to cancel an insurance policy.

Section 56-10-40 permits a similar inference. Section 56-10-40 provides in relevant part:

Every insurer writing automobile liability insurance in this State and every provider of other security approved and accepted by the director or his designee in lieu of such

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insurance shall immediately notify the department of the lapse or termination of any such insurance or security issued to or provided for a resident of this State in the following circumstances:

(1) the lapse or termination of such insurance or security occurs within three months of issuance provided that this subsection only applies to new policies, and not renewal or replacement policies; or

(2) the lapse or termination occurs after three months for a resident who fails one or more of the objective standards prescribed in Section 38-73-455.

This notification must be in writing or magnetic media in a manner considered satisfactory to the department. *Upon receipt of any such notice ... the*

> *department shall make a reasonable effort to notify the person that his certificate of registration has been suspended and shall recover the certificate from such person and the motor vehicle registration plates from the vehicles concerned.*

S.C.Code Ann. § 56-10-40 (Supp.1998) (emphasis added).

The provision's first sentence explicitly limits its scope to insurers. The provision's emphasized portion implicitly assumes the insured lacks notice of a policy's cancellation until the Highway Department notifies the insured, thus implying the insurer, rather than the insured, cancelled the policy. Therefore, we find this provision's applicability also is limited to instances where the insurer, rather than the insured, cancels the policy.

Other statutory provisions imposing notice requirements when the insurer cancels a policy, but not where the insured cancels the policy, buttress our conclusion. *See, e.g., Fidelity & Cas. Ins. Co. v. Nationwide Ins. Co.*, 278 S.C. 332, 335, 295 S.E.2d 783, 785 (1982) (noting that "[i]n construing a statute, it is proper to consider legislation dealing with the same subject matter"). For example, § 38-77-120 provides:

> (a) No cancellation or refusal to renew by an insurer of a policy of automobile insurance is effective unless the insurer delivers or mails, to the named insured at the address shown in the policy, a written notice of the cancellation or refusal to renew.
>
> * * *
>
> [336 S.C. 98]
>
> (b) Subsection (a) of this section does not apply if the:
>
> * * *
>
> (2) named insured has demonstrated by some overt action to the insurer or its agent that he expressly intends that the policy be canceled or that it not be renewed.

S.C.Code Ann. § 38-77-120 (Supp.1998).[3]

This provision absolves an insurer's responsibility to issue notice when the insured cancels or refuses to renew a policy, in contrast to when the insurer takes such action and, thus, illustrates the different duties arising when the insured cancels a policy as opposed to when the insurer cancels the policy.

Therefore, we hold Walker's voluntary cancellation of her policy absolved West American's notice responsibilities under §§ 56-10-40 and 56-10-240.[4] Because Peterson, as Walker's assignee, assumes the same position as Walker, Peterson is also precluded from claiming West American failed to give proper notice. *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201-02, 447 S.E.2d 869, 870 (Ct.App.1994) (holding an assignee stands in the shoes of the assignor and can claim no higher rights than the assignor possessed at the time of the assignment).

B. No continuation of policy in the absence of notice of cancellation.

Even assuming §§ 56-10-40 and 56-10-240 applied, Peterson's claim is without merit because West American's failure to comply with the notice requirements does not effectively continue the policy.

If § 56-10-40 or § 56-10-240 do apply, West American violated these provisions by failing to properly notify the Highway

Department that Walker's policy terminated. *See* S.C.Code Ann. §§ 56-10-40 & -240 (Supp.1998); *United States Fidelity & Guar. Co. v. Security Fire & Indem. Co.* 248 S.C. 307, 313-14, 149 S.E.2d 647, 650 (1966) ("Statutory provisions

[336 S.C. 99]

requiring notice for cancellation or termination of compulsory motor vehicle insurance are mandatory, must be strictly followed to effect a cancellation or termination of the policy, and must be construed so as to effect the statutory purpose of providing protection to the general public.").

However, even if required, West American's failure to properly notify the Highway Department would not continue the policy in effect. *See Fidelity & Cas. Ins. Co. v. Nationwide Ins. Co.*, 278 S.C. 332, 295 S.E.2d 783 (1982). In *Fidelity*, the South Carolina Supreme Court analyzed prior versions of § 56-10-40 [formerly § 56-11-220] and § 56-10-240 [formerly § 56-11-740]. The court held § 56-11-740 required the insured, rather than the insurer, to serve notice of the cancellation to the Highway Department because at the time the cause of action arose the statute required notice from the insured. The court noted the statute had since been amended to provide the insurer was to give notice to the Highway Department in the event of a cancellation of coverage. Next, the court held § 56-11-220 required notice of a cancellation, but did not continue the policy in effect when the insurer failed to properly notify the Highway Department absent an explicit statement providing for such effect. *Fidelity*, 278 S.C. at 334-35, 295 S.E.2d at 784-85 ("Nothing in this statute specifically states that failure to notify as required continues the policy in effect."). Neither of the current statutes, § 56-10-40 and § 56-10-240, provide for a policy's continuation if an insurer fails to give notice under the provisions.

Although Peterson contends *Fidelity* did not require notice under the former § 56-11-740 only because the statute then referenced notice by the "insured" rather than the "insurer," we hold the court's subsequent discussion regarding § 56-11-220, with nearly identical provisions to our current § 56-10-40, governs the case *sub judice*. Therefore, we hold that even if the statutory provisions applied to West American, failure to properly notify the Highway Department of the cancellation of Walker's insurance policy did not continue the policy in effect.

II. Did the court err in finding the policy was properly cancelled in accordance with the relevant policy and statutory provisions?

Peterson further contends Walker's attempt to cancel her policy was invalid because the policy and the corresponding

[336 S.C. 100]

statutory provision prevent cancellation within sixty days of the policy's issuance. We disagree.

The relevant provision in Walker's insurance policy concerning cancellation of the policy states as follows:

> During the first 60 days this policy is in effect, the policy may be cancelled only if:
>
> a. a check or bank draft tendered for payment of premium is returned unpaid for insufficient funds or other reason by the financial institution; or
>
> b. You furnish proof from the Department of Highways and Public Transportation that:

(1) the "your covered auto" shown in the Declarations has been sold or otherwise disposed of; or

(2) you have surrendered the tags and registration of the "your covered auto" shown in the Declarations.

The corresponding statutory provision, § 56-10-280, states: [A] contract or policy may be canceled within the first sixty days only under one or more of the following circumstances:

(1) A check or bank draft tendered by the insured for payment of premium is returned unpaid for insufficient funds or other reason by the insured's financial institution.

(2) The insured produces satisfactory proof from the department that he has sold or otherwise disposed of the insured vehicle or surrendered its tags and registration.

(3) The insured has secured another policy that meets the financial responsibility requirements prescribed in this chapter.

S.C.Code Ann. § 56-10-280 (Supp.1998).

Peterson contends Walker's failure to produce proof from the Highway Department that she sold or otherwise disposed of her vehicle or surrendered her tags and registration renders any attempted cancellation of the policy within sixty days of issuance invalid. While Peterson's assertions may be true, Peterson's argument ultimately fails because we find Walker cancelled the policy more than sixty days after its issuance.

West American issued Walker's policy on November 23, 1990. On February 15, 1991, Walker sought to cancel the

[336 S.C. 101]

policy retroactive to November 23, 1990, the date of issuance. On February 25, 1991, West American issued Walker a cancellation notice and a premium refund. We hold Walker's policy effectively terminated on February 25, 1991, the date West American issued the premium refund and cancellation notice. Although the cancellation notice lists November 28, 1990, as the termination date, West American did not actually terminate the policy until it refunded Walker's unearned premium and issued the cancellation notice on February 25, 1991. Back-dating the termination date only afforded Walker a larger premium refund and did not absolve West American of any liability until the cancellation notice was issued on February 25, 1991.

Furthermore, Walker's policy permits cancellation by returning the policy to West American. Walker returned the policy to West American on February 15, 1991, more than sixty days after West American issued the policy. Therefore, the policy and corresponding statutory provision did not preclude Walker from effectively canceling her policy prior to the date of the accident.

III. Did coverage apply because the alleged negligent entrustment occurred when the policy was in effect?

Peterson lastly argues Walker negligently entrusted her car to Galloway on November 27, 1990, which is before the purported cancellation date of November 28, 1990 used by West American. Peterson contends the date of negligent entrustment as alleged in the underlying complaint was therefore within the period the policy was in effect. Consequently, Peterson contends West American should have provided a defense to

Walker and essentially asserts that West American acted in bad faith by refusing to perform its duty to defend as required by the terms of the policy.

"Where an insurer refuses to undertake the defense of an action against the insured based upon a claim within the coverage of the insurance policy, it thereby breaches the contract of insurance and is liable to the insured for all damages resulting to such insured as a direct result of such refusal and breach." *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) (holding automobile

[336 S.C. 102]

insurance carrier liable for damages resulting from refusal to defend an action within the coverage of the policy). Liability is predicated on the existence of a valid contract of insurance coverage. *Id.*

In addition, every contract carries with it a covenant of good faith and fair dealing in the processing of a claim under a mutually binding insurance contract. *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.2d 52 (1996) (recognizing a cause of action for an insurance company's bad faith handling of third party benefits and holding that a bad faith claim may exist even in the absence of the breach of an express contractual provision). *See also Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983) (court recognized bad faith action in processing of first party benefits, holding "if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action").

To establish a bad faith claim against an insurance company, the plaintiff must show: (1) the existence of a mutually binding contract of insurance between plaintiff and defendant; (2) an insurer's refusal to provide benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action and breach of an implied covenant of good faith and fair dealing arising out of the contract; and (4) causing damage to the insured. *See, e.g., Brown v. South Carolina Ins. Co.*, 284 S.C. 47, 55, 324 S.E.2d 641, 646 (Ct.App.1984) ("[I]f a mutually binding contract exists and the denial is found to be in bad faith or unreasonable, the insurer is liable for consequential losses caused by its breach of the express and implied obligations of the contract...."), *overruled on other grounds by Charleston County Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993) (holding bad faith is in tort, not contract). *See also Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996).

As discussed in Part II above, Walker and West American properly cancelled Walker's policy on February 25, 1991, before the accident of April 14, 1991. Accordingly, no valid insurance contract existed at the time of the automobile

[336 S.C. 103]

accident. Therefore, Peterson failed to establish the first prong necessary to prove West American acted in bad faith by refusing to represent Walker, i.e., the existence of a mutually binding contract of insurance.

CONCLUSION

Based on the foregoing reasons, we conclude Walker cancelled her automobile insurance policy prior to the accident involving her car on April 14, 1991. Accordingly, the decision of the trial court to grant summary judgment in favor of the insurer, West American, is

AFFIRMED.

CURETON and STILWELL, JJ., concur.

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Notes:

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

2. "While both terms refer to the end of coverage under the policy, Cancellation refers to the termination of the policy prior to the end of the policy period, and Termination refers to the expiration of the policy by the lapse of the policy period." *United States Fidelity & Guar. Co. v. Security Fire & Indem. Co.*, 248 S.C. 307, 314, 149 S.E.2d 647, 650 (1966).

3. Our legislature amended this provision effective March 1, 1999. S.C.Code Ann. § 38-77-120(a) (Supp.1998).

4. We express no opinion on how the above analysis differs with a certified policy. *See* S.C.Code Ann. § 56-9-20(5)(h) (Supp.1998).

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293 S.E.2d 706
278 S.C. 195
PIEDMONT ENGINEERS, ARCHITECTS AND PLANNERS, INC., Respondent,
v.
FIRST HARTFORD REALTY CORP., Appellant.
No. 21755.
Supreme Court of South Carolina.
July 8, 1982.

Header ends here. Hubert E. Yarborough, III, of Riley & Riley, Greenville, for appellant.

Thomas H. Coker, Jr., of Haynsworth, Perry, Bryant, Marion & Johnstone, Greenville, for respondent.

PER CURIAM:

In this contract action, respondent sought to collect payment for services performed. The lower court granted respondent's motion for summary judgment, and appellant has brought this appeal.

[278 S.C. 196] In support of its motion, respondent presented a letter from appellant's supervisor of accounts payable which was in response to an invoice from respondent. The letter stated, "I should have told you that $20,289.09 was the correct amount that we feel is due." Appellant asserts that the closing of a construction loan was a condition precedent to payment and that no loan has been closed. The lower court granted respondent's summary judgment motion on the ground that assuming the debt existed, any conditions had been waived by appellant's letter.

In considering whether the lower court was correct in granting the motion, this Court must construe all ambiguities, conclusions and inferences arising from the evidence most strongly against respondent who was the moving party. Finger v. Finger, 270 S.C. 244, 241 S.E.2d 746 (1978). Summary judgment should be granted only when it is perfectly clear that no issue of fact is involved. Vaughn v. A. E. Green Co., Inc., --- S.C. ---, 287 S.E.2d 493 (1982). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts. Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311 (1980).

Construing the evidence most strongly against respondent, the sentence quoted from appellant's letter could mean that appellant felt $20,289.09 was the correct amount due to respondent when and if payment became due. The sentence is not an explicit waiver. Determining whether the sentence is an implicit waiver raises a question as to the conclusions to be drawn from the facts. Respondent's summary judgment motion should have been denied. Murphy.

The lower court judgment is reversed and the action remanded for trial.

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675 S.E.2d 783
Bessie C. PRINGLE and Burdy Pringle, Appellants,
v.
SLR, INC. OF SUMMERTON, d/b/a Knights Inn, Respondent.
No. 4513.
Court of Appeals of South Carolina.
Heard January 6, 2009.
Decided February 27, 2009.
Rehearing Denied May 4, 2009.

[675 S.E.2d 784]

John Eagle Miles, Michael McKinney Jordan, both of Sumter, for Appellants.

Marvin E. McMillan, Jr., of Sumter, for Respondent.

THOMAS, J.

Header ends here.

In this negligence action, plaintiffs Bessie and Burdy Pringle appeal the grant of summary judgment to SLR, Inc. of Summerton, d/b/a Knights Inn. We affirm.

FACTS AND PROCEDURAL HISTORY

On April 18, 2004, Bessie Pringle went with her husband Burdy Pringle and their ten-year-old granddaughter to the Knights Inn restaurant in Summerton for Sunday lunch, as they had done almost every Sunday for several years. When the Pringles arrived at the restaurant, the hostess seated them. The Pringles served themselves from the buffet and returned to the table to eat their meal. After Burdy left the table to pay, the chair in which Bessie was sitting suddenly collapsed as she reached for her pocketbook on the table, causing her to fall to the floor. Subsequently, she was transported from the restaurant to the hospital by ambulance. As a result of the accident, Bessie suffered a meniscus tear to her knee, which required surgery. Shortly after the accident, Knights Inn discarded the chair.

On February 9, 2005, the Pringles jointly filed a lawsuit against Knights Inn. Bessie sued for negligence, and Burdy brought a claim for loss of consortium.

In her deposition, Bessie testified that she did not notice anything wrong with the chair before it collapsed and that the chair was not "rickety," "wobbly," or otherwise unstable. She did not see the chair after she fell and could not testify as to how it broke; however,

[675 S.E.2d 785]

she maintained the legs of the chair had broken. In addition, Bessie had never experienced any problems with chairs during previous visits to the Knights Inn and had no direct knowledge of any other patrons who had experienced problems with the chairs at the restaurant. Bessie claimed, however, a Knights Inn employee approached her a few weeks after the incident and told her that an elderly woman fell and hurt herself at the restaurant when a chair collapsed. During her deposition, after viewing three photographs of different chairs provided by Knights Inn's attorney, Bessie testified the chair in which she was sitting when she fell appeared to look like the chairs in the photographs.[1]

Burdy also testified in his deposition that there was no indication of any problem with the chairs at their table and that he was not directly aware of any problems with chairs at Knights Inn. Burdy identified one of the chairs in the photographs as the same type of chair that collapsed under Bessie. According to Burdy, the chair was in two separate pieces after it collapsed and the right-side legs of the chair were completely loose and broken from the base of the seat. Burdy also claimed Bhupen Patel, the owner and manager of the restaurant, asked him to pass the chair to him immediately following the incident.

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The Pringles named Angus McDuffie as an expert witness in the case. McDuffie has no degrees or specialized training; however, he has been in the furniture business for forty years, selling both commercial and residential furniture and repairing broken furniture. In his deposition, McDuffie testified about the difference between residential and commercial chairs, explaining the two types are different in construction. According to McDuffie, the legs on commercial chairs cannot be removed from the structure of the chair because the leg system "is an integral part of the seating system" where the legs are mounted directly into the seat itself, creating one single unit. In contrast, McDuffie testified residential chairs have separate leg and seat units that operate independently of one another and the legs are attached to a rail on the bottom of a seat rather than into the seat itself; thus, all of the stress on the seat is absorbed at the point where the legs attach. McDuffie opined that commercial chairs are different from residential chairs in their ability to withstand greater frequency of use and that residential chairs are not substantial enough for use in a commercial setting.

After viewing the photographs of the chairs, McDuffie stated the chairs in the pictures were residential chairs unfit for use in a commercial setting. According to McDuffie, the chairs could not sustain "heavy general use without causing some type of failure of the back or leg support system." McDuffie explained that over time and frequency of use, such chairs would show signs of wear, indicated by wobbliness, weakness, loss of parts, squeaking, and screws coming out. Furthermore, McDuffie indicated an inadequate chair would show signs of being shaky and loose and a chair without such signs would not indicate wear from frequency of use. Without inspecting the subject chair, McDuffie could not give an opinion as to whether it collapsed because of frequency of use or sudden failure.

McDuffie also indicated commercial and residential chairs would appear the same to the untrained eye and purchasers would not know a chair was for residential use unless the seller informed them. McDuffie indicated some residential chairs are stamped with a notice that the chair is for residential use; however, he had no opinion as to whether the manufacturer of the chair involved in Bessie's fall told the buyer the chairs were for residential use only. He also stated he had not examined the particular chair involved in the incident and therefore could not state whether it contained such a stamp.

Patel testified in deposition that maintenance is performed at Knights Inn on Saturdays. He further noted there are three types of chairs at the Knights Inn. Some of the chairs came with the restaurant when he

[675 S.E.2d 786]

bought it, and others he purchased later. Patel could not say whether or not the subject chair was one he purchased. Patel also testified that after the subject chair collapsed, the legs were separated from the chair, and he immediately removed it. He never saw the chair again, and it never occurred to him to save the chair in anticipation of a lawsuit. Patel also confirmed the subject chair was the same as the chairs depicted in the photographs, which encompassed all three types of chairs at the Knights Inn. According to Patel, the chairs at the Knights Inn all have screws connecting the legs to rails at the base of the seat. Patel admitted another incident occurred prior to Bessie's fall when a chair broke at the Knights Inn; however, he claimed the person sitting in the chair was extremely heavy and did not fall. He also acknowledged the subject chair was the only other chair he had taken out of use.

Following discovery, Knights Inn made a motion for summary judgment, arguing the Pringles failed to offer evidence creating a genuine issue of material fact regarding its

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negligence. The Pringles contended summary judgment was inappropriate because the evidence showed the chairs used by the restaurant were not fit for commercial use. Additionally, the Pringles made a motion for sanctions against Knights Inn for spoliation of evidence, arguing: (1) summary judgment was inappropriate because Knights Inn disposed of the subject chair; and (2) the Pringles were entitled to an inference that the subject chair would have been adverse to the position of Knights Inn.

The trial court granted summary judgment on both causes of action, concluding the Pringles failed to offer any evidence that Knights Inn knew the subject chair was defective or in a dangerous condition. Furthermore, the court found there was no evidence showing either that Knights Inn knew the subject chair was for residential use only or that the use of residential chairs instead of commercial chairs would constitute negligence.

Additionally, the trial court ruled there was no evidence of spoliation that would defeat summary judgment. Though the trial court noted an inference may be drawn that the lost or destroyed chair would have been adverse to Knights Inn's case, it concluded there was already evidence the subject chair was defective and summary judgment was still appropriate because the Pringles failed to offer evidence Knights Inn knew or should have known the chair was defective. This appeal followed.

ISSUES

Was the grant of summary judgment to Knights Inn proper in view of (1) evidence presented by the Pringles that the chair in question was of residential rather than commercial quality, and (2) the fact that the chair was not available for their inspection during this lawsuit?

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the circuit court under Rule 56, SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct.App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

DISCUSSION

I. Creation of an unreasonably dangerous condition

The Pringles first argue the grant of summary judgment was error because the trial court focused solely on whether Patel knew or should have known of the unsafe condition allegedly created by the chair in which Bessie was sitting when she fell. Citing *Cook v. Food Lion*, 328 S.C. 324, 491 S.E.2d 690 (Ct.App.1997), the Pringles argue the court should have considered the principle that, in a premises liability case, if the defendant created the allegedly dangerous condition, it is not necessary for the plaintiff to show the defendant had prior actual or constructive notice of the dangerous condition. *Cook*, 328 S.C. at 327-28, 491 S.E.2d at 691-92. We disagree.

[675 S.E.2d 787]

To recover damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff "must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it." *Anderson v. Racetrac*

Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988).

In *Cook*, the plaintiff claimed a wrinkled mat placed by the defendant's employees on the floor for its customers caused her to fall and suffer injury. During the trial, she proffered testimony from several of the defendant's employees that the floor mats used in the store had a tendency to wrinkle, had to be straightened, and caused people to trip and stumble on several occasions. Ultimately, this Court held the trial judge erred in directing a verdict for the defendant because the tendency of the mats to wrinkle created a dangerous condition and the defendant was aware of the tendency even though it may not have been aware the particular mat in question was in fact wrinkled immediately before the plaintiff fell on it. *Cook*, 328 S.C. at 329, 491 S.E.2d at 692. The showing that a defendant created a condition that led to a plaintiff's injury is not, however, sufficient to survive a summary judgment motion unless there is evidence that in creating the condition, the defendant acted negligently. *See Shain v. Leiserv, Inc.*, 328 S.C. 574, 576, 493 S.E.2d 111, 112 (Ct.App.1997) (stating the evidence required to show a condition created by the defendant was indeed hazardous must show the defendant was negligent either in the choice of materials used to create the condition or in the manner of their application).

Applying these principles to the present case, we agree with the trial court that the Pringles did not present evidence sufficient to create a genuine issue of material fact that Knights Inn was negligent in placing residential quality chairs in the restaurant. Although McDuffie opined that residential chairs like the ones used in the restaurant are not substantial enough for use in a commercial setting because they cannot sustain heavy general use, he never stated that a residential chair in and of itself is a dangerous condition. Moreover, although McDuffie stated residential chairs "could not withstand heavy general use," he explained that this was because, over time, they would begin to show signs of wear, such as being wobbly or weak with loss of parts or screws coming out. Bessie's own testimony that the chair in which she was sitting when she fell was not unstable supports the trial court's finding that there was no evidence that Knights Inn knew or should have known that the chair was in danger of collapse or other failure.

II. Spoliation

The Pringles also argue they are entitled to an inference that, because the chair in question was lost or destroyed by Knights Inn, it would have been adverse to Knights Inn's case. We disagree.

In *Kershaw County Board of Education v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990), the supreme court upheld a jury charge that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." As an initial matter, however, the party seeking the inference "must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." Kevin Eberle, *Spoliation in South Carolina*, S.C. Law., Sept. 2007, 26, 32. Here, in view of the evidence already presented, the chair in question would not have provided any additional information indicating that its use at the restaurant would have constituted negligence on the part of Knights Inn. Bessie's own testimony established there was no indication the chair was wobbly, weak, unstable, or otherwise defective immediately prior to its collapse. Furthermore, although the Pringles suggested the chair may have been stamped with a disclaimer indicating it was for residential use, they failed to provide any evidence that such a stamp was in fact on the chair. Although McDuffie testified that

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some residential chairs include a stamped disclaimer, it was undisputed that any chair, whether or not it was classified as a residential chair or stamped as such, would show signs of wear before collapsing and that there was no indication that any such signs

[675 S.E.2d 788]

were apparent in the chair in question. We therefore hold that any inference that a jury could make from the absence of the chair would not change the fact that there was no indication the chair was dangerous or unfit for use.

CONCLUSION

We agree with the trial court that the Pringles did not present a genuine issue of material fact as to whether the use of a residential chair in a commercial establishment, without more, constitutes evidence of negligence on the part of the owner of the establishment. To hold otherwise would be directly at odds with the applicable standard of care that "[a] merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in a reasonably safe condition." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). We also uphold the trial court's determination that, because there was no evidence that Knights Inn knew or should have known the chair would collapse, the doctrine of spoliation did not preclude the grant of summary judgment.

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.

Notes:

1. The photographs were not included in the record on appeal; however, it appears from counsel's remarks during the deposition that the only difference among the chairs depicted in the photographs was that one of them had white paint on the back and the other two were of a solid wood color.

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400 S.C. 246
734 S.E.2d 161

The SAVANNAH BANK, N.A., Respondent,
v.
Alphonse STALLIARD; Oldfield Club; and Oldfield Community Association, Inc., Defendants, of whom Alphonse Stalliard is the Appellant.
Appellate Case No. 2011-195508.

No. 27188.

Supreme Court of South Carolina.

Heard Sept. 19, 2012.
Decided Nov. 7, 2012.

Header ends here.
Summaries:

Source: Justia

The Savannah Bank, N.A., (Bank) sought to foreclose on a property owned by Appellant Alphonse Stalliard. Appellant argued that he should not be held liable for a loan closed by a person acting on his behalf under a power of attorney. Appellant alleged, inter alia, that Bank did not conduct reasonable due diligence and did not verify Appellant's ability to pay. He filed a motion seeking additional time for discovery. The master-in-equity denied the motion and ruled in Bank's favor. Appellant appealed that decision, arguing that summary judgment was improper and that the master should have permitted additional time for discovery. Upon review, the Supreme Court held that the master properly denied Appellant's motion.

[734 S.E.2d 162]

Michael W. Mogil, of Hilton Head Island, for Appellant.

Curtis Lee Coltrane of Hilton Head Island, for Respondent.

Chief Justice TOAL.

[400 S.C. 248]The Savannah Bank, N.A., (Bank) seeks to foreclose on a property owned by Alphonse Stalliard, Appellant. Appellant argues that he should not be held liable for a loan closed by a person acting on his behalf under a power of attorney. Appellant alleges, *inter alia,* that Bank did not conduct reasonable due diligence and did not verify Appellant's ability to pay. He filed a motion seeking additional time for discovery. The master-in-equity (the master) denied the motion and ruled in Bank's favor. Appellant now appeals this decision arguing that summary judgment was improper and that the master should have permitted additional time for discovery. We affirm.

Facts/Procedural Background

Appellant, a New York investor, was 26 years old when he purchased property located at 10 Indigo Plantation Drive in Beaufort County, South Carolina (the Hilton Head Property) to "build a house, sell a house, make a profit."

Appellant's ill-fated investment began when a friend introduced him to Steve Corba. Corba informed Appellant about real estate opportunities in Hilton Head, South Carolina, and convinced Appellant to borrow money to invest in development of such properties. Through Corba, Appellant hired Sally Gardocki, an attorney in Hilton Head, and gave her a power of attorney to obtain financing for the Hilton Head Property. On August 23, 2007, Gardocki executed and delivered a written promissory note on Appellant's behalf to obtain a $1.6 million loan from Bank. Appellant would later claim that Gardocki acted beyond the scope of her power of attorney in [400 S.C. 249]obtaining the loan. However, Appellant acknowledged

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that when he signed a document entitled, "Limited Power of Attorney," he understood that Gardocki "would proceed with the closing on the property." He also admitted that Gardocki sent him the file containing relevant loan documents after the closing, and that he reviewed the files without raising any objections. In addition, Gardocki testified that she made Appellant "aware of the form and content of the closing documents ..., and he approved the same and authorized the closing. Appellant

[734 S.E.2d 163]

only raised concerns about the transaction when he realized the "the property wouldn't sell." He now claims that the income and tax information provided on his loan application were false, and Bank should have denied him the loan.

After closing the loan, Appellant used the proceeds to construct a residence on the Hilton Head Property. Blair Witkowski, who was also introduced to Appellant through Corba, coordinated the construction of the house with Appellant's apparent knowledge and approval. Once built, the Hilton Head Property failed to sell, and Appellant sought a loan modification because he could not afford his monthly mortgage payments.

On May 6, 2008, Appellant executed and delivered a loan modification, which was recorded on June 27, 2008. Appellant defaulted on his obligations under the loan modification, and Bank provided Appellant with a notice of default and the right to cure. Appellant did not cure the default, and on August 24, 2009, Bank sought to enforce the note and foreclose on the mortgage. On May 14, 2010, a consent order was entered that bifurcated the trial of the mortgage foreclosure action and Bank's claim for a deficiency judgment. The trial of the foreclosure was held on June 25, 2010, and resulted in an Order of Judgment and Foreclosure in the amount of $1,834,504.41. On August 2, 2010, the subject property was thereafter sold to Bank at a foreclosure sale for $650,000.

On November 10, 2010, the parties entered into a consent scheduling order, requiring Appellant and Bank to complete discovery by February 15, 2011. On March 15, 2011, Bank filed its motion for summary judgment. On May 2, 2011, after the deadline for discovery had passed, Appellant filed a motion [400 S.C. 250]seeking additional time for discovery and continuance of bank's motion. The master denied Appellant's request, and on June 2, 2011, granted summary judgment to Bank. Appellant filed a timely appeal, and this Court certified this case pursuant to Rule 204(b), SCACR.

Issues

I. Whether the master correctly granted summary judgment in determining whether Bank was negligent in processing Appellant's loan application and verifying his ability to pay.

II. Whether the master correctly denied Appellant's motion seeking to extend the time for discovery and to continue Bank's motion for summary judgment

Standard Of Review

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* To withstand a motion for summary judgment "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381

S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence. *Id.* at 330–31, 673 S.E.2d at 803.

Analysis
I. Negligence

Appellant claims summary judgment was inappropriate because the bank was negligent in processing and discovering false information about Appellant's income contained in the loan application, which would have made Appellant ineligible for a loan. We disagree.

[400 S.C. 251][5] Negligence is the breach of a duty of care owed to the plaintiff by the defendant. *Bell v. Atl. Coast Line R.R. Co.*, 202 S.C. 160, 181, 24 S.E.2d 177, 186 (1943); *Crawford v. Atl. Coast Line R.R. Co.*, 179 S.C. 264, 270, 184 S.E. 569, 571 (1936). To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (1) a duty of care owed by the defendant; (2) a breach of that duty by a negligent act or omission; (3) a negligent act or omission

[734 S.E.2d 164]

resulted in damages to the plaintiff; and (4) that damages proximately resulted from the breach of duty. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); *Kleckley v. Nw. Nat'l Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000). In determining whether a particular act is negligent, the test depends on what a person of ordinary reason and prudence would do under those circumstances at that time and place. *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

As an initial matter, we must determine whether Bank owes Appellant a duty of care in the processing of a loan application. We find Bank does not owe Appellant a duty of care under these facts. In *Citizens & Southern National Bank of South Carolina v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994), this Court held the bank did not owe a duty to tell the guarantor of a loan that his liability was for the entire loan amount. We explained, "The law does not impose a duty on the bank to explain to an individual what [she] could learn from simply reading the document." Similarly in *Regions Bank v. Schmauch*, 354 S.C. 648, 668–70, 582 S.E.2d 432, 442–44 (Ct.App.2003), the court of appeals upheld the dismissal of a negligence claim against the bank because the appellant in that case had the opportunity to read the documents she signed, and in not doing so, failed to exercise reasonable diligence in protecting her own interests.

In the instant case, Appellant admitted that Gardocki, his attorney, sent him the file containing the relevant loan documents, and that he reviewed the files without raising objections. Appellant's admission was corroborated by Gardocki who testified:

Mr. Stalliard was made aware of the form and content of the closing documents, including but not limited to the Note, [400 S.C. 252]Mortgage and HUD–1 Closing Statement, and Alphonse Stalliard approved the same and authorized the closing.

....

At no time since then has Alphonse Stalliard ever contacted me and raised any question, issue or complaint concerning the form or content of the closing documents ... or the mortgage loan through [Bank].

Indeed, Appellant only perceived problems with the transaction when he realized the "the property wouldn't sell." Furthermore, the master found that Appellant expressly ratified the loan he obtained on August 23, 2007, by executing and delivering the loan modification agreement on May 6, 2008. [1] Appellant had many opportunities to correct false information submitted to Bank

by persons he authorized, and he failed to do so. We find under these factual circumstances, Bank does not owe Appellant a duty of care. [2]*Lanford*, 313 S.C. at 545, 443 S.E.2d at 551;*Regions Bank*, 354 S.C. at 668–70, 582 S.E.2d at 442–44.

Thus, the master properly granted summary judgment on the issue of negligence.[3]

[400 S.C. 253]II. Denial of Motion to Enlarge

Appellant argues that the master should have granted Appellant's motion to

[734 S.E.2d 165]

enlarge the time for discovery and continue Bank's summary judgment motion. We disagree.

In this case, the deadline for discovery was February 15, 2011. On March 15, 2011, Bank filed and served its Motion for Summary Judgment. On May 2, 2011, more than two months after the discovery deadline had passed, Appellant moved to extend the time for discovery and to continue Bank's summary judgment motion.

The Record indicates that Appellant had ample time during discovery to uncover evidence and speak with any potential witnesses from Bank. If Appellant believed he did not have sufficient time, Appellant should have promptly filed a motion seeking additional discovery time. Instead, Appellant waited until after Bank filed a summary judgment motion and two months after the deadline for discovery expired to request an extension. In addition, Appellant did not provide affidavits to support allegations he made in requesting a discovery extension or submit an affidavit stating why he was unable to obtain such affidavits. *See*Rule 56(e), (f), SCRCP.

[400 S.C. 254]Thus, we hold that the master properly denied Appellant's motion.

Conclusion

For the foregoing reasons, we affirm the master's grant of summary judgment.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

Notes:

1. The loan modification contains the following express affirmation of the validity of the debt owing from Appellant to Bank:

WHEREAS, Borrower is justly indebted unto lender as evidenced by a Promissory Note dated AUGUST 23, 2007, in the original principal sum of ONE MILLION SIX HUNDRED THOUSAND AND NO/100 Dollars ($1,600,000.00), which Note bears interest at the original rate of SIX AND SEVEN TENTHS percent (6.700%) per annum and which Note provides for payment in full on SEPTEMBER 1, 2031....

2. Even if we had held that Bank owed Appellant a duty of care, it would be questionable whether Appellant can prove causation under these circumstances. The Record demonstrates that Appellant had many opportunities to correct false information submitted on his behalf by persons authorized by him under a valid power of attorney, and he failed to do so. Consequently, Appellant, rather than Bank, appears to be the cause-in-fact and proximate cause of his own harm.

3. When discussing negligence, Appellant also accused Bank in a conclusory manner of having unclean hands and behaving unconscionably. We deem such conclusory and unsupported claims abandoned. *See In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory). Furthermore, even if the issues are preserved, the Record does not support Appellant's allegations that the Bank had unclean hands or acted unconscionably.

4. Rule 56(e), SCRCP provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by *affidavits* or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(emphasis added). If the party opposing the motion for summary judgment cannot provide affidavits to justify his opposition, he must submit an affidavit providing reasons why such affidavit cannot be obtained. Rule 56(f), SCRCP. In opposing summary judgment and requesting an extension, Appellant presented allegations unsupported by an affidavit. Specifically, Appellant claims his counsel contacted an unidentified material witness, said to be previously unavailable. Based on a telephone interview with this material witness, Appellant's counsel learned of additional information and potential witnesses who worked for Bank, who might be useful in testifying about what Bank did to verify information contained on the loan application.

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357 S.C. 310
592 S.E.2d 326

Wayne SCHMIDT and Terri J. Schmidt, Appellants,
v.
Michael C. COURTNEY and Kemper Sports of Crowfield, Inc. d/b/a Crowfield Golf & Country Club and Westvaco Development Corporations, Of Whom Kemper Sports of Crowfield, Inc. d/b/a Crowfield Golf & Country Club, is, Respondent.

No. 3719.

Court of Appeals of South Carolina.

Heard December 9, 2003.

Decided December 22, 2003.

Rehearing Denied February 20, 2004.

Header ends here.

[357 S.C. 313]

Joseph F. Kent, of Mt. Pleasant, for Appellants.

Stephen E. Darling and C. Bowen Horger, II, of Charleston, for Respondent.

ANDERSON, J.:

Wayne Schmidt (Schmidt) and Terri J. Schmidt initiated a negligence action against Michael Courtney for injuries Schmidt sustained when he was struck in the head by a golf ball while roofing a house located adjacent to a golf course. Kemper Sports of Crowfield, Inc. (Kemper Sports) was later joined on claims of negligent design, operation, and maintenance of the golf course. The circuit court judge granted Kemper Sports' motion for summary judgment. Schmidt appeals. We reverse and remand.

[357 S.C. 314]

FACTS/PROCEDURAL BACKGROUND

On August 27, 1998,[1] Schmidt was roofing a house located at 113 Waveney Circle in the Hamlets section of the Crowfield Development in Goose Creek, South Carolina. The home is adjacent to the Crowfield Golf and Country Club, which is owned and operated by Kemper Sports. Several oak trees stand between the house and golf course.

While Schmidt was roofing, Courtney was playing golf at the Crowfield Golf and Country Club. When Courtney made his tee shot on the Number 11 fairway, he hooked his ball, causing it to fly out of the boundaries of the course and over to the house where Schmidt was working. The golf ball struck Schmidt in the back of his head and knocked him unconscious. A fellow worker caught Schmidt and prevented him from falling off the roof. Schmidt suffered permanent brain damage from the injury and has been unable to work since the accident.

Schmidt initially filed a negligence suit against Courtney. Schmidt later joined Kemper Sports in the action, alleging negligent design, construction, operation, and maintenance of the golf course. After filing its answer, Kemper Sports then moved for summary judgment.

At the summary judgment hearing, Schmidt's counsel, Joseph F. Kent, presented information regarding an expert witness he located on May 7, 2002, just a few weeks after Kent received notice of the motion for summary judgment. The expert witness, Gerald W. Pirkl, specializes in golf course safety, design, and maintenance. Kent professed: "We were very long in finding this

gentleman, Your Honor. I believe that before the case is over that it is going to turn out that Mr. Pirkl is the most experienced person by way of expert witnesses in this area." Kent requested the court consider his affidavit which identified Pirkl and set forth what Pirkl would likely state during testimony. In his affidavit, Kent declared:

> [357 S.C. 315]
>
> I, Joseph F. Kent, counsel for the Plaintiffs in this action, having been duly sworn do depose and state as a proffer of evidence in this case, as follows:
>
> 1. Full and complete diagnosis of the closed head brain injuries sustained by Wayne Schmidt while working at the residence known as 113 Waveney was not accomplished until about the first of December 1999.
>
> 2. Counsel knows of no cases in this jurisdiction concerning the liability for negligent golf course design, maintenance or operation.
>
> 3. Counsel has found relatively few cases arising in the country from claims of negligent golf course design, maintenance or operation resulting in personal injuries to innocent parties outside of the bounds and property of golf courses.
>
> 4. Counsel has testimony of experienced golfers and an expert in the design of golf courses that foreseeable fields of play for tee shots often extend beyond the bounds of certain fairway boundaries and that such an extended field of play was foreseeable for the fairway and tee boxes in this case.
>
> 5. Counsel has retained an expert in golf course design, Gerald W. Pirkl, of Dana Point, California who counsel believes will testify that the design of the fairway and tee boxes in this case bring the house at 113 Waveney Circle into a foreseeable area of play as counsel understands that area to be defined by the United States Golf Association.
>
> 6. Counsel believes that the constructed contour and topography of the fairway in this case eliminates or substantially reduces the opportunity to play a first shot on the subject hole on the design centerline of the fairway.
>
> 7. Counsel believes that the said expert will further testify that tee shots from the most distant tee box position at the fairway in question reduces the available shot angle for fairway center line both as that line was designed and perceived by golfers in the tee boxes.
>
> 8. Counsel believes that the evidence in this case will be that together with the house location of the house in the predictable field of play for this fairway, that the golf course operator failed to provide adequate screening or fairway map information to reasonably guard and protect against
>
> [357 S.C. 316]

innocent parties outside of the golf course coming within the predictable flight of tee shots from the fairway in this case.

9. Counsel has already begun to shoot aerial photographs of the subject fairway and tee boxes necessary for a written opinion with specifications concerning the deficiencies of the design, maintenance and operation of the Defendant Kemper in this case.

10. Counsel anticipates a first written report from his expert landscape architect within about two weeks and supplemental discovery responses of aerial photography on May 13, 2002.

Kent explained that he expected a final report from Pirkl "before the end of th[e] month." The judge determined the issue of the expert witness was not before the court because Kent did not timely file the affidavit.

The circuit judge granted Kemper Sports' motion for summary judgment. Schmidt filed a motion to reconsider, which the court denied.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct.App.2003); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct.App.2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998); *see also Laurens Emergency Med. Specialists*, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light

[357 S.C. 317]

most favorable to non-moving party). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003); *Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank*, 354 S.C. at 660, 582 S.E.2d at 438. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); *Peterson v. West American Ins. Co.*, 336 S.C. 89, 518 S.E.2d 608 (Ct.App.1999); Rule 56(c), SCRCP. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

[592 S.E.2d 318]

LAW/ANALYSIS

Schmidt argues the trial court erred in granting summary judgment to Kemper Sports on this novel claim prior to the opportunity for full and fair discovery. We agree.

I. CONTINUANCE

Kemper Sports alleges in its brief that Schmidt's counsel failed to request a continuance to develop documentation in opposition to summary judgment. Although Kent did not specifically ask for a continuance, it is clear from the transcript of the hearing the trial judge was fully aware of the importance of having expert testimony for this case, and that Kent had recently located a qualified expert. The judge stated: "As a general rule, we've got to establish all aspects of this case through expert testimony." Then, instead of asking Kent if he would like to move for a continuance, the trial judge directed his query to Kemper Sports' attorney, Stephen E. Darling. The judge, referring to the affidavit prepared by Kent which contained the expert witness information, questioned Darling: "Do you—out of an abundance of caution, do you want to allow it to be heard or continue the Motion?" Darling responded: "No, sir." This dialogue suggests the trial court understood Kent, as counsel for Schmidt, desired a continuance to obtain the expert's affidavit but refused to grant him one because Darling, as counsel for Kemper Sports, objected to the motion being continued to a later date.

II. SUMMARY JUDGMENT

We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the *novel* issue involved in this case. No South Carolina cases discuss the issue of personal injury from the impact of errant golf shots.

Many South Carolina cases point out summary judgment is a "drastic remedy" which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002); *Redwend*

[592 S.E.2d 319]

Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct.App. 2003); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002); *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271

(Ct.App.2001); *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct.App.2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998). Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Trivelas*, 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2001); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999); *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995). "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct.App.1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct.App.2001); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341

[592 S.E.2d 320]

S.C. 143, 533 S.E.2d 597 (Ct.App.2000); *see also Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom). Although the facts regarding Schmidt's injury are not disputed, application of the law to the facts is disputed, and is a *novel* issue.

Rule 56(f), SCRCP, provides:

> When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Our Supreme Court, in *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001), discussed the efficacy of Rule 56(f):

> Rule 56(f) applies when it appears *"from the affidavits* of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." Rule 56(f), SCRCP (emphasis added). In such a case, "the court may refuse the

> application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." *Id.* Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery.

Id. at 321, 548 S.E.2d at 857. The affidavit submitted by Kent is a Rule 56(f) paradigmatic affidavit.

The analysis of Rule 56(f) as juxtaposed to the factual scenario in this case involves whether:

> (1) the word "party" encompasses an "attorney";
>
> (2) the affidavit is conclusory;
>
> (3) the two-day rule as articulated in Rule 56(c) does NOT apply to a Rule 56(f) affidavit; and
>
> (4) the judge abused his discretion because he did not consider the affidavit.

[592 S.E.2d 321]

Party/Attorney

The rule utilizes the word "party" as the entity filing the affidavit under Rule 56(f). Schmidt asserts that the rule allows for an affidavit to be submitted by the attorney. In the instant case, the attorney is intimately familiar with the reasons and justification for being unable to file an affidavit of the expert witness. Clearly, the attorney is in the best position to file this affidavit rather than a party filing the affidavit on information provided by the attorney.

We conclude that Rule 56(f) does allow and permit an "attorney" to file an affidavit averring "that he cannot for reasons stated present by affidavit facts essential to justify his opposition." This construction is consonant with the expressed intent of the rule to provide a procedure "[w]hen [a]ffidavits [a]re [u]navailable."

Affidavit/Conclusory

A review of the affidavit filed by Kent reveals gargantuan specificity of facts and circumstances. There is nothing in the affidavit that falls within the definition of "conclusory."

Rule 56(c)/Rule 56(f)

Kemper Sports argues that the Kent affidavit was untimely because it did not comply with the two-day rule mandated by Rule 56(c). We reject this contention. The etymological format of Rule 56 demonstrates that a time limit application is neither proper nor justified.

Abuse of Discretion

At the conclusion of the summary judgment hearing, the judge found:

> [T]he affidavit has been reviewed. *The Court finds that it was not timely submitted. ... But, primarily, the Court doesn't have to get there because there's no affidavit that's been filed timely, pursuant to the Rules. ... You didn't file it timely. It's that simple.*

A circuit court's failure to exercise discretion is itself an abuse of discretion. *In re Robert M.*, 294 S.C. 69, 362 S.E.2d 639

(1987); *State v. Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981); *Fields v. Regional Med. Ctr. Orangeburg*, 354 S.C.

[592 S.E.2d 322]

445, 581 S.E.2d 489 (Ct.App.2003); *State v. Mansfield*, 343 S.C. 66, 538 S.E.2d 257 (Ct.App.2000); *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990). Here, the circuit court failed to exercise discretion. *See Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *Balloon Plantation*, 303 S.C. at 155, 399 S.E.2d at 441 ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."). The judge was mandatorily required to at least evaluate and consider the affidavit.

The non-moving party in a motion for summary judgment "must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (internal quotation marks omitted). In *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991), the plaintiffs brought an action against a refinery operator, alleging personal injury caused by pollution from the refinery. Based on an opinion letter by an expert that the injuries were consistent with exposure to toxic substances, our Supreme Court ruled the trial judge's grant of summary judgment was premature because further discovery, such as testing and analysis of the medical conditions, would likely reveal additional relevant evidence. *Id.* at 112-13, 410 S.E.2d at 544.

Similarly, Kent's assertions at the hearing regarding the need for Pirkl's expert opinion, and the judge's statement that expert testimony must be used in this case, demonstrate the need for further discovery.

In finding summary judgment was premature, the *Baughman* Court considered the fact that the plaintiffs "were not dilatory in seeking discovery ... but have been reasonably diligent in pursuit of a qualified expert to substantiate their claims." *Id.* at 113, 410 S.E.2d at 544. The Court referenced the plaintiffs' inability to obtain satisfactory responses to their interrogatories, as well as the overall complexity of the case, which contributed to the difficulty in finding an expert. *Id.*

[592 S.E.2d 323]

The trial judge in the present case did not feel Kent was "dilatory" in finding Pirkl. As in *Baughman*, Schmidt did not receive responses to his discovery requests. In addition, the unusual facts of the case made it difficult to locate an appropriate expert. Kent declared that Pirkl, who resides in California, "has only had a website for a few months ... [and he] didn't know of [Pirkl] but since the beginning of last week."

In *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995), Montedison contended the trial court's grant of summary judgment was inappropriate inasmuch as it did not have a full and fair opportunity to conduct discovery. This Court disagreed:

> Montedison advances no good reason why four months was insufficient time ... to develop documentation in opposition to the motion for summary judgment.... Further, the record discloses Montedison made no formal motion for a continuance or pointed out in any specific

> manner how it would be prejudiced by its inability to conduct discovery.

Id. at 479-80, 465 S.E.2d at 771.

In contrast, Kent asserted the difficulty in finding an expert on golf course design and highlighted the inability to obtain responses to discovery requests. Kent pointed out it would be prejudicial to grant summary judgment on this *novel* issue when he had an expert ready to testify.

Because this is a negligence claim, it is important to note that, "[g]enerally, negligence claims are not susceptible of summary adjudication because of the many questions normally present in such cases concerning the reasonableness of a party's conduct, foreseeability, and proximate cause." *Folkens v. Hunt*, 290 S.C. 194, 199, 348 S.E.2d 839, 842 (Ct.App. 1986). Concomitantly, we reverse the grant of summary judgment.

III. NEGLIGENCE

At the time the trial court prematurely granted summary judgment, a genuine issue of material fact existed as to the negligence of Kemper Sports.

[592 S.E.2d 324]

In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. *Andrade v. Johnson*, 356 S.C. 238, 588 S.E.2d 588 (2003); *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002); *Thomasko v. Poole*, 349 S.C. 7, 561 S.E.2d 597 (2002); *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct.App.2003); *see also Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001) (amplifying that elements for negligence cause of action are: (1) duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by negligent act or omission; and (3) damages to plaintiff proximately resulting from breach of duty).

To sustain an action for negligence, it is essential the plaintiff demonstrate the defendant breached a duty of care owed to the plaintiff. *Sabb*, 350 S.C. at 429, 567 S.E.2d at 237; *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998); *Parks v. Characters Night Club*, 345 S.C. 484, 548 S.E.2d 605 (Ct.App.2001). Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 585 S.E.2d 275 (2003); *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977); *Hubbard v. Taylor*, 339 S.C. 582, 529 S.E.2d 549 (Ct.App.2000). The existence of a duty owed is a question of law for the courts. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001); *Washington v. Lexington County Jail*, 337 S.C. 400, 523 S.E.2d 204 (Ct.App.1999). In a negligence action, if no duty exists, the defendant is entitled to judgment as a matter of law. *Huggins*, 355 S.C. at 332, 585 S.E.2d at 277; *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000).

Kemper Sports maintains it did not owe Schmidt a duty. Kemper Sports relies on the proposition that golf courses are not liable to those injured by errant golf shots as long as the course is not unreasonably unsafe. A common theme runs throughout the cases cited by Kemper Sports. The cases involve injury to fellow golfers.

[592 S.E.2d 325]

For example, in *Campion v. Chicago Landscape Co.*, 295 Ill.App. 225, 14 N.E.2d 879 (1938), a golfer was injured when another golfer hooked his ball, causing it to come into the fairway where the plaintiff was standing and strike him in the eye. The court explained: "Persons operating any golf course may reasonably expect that because of the somewhat dangerous nature of the game, accidents may occur at any time; but to subject them to liability for such an accident would make them insurers of all *players* on the course. This is not the law." *Id.* at 883 (emphasis added). The operative word in the court's statement is "players." Because the *Campion* case involved another *player* being injured, it is not comparable to the facts of the instant case.

In *Petrich v. New Orleans City Park Improvement Ass'n*, 188 So. 199 (La.Ct.App.1939), the plaintiff was playing golf when a ball driven from a nearby tee struck and injured her. The court held: "[T]he universally recognized custom and rule required each golfer to give warning before driving a ball into the direction of someone else on the course, and the [golf course operator] was justified in assuming that each *golfer* would recognize and obey this custom." *Id.* at 201 (emphasis added). The *Petrich* court emphasized the fact that the plaintiff was a golfer, suggesting she assumed the risk of injury.

Trauman v. City of New York, 208 Misc. 252, 143 N.Y.S.2d 467 (N.Y.Sup.Ct.1955), cited by Kemper Sports, involved an action by a golfer. In contrariety, the case *sub judice* involves a third party on adjacent premises.

Likewise, in *Baker v. Thibodaux*, 470 So.2d 245 (La.Ct.App.1985), a golfer brought an action against the golf club and another golfer for injuries sustained when he was struck in the eye by a golf ball. The court observed that the plaintiff, who was playing the 15th hole at the time of the accident, had actual knowledge the defendant was ahead of him on the 16th tee. *Id.* at 249. The court noted: "[T]he risk of being struck by an errant shot hit by a player on a contiguous or adjacent fairway is 'a risk all *golfers* must accept.'" *Id.* (emphasis added). The facts of *Baker* differ substantially from those in the case at bar. *Baker* stands for the proposition that *golfers* assume the risk.

[592 S.E.2d 326]

In contrast to these cases involving golfer-plaintiffs, Schmidt was not playing golf at the time he was struck by the golf ball. In fact, Schmidt testified he does not play golf at all. Additionally, Schmidt stated during the time he worked on the house, he never saw "any other golf balls come near [him]." Thus, it would be error to conclude Schmidt assumed the risk of being struck by a golf ball. There was no reason to believe a golf ball would strike him while he was roofing the house.

In addition to the requirement that Schmidt prove the existence and breach of a duty, Schmidt must show that Kemper Sports' negligence was the proximate cause of Schmidt's injury. *See Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003). To prove causation, a plaintiff must demonstrate both causation in fact and legal cause. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001); *Parks v. Characters Night Club*, 345 S.C. 484, 548 S.E.2d 605 (Ct.App.2001); *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. *Trivelas*, 348 S.C. at 136, 558 S.E.2d at 276; *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998).

This Court, in *Trivelas,* summarized the law regarding legal cause:

> Legal cause turns on the issue of foreseeability. An injury is foreseeable if it is the natural and probable consequence of a breach of duty. Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone.

Id. at 136, 558 S.E.2d at 276 (internal citations and quotations omitted).

Because we find further discovery, especially expert testimony, is essential to determine whether: (1) Kemper Sports owed a duty to Schmidt and (2) Kemper Sports' negligence

[592 S.E.2d 327]

was the proximate cause of Schmidt's injury, the grant of summary judgment is reversed.

CONCLUSION

Although Kent did not specifically ask for a continuance, it is obvious the trial judge understood the need for expert testimony in this case. In totality, we come to the ineluctable conclusion that genuine issues of material fact exist in regard to the existence of any duty owed by Kemper Sports to Schmidt and whether negligence on the part of Kemper Sports was the proximate cause of Schmidt's injury. Because additional discovery, especially in the form of expert opinion, is needed to determine these issues, the trial court erred in granting Kemper Sports' motion for summary judgment. Accordingly, the decision of the trial judge is

REVERSED and REMANDED.

GOOLSBY, J., and CURETON, A.J., concur.

Notes:

1. The order of the circuit judge, as well as the first and second amended complaints, reference August 27, 1998, as the date Schmidt was hit by the errant golf ball. However, the Appellants' brief and the Respondent's brief provide that August 28, 1998, was the date Schmidt was injured.

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457 S.E.2d 608
Patricia A. SIMMONS, Appellant,
v.
WINN-DIXIE GREENVILLE, INC., Respondent.
No. 24241.
Supreme Court of South Carolina.
Heard March 21, 1995.
Decided May 1, 1995.

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Header ends here. Douglas F. Patrick and Stephen R.H. Lewis both of Covington, Patrick, Hagins & Lewis, Greenville, for appellant.

David L. Moore, Jr. of Love, Thornton, Arnold & Thomason, Greenville, for respondent.

Dana C. Mitchell, III and Keith C. McCook both of Mitchell, Bouton, Yokel & McCall, Greenville, for amicus curiae S.C. Retail Merchants's.

CHANDLER, Acting Associate Justice.

Patricia A. Simmons (Simmons) appeals Circuit Court's grant of Summary Judgment to Respondent (Winn-Dixie) in her action alleging Winn-Dixie's negligent maintenance of its grocery store.

FACTS

Simmons sustained injuries after slipping and falling on a grape in the check-out area of Winn-Dixie's grocery store. Winn-Dixie markets its grapes by two methods: (1) the grapes are pre-packaged, or (2) the grapes are displayed openly, allowing customers to hand-select and place the grapes in plastic bags. The record failed to establish (1) which method of marketing was used on the day of the accident, (2) what caused the grape in question to be on the floor, (3) whether any employee was aware of the grape, or (4) how long the grape had been on the floor prior to the accident.

Circuit Court relied upon the long-established standard for premises liability and granted Summary Judgment, holding that Winn-Dixie lacked actual or constructive notice that the grape was on its floor.

ISSUE

Was Circuit Court correct in applying the precedent standard

for premises liability?

DISCUSSION

Simmons does not challenge the rule established long ago by this Court that one seeking recovery for injuries sustained in a fall caused by a foreign substance on a storekeeper's floor must establish that the storekeeper had actual or constructive notice that the substance was on the floor. [1] Rather, she contends that Winn-Dixie, on the strength of slip and fall incidents involving grapes in many of its retail stores, creates a question of liability based upon an inherently dangerous condition and foreseeable risk of harm.

We decline to expand the established standard requiring notice, either actual or constructive, by a store owner in slip and fall cases.

From the record here it is clear that Simmons has failed to present any evidence establishing a genuine issue of fact for trial.

AFFIRMED.

FINNEY, C.J., and TOAL, MOORE and WALLER, JJ., concur.

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1 Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969); Anderson Memorial Hospital, Inc. v. Hagen, --- S.C. ----, 443 S.E.2d 399 (Ct.App.1994).

493 S.E.2d 111
328 S.C. 574
Allan SHAIN, Appellant,
v.
LEISERV, INC., Respondent.
No. 2739.
Court of Appeals of South Carolina.
Submitted Oct. 8, 1997.
Decided Oct. 20, 1997.

Header ends here. [328 S.C. 575] Douglas F. Patrick, Greenville, for appellant.

William S. Brown, Greenville, for respondent.

GOOLSBY, Judge:

Allan Shain appeals the grant of summary judgment to Leiserv, Inc., in a slip and fall action. We affirm. [1]

Viewing the facts in the light most favorable to Shain, we find as follows.

Shain, an experienced bowler, went bowling with Ron Barbee and Tony Brown, his brothers-in-law, at the Brunswick Hampton Bowling Alley on April 18, 1992, in the early evening. Leiserv owns the bowling alley. Shain was using a slide enhancer on his shoes to reduce friction and to allow him to slide more easily on the floor. Shain, Brown, and Barbee had bowled one entire game without incident. During the second game,

however, Shain crossed the foul line after delivering his bowling ball. After crossing the foul line, Shain slipped and fell in the lane, injuring his arm and wrist.

After the fall, Shain's clothing was covered with conditioning oil that left spots and stains. In attempting to assist Shain, Brown himself was almost injured. Following the incident, Brown and Barbee observed employees of the bowling alley mopping the lane Shain and they had been using.

The bowling alley applies a conditioning oil to its lanes to reduce friction between the bowling ball and the surface of the lanes to prevent the ball from veering off to either side after being thrown. The oil is placed on the lanes from the foul line to a point about 28 feet from the foul line toward the pins.

[328 S.C. 576] Mary L. Froelich, who was responsible for the maintenance of the bowling alley, testified the American Bowling Congress requires the bowling alley to apply a certain minimum number of units to the bowling lanes. There is no evidence the bowling alley applied less than the minimum number of units to the lanes. Froelich further testified the machine used to spread the conditioner does not always do its job properly, which could result in an uneven application. Because, however, the conditioner is clear, it is not possible to tell visually exactly how much conditioner has been applied to any one particular place.

The trial court granted Leiserv's motion for summary judgment, holding Shain failed to present evidence of a defective condition at the bowling alley. Specifically, the trial court determined absent any testimony regarding the maximum amount of conditioner to be used, there was no evidence the conditioner was defectively applied.

Summary judgment is appropriate when it is clear that 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, 323 S.C. 384, 475 S.E.2d 747 (1996). All reasonable inferences must be considered in the light most favorable to the non-moving party. Cafe Assocs. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991).

To prove negligence in a slip and fall case, a plaintiff must show the defendant or

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defendant's agents either created a hazardous condition or had notice of it. Cook v. Food Lion, 328 S.C. 324, 491 S.E.2d 690 (Ct.App. 1997). Here, because Leiserv or its agents created the condition at issue, namely the slippery surface of the bowling lane in the area beyond the foul line, the key question is whether Shain presented sufficient evidence to create an issue of fact as to whether this condition was indeed hazardous. Such evidence must show Leiserv was negligent either in using the materials to condition the floor or in the manner of application. Howard v. K-Mart Discount Stores, 293 S.C. 134, 359 S.E.2d 81 (Ct.App.1987).

Here, Shain concedes the bowling alley uses the conditioner to reduce the friction between the bowling ball and lane, thus enabling the ball to travel toward the pins without veering off [328 S.C. 577] to the side. He contends, however, questions of fact exist as to (1) whether it was proper for the bowling alley to start applying the conditioner at the foul line, and (2) whether the bowling alley used an excessive amount of conditioner on the night in question.

We have found no evidence supporting Shain's argument that it was improper for the bowling alley to start applying the conditioner at the foul line. To the contrary, the rules of the American Bowling Congress, which were included in the record on appeal, mandate that conditioner be applied beginning at the foul line, and Shain failed to produce a witness to refute this requirement.

In support of his second argument, Shain cites Mary Froelich's testimony that the machine used to spread the conditioner did not always operate properly, possibly resulting in an uneven application of conditioner. This testimony, in our view, is at best only speculative evidence that the bowling alley used more than the usual amount of conditioner on the particular date in question. Cf. Smith v. Wal-Mart Stores, 314 S.C. 248, 442 S.E.2d 606, 607 (1994) ("To avoid a directed verdict in a slip and fall case, the plaintiff has the burden of presenting evidence from which a reasonable inference can

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be drawn that the storekeeper was responsible for creating the hazard which caused the fall....") (emphasis added).

The trial court further held Shain failed to present any testimony regarding the proper amount of conditioner to be applied to a lane. In response to this determination, Shain argues, it is "not the bowlers' job to know the proper amount of oil the bowling alley should place upon its lanes." Although Shain may be correct that a bowler is not necessarily required to know how much conditioner is to be applied to a bowling lane, he overlooks the fundamental principle that he, as the plaintiff in a negligence case, has the burden of establishing the duty of care owed to him. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996). In our view, the fact that the allegedly hazardous condition serves a specific purpose, that of reducing the friction between the bowling ball and the lane surface, only enhances the importance that this burden be met in the present case. Cf. Denton v. Winn-Dixie Greenville, Inc., 312 S.C. 119, 439 S.E.2d 292 (Ct.App.1993)[328 S.C. 578] (holding a grocery store was not negligent in building and maintaining a clearly visible cart corral in its parking lot to keep wayward grocery carts from interfering with pedestrian and vehicular traffic).

As to Shain's argument that there is a question of fact for the jury on the existence of an adequate warning, we agree with Leiserv this issue was not ruled on by the trial court and therefore is not preserved for appeal. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995).

AFFIRMED.

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CURETON and CONNOR, JJ., concur.

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1 Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

457 S.E.2d 608
Patricia A. SIMMONS, Appellant,
v.
WINN-DIXIE GREENVILLE, INC., Respondent.
No. 24241.
Supreme Court of South Carolina.
Heard March 21, 1995.
Decided May 1, 1995.

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Header ends here. Douglas F. Patrick and Stephen R.H. Lewis both of Covington, Patrick, Hagins & Lewis, Greenville, for appellant.

David L. Moore, Jr. of Love, Thornton, Arnold & Thomason, Greenville, for respondent.

Dana C. Mitchell, III and Keith C. McCook both of Mitchell, Bouton, Yokel & McCall, Greenville, for amicus curiae S.C. Retail Merchants's.

CHANDLER, Acting Associate Justice.

Patricia A. Simmons (Simmons) appeals Circuit Court's grant of Summary Judgment to Respondent (Winn-Dixie) in her action alleging Winn-Dixie's negligent maintenance of its grocery store.

FACTS

Simmons sustained injuries after slipping and falling on a grape in the check-out area of Winn-Dixie's grocery store. Winn-Dixie markets its grapes by two methods: (1) the grapes are pre-packaged, or (2) the grapes are displayed openly, allowing customers to hand-select and place the grapes in plastic bags. The record failed to establish (1) which method of marketing was used on the day of the accident, (2) what caused the grape in question to be on the floor, (3) whether any employee was aware of the grape, or (4) how long the grape had been on the floor prior to the accident.

Circuit Court relied upon the long-established standard for premises liability and granted Summary Judgment, holding that Winn-Dixie lacked actual or constructive notice that the grape was on its floor.

ISSUE

Was Circuit Court correct in applying the precedent standard

for premises liability?

DISCUSSION

Simmons does not challenge the rule established long ago by this Court that one seeking recovery for injuries sustained in a fall caused by a foreign substance on a storekeeper's floor must establish that the storekeeper had actual or constructive notice that the substance was on the floor. [1] Rather, she contends that Winn-Dixie, on the strength of slip and fall incidents involving grapes in many of its retail stores, creates a question of liability based upon an inherently dangerous condition and foreseeable risk of harm.

We decline to expand the established standard requiring notice, either actual or constructive, by a store owner in slip and fall cases.

From the record here it is clear that Simmons has failed to present any evidence establishing a genuine issue of fact for trial.

AFFIRMED.

FINNEY, C.J., and TOAL, MOORE and WALLER, JJ., concur.

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1 Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969); Anderson Memorial Hospital, Inc. v. Hagen, --- S.C. ----, 443 S.E.2d 399 (Ct.App.1994).

634 S.E.2d 23
The STATE, Respondent,
v.
Christopher Alan SANTIAGO,
Appellant.
No. 4127.
Court of Appeals of South Carolina.
Heard April 6, 2006.
Decided June 19, 2006.
Rehearing Denied August 25, 2006.

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Richard A. Harpootlian and M. David Scott, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for Respondent.

HEARN, C.J.

Header ends here.

Christopher Santiago appeals his convictions of murder and possession of a firearm during the commission of a violent crime, alleging the trial judge erred in refusing to charge the jury on self-defense and in excluding testimony of a forensic psychiatrist. We affirm.

FACTS

During the summer of 2002, Santiago and Kate Wisn lived together at the Hilton Head vacation home of Kate's parents. When Kate's father, Joe (hereinafter "Wisn"), visited Hilton Head in July, he informed Santiago that he and Kate needed to move out of the home within the next two weeks. That evening, Santiago left the home and drove to New Jersey to live with his parents. After a brief stay in New Jersey, Santiago returned to South Carolina and began renting an apartment near the vacation home.

According to Santiago, on the morning of August 9, 2002, he left his apartment with a 20-gauge shotgun in the trunk of his car with the intent to commit suicide. Before taking his own life, he called his parents to tell them goodbye. They convinced him to see his psychiatrist, who was able to talk Santiago out of committing suicide.[1]

When Santiago returned to his apartment, he had a message on his answering machine from Wisn, requesting that Santiago come to the vacation home to pick up some belongings. Upon his arrival at Wisn's home, Santiago saw his belongings packed in a container beside Wisn's car in the driveway. Santiago rummaged through the container in search of a favorite belt but was unable to

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find it. He rang the doorbell; Wisn answered, and the two men went inside to search for the belt.

According to Santiago, he began to cry while looking for the belt, and Wisn ridiculed him. At that point Santiago left the house, but Wisn followed him. Santiago testified that Wisn told him to "stay the f____away from my daughter." Santiago walked past the container of his belongings, but Wisn picked it up and walked around to the back of Santiago's car to place it in the trunk. After Santiago opened the trunk, Wisn placed the container into it and noticed the 20-gauge shotgun. Wisn looked at the shotgun, looked at Santiago, and then looked at the shotgun again. Santiago testified he thought Wisn was about to grab the shotgun, so he took the gun from the trunk and pointed it at Wisn. Santiago took a step back. Wisn told Santiago "don't be

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f_____ing stupid." Santiago testified he thought Wisn was about to reach for the gun so he opened fire. He shot Wisn four times, and Wisn later died from his wounds.

After fleeing the scene, Santiago drove to a fire station, and told the firemen that he shot someone on Hilton Head who had "ruined his life." A fireman called the police, and the police sent detective Leland Tuten to investigate. Detective Tuten provided Santiago with a *Miranda*[2] rights and waiver form, which Santiago initialed and signed. Tuten then provided Santiago with a pen and paper, and Santiago drafted a confession. In this confession, Santiago explained that while he lived with Kate, Wisn tried to turn her family members against him. He wrote he planned to marry Kate, but his plan fell through because Wisn kicked him out of the house. Santiago also admitted he shot Wisn four times with the shotgun. The confession went on to describe the shooting. Santiago said he was standing near the back of his car when he fired on Wisn, who was standing near the front of the car.[3] After Santiago confessed to the shooting, Tuten arrested him. Santiago was subsequently indicted for murder and possession of a firearm during the commission of a violent crime.

During trial, Santiago attempted to present testimony from Dr. Donna Schwartz-Watts, a forensic psychiatrist, who, prior to trial, had diagnosed Santiago with a condition called asperger's disorder, a subset of autism. Santiago argued Schwartz-Watts's testimony would be relevant to his mental state at the time of the shooting and would also support a finding that Santiago committed voluntary manslaughter rather than murder. The trial judge refused to allow her testimony into evidence, finding it was not relevant because South Carolina does not recognize the defense of diminished capacity. The trial court also rejected Santiago's request to charge the jury with self-defense.

The jury convicted Santiago of murder and possession of a firearm during the commission of a crime. The judge sentenced Santiago to life imprisonment without parole.

LAW/ANALYSIS

I. Self-Defense Charge

Santiago first argues the trial judge erred in refusing to charge the jury on self-defense. We disagree.

An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *State v. Williams*, 367 S.C. 192, 624 S.E.2d 443 (Ct.App.2005). If there is any evidence to support a jury charge, the trial judge should grant the requested charge. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Clark*, 339 S.C. at 390, 529 S.E.2d at 539. To warrant a reversal, however, the error must result in prejudice to the party requesting the charge. *Id.* A self-defense charge is not required unless the evidence supports it. *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994).

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To establish self defense in South Carolina, four elements must be present: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonable, prudent person of ordinary fitness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury other than to act as he did. *Jackson v. State*, 355 S.C. 568, 570-71, 586 S.E.2d 562, 562 (2003); *State v. Day*, 341 S.C. 410, 416,

535 S.E.2d 431, 434 (2000). If there is any evidence of self-defense, the issue must be submitted to the jury. *State v. Burkhart*, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002). In charging self-defense, the trial judge should consider the facts and circumstances of the case and fashion an appropriate charge. *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). The trial judge commits reversible error if he or she fails to give a charge on an issue raised by the evidence and requested by the defendant. *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989).

Here, the record does not support a charge of self-defense for several reasons. First, the evidence does not support a finding that Santiago was without fault in bringing about the difficulty. Santiago had gone to Wisn's house with a loaded gun in his vehicle, and that weapon was apparently observed by Wisn as he lifted Santiago's belongings into the car. Although Santiago asserted that Wisn verbally berated him as he looked for his favorite belt, these words were never accompanied by a hostile act. While we recognize that, depending on the circumstances, words accompanied by hostile acts may establish self-defense, there was no evidence of a hostile act by Wisn. *See State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989); *State v. Harvey*, 220 S.C. 506, 518, 68 S.E.2d 409, 414 (1951) ("[W]here death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation.").

Santiago argues the hostile act occurred when Wisn looked at the gun, looked at Santiago, and then looked at the gun again. This bare assertion is insufficient to establish a hostile act by Wisn. Santiago never claimed Wisn made a move for the gun before Santiago took it from the trunk. Even assuming, as Santiago testified, that Wisn reached for the gun while in Santiago's hands, he did so after Santiago brought about the difficulty by removing the shotgun from the trunk and aiming it at Wisn.[4] Therefore, no question of fact for the jury is created on the first prong of self-defense.

While Santiago asserts he actually believed he was in imminent danger, the third prong of self-defense cannot be established because a reasonable, prudent person of ordinary fitness and courage would not have feared for his life or serious bodily injury under the circumstances of this case. Santiago testified that he and Wisn had never had a physical altercation, nor had Wisn ever threatened to kill or cause serious injury to Santiago before the shooting. Additionally, the evidence, taken in the light most favorable to Santiago, demonstrates that Wisn merely looked at the shotgun, looked at Santiago, and then looked at the shotgun again. Accordingly, no reasonable person would have feared for his life simply because of Wisn's actions of looking. Therefore, no question of fact for the jury is created on this element of self-defense.

Finally, the fourth prong of self-defense cannot be satisfied because Santiago had other probable means of avoiding the danger. If the defendant provokes or initiates the assault, he cannot invoke self-defense; however, he may restore his right to self-defense if he withdraws from the conflict and communicates that decision to his adversary. *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Because Santiago was not on his property, he had a duty to

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retreat. *See Fuller*, 297 S.C. at 444, 377 S.E.2d at 331. Taken in the light most favorable to Santiago, the record indicates that when Wisn was shot, Santiago stood at the back of his car and Wisn stood in the front. Due to the distance between the two men at the time of the shooting, Santiago could have retreated with the shotgun rather than shooting Wisn. Moreover, Santiago simply could have avoided the danger by closing his trunk. *See Bryant*, 336 S.C. at 345, 520 S.E.2d at 322

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(stating appellant easily could have avoided the conflict by leaving the open parking lot where the situation arose). Further, because Wisn was unarmed, Santiago had multiple opportunities to escape his perceived peril without resorting to firing his weapon, let alone firing it four times. Therefore, no question of fact for the jury is created on this prong of self-defense.

Because the record demonstrates as a matter of law the absence of at least one element of self-defense, the trial judge did not err in refusing to charge self-defense.

II. Dr. Schwartz-Watts's Testimony

Santiago next argues the trial judge erred in refusing to allow Schwartz-Watts to testify that because of Santiago's asperger's disorder he did not have the requisite mental state to commit murder nor the ability to provide a voluntary confession. Santiago attempted to call Schwartz-Watts as a witness during his case, but the trial judge refused to allow the testimony. We find no reversible error.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); *State v. Horton*, 359 S.C. 555, 566, 598 S.E.2d 279, 285 (Ct.App.2004). A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion. *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct.App.2000). An abuse of discretion occurs when the trial judge's ruling is based on an error of law. *Id.* For an error to warrant reversal, however, the error must result in prejudice to the appellant. *Id.* Evidence is relevant if it has "any tendency to make[] the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. An expert witness qualified by knowledge, skill, experience, training, or education may testify to assist the jury in understanding the evidence or determining an issue before them. Rule 702, SCRE.

A. Santiago's Mental State During the Commission of the Crime

On appeal, Santiago argues the trial court erred in refusing to allow the testimony of Schwartz-Watts because the evidence was relevant to Santiago's mental state, both at the time he made the statement to police and at the time of the shooting. At trial, defense counsel offered Schwartz-Watts as an expert witness to testify that Santiago's asperger's disorder caused him to fear for his life, and accordingly, Santiago did not have the requisite mental state to commit murder. Essentially, defense counsel argued that Santiago was culpable of a lesser offense because of his diminished capacity. However, the diminished capacity defense is not recognized in South Carolina. *Gill v. State*, 346 S.C. 209, 220, 552 S.E.2d 26, 32 (2001). In *Gill*, defense counsel wanted a forensic psychiatrist to testify that because Gill had a low IQ, he did not have the requisite mental state to commit murder. The supreme court held the trial judge properly excluded this testimony because South Carolina does not recognize the diminished capacity defense. Thus, the trial judge did not commit an abuse of discretion when she refused to allow Schwartz-Watts to testify regarding Santiago's diminished capacity.

B. Voluntariness of Santiago's Statements to Police

Santiago also argues that Schwartz-Watts's testimony was relevant to his mental state at the time he made the statement to the police. Initially, we question whether this issue is preserved for our review.

As a general rule, if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587

S.E.2d 691, 693 (2003); *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 281 (Ct. App.2005). Our courts have "consistently refused to apply the plain error rule." *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (citations omitted). Instead, "it is the responsibility of counsel to preserve issues for appellate review." *Id.* Moreover, a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been. *State v. Roper*, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 868 (Ct.App.2005).

Here, the trial court conducted a *Jackson v. Denno*[5] hearing prior to trial. In that hearing, Santiago challenged the voluntariness of the statements made shortly after the shooting; however, at no point in the hearing did Santiago offer the testimony of Schwartz-Watts on the issue of how his asperger's syndrome affected the voluntariness of his statement. As the trial proceeded, Santiago sought to introduce the testimony of Schwartz-Watts prior to his own testimony. The trial judge stated such testimony would be premature until after Santiago testified if he chose to do so. However, the trial judge stated: "It is my understanding, based on the information I have had the benefit of in chambers, that counsel would have intended to call Dr. Schwartz-Watts for the purpose of describing or explaining Mr. Santiago's mode of communications, mode of testifying, why he projects himself as he does." Neither prior to nor in response to this statement by the court, did Santiago raise the issue of how Schwartz-Watts's testimony would impact the voluntariness of his confession.

After Santiago testified, the trial judge found the testimony of Schwartz-Watts was inadmissible but allowed Santiago's counsel to proffer his arguments for the record. Counsel for Santiago stated three reasons for Schwartz-Watts's testimony:

> My intent, originally, for calling her was . . . while [Santiago] is ordinary and reasonable, he has this developmental disorder . . . that effects his individual perception.
>
> . . .
>
> My second aspect of calling Dr. Schwartz-Watts would be to comment on his mental state as per it would relate to provocation and heat of passion under a charge for voluntary manslaughter.
>
> . . .
>
> The third and final proffer would be for her to explain [Santiago's] affect and appearance in court and dealing with his issuing a statement as he did based on his perceptions of his not being treated well, being messed with, his rights being violated, et cetera, et cetera. That's the entire proffer for the record.

It is apparent from the proffer that Schwartz-Watts would have testified as to Santiago's mental capacity, his perceptions at the shooting, his in-court demeanor, and his mental state as it relates to voluntary manslaughter. Although defense counsel mentioned Santiago's "issuing a statement as he did," counsel never argued Schwartz-Watts's testimony would be relevant to the jury's determination of whether Santiago's confession was voluntary. Santiago only sought to introduce Schwartz-Watts's testimony on issues related to mental capacity, not on the issue of voluntariness, and the trial court never ruled on the admissibility of Schwartz-Watts's testimony

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on the issue of voluntariness. Therefore, the issue is arguably not preserved for our review.

Moreover, even if the issue was preserved for our review, we find any error in failing to allow Schwartz-Watts to testify to be harmless. *See State v. Miller*, 367 S.C. 329, 332, 626 S.E.2d 328, 332 (2006) (explaining that an error is harmless when it could not reasonably have affected the result of the trial). Even without Santiago's written confession, there is overwhelming evidence of Santiago's guilt. Shortly after the shooting, Santiago turned himself in at the fire station where he told the firemen present that he

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just shot someone on Hilton Head, and that the weapon used in the shooting was in his car. Furthermore, Santiago testified at trial that he shot Wisn on the day in question. This is not a case where the perpetrator's identity is at issue or where Santiago's confession was a pivotal piece of evidence against him. Therefore, even if the trial judge erred in declining to allow Schwartz-Watts to testify about how Santiago's syndrome affected the voluntariness of his statement, the error was harmless given the overwhelming evidence of Santiago's guilt.

CONCLUSION

For the aforementioned reasons, Santiago's conviction is hereby

AFFIRMED.

KITTREDGE, J., concurs.

Notes:

1. Santiago did not call his psychiatrist as a witness.

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3. According to the testimony of the forensic pathologist, the shots were fired from a distance of six to ten feet.

4. This is not a case where Santiago was justified in using deadly force before his adversary could "get the drop on him." In *Starnes*, 340 S.C. at 322, 531 S.E.2d at 913, and *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978), the defendant's adversary was already armed, or the defendant believed his adversary was already armed, when the defendant fired. Here, there is no indication that Wisn was armed or that Santiago believed otherwise.

5. 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

ANDERSON, J. (dissenting in a separate opinion):

I disagree with the reasoning and analysis of the majority. I **VOTE** to **REVERSE.**

I. Self-Defense

I agree with Santiago that the trial judge erred in refusing to charge the jury on self-defense. The evidence supports a self-defense charge.

To establish self-defense, a defendant must show: (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonable, prudent person of ordinary fitness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury other than to act as he did. *Jackson v. State*, 355 S.C. 568, 570-71, 586 S.E.2d 562, 562 (2003); *State v. Day*, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000); *State v. Bryant*, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22

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(1999); *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998); *State v. Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997); *State v. Bruno*, 322 S.C. 534, 536, 473 S.E.2d 450, 451 (1996); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994); *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993); *Robinson v. State*, 308 S.C. 74, 79, 417 S.E.2d 88, 91 (1992); *State v. Fuller*, 297 S.C. 440, 442, 377 S.E.2d 328, 330 (1989); *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984); *State v. Hendrix*, 270 S.C. 653, 657-58, 244 S.E.2d 503, 505 (1978); *State v. Slater*, 360 S.C. 487, 491, 602 S.E.2d 90, 91 (Ct.App.2004).

Depending on the circumstances, words accompanied by hostile acts may establish self-defense. *Fuller*, 297 S.C. at 444, 377 S.E.2d at 331; *State v. Harvey*, 220 S.C. 506, 518, 68 S.E.2d 409, 414 (1951), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (abrogating the doctrine of in favorem vitae); *State v. Mason*, 115 S.C. 214, 217, 105 S.E. 286, 286 (1920) ("Words accompanied by hostile acts may, according to the circumstances, not only reduce a killing from murder to manslaughter, but may establish the plea of self-defense."). The defendant does not have to wait until his adversary is on equal footing in order to act; "he has the right to act under the law of self-preservation and prevent his [adversary from] getting the drop on him." *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000); *Hendrix*, 270 S.C. at 660, 244 S.E.2d at 507; *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936).

If the defendant provokes or initiates the assault, he cannot invoke self-defense; however, he may restore his right to self-defense if he withdraws from the conflict and communicates that decision to his adversary. *Slater*, 360 S.C. at 491, 602 S.E.2d at 92-93. Firing multiple shots does not necessarily negate self-defense so long as the defendant is justified in "continuing to shoot until it is apparent that the danger to his life and body has ceased." *Hendrix*, 270 S.C. at 661, 244 S.E.2d at 507 (holding self-defense was established even though defendant fired four times in rapid succession). Furthermore, the unlawful possession of a firearm does not automatically bar a self-defense charge. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

If a self-defense charge is warranted, the trial court should consider the facts and circumstances of the case and fashion an appropriate

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charge. *Starnes*, 340 S.C. at 322, 531 S.E.2d at 913; *Fuller*, 297 S.C. at 443, 377 S.E.2d at 330. "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." *Day*, 341 S.C. at 418, 535 S.E.2d at 435.

Several South Carolina appellate cases are instructive on when evidence is sufficient to require a charge on self-defense. In *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848 (1993), Veronica Hill was present outside a nightclub when a fight broke out. One of the fighters gave Hill a handgun, which she fired in the air when the fight escalated. "The victim, a spectator to the fight, jumped Hill from behind and began wrestling for the weapon. The scuffle ended when Hill and victim turned face to face and the gun fired." 315 S.C. at 261, 433 S.E.2d at 848-49. The trial judge refused to charge on self-defense, and the jury convicted Hill of voluntary manslaughter. The supreme court held there was evidence to support a self-defense charge and reversed:

The relevant question for the Court to answer is whether there is any evidence in the record which would support a self-defense charge. The record shows that Hill fired the gun into the air when several of her friends began fighting, and that the shot was fired to

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stop the fighting. It was this gunshot which prompted the victim to attempt taking the gun away from Hill. The victim, a larger person than Hill, came up behind Hill and grabbed her by "the throat." There was also evidence to support the proposition that after a violent struggle, the victim "lost her grip" on the gun and was shot.

This evidence shows that Hill may not have been responsible for bringing about the difficulty which resulted in the victim's death. Further, the record supports the conclusion that the struggle alone was some evidence that Hill was in fear or imminent danger of losing her life or sustaining serious bodily injury. The method of victim's attack from behind is evidence that Hill was attempting to retreat, and that Hill had no means of avoiding the danger. The size differential between Hill and the victim is evidence which would allow a reasonably-prudent individual of ordinary firmness and courage to entertain the same belief about the danger.

In reviewing the record, it appears that there was ample evidence to support a self-defense charge to the jury. Therefore, the trial judge erred in not granting Hill's request to charge self-defense to the jury.

Hill, 315 S.C. at 262-63, 433 S.E.2d at 849.

State v. Bruno, 322 S.C. 534, 473 S.E.2d 450 (1996), involved a trial court's refusal to charge on self-defense. A jury convicted Bruno of murder for shooting the victim, James Murphy. Bruno argued the trial court erred by refusing his additional charge on self-defense: that he had no duty to retreat if retreating would place him in danger. The supreme court, however, found that Bruno was not entitled to a charge on self-defense at all.

Bruno was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury. On direct examination, his only testimony was that he felt Victim was coming at him with something. He testified, "It happened so quick, you know. I didn't mean to kill him. I just wanted him to keep away from me." Furthermore, when asked what was his intention in firing the weapon, Bruno responded, "Just let him know to try to stay away from me and not mess with me." On cross-examination, Bruno stated that Victim was "getting in his trunk and he came towards me and something snapped and I shot him."

Since Bruno presented no evidence . . . that he believed he was in imminent danger of losing his life or sustaining serious bodily injury, he fails the second element of self-defense. *See State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). Accordingly, the trial court's failure to charge no duty to retreat was not in error as Bruno was not entitled to a self-defense charge.

Bruno, 322 S.C. at 536-37, 473 S.E.2d at 452 (footnote omitted).

The supreme court, in *State v. Bryant*, 336 S.C. 340, 520 S.E.2d 319 (1999), affirmed the

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trial court's refusal to give the jury a self-defense instruction. Lavar Bryant admitted to killing the victim, but gave several conflicting statements of the events. The victim, a DHEC employee, approached Bryant in the DHEC parking lot as Bryant was breaking into the victim's car. Bryant had a knife, but dropped it, and instead stabbed the victim several times with a screwdriver. The *Bryant* court found a self-defense charge was properly declined.

Appellant's statements fail to establish the elements of self-defense entitling appellant to a self-defense charge. No question of fact for the jury is created on this

issue. Appellant concedes he brought on the initial difficulty by breaking into Suber's vehicle. Even if appellant subjectively meant to withdraw from the conflict he failed to communicate this intent to Suber. Although in one statement appellant claimed he dropped the knife because he did not want to fight, appellant admitted Suber did not see him drop the knife. Thus, Suber was unaware of appellant's intent to withdraw from the conflict. Further, appellant never told Suber he was leaving and did not want to fight. If appellant truly intended to withdraw he could have easily left the open parking lot. *See Macias v. State*, 36 Ariz. 140, 283 P. 711 (1929) (a man who is a trespasser and in a place where he has no right to be may not stand his ground and slay his assailant and still claim self-defense, when by leaving such place he might avoid the conflict). Because appellant failed to effectively communicate to Suber his intent to withdraw from the conflict, appellant's right to use self-defense was never restored. Appellant, as the aggressor, remained responsible for bringing on the difficulty.

Bryant, 336 S.C. at 345-46, 520 S.E.2d at 322.

In *State v. Day*, 341 S.C. 410, 535 S.E.2d 431 (2000), the supreme court reversed Raymond Day's murder conviction for, among other reasons, the trial court's failure to charge self-defense. The victim, Wayne Renew, had hired Day to kill Renew's ex-girlfriend, Debra Bouchillon. Day was to murder Bouchillon and meet Renew on a dirt road after the killing. However, Day, who previously had been romantically involved with Bouchillon, had a change of heart. He did go to Bouchillon's home, but he informed her of the conspiracy and made an anonymous phone call to the police regarding the plot. Day and Bouchillon decided to meet Renew on the dirt road so that Renew would believe Day had gone through with the murder. Bouchillon rode along, but hid in the back seat of the car under several blankets. Day informed Renew he had killed Bouchillon. The two returned to their cars and drove away. Day followed Renew, and Renew stopped his car and motioned to Day. At this point

Day became frightened because he thought Renew had figured out he had been duped. According to Day,

I was talking to Wayne listening to what he said and looking, and then I just caught it out of the corner of my eye, the blankets coming up and came up and went down real quick and I saw Mr. Renew reach for a gun . . . and I saw Mr. Renew go like this (indicating). And by the time he had come up, I had shot him. I really thought he had a gun. I re-live that moment every day.

Day, 341 S.C. at 415, 535 S.E.2d at 433. The trial judge refused to charge the jury on self-defense. However, the jury inquired about self-defense law, and in response, the judge gave a self-defense instruction.

The supreme court ruled the initial refusal to charge on self-defense was error.

"If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *State v. Muller*, 282 S.C. 10, 316 S.E.2d 409 (1984). There is sufficient evidence in the instant case to support a charge on self-defense. Day testified he believed he was in imminent danger because he thought Renew was going to pull a gun on him. Day gave the following testimony about the fatal incident:

I pulled in and turned around and pulled in front of him [Renew] and I walked to

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the truck and he said something and I said something and he pulled a gun on me. I pulled Debbie's gun out and shot him in the head the first shot and I don't know where the last stuff, the first shot went.

According to Day's theory, Renew was a violent drug abuser who had a history of violence against him and others. Day knew that Renew had a tendency to violently overreact, and when he thought Renew saw Bouchillon move under the blankets, he believed he was in imminent danger and shot Renew to defend himself.

Day presented an evidence based theory as to what occurred that evening. Although some of the evidence was disputed, there was certainly enough evidence in this case to make self-defense a jury question. Defense counsel felt so strongly about the trial judge's refusal to give a self-defense instruction that she moved for a mistrial. She convincingly argued that the trial judge cast aside Day's entire defense and removed it from the jury's consideration.

. . . .

Day argues the trial judge erred by refusing to instruct the jury that Day did not have the burden of proving self-defense, and that the jury could consider past difficulties between the parties in weighing self-defense. We agree.

The trial judge initially refused to charge the jury on self-defense. However, the jury inquired about the South Carolina law on self defense. The jury wrote: "What does the State of South Carolina have to say when a person can defend themself [sic] with the use of deadly force. May we see a copy of the law concerning this?" In response, the trial judge charged the jury a standard self-defense instruction as outlined by this Court in *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984) along with a specific charge on the right to act on appearances and the duty to retreat. The trial judge did not include in his instruction Day's Request to Charge Number One (factors that would give Day the right to judge Renew's conduct more harshly, including age difference, substance abuse, "bad blood", prior threats, and reputation for violence); Number Two (prior acts of violence and prior difficulties between Day and Renew); and Number Eight (the State's burden of proof when a defendant asserts self-defense).

The trial judge's failure to charge on the specific elements of self-defense that were applicable to Day's theory constitutes reversible error. As we held in *Fuller*, a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant. *State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989). A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant. *Id.* The trial judge's instruction in this case was incomplete. It should have included a charge indicating: (1) Day had a right to judge the conduct of Renew more harshly than otherwise because of Renew's drug consumption (Defendant's Request to Charge Number 1); and (2) the jury could consider prior instances of violence or unprovoked aggression by Renew in determining whether Day had a reasonable belief of imminent danger (Defendant's Request to Charge Number 2). Central to Day's defense was his argument that Renew had previously pulled a gun on him and that Renew was in a drug-induced paranoia the day of the incident. The jury charge was, therefore, incomplete because the trial judge failed to charge on Renew's substance abuse or his prior acts of violence. The trial judge's "after-the-fact" self-defense instruction was inadequate because defense counsel was unable to present a complete defense during her summation. In her closing argument, defense counsel could not assert self-defense, even though that was Day's theory, because she knew the trial judge was not going to

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adequately charge the jury. Instead, she was forced to present the facts so they implied self-defense, without actually saying the word. For example, in her closing defense counsel states:

[Day] knew Wayne to be a violent person who would immediately take action against someone who had double-crossed

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him. . . . [H]e told you he saw Wayne's hands come down and he shot him. . . . Raymond Day honestly believed that he was reaching for a gun. Raymond knew that Wayne carried a gun. He knew Wayne carried the gun stuck in the waistband of his pants or under the seat and he just seen Debbie's head pop up, he knew he had double-crossed Wayne Renew and he did what he had to do. He honestly believed that was the only course of action he could take and he pulled the gun out from his waistband where he held it and he had to shoot Wayne Renew.

Defense counsel attempted to make a case for self-defense but was restricted because she knew the jury was not going to be so charged. The trial judge belatedly recognized that a self-defense charge was necessary. Providing an "after-the-fact" instruction was inadequate because the prejudice to Day was incurable. Day was unable to adequately assert a complete defense during the trial, and the jury was left with the impression that the trial judge did not think the law of self-defense was applicable to the case.

Day, 341 S.C. at 416-19, 535 S.E.2d at 434-36 (alterations in original) (footnote omitted).

In *State v. Slater*, 360 S.C. 487, 602 S.E.2d 90 (Ct.App.2004), a divided court of appeals reversed the trial judge's failure to charge the jury on self-defense. Slater explained that following a school dance, he noticed a disturbance in a nearby parking lot. Slater and several friends went to the parking lot to investigate and discovered a robbery transpiring. Five men were kicking the victim as he lay on the ground. The court summarized Slater's testimony as follows:

Slater testified that he walked up to the robbery and surprised one of the attackers. The man then turned around and pointed a gun toward Slater. Slater quickly turned around and started running back toward his car. As he ran, he heard a gunshot and responded by shooting his own gun behind him. Slater got into the car where his friends were waiting for him. He continued shooting in the air as the car pulled away. In the ensuing chaos, the victim of the attempted robbery lay dying on the ground. He had been shot twice.

360 S.C. at 489, 602 S.E.2d at 92 (footnote omitted). The trial judge refused to charge the jury on self-defense. We held this was error:

Here, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater then turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where he was firing. Slater testified, "when I walked up on him, I guess I surprised him and he turned to me and he had a gun in his hand. And I see his gun and I started running." He added, "Yeah, when I walked up on him like here, like he turned to me, like had the gun pointed at me like he surprised." Additionally, Mark Nelson, a friend of the victim, testified that he saw one of the attackers—someone other than Slater—with a gun.

360 S.C. at 491, 602 S.E.2d at 93. Accordingly, we reversed.

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State v. Light, 363 S.C. 325, 610 S.E.2d 504 (Ct.App.2005), involved the appeal of Michael Light who was convicted for murdering his girlfriend, Priscilla Davis. Light admitted to shooting Davis but claimed that Davis first threatened him with the gun: "She was pointing [the rifle] at me and screaming and hollering and accusing me as usual. . . . I was afraid she was going to shoot me." Light averred:

The only thing I remember, I did try—I took my left hand to knock it away, try to push it away from me. Than [sic] after I jerked it away from her, I did stumble back several feet, you know after jerking it. The weapon discharged but it was not intentionally.

. . . .

Q. Did she back away from you? Did you back away from her?

A. I went back from her after we was tussling with the rifle.

Light, 363 S.C. at 329, 610 S.E.2d at 506 (alteration in original).

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The trial judge charged the jury on murder, voluntary manslaughter, and accident. Light appealed, maintaining the court erred in denying his request for a charge on self-defense. We disagreed:

Although Light vacillates in his various accounts, he stated he had disarmed Davis and taken possession of the rifle when the shot was fired. Under those facts, Davis, then unarmed, no longer posed a threat to the armed Light and he could not have reasonably believed she did. Therefore, the evidence demonstrates he did not have the right to use deadly force in self-defense and the trial court properly refused to so charge the jury.

Light, 363 S.C. at 333, 610 S.E.2d at 508.

A review of the foregoing precedent demonstrates the trial judge should have charged the jury on self-defense. The standard for giving a self-defense charge is critical in this case.

The evidence presented at trial determines the law to be charged. *State v. White,* 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004); *State v. Light,* 363 S.C. 325, 330, 610 S.E.2d 504, 506 (Ct.App.2005). An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion. *State v. Williams,* 367 S.C. 192, 624 S.E.2d 443 (Ct.App.2005). However, if there is any evidence to support a jury charge, the trial judge should grant the requested charge. *Burriss,* 334 S.C. at 262, 513 S.E.2d at 108. "If there is **any evidence** in the record to support self-defense, the issue should be submitted to the jury." *State v. Burkhart,* 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002) (emphasis added); *accord Day,* 341 S.C. at 416, 535 S.E.2d at 434; *Burriss,* 334 S.C. at 262, 513 S.E.2d at 108 (1999); *Hill,* 315 S.C. at 261, 433 S.E.2d at 849; *State v. Muller,* 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984); *cf. Goodson,* 312 S.C. at 280, 440 S.E.2d at 372 (noting a self-defense charge is not required unless the evidence supports it).

In general, the trial judge is required to charge only the current and correct law of South Carolina. A jury charge is correct if it contains the correct definition of the law when read as a whole. The substance of the law must be charged to the jury, not particular verbiage. Current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt. Finally, to warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial.

Burkhart, 350 S.C. at 261, 565 S.E.2d at 302-03 (internal quotation marks and citations omitted). The trial court commits

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reversible error if it fails to give a charge on an issue raised by the evidence and requested by the defendant. *Hill*, 315 S.C. at 262, 433 S.E.2d at 849; *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *Day*, 341 S.C. at 416-17, 535 S.E.2d at 434 (citing *State v. Muller*, 282 S.C. 10, 316 S.E.2d 409 (1984)).

First, there is evidence that Santiago was not at fault in bringing about the difficulty. The trial judge stated that "the only difficulty that existed—the defendant has testified regarding the only difficulty was that Mr. Wisn was swearing at him, wasn't threatening. Just said, stay away from my daughter; stay away from my house." I disagree with the court's characterization of the evidence. Santiago and Wisn went into the house to search for Santiago's belt, but the encounter soon deteriorated with Wisn yelling at Santiago: "And he walked down the steps down in the driveway with me but the whole time he's—it's like screaming and—at my back, don't—you know, don't ever come on my fucking property again and stay the fuck away from my daughter." According to Santiago, "I didn't even stop to pick up my stuff. Because I ain't even gonna stop with that dude behind me." However, Wisn picked up Santiago's belongings, walked to the back of Santiago's car, and "threw the plastic container in the trunk. And then he threw in the garden hose in the trunk. All the while he's still cursing at me." Wisn then spotted the shotgun. According to Santiago, Wisn "looked over at my gun, and then he looked

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back at me. And then he looked at the gun again and stopped." Santiago snatched up the shotgun and began backing away, but Wisn pursued him: "[H]e turned towards me and said, `Don't be fucking stupid,' like that, **like he was gonna grab it."** (Emphasis added.) On cross-examination, Santiago explained, "[H]e said, `Don't be fucking stupid.' And he didn't say to like protect me from myself. He said it as an insult and he was coming from — **with his hands in the thing [sic] towards me and stepping towards me at the same time."** (Emphasis added.) Thus, in addition to the hostile words, Wisn threw Santiago's things into his trunk and eyed the gun. The fact that Santiago picked up the gun does not negate his self-defense claim because a defendant "has the right to act under the law of self-preservation and prevent his [adversary from] getting the drop on him." *Starnes*, 340 S.C. at 322, 531 S.E.2d at 913. It would be absurd for the law to require Santiago to wait for Wisn, a man twice Santiago's size, to grab for the gun before Santiago could reach for it. Most importantly, as Santiago stepped away, Wisn advanced towards him, reaching for the gun. Santiago's version of the events sufficiently establishes some evidence that Santiago was not at fault in bringing about the difficulty.

Second, Santiago believed he was in imminent danger. On direct examination, counsel asked, "What was going through your mind at the time" of the shooting. Santiago replied, "I did not want to be killed. And I didn't want to be killed by my own gun. And this dude is twice as big as me and if he grabbed it, there's no way I could wrestle it away from him." The circuit judge apparently found that Santiago actually believed he was in imminent danger of losing his life or sustaining serious bodily injury when he picked up the gun, but found that "clearly at the point in time that he has the gun and he has backed away from Mr. Wisn, then he is no longer, can no longer be in imminent danger." This was error. The question is whether Santiago continued to believe he was in imminent danger between the time he picked up the gun and the time he shot Wisn. According to Santiago, that window of time lasted a "second;" and during that short span

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of time Wisn was advancing towards Santiago. Santiago's testimony constitutes evidence he actually believed he was in imminent danger when he shot Wisn.

Third, the trial judge opined, "I do not believe there's evidence in this record that a reasonably prudent person of ordinary firmness and courage would entertain the same belief" of imminent danger. However, there is evidence that a reasonably prudent person of ordinary firmness and courage would have entertained the belief he was in imminent danger. In *Hill*, our supreme court stated that "size differential between [the defendant] and the victim is evidence which would allow a reasonably-prudent individual of ordinary firmness and courage to entertain the same belief about the danger." 315 S.C. at 262, 433 S.E.2d at 849. The State did not dispute Santiago's testimony that Wisn was "twice as big" as Santiago. Additionally, the harsh way in which Wisn spoke to Santiago, coupled with Wisn's acts of following Santiago to his car, throwing his belongings into the trunk, and stepping toward him is evidence that a reasonably prudent person would entertain a fear of imminent danger. The trial judge did not state any specific reasons why she believed Santiago's fear was unreasonable under the reasonably prudent person standard.

Finally, Santiago had no other probable means of avoiding the danger. Santiago left the house, but Wisn followed him. The judge concluded that once Santiago had the gun, he "was exercising a means of avoiding the danger, which means at that point there could be no justification in even proceeding to shoot Mr. Wisn four times." This conclusion, however, ignores Santiago's testimony that Wisn continued to come toward him. Santiago attempted to retreat up the point where Wisn was about to come into physical contact with him. These facts make the instant case distinguishable from *Light*. In *Light*, the defendant wrestled a gun away from his girlfriend and testified that after he obtained control of the gun he stumbled back "several feet" when the gun accidentally discharged. 363 S.C. at 329, 610 S.E.2d at 506. The court concluded that once Light had disarmed the victim, she "no longer posed a threat to the armed Light and he could not

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have reasonably believed she did." *Id.* at 333, 610 S.E.2d at 508. Significantly, Light did not claim that he shot the victim as she was advancing toward him, but maintained that the shooting was accidental. Thus, there was no evidence in *Light* that the victim posed a threat of imminent harm to Light at the moment she was shot. Here, Wisn was allegedly advancing toward Santiago when Santiago shot him. The evidence suggests that Santiago reached the point of retreat where he had to discharge the gun or be overpowered by Wisn.

For the purposes of determining whether a charge on the law of self-defense is warranted, Santiago's credibility is not relevant. The court should look only to whether **any** evidence exists to support the charge. Where, as here, the defense introduces some evidence to support the charge, it is the jury's responsibility to determine whether the defendant's account of the events is believable and whether his actions were truly in self-defense. In the case *sub judice*, the trial judge committed reversible error by invading the province of the jury and failing to give a self-defense charge. The failure to charge is patently prejudicial and is reversible error as a jury could have found Santiago was justified in killing Wisn. *See Day*, 341 S.C. at 416-17, 535 S.E.2d at 434 ("If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error.").

II. Relevance of Schwartz-Watts's Testimony

I agree with the majority that the trial judge correctly excluded the testimony as to Santiago's mental state during the commission of the crime. However, the trial judge incorrectly excluded Dr. Schwartz-Watt's testimony as to the voluntariness of Santiago's confession.

A. Diminished Capacity

Schwartz-Watts would have opined that Asperger's Disorder caused Santiago to fear for his life and that consequently, he did not have the requisite mental state to commit murder. However, the diminished capacity defense is not recognized in South Carolina.

South Carolina Code Annotated section 17-24-10 (2003) provides an affirmative defense if, "at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." In addition to an insanity defense, certain jurisdictions acknowledge what Professor LaFave calls "partial responsibility" — a doctrine applicable to a defendant who

may have been suffering from an abnormal mental condition which was not of a kind or character to afford him a successful insanity defense under the right-wrong test or other standard applicable in that jurisdiction. But, while this defendant is therefore ineligible for a finding of not guilty by reason of insanity, his mental abnormality may nonetheless be a most relevant consideration in the determination of whether he is guilty of the crime charged.

Wayne R. LaFave, *Substantive Criminal Law* § 9.2. Our courts, however, have clearly rejected application of the concept.

In *Gill v. State*, 346 S.C. 209, 552 S.E.2d 26 (2001), a forensic psychiatrist, Morgan, testified that Gill had a borderline intellectual capacity and possessed an antisocial personality. Dr. Morgan asseverated Gill could not formulate malice aforethought. Gill requested a charge on diminished capacity, which the trial judge refused. The supreme court held diminished capacity is not recognized in South Carolina:

The diminished capacity doctrine allows a defendant to offer evidence of his mental condition with respect to his capacity to achieve the *mens rea* required for the commission of the offense charged. 21 Am. Jur.2d *Criminal Law* § 38 (1998). In particular, the defense may be invoked to negate specific intent, where such intent is an element of the offense charged. *Id.* Diminished capacity differs from the insanity defense in that it may be raised by a

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defendant who has conceded to be legally sane. *Id.*

The trial judge did not err by refusing to charge diminished capacity because it is not recognized in South Carolina. Furthermore, according to this Court in *State v. Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956), a defendant is not entitled to an instruction concerning his capacity to form the requisite intent for malice aforethought when the instructions, taken as a whole, properly present elements of malice. Gill received proper jury charges on murder, voluntary manslaughter, ABIK, insanity, and self defense. These jury charges, taken as a whole, were sufficient because they adequately presented the elements of malice as recognized by South Carolina law.

Gill, 346 S.C. at 220, 552 S.E.2d at 32.

Schwartz-Watts sought to establish that due to Santiago's Asperger's Disorder, he did not have possess the mental state required for

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murder — in other words, that Santiago suffered from a diminished mental capacity. The trial judge did not abuse her discretion by refusing to allow this testimony.

B. Voluntariness of Santiago's Confession to Police

1. Proffer of the Expert's Testimony

The defense requested that the court allow Schwartz-Watts to testify as to her opinion that Santiago's Asperger's Disorder rendered his confession involuntarily. Specifically, counsel stated,

> The third and final proffer would be for her [explanation of] Chris' affect and appearance in court and his dealing with his issuing a statement as he did based on his perceptions of his not being treated well, being messed with, his rights violated, et cetera, et cetera.

Defense counsel did not proffer Schwartz-Watts's testimony, but rather informed the trial judge of what her testimony would have been. Generally, a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been. *State v. Roper*, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); *State v. Cox*, 258 S.C. 114, 117, 187 S.E.2d 525, 527 (1972); *State v. King*, 367 S.C. 131, 623 S.E.2d 865 (Ct.App. 2005). Here, although defense counsel should have proffered Schwartz-Watts's testimony, I find the record adequately indicates what her testimony would have been. Therefore, in my view, this issue is preserved for review.

2. Admissibility of Confessions

A confession is not admissible unless it was voluntarily made. *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); *State v. Compton*, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct.App.2005); *see also State v. Childs*, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989) ("The test of admissibility of a statement is voluntariness."). "An accused's involuntary statement is inadmissible for any purpose, including impeachment." *State v. Victor*, 300 S.C. 220, 223, 387 S.E.2d 248, 249 (1989); *see also State v. Hook*, 348 S.C. 401, 559 S.E.2d 856 (Ct.App.2001), *aff'd as modified*, 356 S.C. 421, 590 S.E.2d 25 (2003). The voluntariness requirement is in addition to the intelligent waiver mandate of *Miranda*. *See State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) ("In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary *and* taken in compliance with *Miranda*.") (citations omitted). "It is now axiomatic . . . that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . even though there is ample evidence aside from the confession to support the conviction." *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

The requirement that only voluntary confessions be admitted is based on the Fifth Amendment's right against self-incrimination, and was incorporated and made applicable to the States through the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) ("We hold today that the Fifth Amendment's exception from compulsory self-incrimination

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is also protected by the Fourteenth Amendment against abridgment by the States."). In *Hook*, this Court explained:

> The Fifth Amendment to the United States Constitution provides, in relevant part, that no person "shall be compelled in any

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criminal case to be a witness against himself." U.S. Const. amend. V. This provision governs state as well as federal criminal proceedings. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Article 1, Section 12, of the South Carolina Constitution contains a similar provision. S.C. Const. Art. I, § 12 (". . . nor shall any person be compelled in any criminal case to be a witness against himself.").

The Fifth Amendment does not, of course, operate as a blanket prohibition against the taking of any and all statements made by criminal defendants to law enforcement officials. Volunteered statements, whether exculpatory or inculpatory, stemming from custodial interrogation or spontaneously offered up, are not barred by the Fifth Amendment. *State v. Kennedy*, 325 S.C. 295, 307, 479 S.E.2d 838, 844 (Ct.App.1996) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

Hook, 348 S.C. at 409-10, 559 S.E.2d at 860. In *Hook* we observed that the "concept that the privilege against self-incrimination encompasses the right to be free from being penalized for its exercise is well established." *Id.* at 411, 559 S.E.2d at 861 (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977) ("[W]hen a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution. . . . Similarly, our cases have established that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.")). The United States Supreme Court, in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), elucidated the rationales behind the prohibition against involuntary confessions:

It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the `strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' *Blackburn v. Alabama*, 361 U.S. 199, 206-207, 80 S.Ct. 274, 280, 4 L.Ed.2d 242, and because of `the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' *Spano v. New York*, 360 U.S. 315, 320-321, 79 S.Ct. 1202, 1205-1206, 3 L.Ed.2d 1265.

Jackson v. Denno, 378 U.S. at 385-86, 84 S.Ct. 1774.

3. Voluntariness Determinations

The process for determining whether a statement is voluntary, and thus admissible, is bifurcated: it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the confession was voluntarily made by a preponderance of the evidence.

Under *Jackson v. Denno*, a defendant is entitled to a "reliable determination as to the voluntariness of his confession by a tribunal other than the jury charged with deciding his guilt or innocence." *State v. Fortner*, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976). "A defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury." *State v. Salisbury*, 330 S.C. 250, 271, 498 S.E.2d 655, 666

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(Ct.App.1998), *aff'd as modified,* 343 S.C. 520, 541 S.E.2d 247 (2001); *see also State v. Creech,* 314 S.C. 76, 84, 441 S.E.2d 635, 639

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(Ct.App.1993) ("Whenever evidence is introduced that was allegedly obtained by conduct violative of a defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing outside of the presence of the jury at the threshold point to establish circumstances under which it was gained."). "In South Carolina, the judge makes this initial determination of voluntariness required by *Jackson v. Denno* [.]" *Fortner,* 266 S.C. at 226-27, 222 S.E.2d at 510.

The State bears the burden of showing the confession was voluntary. *Von Dohlen,* 322 S.C. at 243, 471 S.E.2d at 695; *Washington,* 296 S.C. at 55, 370 S.E.2d at 612; *State v. Neeley,* 271 S.C. 33, 244 S.E.2d 522 (1978); *see also Middleton,* 288 S.C. at 24, 339 S.E.2d at 694 ("In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary *and* taken in compliance with *Miranda.*").

In *State v. Washington,* 296 S.C. 54, 370 S.E.2d 611 (1988), our supreme court addressed the standard of proof applicable to the *Jackson v. Denno* hearing:

"It has been uniformly held, a confession may be introduced upon proof of its voluntariness *by a preponderance of the evidence.*" *State v. Smith,* 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977) (Emphasis supplied).

"(T)he burden is on the State to prove *by a preponderance of the evidence* that his rights were voluntarily waived." *State v. Neeley,* 271 S.C. 33, 40, 244 S.E.2d 522, 526 (1978) (Emphasis supplied).

"(T)he prosecution must prove . . . *by a preponderance of the evidence* that the confession was voluntary." *Lego v. Twomey,* 404 U.S. 477, 489, 92 S.Ct. 619, 627, 30 L.Ed.2d 618, 627 (1972) (Emphasis supplied).

See also Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *State v. Middleton,* 295 S.C. 318, 368 S.E.2d 457 (1988); *In re Christopher W.,* 285 S.C. 329, 329 S.E.2d 769 (Ct.App.1985).

Washington, 296 S.C. at 55, 370 S.E.2d at 612. *Accord State v. Kennedy,* 325 S.C. 295, 479 S.E.2d 838 (Ct.App.1996).

During the *Jackson v. Denno* hearing, the trial judge must examine the totality of the circumstances surrounding the confession and determine whether the State has carried its burden of showing the confession was voluntarily made. *State v. Childs,* 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989); *State v. Doby,* 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

Once the trial judge determines that the confession is admissible, it is up to the jury to ultimately determine whether the confession was voluntarily made. *Von Dohlen,* 322 S.C. at 243, 471 S.E.2d at 695; *State v. Callahan,* 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974) ("A confession is not admissible unless voluntary, and it [is] for the jury to say in the last analysis whether the confession [is] or [is] not voluntary."); *State v. Clinkscales,* 231 S.C. 650, 653, 99 S.E.2d 663, 664 (1957) ("Although all the evidence may be to the effect that a confession made while under arrest was a voluntary one, the jury may not be so convinced; and it is the jury who, in the final analysis, must determine the factual issue of voluntariness."); *State v. Brown,* 212 S.C. 237, 246, 47 S.E.2d 521, 525 (1948).

Nothing in [*Jackson v. Denno*] questioned the province or capacity of juries

to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.

Lego v. Twomey, 404 U.S. 477, 485-86, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). Thus, the jury is entitled to consider the totality of the circumstances surrounding the confession to determine whether the confession was voluntarily made. *State v. Vang*, 353 S.C. 78, 84, 577 S.E.2d 225, 227-28 (Ct.App.2003).

Confessions, even those that have been found to be voluntary, are not conclusive of guilt. . . . Indeed, stripped of the power to

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describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Crane v. Kentucky, 476 U.S. 683, 689, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (citations omitted).

4. Totality of the Circumstances Test

The test of voluntariness is "'whether a defendant's will was 'overborne' by the circumstances surrounding the given confession. The due process test takes into consideration 'the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation.'" *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (citations omitted); *State v. Aleksey*, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000); *State v. Linnen*, 278 S.C. 175, 179, 293 S.E.2d 851, 853 (1982); *State v. Gillian*, 360 S.C. 433, 458, 602 S.E.2d 62, 76 (Ct.App.2004); *see also State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) ("A determination whether a confession was 'given voluntarily requires an examination of the totality of the circumstances.'") (citation omitted); *State v. Compton*, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct.App.2005) ("The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances.") (internal quotation marks and citation omitted). "'The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused.'" *State v. Ledford*, 351 S.C. 83, 87, 567 S.E.2d 904, 906 (Ct.App.2002) (quoting *State v. Franklin*, 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989)); *accord Childs*, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989); *State v. Corns*, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct.App.1992). "A jury must consider the totality of the circumstances under which a statement was given to determine whether it was voluntarily made." *State v. Vang*, 353 S.C. 78, 84, 577 S.E.2d 225, 227-28 (Ct.App.2003) (citing *State v. Torrence*, 305 S.C. 45, 52, 406 S.E.2d 315, 319 (1991) ("[T]he jury should be instructed that they must find beyond reasonable doubt that the statement was freely and voluntarily given under the totality of the circumstances before the statement may be considered.")). The State must prove to the jury that the statement was voluntary beyond a reasonable doubt. *State v. Washington*, 296 S.C. 54, 55-56, 370 S.E.2d 611, 612 (1988) (citing *State v. Drayton*, 287

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S.C. 226, 337 S.E.2d 216 (1985); *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981)).

Coercive police activity is a necessary predicate to finding a confession is not voluntary. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *Linnen*, 278 S.C. 175, 293 S.E.2d 851; *Salisbury*, 330 S.C. 250, 498 S.E.2d 655. Coercion is determined from the perspective of the suspect. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). The Supreme Court, in *Withrow v. Williams*, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993), set forth a non-exclusive list of factors which may be considered in the totality-of-the-circumstances analysis:

Under the due process approach . . . courts look to the totality of circumstances to determine whether a confession was voluntary. Those potential circumstances include not only the crucial element of police coercion, *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 521, 93 L.Ed.2d 473 (1986); the length of the interrogation, *Ashcraft v. Tennessee*, 322 U.S. 143, 153-154, 64 S.Ct. 921, 925-926, 88 L.Ed. 1192 (1944); its location, see *Reck v. Pate*, 367 U.S. 433, 441, 81 S.Ct. 1541, 1546, 6 L.Ed.2d 948 (1961); its continuity, *Leyra v. Denno*, 347 U.S. 556, 561, 74 S.Ct. 716, 719, 98 L.Ed. 948 (1954); the defendant's maturity, *Haley v. Ohio*, 332 U.S. 596, 599-601, 68 S.Ct. 302, 303-305, 92 L.Ed. 224

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(1948) (opinion of Douglas, J.); education, *Clewis v. Texas*, 386 U.S. 707, 712, 87 S.Ct. 1338, 1341, 18 L.Ed.2d 423 (1967); physical condition, *Greenwald v. Wisconsin*, 390 U.S. 519, 520-521, 88 S.Ct. 1152, 1153-1154, 20 L.Ed.2d 77 (1968) (*per curiam*); and mental health, *Fikes v. Alabama*, 352 U.S. 191, 196, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957). They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. *Haynes v. Washington*, 373 U.S. 503, 516-517, 83 S.Ct. 1336, 1344-1345, 10 L.Ed.2d 513 (1963)[.]

Withrow, 507 U.S. at 693-94, 113 S.Ct. 1745. *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., *Haley v. Ohio*, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224; his lack of education, e.g., *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); or his low intelligence, e.g., *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246; the lack of any advice to the accused of his constitutional rights, e.g., *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; the length of detention, e.g., *Chambers v. Florida*, *supra* [309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940)]; the repeated and prolonged nature of the questioning, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; and the use of physical punishment such as the deprivation of food or sleep, e.g., *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. *Culombe v. Connecticut*, *supra*, 367 U.S.,[568] at 603, 81 S.Ct.,[1860] at 1879[, 6 L.Ed.2d 1037 (1961)].") (footnote omitted).

The appellate entities of South Carolina have recognized that appropriate factors include: background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency. *See Childs*, 299 S.C. at 475, 385 S.E.2d at 842 (background,

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experience, and conduct of the accused); *In re Williams*, 265 S.C. 295, 217 S.E.2d 719 (1975) (age); *State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983) (length of custody); *State v. Rabon*, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980) (police misrepresentations); *State v. Smith*, 268 S.C. 349, 355, 234 S.E.2d 19, 21 (1977) (isolation of minor); *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (threats of violence and promises of leniency).

Furthermore, our courts have recognized the relevance of a factor which is crucial to the determination of this case: the mental state of the accused.

In *State v. Cain*, 246 S.C. 536, 144 S.E.2d 905 (1965), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (abrogating the doctrine of in favorem vitae), Hershel Cain was convicted of murder and sentenced to death. The victim, who owned a grocery store and filling station, was found lying on the floor of his store, dead from a gunshot wound to the chest. Police arrested Cain two days later and he confessed to the murder. The officer who took Cain's statement testified to the facts surrounding the confession. "[A]t the time the confession was admitted in evidence, the sole testimony before the trial Judge was that such confession had been freely and voluntarily made by the appellant. There was no testimony to the contrary." 246 S.C. at 539, 144 S.E.2d at 906. However, prior to the shooting, a doctor diagnosed Cain with a mental condition — "schizophrenic reaction of the paranoid type." *Id.* Cain contended

that the court should have excluded from the evidence the statement or confession signed by the appellant because the appellant, at the time of the making of said confession, was a suspect, was under arrest, and was not provided with counsel; and that at the time of the making of said confession, the appellant was disoriented, having been a patient in the State Hospital

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prior to the alleged confession and again within five days after making such confession.

246 S.C. at 541, 144 S.E.2d at 907. The court found that the confession was admissible, but reversed Cain's convictions because the judge failed to charge the jury as to its role in determining the voluntariness of Cain's confession.

At the time the confession of the appellant was offered and admitted into evidence, even though the confession was taken while the appellant was in custody, all of the evidence showed that the said confession, as made, was a free and voluntary one, and there was no evidence to contradict the *prima facie* showing made by the State. *State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622 [1961]. The lack of mental capacity is an important factor to be considered with other factors in determining whether, in fact, a purported confession was voluntary. *Blackburn v. State of Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242. The appellant had the right to introduce evidence of his insanity at the time of his confession for the purpose of impairing or destroying its effect and it was for the jury to determine what weight should be accorded thereto. We think the confession was admissible in evidence.

. . . .

The record in this case shows that the trial Judge failed to give any instructions whatsoever as to the rules governing confessions. We think this was prejudicial error. The question of whether the appellant was mentally capable of making a confession and understood the contents of his statement and freely and voluntarily executed it should have been submitted to the jury under appropriate instructions. *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 [1951], and *State v. Clinkscales*, 231 S.C. 650, 99 S.E.2d 663. We quote from the last cited case:

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'Although all the evidence may be to the effect that a confession made while under arrest was a voluntary one, the jury may not be so convinced; and it is the jury who, in the final analysis, must determine the factual issue of voluntariness. *State v. Miller*, 211 S.C. 306, 45 S.E.2d 23 [1947]; *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130. *Cf. State v. Harris*, 212 S.C. 124, 46 S.E.2d 682 [1948]. Similarly, even though a jury accepts a written confession as having been voluntarily made, it is not thereby bound to accept every statement contained in it as true; for it is the sole judge of its credibility, and may believe it all, or in part, or not at all. It is unreasonable to assume that these matters are within the knowledge of the average juror; he should be informed of them by the Court. Whether such instruction would have altered the verdict in this case is a matter upon which we need not speculate; since life is at stake the case should be remanded, so that upon its retrial the jury may be instructed as to their power, as sole judges of the facts to determine whether or not, under the evidence, the confession was voluntary, and to what extent they will give it credence.'

We think that in all fairness to the trial Judge it should be stated that he was not requested to instruct the jury on the subject of confessions. However, under the well recognized practice of this Court, where the death penalty is involved, these omissions on the part of counsel will not be held to waive the rights of the appellant.

The judgment of the lower Court is reversed and this case remanded for a new trial.

Cain, 246 S.C. at 541-42, 144 S.E.2d at 907-08.

In *State v. Callahan*, 263 S.C. 35, 208 S.E.2d 284 (1974), Callahan confessed to rape, robbery, and burglary. He was indicted, and a jury convicted him of all charges. His confession was the basis for his appeal. The trial judge heard in camera testimony from a psychiatrist, Dr. Forsthoefel, who "had diagnosed the defendant as 'mental retardation moderate.'" *Id.* at 39-40, 208 S.E.2d at 285. Dr. Forsthoefel

testified somewhat at length as to his ability to think and reason under stress. He said that the defendant 'when subjected to even mild stress would become very labile,

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excitable and disorganized in his thinking and upset.' He did not testify that the defendant did not know legal right from legal wrong.

263 S.C. at 40, 208 S.E.2d at 285.

After hearing additional testimony, the judge concluded Callahan's confession "'was freely and voluntarily made after the defendant had been accorded all of his Constitutional rights.'" 263 S.C. at 40, 208 S.E.2d at 286. The issue of voluntariness became a question of fact for the jury, and accordingly, the State and Callahan proceeded to offer testimony relating to the confession before the jury.

After the State had again submitted its witnesses on the voluntariness issue, and while counsel for the defendant was again presenting his witnesses to the contra, Dr. Forsthoefel was again called to the stand and testified. He said that his diagnosis was that the defendant "is moderate mental retardation, I.Q. range of 55 to 65 at the most."

The record then reflects the following:

"Q. Do you have an opinion as to his ability to think or reason under stress?

"A. Yes, I do have an opinion."

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The solicitor objected to this question and the judge sustained the objection. Later, defense counsel asked this question:

"Q. Okay, Doctor, do you have an opinion as to his quality of thinking?"

"A. His quality of thinking . . ."

The trial judge interrupted and did not permit the witness to continue to answer.

263 S.C. at 40, 208 S.E.2d at 286.

The issue for the *Callahan* court was "whether the defendant was prejudiced by denial of the right to further pursue the question of mental capacity" in the jury's presence. *Id.* The court held the trial judge erred by refusing to allow the psychiatrist's answers:

A confession is not admissible unless voluntary, and it was for the jury to say in the last analysis whether the confession was or was not voluntary. In *State v. Cain*, 246 S.C. 536, 144 S.E.2d 905 (1965), this Court held, "The lack of mental capacity is an important factor to be considered with other factors in determining whether, in fact, a purported confession was voluntary." Accordingly, the defendant was entitled to submit evidence of the psychiatrist touching on the defendant's mental capacity and it would have been appropriate to allow both questions quoted hereinabove.

263 S.C. at 41, 208 S.E.2d at 286. However, the court found no prejudice from the error because the jury heard other testimony of Callahan's mentality. *Id.* at 43, 208 S.E.2d at 287 ("To exclude the testimony of Dr. Forsthoefel was inconsistent with our reasoning in Cain, but we think that the jury was fully apprised of the fact that the defendant was of very low mentality short of insanity.").

In *State v. Doby*, 273 S.C. 704, 709, 258 S.E.2d 896, 899 (1979), our supreme court recalled, "'We have consistently held that mental deficiency alone is not sufficient to render a confession involuntary but that it is a factor to be considered along with all of the other attendant facts and circumstances in determining the voluntariness of the confession. *State v. Cain*, 246 S.C. 536, 144 S.E.2d 905; *State v. Callahan*, 263 S.C. 35, 208 S.E.2d 284.' *In Re Williams*, 265 S.C. 295, 301, 217 S.E.2d 719, 722 (1975)."

Jennings, age twenty-two, confessed to burglarizing a home and killing the resident in *State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983). Jennings had a hearing deficiency and was described as "'mildly' retarded." *Id.* at 63, 309 S.E.2d at 759. However, the record included testimony that "the officers who questioned appellant were aware of the physical deficiencies and exercised caution to be sure that he could hear and understand the communications with him." *Id.* at 63-64, 309 S.E.2d at 760. The court considered Jennings's condition and found his confession voluntary considering the totality of the circumstances.

Neither the length of custody before the confession was made, nor the physical deficiencies of the appellant, were conclusive of the issues concerning the voluntariness of the confession, but were factors to be considered by the trial judge, along with the other testimony and circumstances, in determining the admissibility of the alleged

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confession. We find no basis upon which to disturb the findings of the trial judge that the confession was freely and voluntarily made.

Jennings, 280 S.C. at 64, 309 S.E.2d at 760.

5. Relevance of Expert Testimony to the Voluntariness Analysis

Indubitably, a defendant's mental capacity is a factor that may be considered both by the court in its *Jackson v. Denno* hearing analysis, and by the jury in its voluntariness determination. Santiago sought to admit Schwartz-Watts's testimony as a means of explaining "his issuing a statement as he did based on his perceptions of his not being treated well, being messed with, his rights violated[.]" This testimony was relevant to Santiago's mental condition at the time of the confession and would have had a tendency to make more probable the allegedly involuntary nature of Santiago's confession. As the ultimate arbiter of whether Santiago's confession was voluntary, the jury was entitled to hear Schwartz-Watts's testimony. Therefore, the trial judge erred in excluding it.

Moreover, the error prejudiced Santiago. Because the trial judge excluded Schwartz-Watts's testimony, Santiago was unable to present the jury with evidence relevant to the voluntariness of his confession. Further, the jury was not apprised of Santiago's mental capacity through other testimony. *Cf. Callahan,* 263 S.C. at 42, 208 S.E.2d at 286 (finding error not prejudicial when the jury knew of the defendant's mental capacity through other testimony). Thus, the error was inimical to Santiago.

The trial judge erred by failing to give a self-defense charge and committed an abuse of discretion by excluding evidence relevant to the jury's voluntariness determination. Accordingly, I **VOTE** to **REVERSE** Santiago's convictions.

657 S.E.2d 67
376 S.C. 301
Bobby R. WALTON, Appellant,
v.
MAZDA OF, ROCK HILL, Mazda USA, Lee Faile, Ken McManus, Eric Sigmon, and C.A.R.S., Defendants, of whom Ken McManus and Eric Sigmon are the Respondents.
No. 4306.
Court of Appeals of South Carolina.
Decided October 19, 2007.
Withdrawn, Substituted, and Refiled January 10, 2008.
Rehearing Denied January 10, 2008.

[657 S.E.2d 68]

Mitchell K. Byrd, Sr., of Hilton Head Island, for Appellant.

Lucy London McDow, of Rock Hill, for Respondent.

PER CURIAM.

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Bobby Walton filed this action alleging, *inter alia,* breach of contract arising from his purchase of an automobile. The magistrate granted summary judgment to two of the defendants, Ken McManus and Eric Sigmon. On appeal, the circuit court affirmed and we affirm.[1]

FACTS

On August 31, 2002, Walton purchased a vehicle, and a warranty contract issued by C.A.R.S., from Mazda of Rock Hill, a.k.a. Faile Enterprises, Inc. On December 19, 2002, Faile Enterprises entered into an asset purchase agreement with McManus and Sigmon. In January 2003, Walton brought the vehicle to the dealership for repairs. At that time, Walton was informed of the sale, and McManus and Sigmon refused to honor Walton's contract or warranty. Walton contacted C.A.R.S. expecting it to honor the warranty contract. C.A.R.S. notified Walton it never received the paperwork or payment from Mazda of Rock Hill.

The sale and transfer of the dealership assets closed on March 27, 2003. On March 28, 2003, McManus and Sigmon assigned the asset purchase agreement to McManus-Sigmon, Inc., a.k.a. Team Mazda.

By complaint dated April 2, 2003, Walton sued Mazda of Rock Hill, Mazda USA, Lee Faile, McManus, Sigmon, and C.A.R.S., alleging breach of contract, unfair trade practices, and willful and malicious conduct. The magistrate granted McManus' and Sigmon's motion for summary judgment.

STANDARD OF REVIEW

When reviewing the grant of summary judgment, the appellate court applies the same standard governing the trial court under Rule 56(c), SCRCP. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Miller v. Blumenthal Mills, Inc.,* 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct.App.2005). In determining whether any triable issues of fact exist, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.*

LAW/ANALYSIS

I. Summary Judgment

Walton first argues a magistrate does not have the authority to rule on a motion for summary judgment. We disagree.

Rule 81, SCRCP, provides:

These rules [SCRCP], or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits

of the jurisdiction and, powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable. They shall apply insofar as practicable in magistrates courts, probate courts, and family courts to the extent they

[657 S.E.2d 69]

are not inconsistent with the statutes and rules governing those courts.

See Rule 1, SCRCP (defining the scope of the South Carolina Rules of Civil Procedure) and Rule 56, SCRCP (providing the authority to grant summary judgment).

Additionally, Rule 2, SCRMC, provides:

(a) If no procedure is provided by these rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in like situations but not inconsistent with these rules.

(b) Each magistrate may promulgate rules for the conduct of proceedings in his court which are not inconsistent with these rules and the South Carolina Code of Laws.

Although there is no law within the South Carolina Rules of Magistrate Court specifically addressing summary judgment, the *South Carolina Bench Book for Magistrates and Municipal Court Judges* discusses summary judgment, explaining:

After the filing of a civil case and prior to the actual trial, you may occasionally receive a motion for summary judgment.... Rule 56, SCRCP, which is made applicable to magistrate's court by Rule 81, SCRCP, allows the plaintiff or defendant ... [to] move with or without supporting affidavits for a summary judgment.... Summary judgment is proper when, after reviewing the motion, supporting affidavits, and the pleadings, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. . . . If, after a hearing, the court determines the summary judgment is appropriate, an order to that effect ending the case should be issued.

South Carolina Bench Book for Magistrates and Municipal Court Judges, II-19 to II-20 (2d ed.1984), *available at* http://www.sccourts.org/trial/magistrate/benchbook/HTML/CivilC.htm#C15 (emphasis in original).

Therefore, we find Rule 56, SCRCP, applies to magistrates as members of the South Carolina court system. The circuit court did not err in affirming the magistrate's grant of summary judgment because the grant of summary judgment does not exceed the magistrate's authority.

II. Successor Liability

Walton next contends genuine issues of material fact exist as to successor liability and therefore the magistrate erred in granting summary judgment. We disagree;

In the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully denying creditor claims. *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) (citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)).

(a) Agreement to Assume Obligations Exception

Walton alleges an issue of material fact is present regarding whether McManus and Sigmon agreed to assume Mazda of Rock Hill's debts or obligations. We disagree.

"When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense." *S.C. Farm Bureau Mut. Ins. Co. v. Oates,* 356 S.C. 378, 381, 588 S.E.2d 643, 645 (Ct. App.2003).

The Asset Purchase Agreement states that McManus and Sigmon purchased the assets "free and clear of any liens, encumbrances, restrictions, charges, and equities of any kind whatsoever." Further, the Asset Purchase Agreement states: "Purchaser is not assuming any liabilities of Seller." Walton focuses on language in the Asset Purchase Agreement that obliges McManus and Sigmon to purchase, at cost, all repair work in progress. Under this provision, McManus and Sigmon were to finish customer repair work, and the proceeds were to be divided equally between

[657 S.E.2d 70]

the parties. We agree with the magistrate and circuit court that this provision, in light of the other provisions in the contract, does not convert the agreement from solely an asset sale to a sale of assets and liabilities. Therefore, Walton's reliance on this provision is misplaced and the magistrate did not err in finding no genuine issues of material fact exist regarding this exception.

(b) Consolidation Exception

Walton argues there is a material issue of fact whether the sale between Mazda of Rock Hill and McManus and Sigmon was simply a consolidation. We disagree.

As the circuit court properly determined, there is no evidence in the record indicating the transaction between Mazda of Rock Hill and McManus and Sigmon amounted to a consolidation. Both McManus and Sigmon signed affidavits swearing they have never had any interest in Mazda of Rock Hill. The asset purchase agreement clearly establishes a sale between Faile Enterprises and McManus and Sigmon. The agreement was also subject to a consultant and non-compete agreement, in which Faile promised not to associate with any Mazda dealership within twenty miles of the sold dealership and to work as a consultant for McManus and Sigmon for almost two years. Accordingly, no factual issue prevents summary judgment based on this exception.

(c) Mere Continuation Exception

Walton asserts a material issue of fact exists as to whether McManus and Sigmon merely continued Mazda of Rock Hill. We disagree.

In *Simmons v. Mark Lift Industries, Inc.*, the South Carolina Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the seller and purchaser. 366 S.C. 308, 312 n. 1, 622 S.E.2d 213, 215 n. 1 (2005). As discussed, McManus and Sigmon did not have any relationship with Mazda of Rock Hill except for the purchase of the assets of the dealership. Additionally, Faile only served McManus' and Sigmon's new organization, Team Mazda, as a consultant for a limited time period. Therefore, we find evidence to support the circuit court's finding that there was no material issue of fact supporting Walton's claim of a mere continuation.

(d) Fraud Exception

Finally, Walton contends there is an issue of material fact regarding whether the asset sale was fraudulent. To meet the fraud exception to successor liability, the general rule is that a successor must knowingly

participate in a fraudulent asset transfer. Richard L. Cupp, Jr., *Redesigning Successor Liability,* 1999 U.Ill.L.Rev. 845, 875-76 (1999). Proving such knowledge is difficult, and a few courts have advocated expanding the fraud exception to include reviewing the successor's actual or constructive knowledge. *Id.* at 888-89 (generally discussing the fraud exception in product liability actions alleging successor liability). Under either interpretation of the fraud exception to successor liability, we find no genuine issue of material fact. Walton provides no theory supporting a claim of fraud. For instance, there is no evidence of inadequate consideration and no indication that McManus and Sigmon were not bona fide purchasers for value. A party opposing summary judgment must do more than rely on mere allegations. *Dyer v. Moss,* 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct.App.1985). We find no error by the trial court in affirming the magistrate's grant of summary judgment on the fraud exception.

Based on the foregoing, we find no error in the circuit court's order affirming the master's grant of summary judgment in favor of McManus and Sigmon.

AFFIRMED.

WILLIAMS, J., and CURETON and GOOLSBY, A.J.J., concur.

Notes:

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

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230 S.E.2d 447
267 S.C. 607
James WILLIAMS, Administrator, Estate of Robert Jackson, Appellant,
v.
CHESTERFIELD LUMBER COMPANY, Respondent.
No. 20318.
Supreme Court of South Carolina.
Dec. 2, 1976.

Header ends here. [267 S.C. 608] Jackson & Bell, Florence, for appellant.

Paulling & James, Darlington, for respondent.

[267 S.C. 609] NESS, Justice:

This is a personal injury case. Appellant Jackson was attempting to repair a machine owned by the respondent lumber company. It was necessary for the appellant to work within the machine and while there, it unexpectedly became operational, injuring him and ultimately causing appellant's foot to be amputated. The trial court granted summary judgment for respondent. We hold this was error.

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The depositions, [1] which are in the record, reveal that the appellant, due to his proximity at the time of the injury could not identify who started the machine. It was appellant's understanding that the respondent's foreman had the sole authority to operate the switch and the responsibility to see that no one started the machine except at appellant's request. In fact, the foreman had, on that day, engaged the equipment on several occasions at appellant's request. The foreman denied all of these allegations and stated that he was elsewhere in the mill at the time of the accident. Another deposition indicated that subsequent to the accident the switch was examined and was not defective.

It is apparent from the record that there is a factual dispute as to who had actual control and authority over the switch. The materiality of this factual issue is evinced by the complaint which alleges negligence of the respondent in turning on the switch or allowing it to be turned on. Determination of the factual issue of negligence and negligent supervision is imperative in order to clarify the application of the law.

[267 S.C. 610] Summary judgment can only be granted in those cases where plain, palpable and indisputable facts exist on which reasonable minds cannot differ. All ambiguities, conclusions and inferences arising in and from the evidence must be construed most strongly against the movant for summary judgment. Title Insurance Company of Minnesota v. Christian, S.C., 226 S.E.2d 240 (1976); Eagle Construction Company, Inc. v. Richland Construction Company, Inc., 264 S.C. 71, 74, 212 S.E.2d 580 (1975). Here, there is an issue as to whether the respondent by and through its agents, servants or employees negligently supervised or operated the switch.

We hold under these circumstances, the trial court erred in granting summary judgment.

REVERSED and REMANDED.

LEWIS, C.J., and LITTLEJOHN, RHODES and GREGORY, JJ., concur.

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1 Appellant did not move for a continuance of serve any documents opposing the motion. Subsequent to the hearing appellant submitted two affidavits which the trial judge refused to consider pursuant to Circuit Court Rule 44(c). We do not reach the exceptions relating to this ruling as the depositions

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independently are sufficient for our determination.

fastcase

336 S.C. 132
518 S.E.2d 828

Teresa WINTERSTEEN, Respondent,
v.
FOOD LION, INC., Appellant.

No. 3009.

Court of Appeals of South Carolina.

Heard March 9, 1999.

Decided June 14, 1999.

Rehearing Denied August 28, 1999.

Header ends here.

[336 S.C. 134]

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

Jean P. Derrick, of Law Office of Jean P. Derrick, of Lexington, for respondent.

HOWELL, Chief Judge:

In this classic slip-and-fall case, the jury found in favor of Teresa Wintersteen and awarded her $500,000 in actual damages (to be reduced by her 45% comparative negligence) and $500,000 punitive damages. Food Lion appeals. We reverse.

I.

At approximately 10:30 a.m. on December 24, 1994, Wintersteen slipped and fell on a puddle of clear liquid in a Food Lion grocery store. Wintersteen was walking near a self-service soda fountain equipped with an ice dispenser when the fall occurred. As a result of the fall, Wintersteen suffered a back injury and eventually underwent surgery for herniated disks.

At trial, Wintersteen testified that she did not know what she had fallen in and that she did not know how the liquid had gotten on the floor or how long it had been there. Although two Food Lion employees testified that they had in the past seen ice bounce from the ice machine onto the floor, there was

[336 S.C. 135]

no testimony establishing that any Food Lion employee saw anything on the floor before Wintersteen's fall, nor was there any other evidence establishing how long the liquid had been on the floor.

Bryan Durig, a mechanical engineer, testified on Wintersteen's behalf. Durig testified that, based on his investigation and review of various depositions, interrogatories, and photographs, the liquid upon which Wintersteen slipped "was most likely or most probabl[y] ice from the drink machine that spilled on the floor in this area." According to Durig, ice from self-service dispensers frequently bounces off the grate over the dispenser's drain and onto the floor, where "it will sit on the floor and melt and leave puddles of water in that area in front of the drink machine." Durig described the self-service drink and ice machine as a "hazard," and testified that easiest way to eliminate the hazard was by putting a mat in front of the machine. Durig also recommended more frequent inspections of the area by Food Lion employees.

At the close of Wintersteen's case, Food Lion moved for a directed verdict on the issue of liability. Food Lion contended that Wintersteen presented no evidence establishing that any Food Lion employee had actual or constructive notice of the presence of water or ice on the floor prior to the accident. The trial court denied the motion, concluding that 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

fastcase

floor and create a dangerous condition. After the jury returned its verdict, Food Lion moved for judgment notwithstanding the verdict or, alternatively, for a new trial due to excessiveness of the verdict. The trial court denied the motions.

II.

On appeal, Food Lion argues the trial court erred in failing to direct a verdict against Wintersteen on the issue of negligence. We agree.

It is well-established in South Carolina that

> a merchant is not an insurer of the safety of his customer[s] but owes them only the duty of exercising ordinary care to

[336 S.C. 136]

> keep the premises in reasonably safe condition. The negligence which must therefore be proved by the plaintiff may be proved under our cases by showing (1) that the material causing the fall was placed on the floor through an agency of the store, or (2) that the merchant had actual or constructive notice of the presence of the material on the floor and failed to remove it.

Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969). The storekeeper's constructive knowledge of the foreign substance can be established "by showing that the foreign substance had been on the floor for a sufficient time and that the storekeeper would have discovered and removed it had the storekeeper used ordinary care." *Cook v. Food Lion, Inc.*, 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct.App. 1997), *cert. denied* (May 15, 1998); *accord Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 394 S.E.2d 24 (Ct.App.1990). "The mere fact the substance was on the floor is insufficient standing alone to charge the storekeeper with negligence." *Calvert v. House Beautiful Paint & Decorating Center, Inc.*, 313 S.C. 494, 496, 443 S.E.2d 398, 399 (1994).

In this case, there is no evidence that a Food Lion employee put ice or water on the floor. Wintersteen, therefore, was required to establish that Food Lion had actual or constructive knowledge of the presence of the water on the floor and failed to remove it. We agree with Food Lion that Wintersteen failed to carry this burden.

As noted above, Wintersteen offered no evidence establishing that the Food Lion employees knew that the water was on the floor, nor did she present any evidence showing how long the water had been on the floor. Wintersteen's expert testified that ice falling from the drink machine could melt in as fast as one minute. Thus, while the liquid could have been on the floor for an extended period of time, it is just as possible that it had been on the floor for only moments before Wintersteen fell. Based on the evidence presented at trial, it is apparent that any determination of how long the water had been on the floor would be pure speculation. Wintersteen's evidence, therefore, was insufficient to establish constructive notice. *See Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122, 165 S.E.2d 627, 629 (1969) (concluding that trial court should have directed a verdict in favor of the defendant

[336 S.C. 137]

> because "[n]o evidence is pointed out which reasonably tends to prove that the rice was on the floor at any particular time prior to the actual fall. The jury should not be permitted to speculate that it was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it.");

Pennington, 252 S.C. at 179, 165 S.E.2d at 696 (affirming grant of involuntary nonsuit in

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336 S.C. 132
518 S.E.2d 828

Teresa WINTERSTEEN, Respondent,
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I.

At approximately 10:30 a.m. on December 24, 1994, Wintersteen slipped and fell on a puddle of clear liquid in a Food Lion grocery store. Wintersteen was walking near a self-service soda fountain equipped with an ice dispenser when the fall occurred. As a result of the fall, Wintersteen suffered a back injury and eventually underwent surgery for herniated disks.

At trial, Wintersteen testified that she did not know what she had fallen in and that she did not know how the liquid had gotten on the floor or how long it had been there. Although two Food Lion employees testified that they had in the past seen ice bounce from the ice machine onto the floor, there was

[336 S.C. 135]

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At the close of Wintersteen's case, Food Lion moved for a directed verdict on the issue of liability. Food Lion contended that Wintersteen presented no evidence establishing that any Food Lion employee had actual or constructive notice of the presence of water or ice on the floor prior to the accident. The trial court denied the motion, concluding that 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

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On appeal, Food Lion argues the trial court erred in failing to direct a verdict against Wintersteen on the issue of negligence. We agree.

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> a merchant is not an insurer of the safety of his customer[s] but owes them only the duty of exercising ordinary care to
>
> [336 S.C. 136]
>
> keep the premises in reasonably safe condition. The negligence which must therefore be proved by the plaintiff may be proved under our cases by showing (1) that the material causing the fall was placed on the floor through an agency of the store, or (2) that the merchant had actual or constructive notice of the presence of the material on the floor and failed to remove it.

Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969). The storekeeper's constructive knowledge of the foreign substance can be established "by showing that the foreign substance had been on the floor for a sufficient time and that the storekeeper would have discovered and removed it had the storekeeper used ordinary care." *Cook v. Food Lion, Inc.*, 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct.App. 1997), *cert. denied* (May 15, 1998); *accord Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 394 S.E.2d 24 (Ct.App.1990). "The mere fact the substance was on the floor is insufficient standing alone to charge the storekeeper with negligence." *Calvert v. House Beautiful Paint & Decorating Center, Inc.*, 313 S.C. 494, 496, 443 S.E.2d 398, 399 (1994).

In this case, there is no evidence that a Food Lion employee put ice or water on the floor. Wintersteen, therefore, was required to establish that Food Lion had actual or constructive knowledge of the presence of the water on the floor and failed to remove it. We agree with Food Lion that Wintersteen failed to carry this burden.

As noted above, Wintersteen offered no evidence establishing that the Food Lion employees knew that the water was on the floor, nor did she present any evidence showing how long the water had been on the floor. Wintersteen's expert testified that ice falling from the drink machine could melt in as fast as one minute. Thus, while the liquid could have been on the floor for an extended period of time, it is just as possible that it had been on the floor for only moments before Wintersteen fell. Based on the evidence presented at trial, it is apparent that any determination of how long the water had been on the floor would be pure speculation. Wintersteen's evidence, therefore, was insufficient to establish constructive notice. *See Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122, 165 S.E.2d 627, 629 (1969) (concluding that trial court should have directed a verdict in favor of the defendant

[336 S.C. 137]

because "[n]o evidence is pointed out which reasonably tends to prove that the rice was on the floor at any particular time prior to the actual fall. The jury should not be permitted to speculate that it was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it."); *Pennington*, 252 S.C. at 179, 165 S.E.2d at 696 (affirming grant of involuntary nonsuit in

case where plaintiff slipped on plastic bags on the floor: "The plastic bags were obviously on the floor at the time of the fall. There is no evidence in the record that the bags were on the floor at any time prior thereto. To hold that the bags had been there sufficiently long that they should have been discovered by the merchant would be pure speculation.").

Wintersteen, however, contends that Food Lion created the hazard by installing the self-service drink and ice machine. Wintersteen contends that because the "drink machine constituted a permanent, on-going hazard," this case is not a "foreign substance" case and she was not required to prove Food Lion's actual or constructive notice. In essence, Wintersteen contends that because the drink and ice machine created a foreseeable risk of harm, Food Lion should be held liable for failing to exercise due care in reducing or eliminating the risk of harm. While this argument has some appeal, we are constrained to reject it.

If the defendant in this case were a typical landowner, Wintersteen's argument might well prevail. *See, e.g., Landry v. Hilton Head Plantation Property Owners Ass'n, Inc.*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct.App.1994) ("A landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks."). In foreign substance cases involving storekeepers, however, the theory of liability urged by Wintersteen has been expressly rejected.

In *Simmons v. Winn-Dixie Greenville, Inc.*, 318 S.C. 310, 457 S.E.2d 608 (1995), a plaintiff who fell on a grape contended that she should not be required to establish that the defendant had actual or constructive notice of the presence of the grape on the floor. Instead, the plaintiff argued that, because of the number of slip and fall incidents involving grapes in Winn-Dixie's retail stores, a question of liability was created "based

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upon an inherently dangerous condition and foreseeable risk of harm." *Id.* at 311, 457 S.E.2d at 609. The Supreme Court rejected this argument with little discussion, stating only that "[w]e decline to expand the established standard requiring notice, either actual or constructive, by a store owner in slip and fall cases." *Id.*

In *Bessinger v. Bi-Lo, Inc.*, 329 S.C. 617, 496 S.E.2d 33 (Ct.App.1998), this Court also rejected a theory of liability quite similar to the theory urged by Wintersteen. In *Bessinger*, the plaintiff slipped and fell on grapes near the checkout line. The plaintiff contended that the grapes had fallen out of a vented bag in a grocery cart. *Id.* at 619, 496 S.E.2d at 34. Although the plaintiff did not present any evidence that the grocery store had actual or constructive knowledge of the grapes on the floor, she argued that the grocery store should nonetheless be held liable because the store's "method of displaying grapes in vented bags was negligent and created a dangerous condition." *Id.* Relying on *Simmons*, this Court rejected the plaintiffs theory of liability and affirmed the grant of summary judgment in favor of the defendant. *Id.* at 620, 496 S.E.2d at 34-35.

In light of *Simmons* and *Bessinger*, we conclude that a storekeeper cannot be held liable for injuries caused by falling on a foreign substance absent proof of the storekeeper's actual or constructive knowledge of the presence of the foreign substance, even if the storekeeper's own actions increased the likelihood that a foreign substance would fall on the floor. In this case, Food Lion's actions in positioning the drink machine and failing to put a mat in front of the machine may well have increased the likelihood that ice or liquids would fall on the floor. Nevertheless, because Wintersteen failed to present any evidence that Food Lion had actual or constructive notice of the

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presence of the liquid in which she fell, the trial court erred by denying Food Lion's motions for a directed verdict and judgment notwithstanding the verdict. *See, e.g., Strange v. South Carolina Dep't of Highways & Public Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (S.C.1994) ("In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where

[336 S.C. 139]

either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed by this Court when there is no evidence to support the ruling below.") (citation omitted).[1]

Accordingly, for the foregoing reasons, the jury's verdict in favor of Wintersteen is hereby

REVERSED.[2]

GOOLSBY and CONNOR, JJ., concur.

Notes:

1. Wintersteen contends that the verdict against Food Lion can be sustained under *Henderson v. St. Francis Community Hosp.*, 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), *cert. denied* (June 9, 1993). We disagree. First, we note that *Henderson* involved a patient slipping on balls from sweet gum trees in a hospital parking lot, not a customer slipping on a foreign substance in a self-service store. Moreover, to the extent that these cases can be read as imposing liability on a storekeeper for negligence in allowing a foreign substance to fall on the floor even in the absence of evidence establishing the storekeeper's actual or constructive knowledge of the foreign substance, we believe that such a reading of the cases is no longer viable after the Supreme Court's decision in *Simmons v. Winn-Dixie Greenville, Inc.*, 318 S.C. 310, 457 S.E.2d 608 (1995).

2. Given our decision on this issue, it is unnecessary to address the other issues raised by Food Lion.

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RULE 59
NEW TRIALS; AMENDMENT OF JUDGMENTS

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter. In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

(f) Time for Appeal; End of Term. The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions. The time within which to make the motions under this Rule shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial was held. The motion may in the discretion of the court be determined on briefs filed by the parties without oral argument.

(g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

Note:

This Rule 59 is substantially the Federal Rule. It is consistent with Code § 15-27-150. Rule 59(b) provides that if the motions are not made and heard during the term, the more precise and definite Federal practice of allowing 10 days after the entry of judgment to make the motion is more equitable. Rule 59(f) is added to provide that departure from the circuit does not deprive the trial judge of jurisdiction to rule on motions under this Rule and Rules 50, 52 and 60. It also provides flexibility for the trial judge to determine the motions on briefs without oral argument.

Note to 1986 Amendment:

In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them. These amendments to Rules 59(b) and (e) and (f) conform the language to that of Rules 50 and 52, and provide that the time for appeal commences upon the receipt of written notice of entry of the order disposing of such motions which was prior state practice, rather than the date when the court signed the order which is the practice in the federal courts.

Note to 1998 Amendment:

This amendment adds Rule 59(g). It is intended to help insure that the judge is promptly notified that the motion has been filed.

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RULE 56
SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Note:

This is the language of Federal Rule 56. Present Circuit Court Rule 44, Summary Judgment, is substantially the same as the Federal Rule except for the following:

Rule 56(d) Case Not Fully Adjudicated on Motion, does not appear in the present Circuit Court Rule. This Rule makes the findings of uncontested facts discretionary with the court rather than mandatory, but is valuable in disposing of uncontested issues at trial.

Present Circuit Court Rule 44 has minor textual matters that do not appear in the Federal Rule. Paragraphs (a) and (b) of the Circuit Court Rule have the concluding phrase, "notice of motion shall state the grounds for the motion", which is rendered unnecessary by Rule 7(b). The second sentence of Rule 56(e) permits other relevant materials to be considered by the court, and is a needed addition.

Note to 1986 Amendment:

This change conforms the time for serving affidavits in opposition to a motion for summary judgment with the general standard in Rule 6(d).

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Donna Douglass, Plaintiff, vs. Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group, Defendants.	)))))))))))))))	IN THE COURT OF COMMOM PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2013-CP-10-7133 **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

FILED
2015 FEB 25 PM 4:33
CLIFF J. ARMSTRONG
CLERK OF COURT

TO: JARREL L. WIGGER, ESQ., ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendant, by and through its undersigned attorney, will move at a date and time to be set by the Court, but no sooner than ten (10) days after service hereof, for an order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment in Defendant's favor as to all causes of action listed in Plaintiff's Complaint. The motion is based on the following:

1. Plaintiff has failed to produce any evidence which tends to prove that the Defendant created a dangerous condition which caused Plaintiff's alleged fall and injuries;
2. Plaintiff has failed to produce any evidence which tends to prove that the Defendant failed to properly maintain the alleged condition which caused Plaintiff's alleged fall and injuries;
3. Plaintiff has failed to produce any evidence which tends to prove that Defendant had notice, actual or constructive, of the alleged dangerous condition that Plaintiff claims caused her alleged fall and injuries.

For the foregoing reasons, Defendant hereby moves the Court for an Order Granting its Motion for Summary Judgment as to all of Plaintiff's claims.

This motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and is based upon the pleadings that have been filed in this action, supporting memoranda of law filed or to be filed prior to hearing, and the applicable common and statutory law of the State of South Carolina. Defendant further reserves the right to supplement this Motion prior to hearing.

GALLIVAN, WHITE & BOYD, P.A.

BY: _____

JAMES E. BROGDON, III (SC Bar # 79159)
1201 Main Street, Suite 1200
Post Office Box 7368
Columbia, South Carolina 29202
TEL: (803) 779-1833

ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina
February 23, 2015

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Donna Douglass, Plaintiff, vs. Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group, Defendants.	))))))))))))))	IN THE COURT OF COMMOM PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2013-CP-10-7133 **CERTIFICATE OF SERVICE**

FILED
2015 FEB 25 PM 4:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The undersigned hereby certifies that she served a copy of the Defendant's Notice Of Motion And Motion For Summary Judgment on all known counsel of record by placing a copy in the United States Mail, with due and proper postage affixed thereto and addressed as follows:

Jarrell L. Wigger
WIGGER LAW FIRM, INC.
8086 Rivers Avenue, Suite A
North Charleston, SC 29406

Helen Grant

Helen Grant

Columbia, SC
February 23, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Donna Douglass,

Plaintiff,

v.

Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group,

Defendants.

IN THE COURT OF COMMOM PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-10-7133

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

FILED
2015 APR 13 PM 3:27
R. ARMSTRONG
CLERK OF COURT

Defendants Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group (collectively "Defendants"), by and through their undersigned attorneys, have moved for entry of an Order granting their Motion for Summary Judgment on the grounds that there is no genuine issue of material fact, and Defendants are entitled to summary judgment as a matter of law against Plaintiff Donna Douglass. Defendants submit this Memorandum in Support of their Motion.

I. INTRODUCTION AND BACKGROUND

This case arises out of an alleged trip and fall that occurred on January 6, 2011 at an apartment complex owned by Defendant BVF North Cove, LCC and operated by Defendant Berkshire Property Advisors, LLC. In her Complaint, Plaintiff states she was employed as a pizza delivery person with Pizza Hut at the time of the accident and was at the property to deliver a pizza to a resident of the 700 building when she fell down the stairs due to inadequate lighting. (Compl. ¶ 16). In her deposition, Plaintiff testified that the inadequate lighting was the result of an existing light being "out." (Pls. Dep. 38: 16-21, **Exhibit A**). She also conceded that there were no lighting issues during her previous visits to the 700 building, *Id.*, and that she did not

know (1) when the light went out, (2) what caused the light to go out, (3) whether the outage had been reported to Defendants, or (4) whether a representative of Defendants knew the light was out. (Pls. Dep. 38:22 – 39:13, **Exhibit A**).

In addition to Plaintiff's deposition, the Parties have conducted extensive written discovery, deposed several maintenance supervisors employed by Defendants prior to and at the time of the alleged accident and the Pizza Hut general manager who completed the incident report following Plaintiff's return to work following the accident.

There is no evidence or testimony that Defendants' knew or should have known that a stairwell light in the 700 building was out. Greg Moran, the maintenance supervisor at the time of the accident, testified that he had no knowledge of the light being out prior to Plaintiff's fall on January 6, 2011 either through reports from residents or from other employees (Moran Dep. 16:5-8; 14:2-5, **Exhibit B**). Mr. Moran further testified that he did not have any knowledge regarding how long the light was out or what caused the alleged lighting outage at the 700 building at the time of Plaintiff's alleged fall. (Moran Dep. 16:21-25; 17:1-3, **Exhibit B**). In addition to witness testimony, the documents produced by Defendants do not reveal any reports of lighting problems at the 700 building in the days leading up to the alleged accident. Finally, Plaintiff has not identified any experts to testify regarding the alleged insufficient lighting issues at the 700 building at the time of her fall. The only evidence Plaintiff has produced other than her testimony regarding the lighting condition of the stairwell of building 700 on January 6, 2011 are approximately 6 photographs taken on January 8, 2011 – two days after the accident.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "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 non-moving party." *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). However, "[i]t is not sufficient [to defeat a motion for summary judgment] that one create an inference which is not reasonable or an issue of fact that is not genuine." *Shuler v Tuomey Reg'l Med. Ctr.*, 313 S C 225, 437 S E 2d 128, 129 (Ct. App. 1993). "In order to resist a motion for summary judgment, the non-moving party must come forward with specific facts showing genuine issues necessitating trial." *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 565 S.E.2d 98, 100 (Ct. App. 1995).

III. SOUTH CAROLINA LAW

"The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." *Larrimore v. CP&L*, 340 S.C. 438, 444-45, 531 S.E.2d 535, 538 (Ct. App. 2000) (quoting *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 289, 356 S.E.2d 123, 128 (Ct. App. 1987), *cert. denied*, 293 S.C. 406, 360 S.E.2d 824 (1987) (citation omitted)). To recover for injuries caused by a dangerous condition, "a 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." *Winteristeen v. Food Lion*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). Generally, landowners are under no duty to warn invitees of open and obvious conditions. *Larimore*, 340 S.C. 438, 445, 521 S.E.2d 535, 539 (Ct. App. 2000).

IV. ARGUMENT

a. Plaintiff has produced no evidence that Defendants' created or had actual or constructive notice of the defective lighting condition that allegedly caused Plaintiff's fall.

In *Wintersteen*, a plaintiff filed suit against a store owner claiming she suffered injury when she slipped and fell on a clear liquid near a self-service soda machine that was equipped with an ice dispenser at the time of her fall. *Wintersteen*, 344 S.C. at 34. Despite Plaintiff's failure to produce any evidence that any store employee had actual or constructive notice of the presence of the substance on the floor prior to the accident, the trial court denied the store owner's motion for directed verdict holding that the store owner created a foreseeable risk that ice would fall onto the floor and create a dangerous condition. *Id.* In affirming the court of appeals' reversal of the trial court's denial of the store owner's motion for directed verdict, the South Carolina Supreme Court refused to implement a "duty to prevent" rule and held that "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," and "[t]o require shopkeepers to anticipate and prevent the acts of third parties is, in effect to render them the insurers of their customers' safety." *Id.* at 37.

Although Defendants concede the present case does not involve a foreign substance, the factual scenario presented to the Court in *Wintersteen* is directly analogous to this case. As stated in the facts section above and like the plaintiff in *Wintersteen*, Plaintiff has produced no evidence or testimony that even remotely could be construed as evidence that Defendants' created or had actual or constructive notice of the specific light outage that Plaintiff alleges caused her fall. Instead, Plaintiff seemingly attempts to argue that because Defendants' were aware that light bulbs generally burn out over time and that Defendants' procedures did not call for light bulbs to be replaced before they stop working, they should be held responsible for any

injuries that may result when a person claims injury because they could not see where they were walking due to a light outage. Plaintiff's theory defies common sense and does not constitute notice under South Carolina law.

Ignoring the fact that Plaintiff testified she was aware that the light was out before she fell, to extend liability to a landowner or its agents under the Plaintiff's theory would require landowners and their agents to implement procedures to prevent all instances of darkness in stairwells, common areas, etc. that are the result of a light outage. Essentially, Plaintiff is asking the Court to require landowners and their agents to anticipate events that cannot be anticipated; or, as stated in *Wintersteen*, a "duty to prevent." Not only would such a ruling require landowners and their agents to anticipate when a light may have an outage due to normal use, it would require anticipation of light outages that are due to other things such as a malfunction in the light, acts of third parties, weather related outages, and countless other events that can cause a light to stop working. To allow a jury to consider liability under such a theory, would cut against the current state of South Carolina law and find that landowners are, in fact, the insurers of an invitee's safety. That potential is particularly present in this case where Plaintiff has not produced any evidence or testimony, lay or expert, as to what caused the light to stop working.

Finally, while the current case involves a commercial property, a ruling in Plaintiff's favor would expose all landowners, including individual homeowners, to liability for injuries that occur when a light goes out regardless of whether or not the homeowner was aware of the outage. Such an expansion of potential liability is clearly beyond that which the current state of the law intends.

For the reasons stated above, Plaintiffs' claims against all Defendants should be dismissed for failing to produce any evidence that Defendants created the dangerous condition or had actual or constructive notice of its existence.

b. The alleged dangerous lighting condition was an open and obvious danger and thus Defendants had no duty to warn Plaintiff of its existence.

In *Larimore*, the plaintiff sued a homeowner and power company after he suffered injury at the homeowners' property when he stepped in a dirt covered trench that was created by the power company. *Id.*, 340 S.C. at 442. In directing a verdict for the homeowner, the trial court held that "the trench was an open and obvious condition on the property and, as such, [the homeowner] owed no duty to warn [plaintiff] of the condition." *Id.* 340 S.C. at 445. On appeal, Plaintiff argued that "a landowner may still be liable for injuries suffered from an open and obvious defect if the landowner should have anticipated the harm." *Larimore*, 340 S.C. at 445-46 (citing *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991)). In *Callander*, the issue of liability against a restaurant owner was submitted to a jury when an elderly customer was injured when he sat on a stool that lacked a rounded seat cushion. *Callander*, 305 S.C. at 124-125.

The South Carolina Supreme Court in *Larimore* distinguished *Callander* by stating that in *Callander*, the plaintiff produced evidence that the store owner admitted knowing of the stools condition for over two months, that the store was often frequented by senior citizens and its patrons often backed onto the stools to sit down; whereas in *Larimore*, there was no evidence the homeowner was aware of the defect that caused Plaintiff's injury. *Id.* at 446. The court further held that because the homeowner "had no knowledge of the defect's existence prior to the accident, it would be impossible for him to anticipate any harm that might result from it," and to

"impose liability under such a theory would make landowners insurers of their invitee's safety; it is well established in South Carolina that they are not." *Id.* at 447.

As evidenced by Plaintiff's testimony, there can be no dispute that she was aware of dangers created by the light outage when she elected to proceed up the stairwell. She testified that she proceeded up and down the stairs carefully because she noticed the light was out and it was dark. (Pls. Dep. 42:14 – 43:2, **Exhibit A**). Furthermore, like the facts in *Larimore*, there is no evidence that Defendants had actual or constructive knowledge of the specific lighting outage at the 700 building at the time of Plaintiff's fall. Pursuant to the ruling set forth in *Larimore*, Defendants are not liable for Plaintiffs injuries as the alleged specific dangerous lighting condition that caused her fall was an open and obvious condition to which Defendants did not have actual or constructive notice. As a result, Defendants respectfully request the Court grant summary judgment as to all of Plaintiff's claims on the basis that the alleged dangerous condition which caused her fall was open and obvious as a matter of law.

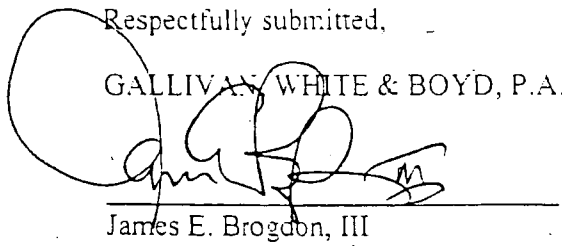
V. CONCLUSION

Based upon the foregoing authorities and argument, Defendants respectfully submit that there is no evidence that they created the alleged dangerous lighting condition or had actual or constructive notice of the alleged dangerous lighting condition prior to Plaintiff's alleged fall and that to the extent a dangerous condition existed, it was open and obvious to Plaintiff. As such, Defendants respectfully request that the Court grant its Motion for Summary Judgment as to all of Plaintiff's claims on the basis that there is no genuine issue of material fact as to any of Plaintiff's causes of action.

[signature page attached]

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.



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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina
April 7, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMOM PLEAS
NINTH JUDICIAL CIRCUIT

Donna Douglass,

Plaintiff,

v.

Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group,

Defendants.

CIVIL ACTION NO.: 2013-CP-10-7133

FILED
2015 APR 13 PM 3:27
BY
CLERK OF COURT

CERTIFICATE OF SERVICE

The undersigned of Gallivan, White & Boyd, P.A., hereby certifies that she has served the following with the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** by mailing a copy of same, postage prepaid and return address clearly indicated, to the below address as well as emailing a copy of the same to the below electronic mail address below on this 7th day of April, 2015.

Jarrell L. Wigger
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Helen Grant
Helen Grant, Legal Assistant

EXHIBIT

A

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2013-CP-10-7133

DONNA DOUGLASS, Plaintiff, -versus- BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC AND THE BERKSHIRE GROUP, Defendants.	DEPOSITION OF: DONNA DOUGLASS

C O P Y

DATE: Tuesday, November 11, 2014

TIME: 9:57 a.m.

LOCATION: Wigger Law Firm, Inc.
8086 Rivers Avenue
North Charleston, SC 294406

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter

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1 A. I haven't speak to them at all.
2 Q. Okay. So you didn't speak with
3 anybody who lived there after the accident; is that
4 right?
5 A. No, sir.
6 Q. Okay. And didn't call and report the
7 accident after it happened; is that right?
8 A. No, sir.
9 Q. Okay. Do you recall on your previous
10 trips to that building whether or not there was any
11 lighting?
12 A. Do I recall?
13 Q. Yeah, was it -- this instance, you said
14 there was -- it was dark, right?
15 A. Yes, sir.
16 Q. Okay. Was it dark in the other
17 instances where you went before this accident?
18 A. No, sir. There was light out there.
19 The light -- I mean, the light was working, the
20 particular 700, it -- the light wasn't -- the light
21 was out.
22 Q. Okay. Do you know when that light went
23 out?
24 A. I couldn't tell you, sir.
25 Q. Okay. Do you know how -- what caused

1 the light to go out?

2 **A. I couldn't tell you that either.**

3 Q. Okay. Do you know whether or not

4 anyone ever reported the lighting problem to the

5 property manager or anyone who owned the property?

6 **A. No, sir. I just deliver, and I just**

7 **worked there for business, for pizza.**

8 Q. Okay. Have you ever spoken with --

9 with anyone who lives at those apartments who told

10 you that, yes, that light frequently goes out and

11 that they had told the property owners or property

12 manager about that problem?

13 **A. No, sir.**

14 Q. Besides the person who you delivered

15 the pizza to on that night, have you spoken with

16 anyone who lives there since this accident?

17 **A. No, sir. I don't know nobody who lives**

18 **there.**

19 Q. Okay. Had you made any other

20 deliveries that day or that night?

21 **A. I made other deliveries that night.**

22 Q. Okay. How many did you make? Do you

23 know?

24 **A. I couldn't tell you, sir.**

25 Q. Okay. The first person you called,

1 -- the lights was still -- the light was still
2 out.
3 Q. Okay. Was there anything -- did there
4 appear to be anything wrong with the stairs
5 themselves?
6 A. I'm not sure. I couldn't answer you, I
7 mean.
8 Q. Okay. But you're not claiming that the
9 stairs caused you to fall? It was just that you
10 weren't able to see where you're walking; is that
11 right?
12 A. No. It was too dark. The light --
13 like I said, the light was out.
14 Q. Okay. And I think that you said when
15 you went up to deliver the pizza, the light was
16 also out at that point in time, too; is that
17 correct?
18 A. Yes, sir.
19 Q. As you were proceeding down the stairs,
20 I think you said you did it carefully because you
21 realized that it was dark; is that right?
22 A. I did it careful going up and coming
23 down.
24 Q. Okay. And why did you do it carefully
25 going up and down?

1 A. Because I -- I want to prevent myself
2 from falling.
3 Q. Okay. Why did you feel in that
4 instance you needed to --
5 A. Because you --
6 Q. -- do it carefully?
7 A. Because you couldn't see -- you
8 couldn't -- you couldn't see.
9 Q. Were you able to drive yourself from
10 the apartment complex back to Pizza Hut?
11 A. Yes, sir. I drove myself. I had to
12 use my left foot.
13 Q. Okay. And you drove with your left
14 foot?
15 A. Uh-huh.
16 Q. How far is the Pizza Hut?
17 A. The Pizza Hut from the apartment
18 building?
19 Q. Yeah.
20 A. I don't want to guess how far it is. I
21 can't guess. It's not too far.
22 Q. Okay. At some point, you went to the
23 hospital; is that right?
24 A. Yes, sir.
25 Q. And what hospital did you go?

EXHIBIT

B

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT

- - - -

DONNA DOUGLASS

Plaintiff,

vs.

BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC, AND THE BERKSHIRE GROUP

Defendants,

CIVIL ACTION NO. 2013-CP-10-07133

GREGORY MORAN

DATE TAKEN: MONDAY, APRIL 6, 2015
TIME BEGAN: 10:34 A.M.
TIME ENDED: 11:17 A.M.
LOCATION: THE WIGGER LAW FIRM, INC.
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REPORTED BY: DEIRDRE J. WEYER, RPR
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Representing the Defendants

1 A No.
2 Q Before January 6th of 2011, did you ever
3 receive any reports of problems with the lighting in
4 the stairwell of building 7 -- Phase I, 700 building?
5 A No.
6 Q Around January 6th of 2011 or right before
7 that, in the days before it, did you ever see any
8 work orders to replace any lights being out in the
9 700 building of Phase I?
10 A I would never be able to recall that.
11 Q That's records that would exist, right?
12 A I wouldn't have them. Berkshire took all
13 their stuff when they...
14 Q Is it fair to say that, you know -- if
15 they did have the work orders for around that period
16 of time and there were no work orders in those
17 documents that relate to a light being out, is it
18 fair to state that a light being out was never
19 reported?
20 A Oh, yeah.
21 Q After January 6th, 2011, did you ever go
22 to the 700 building and check the lighting in the
23 stairwell after hearing the report of the fall?
24 A I haven't -- we never knew which building
25 it was. We knew there was a lawsuit.

1 Q You mentioned that in order to check the
2 lights you'd have to cover up the photocell; is that
3 right?
4 A Correct.
5 Q Is that because you don't have anybody
6 working at nighttime?
7 A Correct.
8 Q And what does the photocell do?
9 A It detects darkness and turns the lights
10 on.
11 Q So that's to keep the lights from being on
12 all day; is that right?
13 A Correct.
14 Q How long have you been in property
15 management or doing maintenance for property
16 management?
17 A Seven years. Seven or eight years.
18 Q And the length of time you've been doing
19 that, in terms of lights being out and general
20 maintenance issues, do you rely on residents to
21 report those problems?
22 A No. Just my guys check it.
23 Q In terms of lights being out at night, you
24 would need residents to report those problems -- or
25 you would hope that they would report them if they

1 saw them, right?
2 A Yes. That's our best resource.
3 Q The residents?
4 A Yeah.
5 Q Do you recall any residents ever telling
6 you that there was problems with the lighting before
7 January 6th, 2011, at the 700 building, Phase I?
8 A No.
9 Q Are there other lights around the
10 buildings as well?
11 A Yeah. That light -- that whole inside
12 light well has 16 lights, divided by three -- three
13 floors, there's six on each floor.
14 Q In this case, do you know whether or not
15 it was all the lights or just one that was out?
16 A I wouldn't know.
17 Q Would it be unusual for more than one or
18 two of the lights to be out at the same time?
19 A No.
20 Q Bear with me for one minute.
21 Do you have any knowledge how long the
22 light was out in the stairwell of the 700 building of
23 Phase I before Miss Douglass's alleged accident on
24 January 6th, 2011?
25 A No.

1 Q Do you know what caused the light to be
2 out on January 6th, 2011?
3 A Absolutely not.
4 Q Are there handrails leading up the
5 stairwells of all the buildings?
6 A Yes.
7 Q So I assume there was handrails leading up
8 to the 700 building; is that fair?
9 A Um-hum.
10 Q Yes?
11 A Yes.
12 Q If a visitor or a resident noticed a
13 problem which they thought presented them some
14 danger, what would you expect them to do?
15 A Report it to the office.
16 Q If a visitor or a resident came to a
17 stairwell and noticed that a light was out and the
18 stairwell was dark and saw that to be a dangerous
19 situation, would you expect them to proceed up or
20 down the stairwell regardless of that fact without
21 reporting it?
22 A I would say so. There was still plenty of
23 light.
24 Q But if they felt that it was a dangerous
25 condition or a dangerous situation, would you still

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Donna Douglass,

Plaintiff,

v.

Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group,

Defendants.

IN THE COURT OF COMMOM PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-10-7133

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO RULE 59(e)

FILED
2015 MAY 11 PM 3: 04
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the Court upon Plaintiff's Motion for Reconsideration regarding this Court's April 23, 2015 Order Granting Defendants' Motion for Summary Judgment. Defendants submit this Memorandum in Opposition to Plaintiff's Motion. Based on the reasons set forth below, Defendants respectfully request that Plaintiff's Motion be denied.

I. INTRODUCTION

In its April 23rd decision, this Court, after consideration of the relevant facts and arguments of counsel and applying the relevant law, properly granted Defendants' Motion for Summary Judgment. In its April 23, 2015 Order, this Court correctly held, among other things:

- The condition that caused Plaintiff's fall was a burned out light bulb.
- Despite Plaintiff's contention, Defendants did not create the condition of a burned out light bulb.
- Under South Carolina law, Plaintiff was required to prove Defendants had actual or constructive notice of the condition that caused her injury. Plaintiff produced no evidence that Defendants' possessed actual or constructive notice of the burned out light bulb at the time of Plaintiff's fall.

- Without notice, Defendants did not owe Plaintiff a duty to warn of or remedy the lighting condition that Plaintiff claims caused her fall. As a result, Plaintiff's causes of action against Defendants must fail as a matter of law.

- As an alternate ground, Plaintiff bears greater than fifty-percent (50%) of the fault for causing her fall by assuming the risk of traversing the dark stairwell despite recognizing the danger associated with doing so prior to her fall. As a result, Plaintiff's causes of action against Defendants must fail as a matter of law.

II. LEGAL STANDARD

Rule 59(e) of the South Carolina Rules of Civil Procedure provides a mechanism for parties to move the court to alter or amend a judgment within ten days following receipt of written notice of the entry of the order. The purpose of a motion to alter or amend is "to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Coward Hund Constr. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004).

A motion for reconsideration is not intended to give the moving party a "second bite of the apple." Under South Carolina law, a motion for reconsideration is governed by Rule 59(e) of the South Carolina Rules of Civil Procedure. Federal case law is also instructive on this issue, as the comments to South Carolina's Rule 59 state that "Rule 59 is substantially the Federal Rule." A motion for reconsideration under Rule 59(e) "should not be granted, absent highly unusual circumstances, unless the ... court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *See 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.1999); *McCall v. Williams*, 59 F. Supp.2d 556, 558 (D.S.C. 1999). Motions for reconsideration are not vehicles for providing litigants with the opportunity to relitigate previously decided issues. *See National Ecological Foundation v. Alexander*, 496 F.3d 466, 477 (6th Cir. 2007).

III. ARGUMENT

Applying the law to the case at bar, it quickly becomes clear that Plaintiff is attempting to use a Rule 59(e) Motion to re-litigate old issues. Plaintiff's Motion indicates that Plaintiff has no basis for her request other than her mere disagreement with how the Court applied the law in this case. Plaintiff's Motion does not present any new evidence that was previously unavailable, nor does it present intervening changes in controlling law. Thus, the only possible basis for Plaintiff's Motion is that the Court made a clear error of law. However, Plaintiff has presented no evidence in this regard.

a. The Court correctly found that Plaintiff failed to prove Defendants owed a duty to Plaintiff.

In her Motion for Reconsideration Plaintiff asserts several unsupported measures she contends Defendants could have taken that may have prevented her fall. Those measures include: (1) "[design] the steps to have (2) lights so if (1) burned out, the other would still be lit"; (2) use a light meter to check the lights more than once a month; and (3) "conduct regular nighttime inspections." This is the first time Plaintiff has attempted to argue specific actions Defendants should have taken despite having ample opportunity to raise these arguments prior to her Motion for Reconsideration. As a result, to consider Plaintiff's argument would be to allow her to re-litigate a previously decided issue.

However, even if the Court reaches the merits of Plaintiff's arguments, it should still deny Plaintiff's Motion for Reconsideration because Plaintiff produced no evidence, expert testimony or otherwise, to show that Defendants had a duty to take the measures Plaintiff asserts in her Motion for Reconsideration. Plaintiff simply lists several measures which she believes may have prevented her fall, and cites for the first time what she purports to be sections of the

International Property Maintenance Code without any supporting evidence, testimony or otherwise, that establishes that the cited language is relevant or authoritative in the present case. Plaintiff also failed to produce any evidence that Defendants' violated the select sections of the cited code language. Without such evidence or testimony, the purported code sections cited by Plaintiff are nothing more than irrelevant words on paper. For these reasons, this Court correctly found that Plaintiff failed to prove Defendants owed a duty to remedy the lighting condition that Plaintiff claims caused her fall.

b. **The Court correctly held as an alternate ground that Plaintiff was more than fifty-percent (50%) at-fault for causing her fall.**

Plaintiff argues that because she is a person of "diminished capacity," a jury question exists as to whether or not it was reasonable for her to make the conscious decision to traverse the stairwell on the night of her fall. As stated above, Plaintiff had ample opportunity to raise this argument prior to her Motion for Reconsideration but failed to do so. To consider Plaintiff's argument would be to allow her to attempt to re-litigate a previously decided issue.

Regardless, even if the Court reaches the merits of her argument, her argument fails because it is contradicted by her own deposition testimony where Plaintiff clearly states that she attempted to *carefully* traverse the stairwell *after noticing* the dark condition. Defendants submitted this testimony to the Court in support of their Motion for Summary Judgment. Plaintiff's testimony proves that she was of sufficient mental capacity to recognize the condition and the potential danger that it caused.

Plaintiff also argues in her Motion for Reconsideration that she had no option but to traverse the stairwell to deliver the pizza. Once again, Plaintiff had ample opportunity to raise this argument prior to her Motion for Reconsideration but failed to do so. To consider Plaintiff's

argument would be to allow her to attempt to re-litigate a previously decided issue.

However, even were the Court to address the merits of Plaintiff's argument, the argument is contradicted by the testimony of Plaintiff's supervisor at the time of the accident, Richard Fortenberry, who testified that Plaintiff had the ability to call the customer and ask the customer to meet her at the bottom of the building if she did not feel comfortable walking up and down the stairwell. (Fortenberry Dep. 18:12-22, **Exhibit A**.) Clearly, Plaintiff is grasping at straws to the extent that her new arguments even contradict the evidence in the case.

Based on the evidence and testimony submitted by the Parties, this Court correctly found as an alternate ground that Plaintiff's fault for causing her fall was greater than fifty percent (50%) thus barring her recovery as a matter of law.

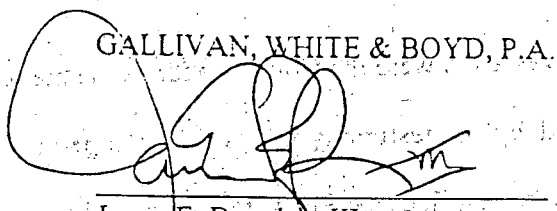
IV. CONCLUSION

There is no clear error of law warranting reconsideration of this Court's April 23rd decision. Plaintiff simply seeks to re-litigate issues that were fully briefed and argued by the Parties and properly decided by this Court. As a result, Defendants respectfully request the Court deny Plaintiff's Motion for Reconsideration.

[signature page attached]

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.



James E. Brogdon, III
1201 Main Street, Suite 1200
Post Office Box 7368
Columbia, South Carolina 29202
Telephone: 803-724-1801

ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina
May 7, 2015

EXHIBIT

A

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2013-CP-10-7133

DONNA DOUGLASS,

Plaintiff,

-versus-

BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC, AND THE BERKSHIRE GROUP,

Defendant.

DEPOSITION OF:
RICHARD FORTENBERRY

DATE: Monday, April 6, 2015

TIME: 12:56 p.m.

LOCATION: Wigger Law Firm, Inc.
3086 Rivers Avenue, Suite A
North Charleston, SC 29406

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter

1 Q. -- that type of thing?
2 A. Bad areas of town, dark situations, you
3 know.
4 Q. Sure.
5 A. She's female, you know, definitely have
6 to be cautious.
7 MR. WIGGER: Sure. Okay. Those are
8 all the questions I had.
9 MR. BROGDON: One follow-up to that.
10 RE-EXAMINATION
11 BY MR. BROGDON:
12 Q. If somebody would call you and say, I'm
13 supposed to deliver this pizza up on the second
14 floor, I can't hardly even see the stairs to walk
15 up them, I don't feel safe, what would your
16 response be?
17 A. I would say, call the customer and have
18 them bring the -- you know, come down to the bottom
19 of the stairs and either do that or come back to
20 the restaurant and we'll send somebody else.
21 Q. That's a pretty easy fix, isn't it?
22 A. Yeah. That's a pretty easy fix.
23 MR. BROGDON: That's all I have.
24 RE-EXAMINATION
25 BY MR. WIGGER:

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Donna Douglass,

Plaintiff,

v.

Berkshires on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group,

Defendants.

IN THE COURT OF COMMOM PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-10-7133

CERTIFICATE OF SERVICE

FILED
2015 MAY 11 PM 3:05
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The undersigned employee of Gallivan, White & Boyd, P.A., attorneys for Defendants, does hereby certify that on the 7th day of May, 2015 service of the Memorandum in Opposition to Plaintiff's Rule 59(e) Motion for Reconsideration in the above-referenced action was made upon all counsel of record by placing same in the United States Mail, first class postage prepaid, addressed to the following:

Jarrell L. Wigger, Esquire
WIGGER LAW FIRM, INC.
8086 Rivers Avenue, Suite A
North Charleston, SC 29406

Counsel for the Plaintiff

Helen Grant

Helen Grant, Legal Assistant

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICAL CIRCUIT CASE NO: 2013-CP-10-7133
DONNA DOUGLASS, Plaintiff, v. BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE LLC and THE BERKSHIRE GROUP, Defendants.	**MEMORANDUM IN OPPOSITION OF SUMMARY JUDGMENT**

The Plaintiff, by and through her undersigned counsel, hereby submits her response in opposition to Defendants' Motion for Summary Judgment and states the following:

STATEMENT OF FACTS

Prior to January 6, 2011, the Defendant's built and maintained an apartment complex. Defendants leased to residential apartment dwellers and retained control over many areas. The Defendants were responsible for common areas (which are at issue here), sidewalks; stairs, grass, lawns, parking lots, buildings, plumbing, HVAC, etc.

Neither apartment renters, nor visitors, had the right, responsibility, or ability to do anything to the common areas. Any action by an outside person would be a trespass (**see attached deposition excerpts of Greg Moran, page 24, lines -16**).

Traversing stairs has long been regarded as an inherently dangerous activity. The International Building Code (IBC), and the Southern Building Code (SBC), etc. have special sections just dealing with stairs. Stairs without lighting have long been recognized to create

inherently hazardous conditions. The maintenance supervisor admitted lighting on the stairs was a safety issue (**see attached deposition excerpts of Greg Moran, page 27, lines 7-8**).

The owner in this case created the inherently dangerous condition. They would have installed the lights, and controlled their replacement and they created the stairway. As the owner created the hazardous condition, they require no notice if there is a problem. *Cook v. Food Lion, Inc., 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct. App. 1997)*. Plaintiff was invited to the premises for a business purpose, and had no choice but to travel through the area of invitation and inherently hazardous area created by the apartment complex (**see attached deposition excerpts of Greg Moran, page 30, lines 9-25 and page 31, lines 1-16**). Unfortunately, the Defendants did not provide a lighted area for the Plaintiff to traverse in an inherently dangerous area (**see attached deposition excerpts of Donna Douglass, page 38, lines 18-21 and page 39, lines 6-7**).

On or about January 6, 2011, the Plaintiff was delivering a pizza to a resident located at building 700 on the premises of the Defendants, when she fell down a flight of stairs due to the lack of adequate lighting. Plaintiff was injured during said fall and had to seek medical treatment (**see attached deposition excerpts of Donna Douglass, page 44, line 1**).

That pursuant to the testimony of the Defendants' Maintenance Supervisor, Greg Moran, he stated that it would not be unusual for more than one or two of the lights to be out at the same time (**see attached deposition excerpts of Greg Moran, page 16, lines 18-19**). He further testified that lighting was always a safety issue, that he could not delegate a safety issue to a resident, that he buys the lights and that if he saw a lighting issue it was his responsibility to fix it (**see attached deposition excerpts of Greg Moran, page 27, lines 1-24**). Mr. Moran went on to state in his deposition excerpts that he generally knew the life of a light bulb, that he knew

where to locate the life expectancy of a light bulb (**see attached deposition excerpts of Greg Moran, Page 27, line 25 and page 28, lines 1-8**). He stated that they would not replace the light bulbs until they were burned out, and that there were no systems in place to systematically replace the light bulbs (**see attached deposition excerpts of Greg Moran, page 28, lines 9-22**). He went on to state that he knew there was a situation where the lighting would burn out, would wait until either it was reported or see before he would replace it, that it was a safety issue and he was aware that it was going to burn out and he should anticipate replacing it. (**see attached deposition excerpts of Greg Moran, page 28, lines 23-25 and page 29, lines 1-20**). Further in Mr. Moran would state that there were not any overhead lighting or any lighting that would illuminate the area on the landscape on the particular stairway where the Plaintiff fell (**see attached deposition excerpts of Greg Moran, Page 33, lines 2-7**). Mr. Moran also stated he was not familiar with any of the building codes regarding the rise and run of the stairways, that they were always repairing the stairs because they were about 30 years old, made out of wood, and would become misshapen or disfigured (**see attached deposition excerpts of Greg Moran, page 34, lines 24-25 and page 35, lines 1-18**). Mr. Moran further stated that the maintenance guys do not always make an entry in the maintenance log every time they change a light bulb (**see attached deposition excerpts of Greg Moran, page 35, lines 19-21**). He also stated they only checked for light bulbs about once a month (**see attached deposition excerpts of Greg Moran, page 13, lines 14-15**). And that only residents or employees could put in a work order (**see attached deposition excerpts of Greg Moran, page 10, lines 2-3**).

The Defendants' previous service manager has also testified that sometimes a service requests would be written up and sometimes they wouldn't (**see attached deposition excerpts of Richard King, page 10, lines 2-4**). Mr. King also would advise that if he would walk through

the grounds that if something needed to be fixed, they would just fix it right away **(see attached deposition excerpts of Richard King, page 10, lines 19-24)**. Mr. King stated in his deposition excerpts that maintenance work is the owner of the apartment complex's responsibility, and that if the stairs were wood, that they should be constantly nailed down if they were pulling up **(see attached deposition excerpts of Richard King, page 13, lines 1-13)**.

Pursuant to the deposition excerpts of the Defendants' previous service manager and current maintenance supervisor, it appears as if the Defendants do not have any systems in place for the safety issues regarding lighting, that there wasn't always a written log of if and when lights were replaced, the stairs had to be constantly nailed down, that the stairs had to be repaired and or replaced, that the building code evidently wasn't an issue because they didn't know what they were, that they knew the life expectancy or knew how to find out the life expectancy of a light bulb, that there were not any overhead lighting or any lighting that would illuminate the area on the landscape on the particular stairway where the Plaintiff fell, and that it was the Defendants' responsibility to provide a safe environment for the tenants and or visitors on their premises.

The parties have mediated this matter, however, to no avail.

SUMMARY JUDGMENT STANDARD

"Summary judgment is inappropriate when reasonable minds can differ as to any material fact." Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447, 448 (1976). "Summary Judgment must be denied if there is any genuine dispute between the parties." Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336, 339 (1977).

"The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Richardson v. The State Record Co., Inc., 330 S.C.

562, 499 S.E.2d 822, 824-825 (Ct. App. 1998). "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied. Hill v. York County Sheriff's Department, 313 S.C. 303, 437 S.E.2d 179, 182 (Ct. App. 1993).

The Plaintiffs, by and through the facts of the case, have established there are genuine issues as to the acts of the Defendants. "In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." Koester v. Carolina Rental Ctr. Inc., 313 S.C. 490, 443 S.E.2d 392 (1994); Faile v. South Carolina Department of Juvenile Justice, *Supra.*

"Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Tupper v. Dorchester County, 326 S.E.318, 487 S.E.2d 187 (1997); Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991). Even if the only dispute is how to draw conclusions or determinations from undisputed facts, summary judgment should be denied. Koester, *Supra*; Tupper, *Supra.* At the summary judgment stage, the Plaintiff need not prove her case, only that there is a genuine issue of material fact regarding the merits of her claim. For summary judgment to be granted, it must be perfectly clear no issue of facts is involved. Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 293 S.E.2d 706 (1982).

Defendant's Motion should be denied due to the fact that South Carolina is now a scintilla of evidence State. Froneberger v. Smith, 406 S.C. 37, 748 S.E.2d 625 (S.C. App. 2013). In Froneberger, the court concluded that the Plaintiff presented sufficient evidence to satisfy the scintilla of evidence requirement that is needed to defeat summary judgment. "However, given

the minimal amount of discovery the parties had conducted at the time summary judgment was granted, we find the Smiths' answers created a mere scintilla of evidence that precluded summary judgment." Froneberger at 406 S.C. at 51, 748 S.E.2d at 632. South Carolina has now universally adopted this standard. The Plaintiff opposes this motion on the grounds that based on the facts, taken in the light most favorable to the Plaintiff, do not entitle the Defendant to judgment as a matter of law. Moreover, there are issues of material fact which make the matter one for a jury.

CONCLUSION

It is clear, based on the facts of the case and applicable standards and law that the Plaintiff's injury was caused by the negligence, gross negligence, breach of duty of care, of the premises owned by the Defendants. Additional discovery and deposition excerptss will need to be completed. Based on the facts and law as set out in this memorandum and the fact that the Defendants' motion has no merit, the Plaintiff respectfully requests this Honorable Court to deny the Defendants' Motion for Summary Judgment.

Respectfully Submitted,

WIGGER LAW FIRM, INC.

Jarrel L. Wigger
Attorney for the Plaintiff
8086 Rivers Avenue, Suite A
North Charleston, SC 29406
Telephone: (843) 553-9800
Facsimile: (843) 553-1648

North Charleston, South Carolina
This 8th day of April, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT

- - -

DONNA DOUGLASS

Plaintiff,

vs.

BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC, AND THE BERKSHIRE GROUP

Defendants,

CIVIL ACTION NO. 2013-CP-10-07133

GREGORY MORAN

DATE TAKEN: MONDAY, APRIL 6, 2015
TIME BEGAN: 10:34 A.M.
TIME ENDED: 11:17 A.M.
LOCATION: THE WIGGER LAW FIRM, INC.
8086 RIVERS AVENUE, SUITE A
NORTH CHARLESTON, SOUTH CAROLINA

REPORTED BY: DEIRDRE J. WEYER, RPR
EVERYWORD, INC.
P.O. BOX 1459
COLUMBIA, SOUTH CAROLINA 29202
803-212-0012

1 specific light bulb, the time that they last could
2 vary; is that right?
3 A Correct.
4 Q Besides reports from residents or anyone
5 else who happened to be or y'all just making rounds
6 through the property and noticing a light being out,
7 are there any other procedures that you use to check
8 lights?
9 A Yes. The property's divided into sections
10 and everyone's responsible for their own section.
11 And they would tape up the photocell, because it's
12 daylight, and check the light. Do a light check.
13 Q And how often was that done?
14 A There wasn't a set time. Maybe once a
15 month. Every so often.
16 Q Do you know who was responsible for the
17 700 building of Phase I?
18 A Not at that time.
19 Q Sitting here today, do you have any reason
20 to believe that the light checks that you just
21 mentioned were not done around the time of the
22 accident?
23 A Were not done?
24 Q Do you have reason to believe they were
25 not done around the time of the accident?

1 saw them, right?
2 A Yes. That's our best resource.
3 Q The residents?
4 A Yeah.
5 Q Do you recall any residents ever telling
6 you that there was problems with the lighting before
7 January 6th, 2011, at the 700 building, Phase I?
8 A No.
9 Q Are there other lights around the
10 buildings as well?
11 A Yeah. That light -- that whole inside
12 light well has 16 lights, divided by three -- three
13 floors, there's six on each floor.
14 Q In this case, do you know whether or not
15 it was all the lights or just one that was out?
16 A I wouldn't know.
17 Q Would it be unusual for more than one or
18 two of the lights to be out at the same time?
19 A No.
20 Q Bear with me for one minute.
21 Do you have any knowledge how long the
22 light was out in the stairwell of the 700 building of
23 Phase I before Miss Douglass's alleged accident on
24 January 6th, 2011?
25 A No.

1 A Other than an outside ramp or a different
2 toilet -- higher toilets. Something like that.
3 Q Okay. What about if a visitor is there
4 visiting one of the apartment complex residents, do
5 they have the ability to request any changes to be
6 made?
7 A No, not if they don't have a lease.
8 Q In fact, if they did start making
9 alterations to the property, would that be considered
10 a trespass?
11 A Some violation. Some kind of a violation.
12 Q Okay. Sure. I mean, you wouldn't want
13 somebody coming up and changing your sprinkler
14 systems or moving bushes or changing light bulbs or
15 anything like that, right?
16 A Right.
17 Q So would it be fair to say then -- or
18 would it be a fair characterization to say that a
19 visitor has no ability to make changes when they come
20 onto the property?
21 A I would say that's fair to say.
22 Q Yeah. Now, would you agree also as your
23 job as a maintenance person there are some things
24 that are safety related and some things that are
25 aesthetically related?

1 Q And you can't delegate to a resident to
2 fix that, can you?
3 A Not at all.
4 Q Okay. So some safety issues cannot be
5 delegated to residents. Is that fair to say?
6 A Correct.
7 Q Is lighting a safety issues?
8 A Always.
9 Q Okay. And is it fair to say you can't
10 delegate a safety issue regarding lighting to one of
11 the residents?
12 A No, but we can ask them to report.
13 Q Right. But if you see a lighting issue,
14 that's your responsibility to fix, right?
15 A Correct.
16 Q Okay. Have you ever read any of the
17 building codes that are applicable to those
18 apartments regarding lighting issues?
19 A No.
20 Q And you were asked about doing things to
21 prevent this situation. You guys when you -- do you
22 buy the light bulbs or does the company just send
23 them to you?
24 A I buy them.
25 Q Okay. And you know what the life of those

1 bulbs is generally, right?
2 A Generally.
3 Q Sometimes they burn hot?
4 A Yep.
5 Q But is there an expected life expectancy
6 within any of the bulbs that you buy?
7 A I think on that page it tells you how many
8 hours you can expect.
9 Q Right. Is it fair to say there's no
10 system in place -- or there was no system in place in
11 2011 to replace the bulbs prior to the time that they
12 burned out?
13 MR. BROGDON: Object to the form.
14 THE WITNESS: We wouldn't replace them
15 until they burned out.
16 BY MR. WIGGER:
17 Q Right. You would wait till they burned
18 out before you replaced them, right?
19 A Yes.
20 Q So there was no system in place to replace
21 them prior to the time they burned out, was there?
22 A No.
23 Q Right. So what you had was a situation
24 where you knew that the lighting would burn out at
25 some point and then you would wait until it was

1 Q And I'm not even talking about
2 Donna Douglass's situation. I'm asking you in
3 general. You had a situation set up where you waited
4 until the light burned out, you knew it was a safety
5 issue, yet you waited till it burned out before
6 replacing it, right?
7 A I just -- I don't replace light bulbs that
8 are still lit.
9 Q Yeah. Now, as maintenance folks in the
10 apartment complex, you guys knew visitors came to the
11 apartment complex, right?
12 A Always.
13 Q And have you ever seen any pizza delivery
14 people come to the apartments?
15 A Every kind of delivery service comes in.
16 Q Sure. Chinese food, people delivering
17 furniture. All kind of stuff, right?
18 A Right.
19 Q So you can anticipate those types of users
20 for your facilities, right?
21 A Um-hum.
22 Q Is that right?
23 A Yes.
24 Q So it's fair to say that Miss Douglass was
25 an anticipated user of y'all's facilities --

1 A Something like that, yes.
2 Q What about any overhead lighting, is there
3 any overhead lighting on this particular stairway?
4 A No.
5 Q How about any lighting down below? Any
6 lighting that would illuminate this area?
7 A The landscaping? No.
8 Q And is that designed that way or is it
9 something that lights were burned out?
10 A What do you mean, "lights were burned
11 out"?
12 Q I'm just asking is this a accurate picture
13 of the way these stairways always are, or is it that
14 dark because the lights were burned out?
15 A It's not -- it doesn't look as dark as
16 this picture.
17 Q Yeah?
18 A The picture's darker than it looks.
19 Q Yeah. Where would other lighting be, if
20 any, relative to this picture?
21 A The next floor up above these
22 (indicating).
23 Q Okay. So on the next landing there would
24 be two lights kinda equivalent to these two lights
25 down here?

1 A There's three floors would be that way.
2 Q Okay. Is it fair to say there's no direct
3 light that comes down on the particular stairway
4 itself?
5 A Well, there's a light up here that would
6 shine down to it (indicating).
7 Q Okay. So when you're pointing, you're
8 pointing up north of where the stairway goes to --
9 A Right here's the floor (indicating). It's
10 going to be right (indicating).
11 Q Okay. So there's a light up in this area
12 somewhere (indicating)?
13 A And they all have their own door light.
14 That's their own private light to turn on at their
15 front door.
16 Q For the -- like, the residents?
17 A Right.
18 Q Yeah. Now, looking at this picture, does
19 it look like the light that would have been up here,
20 north, is out?
21 A I couldn't say because I'm not seeing that
22 floor that well. This picture is darker than I would
23 imagine it to be though.
24 Q Yeah. Are you familiar with any of the
25 building codes regarding rise and run of stairways?

A No. Whatever the code was when they built that building, I would assume that's how it was built.

Q Do you know if the rise and run is consistent on this particular stairway?

A Yes.

Q Is that because you've actually measured it or --

A No. We're always repairing stairs.

Q Yeah? Why are the stairs always be being repaired?

A Because they're about 30 years old.

Q And they're made out of wood?

A Pressure-treated wood.

Q So the wood sometimes becomes misshapen or disfigured?

A Yeah. People moving damage them from time to time.

Q Now, every time a light bulb is changed, do you guys make an entry on the maintenance log?

A No.

Q Is that one of those things that just if you come across it, you change it out and it's --

A It's changed.

Q So even if we have the Berkshire records,

1 You're welcome to read it over and make
2 sure.
3 A You can go on.
4 Q Okay. As a maintenance supervisor, would
5 you agree that part of your job deals with safety?
6 A Correct.
7 Q Would you agree with the safety principle
8 that any risk of serious injury is unreasonable if
9 reasonable accident prevention measures can prevent
10 it?
11 MR. BROGDON: Object to the form.
12 THE WITNESS: Can you rephrase that a
13 little bit?
14 BY MR. WIGGER:
15 Q Sure. Would you agree with the safety
16 principle that any risk of serious injury is
17 unreasonable if you can use reasonable acts and
18 measures to prevent it?
19 MR. BROGDON: Objection.
20 THE WITNESS: Yeah.
21 BY MR. WIGGER:
22 Q Okey-doke. I think those are all the
23 questions I have. Mr. Brogdon may have some more.
24 MR. BROGDON: No, that's it. You're done.
25

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2013-CP-10-7133

DONNA DOUGLASS,	)	DEPOSITION OF:
	)	DONNA DOUGLASS
Plaintiff,	)	
	)	
-versus-	)	
	)	
BERKSHIRES ON ST. IVES,	)	
BERKSHIRE PROPERTY ADVISORS,	)	
LLC, BVF NORTH COVE, LLC	)	
AND THE BERKSHIRE GROUP,	)	
	)	
Defendants.	)	
	)	

COPY

DATE: Tuesday, November 11, 2014

TIME: 9:57 a.m.

LOCATION: Wigger Law Firm, Inc.
8086 Rivers Avenue
North Charleston, SC 294406

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter

SPECTRUM
COURT REPORTING SERVICES
www.spectrumcourtreporting.com
465 West Coleman Blvd., Suite 302
Mount Pleasant, SC 29464
SpectrumAAA@gmail.com
843.849.0133

1 **A. I haven't speak to them at all.**
2 Q. Okay. So you didn't speak with
3 anybody who lived there after the accident; is that
4 right?
5 **A. No, sir.**
6 Q. Okay. And didn't call and report the
7 accident after it happened; is that right?
8 **A. No, sir.**
9 Q. Okay. Do you recall on your previous
10 trips to that building whether or not there was any
11 lighting?
12 **A. Do I recall?**
13 Q. Yeah, was it -- this instance, you said
14 there was -- it was dark, right?
15 **A. Yes, sir.**
16 Q. Okay. Was it dark in the other
17 instances where you went before this accident?
18 **A. No, sir. There was light out there.**
19 **The light -- I mean, the light was working, the**
20 **particular 700, it -- the light wasn't -- the light**
21 **was out.**
22 Q. Okay. Do you know when that light went
23 out?
24 **A. I couldn't tell you, sir.**
25 Q. Okay. Do you know how -- what caused

1 **A. I went to Trident.**
2 Q. And how did you get to Trident?
3 **A. My sister and Justin.**
4 Q. Okay.
5 **A. Tonya Wright.**
6 Q. Did any -- that's your sister?
7 **A. Uh-huh.**
8 Q. Okay. That's who is sitting here
9 today; is that right?
10 **A. Yes, sir.**
11 Q. Did anyone at Pizza Hut recommend that
12 you go to the hospital?
13 **A. They told me that they were going to**
14 **get workman's comp to call me to go to the doctor.**
15 Q. Okay. Besides your ankle injury, did
16 you injure any other part of your body?
17 **A. Just my ankle, and I think I scraped my**
18 **-- got a little scratch on my hand.**
19 Q. Okay. Nothing serious on your hand,
20 though?
21 **A. No, sir.**
22 Q. Okay. Didn't have to get stitches or
23 anything like that?
24 **A. No, sir.**
25 Q. Okay. When you got back to Pizza

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2013-CP-10-7133

DONNA DOUGLASS, Plaintiff, -versus- BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC, AND THE BERKSHIRE GROUP, Defendant.	DEPOSITION OF: RICHARD KING

C O P Y

DATE: Friday, April 3, 2015

TIME: 9:58 a.m.

LOCATION: Wigger Law Firm, Inc.
8086 Rivers Avenue, Suite A
North Charleston, SC 29406

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter

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Mount Pleasant, SC 29464
SpectrumAAA@gmail.com
843.849.0133

1 **ins come in during the daytime that they would just**
2 **call you and tell you go check it out. Sometimes**
3 **service requests would be written up on it and**
4 **sometimes it wouldn't.**
5 Q. Now, was there some kind of logbook to
6 keep track of all of the service requests?
7 **A. They filed them in the individual**
8 **apartment residents in folders.**
9 Q. What if it was for an area that wasn't
10 an actual apartment, like, if it was a common
11 area?
12 **A. A common area? I don't know how**
13 **they filed those. It -- it should be on file,**
14 **though. It should be some kind of file in place**
15 **for that.**
16 Q. But that's not something that you
17 handled?
18 **A. No.**
19 Q. Okay. Was there ever a time where, if
20 you were just walking through the grounds and you
21 saw something simple that needed to be fixed, you
22 would just go ahead and fix it instead of doing a
23 service repair or --
24 **A. Fix it right away.**
25 Q. -- replace it?

1 maintenance work is the owner of the apartment
2 complex's responsibility?
3 **A. Yes.**
4 Q. Now, Ms. Douglass says -- stated here
5 in this lawsuit that she fell down the stairs at
6 this location because of a light bulb that was
7 burned out on the stairway. Are you aware that
8 stairs kind of have their own set of regulations as
9 far as building codes and things like that?
10 **A. They should be stable at all times,**
11 **being concrete or wood. If it's wood, they**
12 **should be constantly nailed down if they're pulling**
13 **up.**
14 Q. Yeah. And kind of along the same
15 lines, there's guidelines for rails and lighting?
16 **A. Rails and lighting kind of stuff, yes.**
17 Q. Would you agree that those rules are in
18 place to make stairs safe for people to use?
19 MR. BROGDON: Object to the form.
20 **A. Yes.**
21 Q. Would you agree that part of your job
22 as doing -- or when doing maintenance work is to
23 make the area safe for people to use?
24 **A. At all times.**
25 Q. Would you agree that an unlit stairwell

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICAL CIRCUIT
CASE NO: 2013-CP-10-7133

DONNA DOUGLASS,
Plaintiff,

v.

BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE LLC and THE BERKSHIRE GROUP,
Defendants.

MOTION FO RECONSIDERATION PURSUANT TO RULE 59(e)

2015 MAY -7 PM 3:02

TO: DEFENDANTS, and THEIR ATTORNEY, JAMES E. BROGDON, III

The Plaintiff, Donna Douglass, by and through her undersigned counsel, prays this court to grant relief in the interests of justice and pursuant to Civil Procedure, Rule 59(e), by reconsidering and setting aside its Order Granting Defendant's Motion to Dismiss.

In addition and pursuant to the *South Carolina Rules of Civil Procedure*, the Plaintiff hereby requests that a hearing is held before the Court regarding this motion so that the parties may present oral arguments. This Motion is based on the following:

Plaintiff is filing this Motion for Reconsideration based upon the legal argument below:

LEGAL ARGUMENT

In the motion hearing oral argument, the Defendant presented to the Court that the Plaintiff knew the light in question was out and proceeded up the stairs anyway. With regard to that argument, the Plaintiff would offer the following additional information:

The Plaintiff is a person of diminished capacity and even alluded to such in her deposition given in her workers' compensation claim for the same case. Ms. Douglass relayed the following: She finished school with the special ed program. She did not attend a regular high school, she had to attend a special school in the city. Ms. Douglass only received a paper saying that she went to school for 12 years and that she had a learning disability. Ms. Douglass stated

that she was dyslexic, but then she wasn't sure so she would have to ask her mom. (**see attached excerpts of the South Carolina Workers' Compensation Commission Deposition of Donna Douglas dated Thursday, June 28, 2011, page 7, lines 1-25 and page 8, lines 1-8**). Plaintiff having represented Ms. Douglass for many years, it is clear she only has a basic level of functioning. She has worked at Goodwill and similar low level type jobs, but her understanding of what goes on around her is evidenced in her answers in the **attached excerpt of the deposition of Donna Douglass dated November 11, 2014, page 46, lines 15-23 and page 47, lines 1-11**. That would contrast with the deposition of the corporate maintenance man, who states he knows lighting is a safety issue and that he can't delegate safety issues to third (3rd) parties (**see the attached complete deposition of Greg Moran, page 26, lines 7-8**).

Someone with Ms. Douglass's abilities would not only be extremely narrow minded about delivering her pizza, since tips are the primary means for her to get paid, it should be a jury question as to whether it would be reasonable for her to transverse the steps. For the Court to rule that as a matter of law, her negligence out weighed the business owners' responsibility flies in the fact of South Carolina Jurisprudence.

Also, had there been any means for Ms. Douglass to do anything about the lighting, the office was closed and there was no way for her to do anything other than to take the risk not getting paid or delivering the pizza. (**see attached complete deposition of Greg Moran, page 36 lines 15-23**).

Additionally, the court focused on the light burning out, but the Plaintiff would offer that the Defendant had several methods available for dealing with this known hazard:

1. They could have designed the steps to have two (2) lights so if one (1) burned out, the other would still be lit;
2. They had a light meter available which they only used to check on lights once a month during the daytime;
3. They could have done a regular nighttime inspection, which was never done.

In light of all these factors, the Plaintiff would respectfully request the court reconsider its ruling.

Furthermore, pursuant to the International Property Maintenance Code:

...the owner of the structure shall provide and maintain light, ventilation and space conditions in compliance with these requirements. A person shall not occupy as owner-occupant, or permit another person to occupy, any premises that do not comply with these requirements of this chapter...

...Every common hall and stairway in residential occupancies, other than in one- and two-family dwellings, shall be lighted at all times with at least a 60-watt standard incandescent light bulb for each 200 square feet (19m²) of floor area or equivalent illumination, provided that the space between lights shall not be greater than 30 feet (9144mm). In other than residential occupancies, means of egress, including exterior means of egress, stairways shall be illuminated at all times the building space served by the means of egress is occupied with a minimum of 1 footcandle (11 lux) at floors, landings, and treads...

In addition, it states that "The owner of the premises should maintain the structure and exterior property in compliance with these requirement" and it further states that "All sidewalks, walkways, stairs, driveways, parking spaces, and similar areas shall be kept in a proper state of repair and maintained free from hazardous conditions."

The Plaintiff would also point out that the same court with your Honor Presiding with similar issues, a case centering around a commercial enterprise without adequate lighting, a jury rendered a split 75/25 verdict for the Plaintiff for over $4,000,000 on December 14, 2014, Robert J. Burke vs. Republic Parking System, Inc. case number 2013-CP-10-1400.

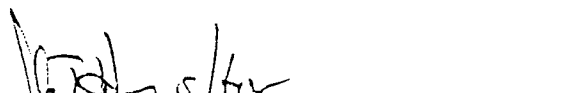
As the Court is aware, the purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. As one authority has noted, "Once the issue has been properly raised by a Rule 59(e)

motion. it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.

CONCLUSION

Plaintiff respectfully requests this Court reconsider or vacate the Order Granting Defendants' Motion to Dismiss and to allow the Plaintiff to proceed to trial.

WIGGER LAW FIRM, INC.



Jarrel L. Wigger
8086 Rivers Avenue, Suite A
North Charleston, South Carolina 29406
(843) 553-9800

Attorney for the Plaintiff.

North Charleston, South Carolina
This 7th day of May, 2015.

1 BEFORE THE
2 SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
3 WCC FILE NO. 1103149
4
5 DONNA DOUGLASS,) DEPOSITION OF
6 Claimant,) DONNA DOUGLASS
7 -versus-)
8 JEM PIZZA DELIVERY, LLC,)
9 Employer,)
10 -and-)
11 THE PMA INSURANCE GROUP,)
12 Carrier-Defendants.)
13 ----------
14
15
16 DATE: Thursday, June 28, 2011
17 TIME: 9:05 a.m.
18 LOCATION: Wigger Law Firm, Inc.
19 8086 Rivers Avenue, Suite A
North Charleston, South Carolina 29406
20 REPORTED BY: Janice D. Hayward, RMR
21 NCRA Registered Merit Reporter
CAROLINA REALTIME LLC
22 P.O. Box 80397
CHARLESTON, SC 29416
23
24
25

1 Q Can you spell that for me?
2 A D-e-s-a-u-s-s-u-r-e.
3 Q Okay. And how long were you married?
4 A For about a year and a half.
5 Q Any kids?
6 A No kids.
7 Q How far did you go in school?
8 A I finished school with the special ed
9 program.
10 Q Okay. A high school program?
11 A No, I had to go to a special school in the
12 city.
13 Q Okay. What was the name of it, do you
14 recall?
15 A I don't remember the name of it.
16 Q Okay. But you said it was a special
17 education school?
18 A Um-hum.
19 Q Did it have like a grade that you
20 completed?
21 A No, it's just, you just get a paper saying
22 that you did equivalent to 12 years in school.
23 Q Okay. And do you have a learning
24 disability?
25 A Um-hum.

1 Q What's your learning disability?
2 A Dyslectic and --
3 Q I'm sorry?
4 A I don't know what all the term mean, I
5 don't know.
6 Q You said dyslexic?
7 A Yeah, but I have to ask my mom too so, I
8 don't know.
9 Q I have a dyslexic child so I understand.
10 Okay. And you think it was
11 something else but you don't remember?
12 A Um-hum.
13 Q Okay. Is that a yes?
14 A Yes, it is.
15 Q Okay. Okay. Do you have any specialized
16 on-the-job training or certification?
17 A No.
18 Q Ever served in the military?
19 A No.
20 Q Okay. Tell me about your medical history.
21 Do you have any chronic medical conditions that you
22 take medication on a regular basis for?
23 A No.
24 Q Such as diabetes, high blood pressure,
25 anything like that?

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2013-CP-10-7133

DONNA DOUGLASS, Plaintiff, -versus- BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC AND THE BERKSHIRE GROUP, Defendants.	DEPOSITION OF: DONNA DOUGLASS

C O P Y

DATE: Tuesday, November 11, 2014

TIME: 9:57 a.m.

LOCATION: Wigger Law Firm, Inc.
8086 Rivers Avenue
North Charleston, SC 294406

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter

SPECTRUM
COURT REPORTING SERVICES
www.spectrumcourtreporting.com
465 West Coleman Blvd., Suite 302
Mount Pleasant, SC 29464
SpectrumAAA@gmail.com
843.849.0133

1 Q. Did they tell you what was wrong with
2 your ankle?
3 **A. They told me I sprung it.**
4 Q. You sprained it?
5 **A. Yes, sir.**
6 Q. Okay. Have you ever had a sprained
7 ankle before?
8 **A. Well, that's what they called the first**
9 **one at West Staff, that it was sprained.**
10 Q. Okay. And that one you ended up having
11 to have some tendons replaced; is that right?
12 **A. Yes, sir.**
13 Q. Okay. You didn't have to have that
14 happen in this case, did you?
15 **A. I'm not really -- like I said, I'm not**
16 **good with medical terms. I usually get my parent**
17 **-- my mom to help me with the medical terms. So**
18 **I'm not really sure. They just said that -- I went**
19 **to the doctor, and I just -- my mom just explains**
20 **to me what it is.**
21 MR. WIGGER: And I should say -- and I
22 don't think Donna will have any problem with this,
23 but Donna's got a lot of LD-type issues.
24 MR. BROGDON: Okay.
25 MR. WIGGER: I know she -- and she

1 knows that, too. So that has something to do with
2 her --
3 MR. BROGDON: I understand.
4 MR. WIGGER: -- inability to talk about
5 what some of these terms are.
6 MR. BROGDON: Understood.
7 MR. WIGGER: That's probably why she's
8 so nervous right now, too.
9 MR. BROGDON: I have difficulty with
10 them -- with the terms as well on a regular basis,
11 so you're not any different in that regard.
12 BY MR. BROGDON:
13 Q. Okay. Did you follow-up with the
14 orthopedist?
15 **A. No, sir. I had -- kept trying to go to**
16 **the Pizza Hut doctor. They wouldn't refer me, and**
17 **then I hired Mr. Wigger.**
18 Q. Okay.
19 **A. And he got me to go to the doctors.**
20 Q. And who -- do you recall what
21 orthopedist you went to see?
22 **A. I went to Charleston Bone and Joint**
23 **doctor, and I want to say they sent me to a -- a**
24 **Medicare doctor, like an urgent care.**
25 Q. Okay.

Copy and Index

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT

- - -

DONNA DOUGLASS Plaintiff, vs. BERKSHIRES ON ST. IVES, BERKSHIRE PROPERTY ADVISORS, LLC, BVF NORTH COVE, LLC, AND THE BERKSHIRE GROUP Defendants,	:	CIVIL ACTION NO. 2013-CP-10-07133

GREGORY MORAN

DATE TAKEN: MONDAY, APRIL 6, 2015
TIME BEGAN: 10:34 A.M.
TIME ENDED: 11:17 A.M.
LOCATION: THE WIGGER LAW FIRM, INC.
8086 RIVERS AVENUE, SUITE A
NORTH CHARLESTON, SOUTH CAROLINA

REPORTED BY: DEIRDRE J. WEYER, RPR
EVERYWORD, INC.
P.O. BOX 1459
COLUMBIA, SOUTH CAROLINA 29202
803-212-0012

APPEARANCES:

WIGGER LAW FIRM, INC.
JARREL L. WIGGER, ESQUIRE
8086 Rivers Avenue, Suite A
North Charleston, SC 29406
843.553.9800
jwigger@wiggerlawfirm.com
Representing the Plaintiff

GALLIVAN, WHITE & BOYD
BY: JAMES E. BROGDON, III, ESQUIRE
1201 Main Street, Suite 1200
Columbia, South Carolina 29201
803.779.1833
jbrogdon@gwblawfirm.com
Representing the Defendants

I N D E X

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E X H I B I T S

MORAN	DESCRIPTION	MARKED
1	Copy of Color Photograph	31
2	Berkshire Property Advisors, LLC, Procedure for Completing the Apartment Interior Inspection Bates Stamp DEF 00005	36
3	Berkshire Property Advisors, LLC, Job Description Bates Stamped DEF 000026	37

1 (It is hereby stipulated and agreed by and
2 between counsel for the respective parties that this
3 deposition is being taken in accordance with the
4 South Carolina Rules of Civil Procedure, and that the
5 deponent does not waive reading and signing of this
6 deposition transcript.)
7 - - -
8 GREGORY MORAN,
9 after having been first duly sworn, was
10 examined and testified as follows:
11 - - -
12 EXAMINATION
- - -
13 BY MR. BROGDON:
14 Q Mr. Moran, as I introduced myself a minute
15 ago, my name's James Brogdon and I represent several
16 defendants in a lawsuit that was filed by Donna
17 Douglass, who is represented by Mr. Wigger, who is
18 sitting as well, for an accident that happened at a
19 place where I believe you were employed back in
20 January of 2011.
21 Are you familiar with the accident and the
22 location of it?
23 A I heard about it, but I was never
24 familiar.
25 Q I believe it happened on the Berkshires on

1 St. Ives property. Is that somewhere you're
2 currently employed?
3 A Yes.
4 Q Is it still owned by Berkshire?
5 A No.
6 Q Okay. Who owns it now?
7 A The owner is Starwood --
8 Q Okay.
9 A -- Investors, but it's operated by a
10 company I work for.
11 Q Okay. Before we get started, have you
12 ever given a deposition before?
13 A Yeah.
14 Q You have?
15 A (Nods head up and down.)
16 Q Okay. How many times?
17 A Once or twice.
18 Q All right. What was the nature of those
19 instances?
20 A I don't recall, but I just remember doing
21 it.
22 Q All right. Well, obviously, you
23 understand what's going on here. This young lady is
24 taking down everything that I say, everything that
25 you say. It might get conversational at times, but

1 I'll do my best to let you finish your answer if you
2 let me finish my question just so we can have a clear
3 transcript at the end of the day. Okay?
4 A Sure.
5 Q You're doing a good job so far. If you
6 respond in verbal responses as opposed to a head nod
7 or head shake or even a um-hum or hum-um, once again,
8 just makes her life a little bit easier. If I say,
9 "Is that a yes or no," I'm not getting on you, okay?
10 A (No audible response.)
11 Q Is that a "yes"?
12 A Yes.
13 Q All right. If you need to take a break,
14 let me know. I don't think we'll be here very long
15 though, okay?
16 What is your full name, Mr. Moran?
17 A Gregory Moran.
18 Q And what's your date of birth?
19 A 11/22/49.
20 Q Where are you from?
21 A Originally, New York.
22 Q When did you move down to South Carolina?
23 A About 11 and a half years ago.
24 Q All right. And what is your current
25 employment?

1 A I'm employed by Bell Partners and they
2 operate the old Berkshire property.
3 Q What's the name of the property now?
4 A Palmetto Grove I and Palmetto Grove II.
5 Q And how long have you been employed at
6 that particular location?
7 A Six years.
8 Q Okay. So you were employed at that
9 location in January of 2011?
10 A Yes.
11 Q When did you start working at the location
12 Palmetto Grove I and II?
13 A I believe it was September of 2010.
14 Q Okay. And what would that property have
15 been called at that point in time?
16 A That was Berkshire on St. Ives.
17 Q And that was the name of the property?
18 A I and II.
19 Q Okay. At the time -- in January of 2011,
20 what was your title with Berkshire?
21 A Maintenance supervisor.
22 Q And had you held that position since
23 September 2010?
24 A Yeah. Now it's just called "maintenance
25 manager." Same job.

1 Q As maintenance supervisor, what were your
2 duties and roles in January of 2011?
3 A Basically, to the operation of the
4 facility as far as maintenance goes. Could be turns.
5 Could have been work orders. And I had three guys
6 working for me.
7 Q How many guys do you have working for you
8 now?
9 A Three.
10 Q Three. Okay. And I think you said you
11 generally know about the accident that brings us here
12 today. What do you know about it?
13 A The only thing I know is we -- the
14 property manager told me we received a lawsuit for
15 someone slipping on stairs and they had absolutely no
16 idea when, where, how, or even what building.
17 Q Okay. Do you know what the date or
18 approximate date when you found out about the
19 accident was?
20 A I would never remember that, no.
21 Q Do you know the location of the alleged
22 fall?
23 A 700 building.
24 Q Are there two phases? Is that right?
25 A Yeah.

1 Q And what phase was this?
2 A You can say 700, Phase I.
3 Q Are you familiar with that building?
4 A Yeah.
5 Yes. Sorry.
6 Q Do you have any idea or knowledge about
7 what Miss Douglass is claiming caused her fall?
8 A Absolutely not.
9 Q I'll submit to you that Miss Douglass is
10 alleging that there was a light out in the stairwell
11 and Miss Douglass was there at the building to
12 deliver a pizza. So I want to talk to you a little
13 bit about the procedures that you all had in place at
14 the time in January of 2011 in terms of fixing light
15 bulbs and general maintenance, okay?
16 A Sure.
17 Q I assume that there is some procedure for
18 problems or maintenance issues being reported and
19 fixed; is that right?
20 A Correct.
21 Q And what is that procedure? Or what was
22 that -- and when I say "what is," I want to talk
23 about the procedure at the time of the accident,
24 okay?
25 A Yeah. Yeah. It would be -- we'd react

1 off a work order.
2 Q And who would submit a work order?
3 A It could be a resident. It could be an
4 employee.
5 Q Okay. And would they call you or would
6 they call an office? Or how would they submit that
7 work order?
8 A They could call the office. They could
9 tell someone that's out on the grounds. That's
10 basically how it would happen at that time.
11 Q So if someone were to see a light out and
12 they called the office, how would you get knowledge
13 about going to fix that light?
14 A Whoever received the call would do a work
15 order.
16 Q And they would give that work order to
17 you; is that right?
18 A We'd just go on the computer and look at a
19 list of work orders.
20 Q And is that something you would do on a
21 everyday basis, look at work orders?
22 A Every morning.
23 Q Every morning?
24 A Well, throughout day, but in the morning's
25 the big one.

1 Q Generally, was there a time frame that
2 your employer wanted you to get certain tasks
3 completed by?
4 A All work orders had to be done within 48
5 hours.
6 Q Were there enough work orders to where
7 that became an issue with your staff to whether it
8 would take longer to do certain things or --
9 A No.
10 Q How about --
11 A If there was parts to be ordered.
12 Q Fair enough. If there was a light -- if
13 you hopped on your system in the morning and saw
14 that, hey, someone reported a light bulb being out,
15 what would be the procedure for going to fix that?
16 A It would be the same. It would have been
17 a work order.
18 Q When you saw the work order, would you
19 just delegate that task to someone or would you just
20 go get a light bulb and fix it?
21 A Somebody's always assigned to work orders.
22 Sometimes it's two people; sometimes it's one.
23 Depends on the load.
24 Q If there was a report or a work order for
25 a light being out, is that something that would ever

1 take more than 48 hours to fix?
2 A No.
3 Q I assume y'all keep light bulbs at the
4 premises; is that right?
5 A Yes.
6 Q Is there anything else you need to fix a
7 light being out?
8 A Could need a light -- a new light. We
9 have them. Sometimes it's the facing on it, the
10 plastic facing.
11 Q Do you know what kind of light -- at the
12 time of the accident what kind of light was in the
13 stairwell in the 700 building of Phase I?
14 A They're all fluorescent lights.
15 Q Sitting here today, do you have any
16 knowledge about how long fluorescent bulbs last?
17 A They last longer than regular bulbs.
18 That's why they use them.
19 Q But you can't give a certain amount of
20 days that every bulb would last?
21 A (Shakes head from side to side.)
22 Q No?
23 A Whenever it was built, that was the
24 technology -- the best technology to use.
25 Q And depending on the usage and the

1 specific light bulb, the time that they last could
2 vary; is that right?
3 A Correct.
4 Q Besides reports from residents or anyone
5 else who happened to be or y'all just making rounds
6 through the property and noticing a light being out,
7 are there any other procedures that you use to check
8 lights?
9 A Yes. The property's divided into sections
10 and everyone's responsible for their own section.
11 And they would tape up the photocell, because it's
12 daylight, and check the light. Do a light check.
13 Q And how often was that done?
14 A There wasn't a set time. Maybe once a
15 month. Every so often.
16 Q Do you know who was responsible for the
17 700 building of Phase I?
18 A Not at that time.
19 Q Sitting here today, do you have any reason
20 to believe that the light checks that you just
21 mentioned were not done around the time of the
22 accident?
23 A Were not done?
24 Q Do you have reason to believe they were
25 not done around the time of the accident?

1 A No.
2 Q Before January 6th of 2011, did you ever
3 receive any reports of problems with the lighting in
4 the stairwell of building 7 -- Phase I, 700 building?
5 A No.
6 Q Around January 6th of 2011 or right before
7 that, in the days before it, did you ever see any
8 work orders to replace any lights being out in the
9 700 building of Phase I?
10 A I would never be able to recall that.
11 Q That's records that would exist, right?
12 A I wouldn't have them. Berkshire took all
13 their stuff when they...
14 Q Is it fair to say that, you know -- if
15 they did have the work orders for around that period
16 of time and there were no work orders in those
17 documents that relate to a light being out, is it
18 fair to state that a light being out was never
19 reported?
20 A Oh, yeah.
21 Q After January 6th, 2011, did you ever go
22 to the 700 building and check the lighting in the
23 stairwell after hearing the report of the fall?
24 A I haven't -- we never knew which building
25 it was. We knew there was a lawsuit.

1 Q You mentioned that in order to check the
2 lights you'd have to cover up the photocell; is that
3 right?
4 A Correct.
5 Q Is that because you don't have anybody
6 working at nighttime?
7 A Correct.
8 Q And what does the photocell do?
9 A It detects darkness and turns the lights
10 on.
11 Q So that's to keep the lights from being on
12 all day; is that right?
13 A Correct.
14 Q How long have you been in property
15 management or doing maintenance for property
16 management?
17 A Seven years. Seven or eight years.
18 Q And the length of time you've been doing
19 that, in terms of lights being out and general
20 maintenance issues, do you rely on residents to
21 report those problems?
22 A No. Just my guys check it.
23 Q In terms of lights being out at night, you
24 would need residents to report those problems -- or
25 you would hope that they would report them if they

1 saw them, right?
2 A Yes. That's our best resource.
3 Q The residents?
4 A Yeah.
5 Q Do you recall any residents ever telling
6 you that there was problems with the lighting before
7 January 6th, 2011, at the 700 building, Phase I?
8 A No.
9 Q Are there other lights around the
10 buildings as well?
11 A Yeah. That light -- that whole inside
12 light well has 16 lights, divided by three -- three
13 floors, there's six on each floor.
14 Q In this case, do you know whether or not
15 it was all the lights or just one that was out?
16 A I wouldn't know.
17 Q Would it be unusual for more than one or
18 two of the lights to be out at the same time?
19 A No.
20 Q Bear with me for one minute.
21 Do you have any knowledge how long the
22 light was out in the stairwell of the 700 building of
23 Phase I before Miss Douglass's alleged accident on
24 January 6th, 2011?
25 A No.

1 Q Do you know what caused the light to be
2 out on January 6th, 2011?
3 A Absolutely not.
4 Q Are there handrails leading up the
5 stairwells of all the buildings?
6 A Yes.
7 Q So I assume there was handrails leading up
8 to the 700 building; is that fair?
9 A Um-hum.
10 Q Yes?
11 A Yes.
12 Q If a visitor or a resident noticed a
13 problem which they thought presented them some
14 danger, what would you expect them to do?
15 A Report it to the office.
16 Q If a visitor or a resident came to a
17 stairwell and noticed that a light was out and the
18 stairwell was dark and saw that to be a dangerous
19 situation, would you expect them to proceed up or
20 down the stairwell regardless of that fact without
21 reporting it?
22 A I would say so. There was still plenty of
23 light.
24 Q But if they felt that it was a dangerous
25 condition or a dangerous situation, would you still

1 expect them to venture out and to go into that
2 dangerous condition without reporting it?
3 A I'm sure they would. They got to go to
4 their apartment
5 Q In your years as a maintenance supervisor,
6 is there anything that could be reasonably done to
7 prevent any period of time where there'd be a light
8 outage?
9 A The only prevention would to be check it
10 every single morning, 24 buildings.
11 Q But even then it provides the potential
12 for a light to go out right after you check it,
13 right?
14 A Sure. It happens in my own home.
15 Q That's the nature of light bulbs, isn't
16 it?
17 A Yeah. They burn hot. So...
18 Q Have you ever spoken to anyone, whether it
19 was one of your other maintenance employees or a
20 resident, that told you that they were aware that the
21 light was out in the stairwell in the 700 building at
22 Phase I prior to Miss Douglass's fall on January 6th,
23 2011?
24 A Not at all, to my knowledge.
25 Q At that point in time, do you know whether

1 or not the building -- 700 building was fully
2 occupied?
3 A I wouldn't know.
4 Q Generally in a building, how many
5 apartments are there?
6 A There's 18 for the whole building. Inside
7 there -- there's an outside part of the building and
8 an inside. In the inside, it would be 6 less. Then
9 it would be 12.
10 Q So 700 building would have had 12
11 apartments --
12 A Four on each floor.
13 Q Okay.
14 A On the inside. I don't know whether that
15 was outside or inside.
16 Q Mr. Moran, I believe that's all I have at
17 this time. I will pass it over to Mr. Wigger as I
18 review my notes.
19 - - -
EXAMINATION
20 - -
21 BY MR. WIGGER:
22 Q Good morning, Mr. Moran. My name's Jarry
23 Wigger. I represent Miss Douglass. You said that
24 Berkshire took all the records with them when they
25 changed out the management; is that right?

1 A (Nods head up and down.)
2 Q Do you know when that was?
3 A Halloween this year past. '14.
4 Q Okay. Do you know if y'all made any
5 copies of those records prior to the time that they
6 took them?
7 A No, we didn't.
8 Q Okay. With the maintenance department,
9 you said nobody was working at nighttime. Is that
10 the way you guys worked it?
11 A Yeah. We just do a day shift.
12 Q Okay. How many maintenance folks are
13 there?
14 A Besides me -- there's three plus me.
15 Three techs.
16 Q Do you know where the -- first of all, you
17 guys had video surveillance at the apartment complex,
18 right?
19 A Not at the apartments.
20 Q No?
21 A Just around the club house area.
22 Q Okay.
23 A The amenity center.
24 Q The area where Miss Douglass fell, that
25 wouldn't have been subject to a video or

1 surveillance?
2 A No.
3 Q Okay. I want to ask you a little bit
4 about your background. What all did you -- when you
5 were applying for a maintenance job, what all did you
6 put as your background and qualifications?
7 A I was operations manager for a water
8 company up North for 33 years, so I always was in
9 operations of some kind. Mechanical kind of things.
10 Q Okay. Did you manage buildings or did you
11 just manage processes?
12 A I had buildings. Booster stations.
13 Things like that.
14 Q Okay. Do you have any certifications in
15 maintenance?
16 A No.
17 Q Any certifications in --
18 A Just some electrical background.
19 Q Okay. Certifications in property
20 management?
21 A No.
22 Q Have you ever taken any safety courses?
23 A When I worked for a water company, I took
24 plenty of 'em. We have a thing called -- when I
25 worked for them, it was called Berkshire University

1 and you go on there and do safety classes on the
2 computer.
3 Q Any of those classes talk about building
4 codes?
5 A They talk about building maintenance.
6 There's all -- an array of subjects.
7 Q And was codes part of that?
8 A I can't recall.
9 Q What's your familiarity with the building
10 codes?
11 A Generally, I only know something about a
12 code if I'm going to go do something and change
13 something to make sure we're in compliance.
14 Q When you came in as maintenance
15 supervisor, did you make any structural changes to
16 anything on the property?
17 A No.
18 Q Did you ever make any alterations in any
19 stairways?
20 A No.
21 Q Did you ever measure any stairways for a
22 rise and run to make sure they complied with the
23 building code?
24 A No.
25 Q Did you ever check the handrails to make

1 sure they were in compliance with the building code?
2 A No.
3 Q Do you know what the handrail distance is
4 from riser to handrail under the building code that's
5 in effect or that was in effect in 2011?
6 A I don't know. My guess would be 32
7 inches, but...
8 Q But that'd just be based on a guess versus
9 knowing what the code says?
10 A Right.
11 Q Okay. When you're running an apartment
12 complex, is it fair to say that a visitor has no
13 ability to change anything when they come onto that
14 property?
15 A That's not true.
16 Q Okay. What type things can they alter if
17 the --
18 A For American Disability Act, they can
19 request changes.
20 Q Okay. They can request changes to make
21 things handicapped accessible?
22 A Right.
23 Q Have you ever had anybody request any
24 changes to make any of the buildings handicapped
25 accessible?

1 A Other than an outside ramp or a different
2 toilet -- higher toilets. Something like that.
3 Q Okay. What about if a visitor is there
4 visiting one of the apartment complex residents, do
5 they have the ability to request any changes to be
6 made?
7 A No, not if they don't have a lease.
8 Q In fact, if they did start making
9 alterations to the property, would that be considered
10 a trespass?
11 A Some violation. Some kind of a violation.
12 Q Okay. Sure. I mean, you wouldn't want
13 somebody coming up and changing your sprinkler
14 systems or moving bushes or changing light bulbs or
15 anything like that, right?
16 A Right.
17 Q So would it be fair to say then -- or
18 would it be a fair characterization to say that a
19 visitor has no ability to make changes when they come
20 onto the property?
21 A I would say that's fair to say.
22 Q Yeah. Now, would you agree also as your
23 job as a maintenance person there are some things
24 that are safety related and some things that are
25 aesthetically related?

1 A That can happen a lot, yeah.
2 Q You know, like cutting the grass, that's
3 kind of an aesthetic thing, right?
4 A Um-hum.
5 Q But it's not necessarily a safety thing;
6 is that fair to say?
7 A That could be, except for the snakes and
8 things you can't see.
9 Q Yeah. And is it fair to say that as the
10 maintenance supervisor you can't delegate a safety
11 issue to one of the residents?
12 A If they're doing something unsafe, we feel
13 it's unsafe, we would ask them to correct it.
14 Q Right.
15 A If it's something they did.
16 Q But if it's something within your job
17 description and it's safety related, you can't ask
18 the residents to be responsible for that; is that
19 fair to say?
20 A Not unless they caused the situation.
21 Q Right. But what I'm getting at is you
22 can't delegate safety issues to residents?
23 MR. BROGDON: Object to form.
24 THE WITNESS: I wouldn't say "delegate."
25 You can tell 'em.

1 BY MR. WIGGER:
2 Q Right. But if it's something within your
3 scope of job description, something within your
4 duties, you can't delegate that to one of the
5 apartment complex residents, can you?
6 MR. BROGDON: Object to form.
7 THE WITNESS: No. That's not a clear-cut
8 answer. I can't give you a clear-cut answer to that.
9 BY MR. WIGGER:
10 Q Okay. If there is a open wiring issue,
11 would you agree that's a safety issue?
12 A Definitely.
13 Q Definitely violate the building code?
14 A Yes.
15 Q And you can't delegate that to a resident
16 to fix, can you?
17 A No, but I can ask them to remove it.
18 Q If it's, say, a wiring issue within the
19 walls, you can ask the resident to remove that?
20 A Not within a wall. I doubt if they'd get
21 within a wall.
22 Q Let's talk about things within your area,
23 which would be things in the wall. Would you agree
24 electrical issues within the wall are your issue?
25 A Oh, yes.

1 Q And you can't delegate to a resident to
2 fix that, can you?
3 A Not at all.
4 Q Okay. So some safety issues cannot be
5 delegated to residents. Is that fair to say?
6 A Correct.
7 Q Is lighting a safety issues?
8 A Always.
9 Q Okay. And is it fair to say you can't
10 delegate a safety issue regarding lighting to one of
11 the residents?
12 A No, but we can ask them to report.
13 Q Right. But if you see a lighting issue,
14 that's your responsibility to fix, right?
15 A Correct.
16 Q Okay. Have you ever read any of the
17 building codes that are applicable to those
18 apartments regarding lighting issues?
19 A No.
20 Q And you were asked about doing things to
21 prevent this situation. You guys when you -- do you
22 buy the light bulbs or does the company just send
23 them to you?
24 A I buy them.
25 Q Okay. And you know what the life of those

1 bulbs is generally, right?
2 A Generally.
3 Q Sometimes they burn hot?
4 A Yep.
5 Q But is there an expected life expectancy
6 within any of the bulbs that you buy?
7 A I think on that page it tells you how many
8 hours you can expect.
9 Q Right. Is it fair to say there's no
10 system in place -- or there was no system in place in
11 2011 to replace the bulbs prior to the time that they
12 burned out?
13 MR. BROGDON: Object to the form.
14 THE WITNESS: We wouldn't replace them
15 until they burned out.
16 BY MR. WIGGER:
17 Q Right. You would wait till they burned
18 out before you replaced them, right?
19 A Yes.
20 Q So there was no system in place to replace
21 them prior to the time they burned out, was there?
22 A No.
23 Q Right. So what you had was a situation
24 where you knew that the lighting would burn out at
25 some point and then you would wait until it was

1 either reported or seen before you replaced it. Is
2 that fair to say?
3 A Correct.
4 Q Okay. Yeah. And you said lighting was a
5 safety issue, right?
6 A (Nods head up and down.)
7 Q That's a "yes"?
8 A Yes.
9 Q So you were in a situation where you knew
10 that you were going to have lighting issues; but you
11 didn't implement any system to avoid that safety
12 issue, did you?
13 MR. BROGDON: Object to the form.
14 THE WITNESS: I don't know if -- I don't
15 know that's a lighting issue. You're asking me
16 before it burns out --
17 MR. WIGGER: Right.
18 THE WITNESS: -- that I'm aware that it's
19 going to burn out and I should anticipate replacing
20 it?
21 MR. WIGGER: Right.
22 THE WITNESS: There's more than enough
23 lighting that it can afford to have a bulb out if I
24 can't catch it in time.
25 BY MR. WIGGER:

1 Q And I'm not even talking about
2 Donna Douglass's situation. I'm asking you in
3 general. You had a situation set up where you waited
4 until the light burned out, you knew it was a safety
5 issue, yet you waited till it burned out before
6 replacing it, right?
7 A I just -- I don't replace light bulbs that
8 are still lit.
9 Q Yeah. Now, as maintenance folks in the
10 apartment complex, you guys knew visitors came to the
11 apartment complex, right?
12 A Always.
13 Q And have you ever seen any pizza delivery
14 people come to the apartments?
15 A Every kind of delivery service comes in.
16 Q Sure. Chinese food, people delivering
17 furniture. All kind of stuff, right?
18 A Right.
19 Q So you can anticipate those types of users
20 for your facilities, right?
21 A Um-hum.
22 Q Is that right?
23 A Yes.
24 Q So it's fair to say that Miss Douglass was
25 an anticipated user of y'all's facilities --

1 A Yes.
2 Q -- as a pizza delivery driver, right?
3 A Correct.
4 Q Okay. Now, if Miss Douglass comes at
5 night, you wouldn't expect her to go find the office,
6 then find a maintenance person to try to get a light
7 bulb changed prior to the time that she traversed the
8 stairs, would you?
9 A No.
10 Q I mean, that's just common sense. She's
11 there delivering pizza. She's going to try to get in
12 and get out, right?
13 A Right.
14 Q And there wouldn't be anybody there for
15 her to find anyway, right?
16 A No.
17 Q Sure.
18 (Moran Exhibit Number 1 was marked for
19 identification.)
20 BY MR. WIGGER:
21 Q Mr. Moran, I'm going to show you what's
22 been marked as Exhibit 1. Do you know if that's the
23 stairway that we have been talking about as far as
24 Donna Douglass's situation goes?
25 A This is the outside of the building.

1 Q Okay.
2 A Let's see. There's eight more that look
3 like it in eight buildings.
4 Q Okay. But has anybody ever pointed that
5 one out to you and said, Here's where Miss Douglass's
6 situation occurred?
7 A Absolutely not. I wouldn't even know if
8 that's the 700 building or not.
9 Q Okay. If that was the 700 building, where
10 would the nearest light be?
11 A There's one (indication), because the wall
12 comes out like this a little bit (indicating). So
13 there's one on every floor like that.
14 Q Okay.
15 A And there's one in the middle.
16 Q Now, these walls, are they behind where
17 the stairway physically comes down?
18 A It's sort of in the middle.
19 Q Okay.
20 A Right in the middle of the wall
21 (indicating).
22 Q Okay. So if we were out there on the
23 scene, the lights would be kinda halfway maybe up the
24 stairs on the front side and halfway up the stairs on
25 the back side?

1 A Something like that, yes.
2 Q What about any overhead lighting, is there
3 any overhead lighting on this particular stairway?
4 A No.
5 Q How about any lighting down below? Any
6 lighting that would illuminate this area?
7 A The landscaping? No.
8 Q And is that designed that way or is it
9 something that lights were burned out?
10 A What do you mean, "lights were burned
11 out"?
12 Q I'm just asking is this a accurate picture
13 of the way these stairways always are, or is it that
14 dark because the lights were burned out?
15 A It's not -- it doesn't look as dark as
16 this picture.
17 Q Yeah?
18 A The picture's darker than it looks.
19 Q Yeah. Where would other lighting be, if
20 any, relative to this picture?
21 A The next floor up above these
22 (indicating).
23 Q Okay. So on the next landing there would
24 be two lights kinda equivalent to these two lights
25 down here?

1 A There's three floors would be that way.
2 Q Okay. Is it fair to say there's no direct
3 light that comes down on the particular stairway
4 itself?
5 A Well, there's a light up here that would
6 shine down to it (indicating).
7 Q Okay. So when you're pointing, you're
8 pointing up north of where the stairway goes to --
9 A Right here's the floor (indicating). It's
10 going to be right (indicating).
11 Q Okay. So there's a light up in this area
12 somewhere (indicating)?
13 A And they all have their own door light.
14 That's their own private light to turn on at their
15 front door.
16 Q For the -- like, the residents?
17 A Right.
18 Q Yeah. Now, looking at this picture, does
19 it look like the light that would have been up here,
20 north, is out?
21 A I couldn't say because I'm not seeing that
22 floor that well. This picture is darker than I would
23 imagine it to be though.
24 Q Yeah. Are you familiar with any of the
25 building codes regarding rise and run of stairways?

1 A No. Whatever the code was when they built
2 that building, I would assume that's how it was
3 built.
4 Q Do you know if the rise and run is
5 consistent on this particular stairway?
6 A Yes.
7 Q Is that because you've actually measured
8 it or --
9 A No. We're always repairing stairs.
10 Q Yeah? Why are the stairs always be being
11 repaired?
12 A Because they're about 30 years old.
13 Q And they're made out of wood?
14 A Pressure-treated wood.
15 Q So the wood sometimes becomes misshapen or
16 disfigured?
17 A Yeah. People moving damage them from time
18 to time.
19 Q Now, every time a light bulb is changed,
20 do you guys make an entry on the maintenance log?
21 A No.
22 Q Is that one of those things that just if
23 you come across it, you change it out and it's --
24 A It's changed.
25 Q So even if we have the Berkshire records,

1 we can't necessarily tell if light bulbs were changed
2 out just from looking at that?
3 A That's fair to say.
4 Q All right. And earlier you said a
5 resident or an employee could submit a work order.
6 Is it fair to say a visitor can't submit a work
7 order?
8 A No. She can tell the person they're
9 visiting, or he.
10 Q But a visitor doesn't have any authority
11 to submit a work order to anybody, right?
12 A No. That doesn't stop them from -- they
13 could stop at the office and just say, I was at your
14 building and there's a problem there.
15 Q What are the office hours?
16 A They're seasonal, so I wouldn't be able to
17 tell you exactly; but in general, it was open at 9
18 and closed at 6.
19 Q 9 a.m., 6 p.?
20 A 6 p.m., yes. That's just office people.
21 Q Yeah.
22 (Moran Exhibit Number 2 was marked for
23 identification.)
24 BY MR. WIGGER:
25 Q Mr. Moran, I show you what's been marked

1 as Exhibit 1 to your deposition.
2 MR. BROGDON: What's the Bates numbers on
3 that?
4 MR. WIGGER: It's 05, I think, and 06.
5 BY MR. WIGGER:
6 Q Does that appear to be out of y'all's
7 maintenance manual back during the 2011 time frame?
8 A It looks like Berkshire's format.
9 Q Yeah.
10 MR. WIGGER: And we'll get this marked.
11 (Moran Exhibit Number 3 was marked for
12 identification.)
13 BY MR. WIGGER:
14 Q Show you what's been marked as Exhibit 3
15 to your deposition. Does that appear to be a copy of
16 your job description for 2011?
17 A I don't know if it's exactly what I looked
18 at, but it looks like the same format.
19 Q We had gotten some discovery from
20 Mr. Brogdon as part of this case and that's what he
21 sent us, so I just want to make sure that there's not
22 some other document you say would be more
23 accurately --
24 A No.
25 Q -- describing your job description.

1 You're welcome to read it over and make
2 sure.
3 A You can go on.
4 Q Okay. As a maintenance supervisor, would
5 you agree that part of your job deals with safety?
6 A Correct.
7 Q Would you agree with the safety principle
8 that any risk of serious injury is unreasonable if
9 reasonable accident prevention measures can prevent
10 it?
11 MR. BROGDON: Object to the form.
12 THE WITNESS: Can you rephrase that a
13 little bit?
14 BY MR. WIGGER:
15 Q Sure. Would you agree with the safety
16 principle that any risk of serious injury is
17 unreasonable if you can use reasonable acts and
18 measures to prevent it?
19 MR. BROGDON: Objection.
20 THE WITNESS: Yeah.
21 BY MR. WIGGER:
22 Q Okey-doke. I think those are all the
23 questions I have. Mr. Brogdon may have some more.
24 MR. BROGDON: No, that's it. You're done.
25

1 - - -

2 (Witness excused.)

3 - - -

4 (Deposition was concluded at 11:17 a.m.)

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1 CERTIFICATE OF REPORTER

2 I, Deirdre J. Weyer, Registered
Professional Reporter and Notary Public for the State
3 of South Carolina at Large, do hereby certify:
That the foregoing deposition was taken
4 before me on the date and at the time and location
stated on page 1 of this transcript; that the
5 deponent was duly sworn to testify to the truth, the
whole truth and nothing but the truth; that the
6 testimony of the deponent and all objections made at
the time of the examination were recorded
7 stenographically by me and were thereafter
transcribed; that the foregoing deposition as typed
8 is a true, accurate and complete record of the
testimony of the deponent and of all objections made
9 at the time of the examination to the best of my
ability.
10 I further certify that I am neither
related to nor counsel for any party to the cause
11 pending or interested in the events thereof. Witness
my hand, I have hereunto affixed my official seal
12 this 6th day of April 2015, at Moncks Corner,
Berkeley County, South Carolina.
13
14
15 Deirdre J. Weyer
Registered Professional Reporter
16 Notary Public
State of South Carolina at Large
17 My Commission expires:
May 15, 2023
18
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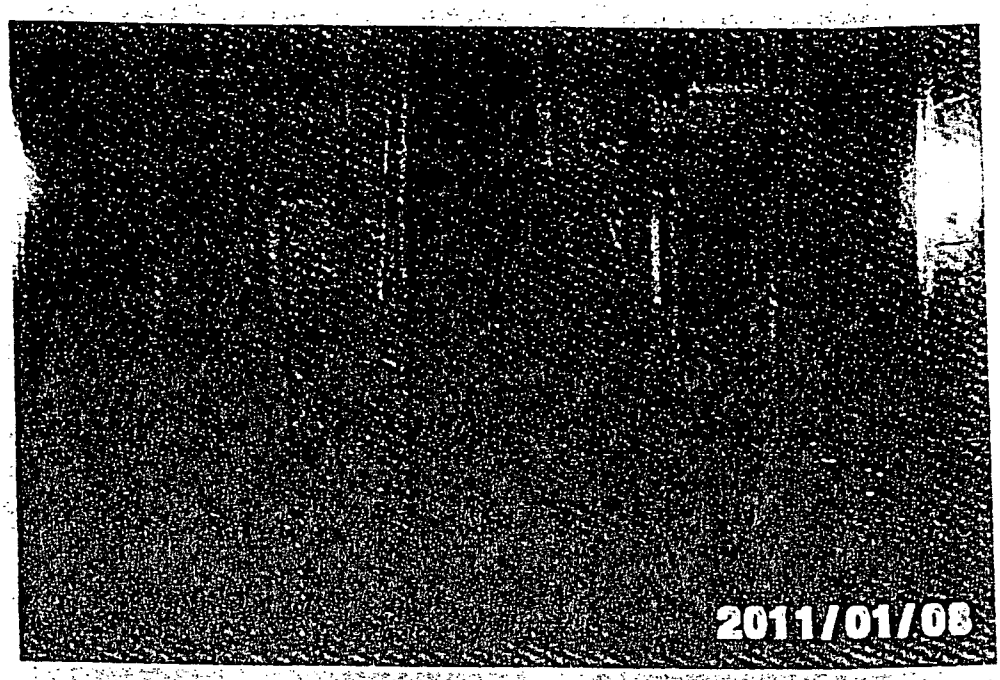

EXHIBIT

Procedure for Completing the Apartment Interior Inspection:

- An Apartment Interior Inspection form should be completed for each apartment noting the general condition for each area inspected.
- If a safety concern is found when inspecting an apartment, the issue should be written in the "Specific Notes" section of the Apartment Interior Inspection form.
- The Property Manager or Assistant Property Manager will complete the Resident Inspection Notification Letter with areas that require a resident's attention and leave the letter in the resident's apartment.
- The box "Left Letter" in the action column of the Apartment Interior Inspection form should be checked beside areas that noted a safety concern that were documented on the Resident Inspection Notification Letter.
- The Apartment Interior Inspection form should be filed in the resident's file.
- Property Manager's must notify the District Manager once inspections have been completed. If inspections occur on a monthly basis, the District Manager should be notified monthly. If the inspections occur twice a year, the District Manager should be notified after all units have been inspected each time.
- District Manager's should keep of log of when inspections have been completed for their properties.

Safety and Preventative Maintenance Inspections

The longer a hazardous situation is left uncorrected the greater the percentage of liability that resides with management should an injury occur. Why? In the eyes of the law, 1) if you are aware and do nothing, you are negligent and 2) if you are not aware of a long-time condition you are guilty of failure to maintain the property in a safe condition.

Conducting safety inspections will aid in the reduction of accidents and unsafe work practices, and safeguard against or eliminate them before they can cause personal injury. The inspection will identify existing and potential hazards that require attention. When identifying the hazards, remember to dig beneath the surface to determine the cause of the unsafe condition and to implement a permanent solution rather than a "quick fix."

A preventive maintenance program is not "extra" work; it is part of on-going maintenance of the property. An effective program can save considerable time and money by prolonging the useful life of equipment and fixtures.

Preventive maintenance is a necessary function to prevent damage or deterioration of equipment or prolong the economic life of equipment or buildings or to increase the efficiency of equipment.

- In most cases, the expense associated with preventive maintenance is largely labor, whereas, if the preventive maintenance is not performed, pre-mature replacement will be a substantially greater expense. Preventive maintenance actually saves you money.
- Example, three drops of oil in a re-circulating pump is not very expensive compared to the replacement cost of at least $150.00.
- Preventive maintenance allows you to schedule your maintenance activity, rather than reacting to larger problems which require establishing priorities. In essence, it allows you to be proactive on maintenance rather than reactive.
- Preventive maintenance prolongs the life and efficiency of your equipment.
- Residents are less inconvenienced. For example, when maintenance goes to each apartment to change a filter, they could also pre-check the air conditioner, which could minimize the chance of future problems. While they are in the apartment, they might find out if there are other items that need repair. The resident is assured that staff really cares about their concerns and scheduling of work can be more efficient.

It is the policy of Berkshire Property Advisors to conduct a comprehensive inspection of every apartment at every community at least twice a year.

EXHIBIT 2

PENGAD 800-631-6989

A Property Safety and Preventive Maintenance form will be completed twice a year. The Property Manager and the Maintenance Supervisor will complete the form.

As part of the annual budget process, the Property Manager and District Manager will establish the inspection dates for the upcoming year.

Procedure for Completing the Property Safety and Preventive Maintenance Inspection:

- When completing the Property Safety and Preventative Inspection form, notes should be written for items that will require a service request to be issued.
- Once the inspection is complete, service request must be created in One Site Facilities and completed by the maintenance teams.
- The Property Safety and Preventative Inspection form will need to be typed or scanned and emailed to the District Manager within 30 days of completion.
- The District Managers will need to keep a log of when inspections have been completed for their properties.
- A designated person in each region will be responsible for uploading the Property Safety and Preventative Maintenance Inspection forms to the DMS.

FORMS

- Apartment Interior Inspection
- Safety and Preventive Maintenance Inspection
- Resident Inspection Notification Letter

BERKSHIRE PROPERTY ADVISORS, LLC

JOB DESCRIPTION

JOB TITLE: Maintenance Supervisor
DEPARTMENT: Property
LOCATION: Specified property
REPORTS TO: Property Manager
FLSA STATUS: non-exempt
DATE MODIFIED: January 18, 2011

BASIC PURPOSE:
Under the general direction of the Property Manager, the Maintenance Supervisor will own and drive preservation of the property's physical attributes for Berkshire Property Advisors.

ESSENTIAL FUNCTIONS: (These are the main duties/tasks of the position and the important in order to be successful)

- Be responsible for performance of the service team.
- Communicate openly and clearly.
- Positive role model.
- Review and monitor all time by means of time cards, supplemental logs, punch out sheets, service requests, and over-time logs.
- Provide complete support to the property manager and Berkshire Property Advisors in upholding community and corporation standards, policies, and procedures.
- Keep up-to-date and accurate logs and maintain vacancy board and scheduling of preventive maintenance, appliances, smoke detectors, filter changes, HVAC history logs, supplemental sheets, etc.
- Ensure service team members attend required training and assist in on-going training on site.
- Self seek and participate in on-going training/education.
- Schedule, conduct, and document regular meetings including safety meetings with service team members as a group to inform them of policy and procedure changes/ updates that affect them. Ensure that safety measures are enforced.
- Evaluate service team members on a regular basis for positive and negative behavior. Perform team member discussions, warning notices, and performance appraisals with counseling and coaching goals, using the appropriate forms on documentation.
- Brief new service team members on procedures, goals, and the community.
- Instruct team members on maintenance etiquette.
- Check all service team members' tools regularly for ownership and safe working condition, ensure uniform appearance is in accordance with BPA dress code policy, and provide documentation to the property manager.
- Schedule and manage appropriate contracts, i.e.: painting, cleaning company, trash removal, etc.
- Schedule daily activities efficiently, monitoring for quality or quantity.
- Assist in the preparation of long range planning, and make budget recommendations.
- Ensure punch out work is completed in accordance with BPA policies, standards, and punch out sheets.

EXHIBIT 3

DEF 000026

- Maintain shop, company equipment, ample supplies, inventory control, and ensure key security.
- Read and interpret prints and specifications.
- Watch for unauthorized vehicles or suspicious persons on the property and report to property authority.
- Maintain fire extinguishers, sprinklers, Range Queens, fire stops and standpipe systems.
- Perform hands-on maintenance as needed, and to further team abilities and knowledge.
- Perform daily morning checks of the overall community appearance, to include a neat and clean appearance, cleaned and painted common areas, and clean and clear windows and balconies.
- Perform service technician responsibilities/tasks to include on-call coverage as necessary.
- Prepared to respond and act in an emergency situation, following corporate/community emergency procedures.
- Perform various other duties as assigned by the property manager.
- On call hours are required.

The Company may revise this job description from time to time as business needs require. It is not intended to be an exhaustive listing of all the functions of the job, nor is to limit the Company right to assign other functions to an employee in this position. This job description does not constitute a written or implied contract of employment.

JOB QUALIFICATION REQUIREMENTS:

Knowledge/Experience:

- Ability to effectively supervise and motivate a team of (5) or more members.
- Good communication skills; interpersonal, written and required documentation.
- A thorough knowledge of each job description, as it pertains to self and service team members.
- A thorough knowledge of interviewing techniques.
- Ability to understand, demonstrate, and ensure team compliance of all necessary national and local building codes, safety codes, labor laws, to include but not limited to safe work practices, Fair Housing, Sexual Harassment prevention, ADA, etc.
- Thorough knowledge, understanding, and compliance with Berkshire Property Advisors standards, policies, procedures, and guidelines to include, but not limited to safety, Fair Housing, OSHA, personnel appearance, maintenance etiquette, and tool requirements.
- Ability to maintain high productivity for effective cost control.
- Knowledge of contract requirements.
- Ability to read and interpret prints and specifications.
- Knowledgeable in boilers and chillers and/or individual HVAC System, as applicable.
- Ability to review service related reports generated through OneSite.
- Thorough knowledge, and understanding of preventive maintenance.

Technical/ Educational Requirements:

- Able to use computers and Berkshire related applications to complete required work according to Berkshire policies and procedures, including Microsoft Office products, OPS, OneSite, Performance Manager and others as required.

Physical Requirements: (amount of standing, walking, sitting, typing, lifting etc)

- Constant need to be on feet.

Revised 1/21/2011

DEF 000027

- Have constant need to perform the following physical activities:

Bend/Stoop/Squat/Kneel	Perform routine maintenance/repairs, pick up tools and needed equipment.
Climb Stairs	Service requests, make-ready needs for 2nd and 3rd floor apartments.
Push or Pull	Move equipment, appliances, open and close doors, etc.
Reach Above Shoulder	Perform routine maintenance/repairs, stock and remove equipment, parts, etc.
Climb Ladders	Perform routine maintenance/repairs.
Grasp/Grip/Turning	Handle tools and equipment, perform routine maintenance/repairs.
Finger Dexterity	Handle tools and equipment, peform routine maintenance/repairs.

- Constant need to perform the following physical activities:

Writing	Inventory maintenance, requisition requests, required maintenance reports.

- Lifting/carrying (supplies, replacement parts, ladders, etc.):

Over 150 lbs.	Rare need
75 - 150 lbs.	Occasional need
25 - 75 lbs.	Frequent need
1 - 25 lbs.	Constant need

NOTE: Lifting and carrying of weights exceeding 50 lbs. is often accomplished with assistance from one of more persons. Examples of heaviest items lifted include washer/dryers, refrigerators, A/C units, abandoned sofas, etc.

Vision Requirements: (Visual needs for the position – color, small details, inspections etc.)

- Constant need to document maintenance and complete forms, review manuals and operating instructions, read cautionary labels, respond to written instruction from staff and residents. Constant need to see small detail when peforming maintenance duties.
- Frequent need to see things clearly beyond arm's reach (oversee assistants, observe problems, throughout the property).

Hearing Requirements: (Hearing needs for the position –telephone, meetings, etc)

- Constant need to communicate with assistants, resident staff, vendors, and residents. Must use listening skills to diagnose needed repairs, etc.

Speaking Requirements: (Clarity, customer interaction, presentations, etc)

- Constant need to verbally communicate with assistants, resident staff, vendors, and residents.

Driving Requirements: (Driving needs for the position – from property to property, travel, etc)

- Frequent need to utilize personal transportation to pick up replacement parts and supplies from vendors. Rotation "on-call" status may occasionally require expedient travel to assigned property at moment's notice. Pick up and deliveries to the corporate office.
- Must have valid driver's license and automobile insurance coverage.

Reasoning Development: (Low, Medium, High – for ability to apply logical thinking to defined problem solving)

- HIGH. Must be able to apply principles of logical thinking to define problems, collect pertinent data, establish facts, draw valid conclusions, and initiate appropriate course of action. Must effectively convey ideas, images, and goals to a diverse group of personalities.

WORKING ENVIRONMENT: (Indoors, Outdoors, special things to know about job)

- Indoors. Frequently outdoors, all conditions, often for extended periods.
- Occasional exposure to paint fumes, solvents, adhesives, etc. Example: Apartments during/after make-ready.
- Frequent need to work in awkward and confining positions.

I have read this job description, understand it, and am able to perform the essential functions and meet the job requirements of the position. In addition, I have had the opportunity to discuss the job description with my supervisor.

Employee Name: Date:
(Print Name)

Employee Signature: Date:

Revised 1/21/2011

DEF 000029

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(843) 203-1500

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APR 14 2016
SC Court of Appeals

April 13, 2016

VIA OVERNIGHT FEDERAL EXPRESS:
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
Attn: Jenny Abbott Kitchings, Clerk of Court

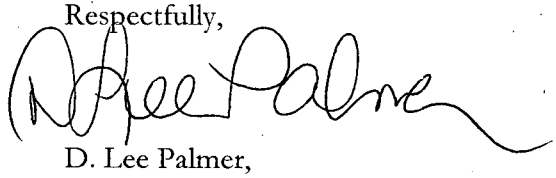
RE: *Donna Douglass vs. Berkshires On St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC and The Berkshire Group*
Case No.: 2013-CP-10-7133

Dear Ms. Kitchings:

As requested, enclosed please find the unbound copy of the Amended Record on Appeal in the above referenced matter.

Thank you for your continued assistance and attention to this matter.

Respectfully,



D. Lee Palmer,
Paralegal to Jarrel L. Wigger

/dlp
cc:
Jessica A. Waller
1201 Main Street, Suite 1200
Columbia, SC 29201
Attorney for Respondent

106 6 15:00 E 2360 04.14

0000 9149 2360

14 APR AA
STANDARD OVERNIGHT

28 USCA

29201
SC-US
CAE

FID 676139 13APR16 CHSA 539C1/1042/481B

FedEx Express Package US Airbill

FedEx Tracking Number 8060 9149 2360

Form ID No. 0215

00074
00100

1 From

Date 4/13/2016

Sender's Name Jarrel L. Wigger Phone

Company WIGGER LAW FIRM INC

Address 8086 RIVERS AVE STE A Dept/Floor/Suite/Room

City NORTH CHARLESTON State SC ZIP 29406-9821

2 Your Internal Billing Reference D. Douglass

3 To

Recipient's Name Jenny Litchings Phone

Company SC Court of Appeals

Address 1220 Senate Street Dept/Floor/Suite/Room

We cannot deliver to P.O. boxes or P.O. ZIP codes.

Address

Use this line for the HOLD location address or for continuation of your shipping address.

City Columbia State SC ZIP 29201

HOLD Weekday FedEx location address REQUIRED. NOT available for FedEx First Overnight.

HOLD Saturday FedEx location address REQUIRED. Available ONLY for FedEx Priority Overnight and FedEx 2Day to select locations.

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8060 9149 2360

4 Express Package Service * To most locations.

NOTE: Service order has changed. Please select carefully.

For packages over 150 lbs., see FedEx Express Freight US Airbill.

Next Business Day

- [ ] FedEx First Overnight — Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- [ ] FedEx Priority Overnight — Next business morning.* Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- [x] FedEx Standard Overnight — Next business afternoon.* Saturday Delivery NOT available.

2 or 3 Business Days

- [ ] FedEx 2Day A.M. — Second business morning.* Saturday Delivery NOT available.
- [ ] FedEx 2Day — Second business afternoon.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- [ ] FedEx Express Saver — Third business day.* Saturday Delivery NOT available.

5 Packaging * Declared value limit $500.

- [x] FedEx Envelope*
- [ ] FedEx Pak*
- [ ] FedEx Box
- [ ] FedEx Tube
- [ ] Other

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SC Court of Appeals

6 Special Handling and Delivery Signature Options

- [ ] SATURDAY Delivery — NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver
- [x] No Signature Required — Package may be left without obtaining a signature for delivery.
- [ ] Direct Signature — Someone at recipient's address may sign for delivery. Fee applies.
- [ ] Indirect Signature — If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

Does this shipment contain dangerous goods? One box must be checked.

- [x] No
- [ ] Yes — As per attached Shipper's Declaration.
- [ ] Yes — Shipper's Declaration not required.
- [ ] Dry Ice — Dry ice, 9, UN 1845 kg
- [ ] Cargo Aircraft Only

Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.

7 Payment Bill to: Enter FedEx Acct. No. or Credit Card No. below. Obtain recip. Acct. No. [ ]

- [ ] Sender — Acct. No. in Section 1 will be billed.
- [ ] Recipient
- [ ] Third Party
- [ ] Credit Card
- [ ] Cash/Check

Total Packages Total Weight lbs. Credit Card Auth.

†Our liability is limited to US$100 unless you declare a higher value. See the current FedEx Service Guide for details.

611

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