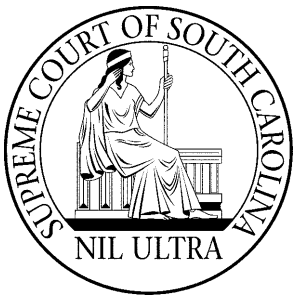

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1

January 4, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

James A. Sellers, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Horry County
Sidney T. Floyd, Trial Judge
Paula H. Thomas, Post-Conviction Relief Judge

Opinion No. 25917
Submitted November 4, 2004 – Filed January 4, 2005

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley Elliott, and Assistant Attorney General Christopher L. Newton, all of Columbia, for Petitioner.

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The post-conviction relief (PCR) judge granted James A. Sellers (Respondent) a new trial after finding that counsel was ineffective for (1) failing to move for a directed verdict on the charge of accessory before the fact of murder, (2) failing to request a jury charge for a lesser-included offense on the trafficking in crystal methamphetamines and accessory before the fact of murder charges, and (3) failing to move for a ruling upon the competency of a witness. We reverse the PCR judge's decision.

FACTUAL / PROCEDURAL BACKGROUND

Respondent was arrested for accessory before the fact of murder and trafficking in crystal methamphetamine. Respondent was indicted and convicted on both charges.

At trial, the State alleged that Respondent and William Perry (Perry) arranged a drug deal, in which they planned to set up the supplier so that they could keep the drugs for themselves. During the drug deal, which Respondent did not attend, Perry shot the supplier because he believed the supplier was about to pull a gun on him. Perry pled guilty to voluntary manslaughter. Respondent's counsel moved for a directed verdict, arguing that Respondent could not have been an accessory before the fact to murder because he was unaware of Perry's intention to shoot the supplier. The motion was denied.

The State alleged that Respondent gave Perry the gun in case he needed it during the deal. But Respondent's mother testified that Perry took the gun without Respondent knowing what Perry was going to do with it. Perry testified that Respondent did not tell him to shoot the supplier, but that Respondent gave him the gun prior to the meeting with the supplier. Respondent did not testify at trial.

None of the drugs in question were ever recovered. During trial, Bruce Lewey (Lewey) was the sole witness to testify as to the amount of drugs in question. Lewey was another partner in the scheme with Respondent and Perry. Lewey testified that he weighed the drugs on a digital scale, and the

drugs weighed six ounces. Lewey testified that he has been diagnosed with and was prescribed a psychotic medication for schizophrenia. He further testified that he stopped taking the medication and had been a methamphetamine addict for over fifteen years.

The jury found Respondent guilty of trafficking crystal methamphetamine and accessory before the fact of murder. Respondent was sentenced to concurrent terms of twenty-five years imprisonment and ordered to pay a fine of $50,000. This Court affirmed his convictions and sentences on direct appeal. *State v. Sellers*, Op. No. 99-MO-79 (S.C. Sup. Ct. filed November 15, 1999).

Respondent filed an application for PCR and was granted relief based on three of the eleven grounds asserted. The PCR judge granted a new trial. This Court granted certiorari to review the PCR judge's decision.

The State raises the following issues for review:

I. Did the PCR court err in ruling that counsel was ineffective for failing to request a directed verdict for the accessory before the fact of murder charge on the basis that the State failed to prove the principal's guilt?

II. Did the PCR court err in ruling that counsel was ineffective for failing to request jury charges on lesser-included offenses on the murder and trafficking offenses?

III. Did the PCR court err in ruling that counsel was ineffective for failing to move for the trial court to rule upon the competency of a witness?

LAW/ANALYSIS

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514,

517 (2000). On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 688 (1984); *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694. Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding. *Scott v. State*, 334 S.C. 248, 513 S.E.2d 100 (1999).

I. DIRECTED VERDICT

The State argues the PCR court erred in ruling that Respondent's trial counsel was ineffective for failing to request a directed verdict on the basis that the State failed to prove that Perry, the principal, was guilty of murder. We agree.

Murder is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10 (2003). In a murder prosecution, malice may be implied if the defendant uses a deadly weapon. *State v. Kelsey*, 331 S.C. 50, 63, 502 S.E.2d 63, 69 (1998).

To support a conviction of accessory before the fact of a felony, the prosecution must show that the accused advised, agreed, urged, or in some way aided some other person to commit the offense; the accused was not present when the offense was committed; and *some principal committed the crime*. *State v. Smith*, 316 S.C. 53, 56, 447 S.E.2d 175, 176 (1993) (emphasis added). The State is not barred from prosecuting and convicting an accessory before the fact even though the principal has been acquitted. *State v. Massey*, 267 S.C. 432, 446-447, 229 S.E.2d 332, 339 (1976). At the accessory's trial,

however, the State must prove that the principal is guilty or the accessory may not be convicted. *Id*.

When ruling on a criminal defendant's motion for directed verdict, a trial court is concerned with the existence of evidence, not its weight. *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). If there is any direct or substantial evidence tending to prove the guilt of the accused, or from which guilt may be fairly and logically deduced, the case should be submitted to the jury. *State v. Johnson*, 334 S.C. 78, 84, 512 S.E.2d 795, 798 (1999).

A motion for directed verdict, when viewed in the light most favorable to the State, would not have been granted because evidence was presented that a principal shot and killed a victim with a gun provided by Respondent. In the present case, the principal used a deadly weapon to murder the victim. As a result, malice may be inferred. The State provided evidence that the weapon was provided by Respondent. We find enough evidence to warrant the submission of the case to the jury.

We hold the PCR court erred in granting a new trial on this issue. A motion for directed verdict would not have changed the outcome of the trial. Had counsel made a motion for a directed verdict, the trial court would have been wrong to grant it.

II. JURY CHARGE

The State argues the PCR court erred in ruling that Respondent's trial counsel was ineffective for failing to request jury charges for lesser-included offenses on the murder and trafficking offenses.[1] We agree.

A judge is only required to charge a jury on a lesser-included offense if evidence exists that suggests that the lesser, rather than the greater, crime was committed. *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996). There must be evidence that the defendant committed the lesser-included offense to entitle him to a jury charge on the offense. *State v.*

[1] Respondent does not identify the lesser-included offenses.

Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986). The lesser-included offense of accessory before the fact of manslaughter does not exist. *State v. Jennings*, 160 S.C. 348, 349, 158 S.E.2d 687, 688 (1931) (holding there can be no charge for accessory before the fact to manslaughter).

A defendant is not entitled to a lesser-included charge of possession with intent to distribute when there is evidence that the amount involved exceeded minimum for trafficking. *State v. Grandy*, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991).

In the present case, there is no evidence in the record that would entitle Respondent to a charge on lesser-included offenses. First, accessory before the fact of manslaughter does not exist. Second, as to the trafficking charge, Respondent did not present evidence that he possessed less than the minimum required for trafficking. In fact, the only evidence before the jury was that the amount of methamphetamines in question would constitute trafficking. In addition, the State presented the only evidence as to the amount of drugs at issue, which included testimony that Respondent possessed enough methamphetamines to warrant a trafficking charge. As a result, Respondent was not entitled to a lesser-included charge, such as possession with intent to distribute, for the trafficking charge.

We hold the PCR court erred in granting a new trial for counsel's failure to request jury charges on lesser-included offenses. Respondent was not entitled to jury charges on lesser-included offenses.

III. COMPETENCY OF WITNESS

The State argues the PCR court erred in ruling that Respondent's trial counsel was ineffective for failing to ask the trial court to rule upon the competency of a witness. We agree.

All witnesses are presumed competent to testify. Rule 601(a), SCRE. A witness will be disqualified if he cannot express himself "concerning the matter as to be understood by the judge and jury . . . or is incapable of understanding the duty of a witness to tell the truth." Rule 601(b), SCRE. Mere speculation on the applicant's part as to impeachment evidence is

insufficient to show prejudice. *Jackson v. State*, 329 S.C. 345, 350-351, 495 S.E.2d 768, 770-771 (1998).

A witness's mental illness is not enough to rebut the presumption set forth in Rule 601, SCRE. A witness's mental capacity could, however, affect the credibility of that witness's testimony. At trial, counsel attacked the credibility of the witness on several grounds, including mental illness. Trial counsel cross-examined witness Lewey at length about his mental illness. The jury was fully aware of the fact that Lewey was schizophrenic, and therefore the jury could have decided to believe all or none of his testimony.

We hold the PCR court erred in ruling that Respondent's trial counsel was ineffective for failing to move for the trial court to rule upon the competency of a witness.

CONCLUSION

Because there is no probative evidence supporting the PCR judge's decision, we **REVERSE** the PCR court's decision to grant a new trial.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ernest Hagood, Petitioner,

v.

Brenda S. Sommerville, Respondent.

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

Opinion No. 25918
Heard October 20, 2004 - Filed January 4, 2005

REVERSED

James H. Moss and H. Fred Kuhn, Jr., of Moss, Kuhn & Fleming, P.A., of Beaufort, for Petitioner.

A. Parker Barnes, Jr., of Beaufort, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' opinion in Hagood v. Sommerville, S.C. Ct. App. Order dated May 22, 2003 (unpublished order). We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Ernest Hagood (Petitioner) sued Brenda S. Sommerville (Respondent) after Petitioner allegedly was injured in 1997 when he was struck by Respondent's vehicle while riding a bicycle. Petitioner was represented by James H. Moss (Petitioner's Attorney). Respondent moved to disqualify Barton J. Adams (Adams) from testifying as an expert witness for Petitioner because Adams is employed full-time by Petitioner's Attorney as a professional investigator and accident reconstruction expert.[1]

The trial court gave Petitioner two options: (1) do not use Adams as a witness, but find another expert witness and proceed to trial with Petitioner's Attorney; or (2) Petitioner's Attorney may withdraw due to the disqualification, Petitioner may retain new counsel, and use Adams as an expert witness at trial. Petitioner's Attorney withdrew.

Following the Court of Appeals' dismissal of Petitioner's case, we granted the petition for a writ of certiorari to consider an issue of first impression in South Carolina: Is an order which grants a motion to disqualify a party's attorney immediately appealable?

STANDARD OF REVIEW

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2003), and S.C. Code Ann § 14-8-200 (Supp. 2003)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same).

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[1] We describe Adams as an "expert" witness because that is the description used by the parties. We express no opinion on his potential qualification as an expert at trial.

LAW AND ANALYSIS

The right of appeal arises from and is controlled by statutory law. North Carolina Federal Sav. and Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 347 S.E.2d 97 (1986). An appeal ordinarily may be pursued only after a party has obtained a final judgment. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; Rule 201(a), SCACR.

The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330 (1976 & Supp. 2003). An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable. Baldwin Constr. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004); Woodard v. Westvaco Corp., 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), overruled on other grounds, Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002); Mid-State Distributors, 310 S.C. at 333 n.3, 426 S.E.2d at 780 n.3.

Petitioner argues the order in his case is immediately appealable under S.C. Code Ann. § 14-3-330(2) (1976) because it affects a substantial right, namely, the right to proceed with a lawyer of his choosing. Petitioner relies on foreign authority to argue the right would likely be lost if not immediately appealed. If a new trial were ordered after an appeal in the distant future, the preferred attorney may not be available or a litigant may not be able to afford the attorney for a second trial. Further, a litigant would find it difficult or impossible to show prejudice resulting from the disqualification order in a later appeal.

Respondent argues the order does not affect a substantial right as the term is defined in Section 14-3-330(2). If the trial court erred in disqualifying Petitioner's attorney, Petitioner may protect his rights by challenging the errors in an appeal following a final judgment.

An order affects a substantial right and is immediately appealable when it "(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]" Section 14-3-330(2). An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed. Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002).

The provisions of Section 14-3-330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial. See e.g. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) (order denying motion for change of venue is not immediately appealable because any error in the order can be corrected by new trial); Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77-78, 533 S.E.2d 575, 577 (2000) (order denying bifurcation of trial on issues of liability and damages in personal injury case is not immediately appealable as affecting a substantial right); Townsend v. Townsend, 323 S.C. 309, 312, 474 S.E.2d 424, 427 (1996) (denial of motions for disqualification of a judge and for a continuance are interlocutory orders not affecting the merits, and thus are reviewable only on appeal from a final order); Collins v. Sigmon, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989) (order allowing amendment of a pleading generally is not immediately appealable); Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) (order directing a party or a non-party to submit to discovery is not immediately appealable; instead, the party or non-party must be held in contempt before an appeal may be taken challenging the validity of the discovery order); Tatnall, 350 S.C. at 138, 564 S.E.2d at 379 (order denying motion to amend pleadings to assert third party claims was not immediately appealable because the order did not affect a substantial right).

In a well-established exception to the general rule, we repeatedly have held that the denial of a party's right to a particular mode of trial is

immediately appealable as a substantial right under Section 14-3-330(2). See Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) ("Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.") (listing cases); Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985) (order referring case to master in equity affects the mode of trial, a substantial right, and party waived his objection to the reference and his right to jury trial by failing to immediately appeal the order); Bateman v. Rouse, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (purpose of immediate appeal on right to particular mode of trial is to preserve party's constitutional right to trial by jury which would otherwise be lost.)

There does not appear to be a clear majority view on the appealability of an order granting a motion to disqualify a party's attorney in a civil case. See David B. Harrison, Appealability of State Court's Order Granting or Denying Motion to Disqualify Attorney, 5 A.L.R. 4th 1251 (1981) (discussing cases on both sides of issue).

The reasons most often cited by state courts which have concluded such an order may be immediately appealed include (1) the importance of the party's right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney. See Goldston v. American Motors Corp., 392 S.E.2d 735, 737-38 (N.C. 1990); Russell v. Mercy Hosp., 472 N.E.2d 695, 697-98 (Ohio 1984); Richardson v. Griffiths, 560 N.W.2d 430, 434-35 (Neb. 1997); Casco Northern Bank v. JBI Associates, Ltd., 667 A.2d 856, 859 n.3 (Me. 1995); Parker v. Volkswagenwerk, 781 P.2d 1099, 1104-05 (Kan. 1989); In re Estate of French, 651 N.E.2d 1125, 1130-31 (Heiple and Freeman, JJ., dissenting).

We find persuasive the arguments of Petitioner and the reasoning expressed by other jurisdictions which allow immediate appeal of such orders. We conclude an order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2). Such an order implicitly falls within the statutory definition of a substantial right under Section 14-3-330(2)(a). The right to be represented by an attorney of one's choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by one's preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.

Deprivation of the right to one's preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification.

We further conclude, as we have with regard to the right to a particular mode of trial, an order granting a motion to disqualify a party's preferred attorney *must* be immediately appealed or any later objection in a subsequent appeal will be waived. Cf. Flagstar Corp., 341 S.C. at 72, 533 S.E.2d at 333 (party is required to immediately appeal if denied a mode of trial to which he is entitled as a matter of right, and failure to do so forever bars appellate review of the issue).

The circuit court concluded it would be improper under the Rules of Professional Conduct for an investigator or accident reconstruction expert who works as a full-time employee for Petitioner's Attorney to testify on Petitioner's behalf at trial.

The circuit court relied on Rule 3.7 of Rule 407, SCACR, which generally prohibits a lawyer from acting as an advocate at a trial in which the lawyer will be a necessary witness.[2] Respondent contends Rule 3.7 prohibits not only the attorney, but also the attorney's employee, from testifying at trial. Respondent has not cited and we have not found any authority supporting this proposition.

Nothing in Rule 3.7 or the accompanying comments indicates it is intended to prohibit an employee of an attorney from testifying in a case handled by the attorney in which there exists no conflict of interest between the attorney and client, or between the attorney's employee and client. Jurors are not likely to be confused by a lawyer's employee testifying as a witness for a client while the lawyer serves as the client's advocate. Jurors should readily perceive the distinction, particularly since the opposing party may emphasize the fact of the witness's employment.

Moreover, Rule 3.7(b) addresses situations in which a lawyer may testify as a witness in a case handled by a lawyer from the same firm, provided there are no conflicts of interest with clients or former clients. If this is permissible, it naturally follows that a non-lawyer employee of the firm may testify, subject, of course, to the rules of cross-examination. See e.g. Rules 607-609, SCRE (addressing admissibility of impeachment evidence relating to witness's bias or credibility).

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[2] Rule 3.7 states:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9 [which address conflicts of interest with clients or former clients].

CONCLUSION

An order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2). Further, such an order must be immediately appealed or any later objection in a subsequent appeal will be waived. We find it unnecessary to address Petitioner's remaining issues and arguments. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

REVERSED.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. I agree with the majority that this attorney disqualification was unwarranted, but I would not reach that issue because, in my opinion, a disqualification order is not immediately appealable.

As the majority notes, the right of appeal is controlled by statute. S.C. Code Ann. § 14-3-330 (1976 and Supp. 2003); N.C. Fed. Sav. and Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986). Attorney disqualification does not fall within the ambit of section 14-3-330(2)(a). Representation by a particular attorney does not in effect determine or discontinue the action, or prevent a judgment from which an appeal might be taken. Compare Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93-95, 529 S.E.2d 11, 13-14 (2000) (holding that an order denying a motion to change venue is not immediately appealable under section 14-3-330(2)); Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77-79, 533 S.E.2d 575, 577-78 (2000) (same with respect to an order denying a motion to bifurcate liability and damages); Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995) (same with respect to an order denying a motion to approve a settlement agreement).

I understand that proving on appeal that an attorney disqualification has prejudiced a party is difficult. Because appealability is governed by statute, however, this difficulty is a concern of the legislature, not the judiciary. I would affirm the decision of the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dorothy L. Sides and Arthur W. Sides, Appellants,

v.

Greenville Hospital System, Rodgers Builders Inc., and F.T. Williams Co., Inc., Defendants,

of whom Rodgers Builders Inc. and F.T. Williams Co., Inc. are Respondents.

Appeal From Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 3913
Heard November 16, 2004 – Filed December 20, 2004

AFFIRMED

W. Grady Jordan, of Easley, for Appellants.

John P. Riordan and N. Heyward Clarkson, III, both of Greenville, for Respondents.

GOOLSBY, J.: Dorothy Sides and her husband, Arthur, brought this action after Dorothy Sides fell at the Greenville Memorial Hospital while visiting her husband. The accident occurred near a construction area in the parking lot. They sued the Greenville Hospital System, as well as the general contractor, Rodgers Builders, Inc., and a subcontractor, F.T. Williams Co., Inc. The trial court granted summary judgment to both the contractor and the subcontractor, and Mr. and Mrs. Sides appeal. We affirm.

FACTS

In late 2000, Greenville Memorial Hospital was undergoing Phase V of a construction project, which included the addition of around 184,000 square feet of construction. Rodgers Builders was the general contractor for Phase V. F.T. Williams was a subcontractor for the project and was responsible for site preparation and construction, which consisted of demolition of the existing parking lot and pouring concrete.

On November 28, 2000, Mrs. Sides visited her husband at Greenville Memorial Hospital. Her daughter, Theresa Allen, accompanied her. They were parked in a hospital parking lot across from the emergency room. Mrs. Sides and Ms. Allen left the hospital after dark at around 7:00 p.m. and walked through an area in the parking lot where concrete had recently been poured, requiring them to follow a designated path. According to Mrs. Sides and Ms. Allen, the path was unlit because the bollard lights[1] in this area were not working. Mrs. Sides fell when she suddenly stepped off a curb that she could not see in the darkness. Ms. Allen also stumbled on the curb, but did not fall.

After the accident, a person identifying herself as a hospital employee called Ms. Allen to ask how Mrs. Sides was doing and where she had fallen. When Ms. Allen told her the fall had occurred where the lights were out, the

[1] As indicated by the record, the "bollard lights" were lighting fixtures contained in low, thick posts or stands that were approximately three feet high.

employee allegedly stated, "Yes, we've had a problem with those lights. We've been meaning to get them fixed and we haven't been able to get them fixed yet."

Frederick Scott McMillan, a hospital employee who was the Project Coordinator for Phase V, testified in his deposition that something appeared to be cracked inside the lower casing of the bollard light near where Mrs. Sides fell. He noted concrete had recently been poured in the same area. Mr. McMillan admitted the Engineering and Security divisions of the hospital were responsible for, and maintained control of, the lighting in the area where Mrs. Sides fell.

Mr. and Mrs. Sides filed suit against the hospital, Rodgers Builders, and F.T. Williams. All defendants moved for summary judgment. The trial court denied the hospital's motion, but granted summary judgment to both Rodgers Builders and F.T. Williams. The court subsequently denied a motion to reconsider by Mr. and Mrs. Sides, and this appeal followed.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." Id. at 361-62, 563 S.E.2d at 333. On appeal from an order granting summary judgment, an appellate court will review all ambiguities, conclusions, and inferences arising from the evidence in the light most favorable to the non-moving party. Id.; see also Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).

LAW/ANALYSIS

Mr. and Mrs. Sides argue the trial court erred in ruling on the motions for summary judgment because Rodgers Builders and F.T. Williams presented no evidence in support of their motions. They further argue the trial court erred in granting summary judgment to both Rodgers Builders and F.T. Williams. We disagree.

I. Evidence to Support a Motion for Summary Judgment

Mr. and Mrs. Sides submit that, because Rodgers Builders and F.T. Williams did not offer evidence in support of their respective motions for summary judgment, the trial court should not have granted the motions. They further argue the trial court erred in relying upon only the evidence they themselves submitted.

Rule 56 of the South Carolina Rules of Civil Procedure provides that a party may move, with or without supporting affidavits, for summary judgment in his favor as to all or part of a claim. Rule 56(a), SCRCP. The trial court shall grant the motion "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." Id. Rule 56(c).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "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.'" Id. (alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). "The moving party need not 'support its motion with affidavits or other similar materials *negating* the opponent's claim.'" Id. (quoting Celotex, 477 U.S. at 323); see also Richardson v. State-Record Co., 330 S.C. 562, 499 S.E.2d 822 (Ct. App. 1998). Once the moving party carries its initial burden, the opposing party

must come forward with specific facts that show there is a genuine issue of fact remaining for trial. Baughman, 306 S.C. at 115, 410 S.E.2d at 545.

Both Rodgers Builders and F.T. Williams brought to the attention of the trial court the absence of evidence to support their opponents' case. The burden then shifted to Mr. and Mrs. Sides to prove that a genuine issue of material fact did indeed exist. The trial court's consideration of evidence presented by Mr. and Mrs. Sides was appropriate and provides no grounds for reversal as the trial court must consider all of the evidence in the light most favorable to the non-moving party in ruling on a motion for summary judgment. Although Mr. and Mrs. Sides were not required to make a submission, the trial court need not have excluded that evidence in determining whether any triable issues of fact existed.

II. Rodgers Builders

Mr. and Mrs. Sides contend sufficient evidence was presented to survive summary judgment regarding the potential liability of Rodgers Builders for the accident under the premises liability theory that a contractor owes an invitee the same duties as a landowner owes an invitee. They further argue summary judgment as to Rodgers Builders was improper because the trial court did not grant summary judgment to the hospital.

A property owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty. Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000). The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge. Id. at 445, 531 S.E.2d at 538. A property owner generally does not have a duty to warn others of open and obvious conditions, but a landowner may be liable if the landowner should have anticipated the resulting harm. Id. at 445-46, 531 S.E.2d at 539.

"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." Id.

at 448, 531 S.E.2d at 540. No contractor liability exists, however, for injuries resulting from dangers that were obvious or that should have been observed in the exercise of reasonable care. Id. "The entire basis of an invitor's liability rests upon his superior knowledge of the danger that causes the invitee's injuries." Id. "If that superior knowledge is lacking, as when the danger is obvious, the invitor cannot be held liable." Id.

Because a contractor's potential liability is based on the notion that it has superior knowledge, finding the contractor did not have such superior knowledge extinguishes its liability. In this case, Rodgers Builders did not have superior knowledge of the lighting as the hospital admitted it was responsible for the lighting on the premises. According to Mr. McMillan, the hospital's Engineering and Security divisions maintained the lights. Thus, based on the absence of evidence suggesting Rodgers Builders had any superior knowledge, the trial court did not err in granting summary judgment to Rodgers Builders.

Moreover, the hospital, with superior knowledge, may have owed a duty to invitees that Rodgers Builders did not owe; consequently, the trial court acted properly in separately considering the duties owed by the respective parties in ruling on the motions for summary judgment. The fact that the trial court denied the hospital's motion for summary judgment did not automatically require the court to deny the motion by Rodgers Builders.

III. F.T. Williams

Mr. and Mrs. Sides further argue the trial court erred in granting summary judgment to F.T. Williams as a subcontractor for the project. They argue Mrs. Sides fell in an area where concrete had recently been poured (the pouring of concrete being F.T. Williams's responsibility); however, they fail to assert anything other than their general allegation that the lack of lighting in the area caused Mrs. Sides's fall.

"[A] subcontractor is an invitee as to a general contractor." Larimore, 340 S.C. at 448 n.18, 531 S.E.2d at 540 n.18 (citing 62 Am. Jur. 2d Premises Liability § 457 (1990)). In this case, the absence of evidence as to F.T. Williams's duty to Mrs. Sides supports the trial court's decision to grant

summary judgment. And, even if F.T. Williams owed some duty to Mrs. Sides, we agree with the trial court that there was no evidence presented that F.T. Williams knew or should have known the lights were not working (assuming they were out) or that the fall was the result of anything that F.T. Williams did or did not do. Since there was no evidence F.T. Williams had superior knowledge of the lighting situation, we affirm the trial court's grant of summary judgment in this regard as well.

AFFIRMED.

HEARN, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Knox and Beatrice Knox, Appellants,

v.

Greenville Hospital System, Respondent.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3914
Submitted November 1, 2004 – Filed January 4, 2005

AFFIRMED

Jeffrey Falkner Wilkes and Mark Stan Meglic, of Greenville, for Appellants.

J. Ben Alexander, Sarah McMillan Purnell and G. Dewey Oxner, Jr., of Greenville, for Respondent.

KITTREDGE, J.: Robert and Beatrice Knox appeal the circuit court order granting summary judgment to defendant Greenville Hospital System (Hospital) on his medical negligence claim and her loss of consortium claim, arguing the circuit court erred in finding the applicable two-year statute of

limitations barred the claims. Viewing the facts and circumstances in the light most favorable to Knox,[1] we find that under the discovery rule he should have reasonably been aware of a potential claim on the date of his injury, May 2, 2000, regardless of the fact that he did not know the extent of his injury until later diagnosed by an orthopedic surgeon. Because the two-year statute of limitations commenced on May 2, 2000, and Knox did not file the present action until May 8, 2002, we find the statute of limitations bars the present action. Accordingly, we affirm the grant of summary judgment to the Hospital.

FACTS

On May 2, 2000, Knox sought treatment for high blood pressure at Hospital's emergency room. In an effort to intravenously administer a saline treatment (I.V.) to Knox, a nurse inserted a needle into his wrist. In response, Knox "screamed," "squealed and hollered," and his "whole hand jumped up … in [his] fingers." Knox's nurse stated that she "hit the wrong thing in there" and "apologized." Although Knox received "plenty of I.V.s before," he knew something was "different" about this one because of the pain, reaction of his hand, and the nurse's admission to "hit[ting] the wrong thing." Knox believed that "the doctor had hit a nerve in there."[2] Before the Hospital discharged Knox, he informed his nurses that he was still experiencing pain in his wrist. They told him to treat his wrist with ice packs and to return to the Hospital if he experienced trouble.

The icepacks did not alleviate Knox's wrist pain, which continued unabated. Consequently, on May 9 Knox returned to the Hospital, where he was advised to take non-prescription pain medicine and apply warm compresses to his wrist. Knox sought treatment from an orthopedic surgeon

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[1] We refer only to Mr. Knox's claim, recognizing as the parties do that the viability of Mrs. Knox's consortium claim is contingent upon the timeliness of Mr. Knox's claim.

[2] The record indicates a nurse administered the I.V., but Knox refers to the person who administered the I.V. as a "doctor."

at the Hospital's clinic on July 12, 2000. On July 26, 2000, the orthopedic surgeon confirmed Knox's suspicions and informed Knox that he suffered a permanent injury to his radial nerve. Knox subsequently underwent surgery and received pain management treatment.

The Knoxes initiated the present action on May 8, 2002. The Hospital answered and subsequently moved for summary judgment on the ground that the applicable two-year statute of limitations barred the Knoxes' claims. The Knoxes responded by submitting a memorandum opposing the Hospital's summary judgment motion.[3]

The circuit court granted summary judgment to the Hospital, ruling that both "Plaintiffs' claims are barred by the applicable statute of limitations." The court noted that Knox—who had received "plenty of I.V.s before" without incident, and experienced admittedly abnormal pain, coupled with the uncharacteristic hand movement, when the nurse inserted the needle in his wrist on May 2, 2000—"was on notice that a claim against another party might exist." The court consequently found that the applicable two-year statute of limitations began running on that date, May 2, 2000, and had expired prior to the filing of the complaint on May 8, 2002. This appeal followed the denial of a Rule 59(e), SCRCP, motion for reconsideration.

STANDARD OF REVIEW

A motion for summary judgment shall be granted "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." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578

[3] In their memorandum, the Knoxes only challenged the statute of limitations defense with respect to Mr. Knox's claim. They did not dispute the Hospital's assertion that if the statute barred Mr. Knox's claim, it would also necessarily bar Mrs. Knox's claim for loss of consortium.

S.E.2d 329, 334 (2003). On a summary judgment motion, "a court must view the facts in the light most favorable to the non-moving party." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

DISCUSSION

Knox argues the circuit court erred in finding he should have reasonably discovered the existence of a potential claim on May 2, 2000, because he did not know the extent of his injury until the July 26, 2000, diagnosis by the orthopedic surgeon. As a result, Knox contends the circuit court erred in barring his medical malpractice claim under the applicable two-year statute of limitations. We disagree.

The Hospital is a governmental entity under the South Carolina Tort Claims Act (Act), S.C. Code Ann. § 15-78-10 (Supp. 2003). Under the Act, an action is "forever barred unless . . . commenced within two years after the date the loss was or should have been discovered . . ." S.C. Code Ann. § 15-78-110 (Supp. 2003).

Actions brought under the Act are subject to the discovery rule. Joubert v. South Carolina Dep't of Soc. Services, 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000). "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." Id. The statute does not necessarily run from the date of the negligent act, but from when the injury resulting from the negligent act is discovered or may be discovered by the exercise of "reasonable diligence." Id., 341 S.C. at 8, 534 S.E.2d at 190-91. "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). "The date on which discovery should have been made is an objective, not subjective, question." Joubert, 341 S.C. at 191, 534 S.E.2d at 9. Additionally, the fact that the injured party does not comprehend the full

extent of his injuries is immaterial. Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996).

Here, Knox argues he did not discover that he had a cause of action until his orthopedic surgeon informed him of the true nature of his injury on July 26, 2000. Thus, Knox maintains the two-year statute of limitations did not start running until that date and did not expire until July 26, 2002, well after he filed suit on May 8, 2002. We find this argument unavailing under the facts of this case.

In particular, we note that Knox acknowledged that he "screamed," "squealed," and "hollered" from pain when the I.V. was injected in his wrist, and his fingers "threw" and his hand "jumped." He testified that the nurse who administered the I.V. apologized and told Knox she "had hit the wrong thing in there." Knox testified she also said: "It must have been a nerve." He stated he previously had many other I.V.s. and knew something was different about this one because "that hand felt like my whole hand jumped straight up like that. But she know [sic] she had hit something wrong in there." Before he was discharged, Knox told relatives he was experiencing pain, and the "doctor" had hit a nerve. When he left the emergency room, Knox knew he had experienced pain upon injection, that the pain was not a normal consequence of an I.V. administration, that the nurse had hit a nerve, and that the nerve was the "wrong thing" to hit.

We, of course, recognize that varying degrees of pain and discomfort are frequently associated with certain medical procedures, especially invasive ones. The mere presence of pain or discomfort, to be sure, will ordinarily not serve to trigger the commencement of the applicable statute of limitations. The distinctive feature here is Knox's multiple, uneventful experiences with "plenty of I.V.s before." The exercise of reasonable diligence under these facts "would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against [the Hospital] might exist." Snell, 276 S.C. at 303, 278 S.E.2d at 334.

Viewing this evidence objectively and in the light most favorable to Knox, we find the circuit court correctly concluded that the "loss … should

have been discovered" on May 2, 2000, and consequently Knox was on notice at that time of a potential claim against the Hospital. S.C. Code Ann. § 15-78-110. Additionally, we find it immaterial that Knox did not know the extent of his injury on May 2, 2000. See Young v. South Carolina Dep't of Corr., 333 S.C. 714, 720, 511 S.E.2d 413, 416 (Ct. App. 1999) ("[T]he statute of limitations is not tolled during the period of time in which a plaintiff is merely unaware of the extent of an actionable injury.").

CONCLUSION

We find that a reasonably diligent person of common knowledge and experience, under the admitted facts, would have been aware at the time of the incident on May 2, 2000, that a claim against the Hospital might exist, even though the full extent of the injury was only subsequently discovered. Thus, we conclude that the two-year statute of limitations period began to run on May 2, 2000. Because the complaint was not filed until May 8, 2002, we find no genuine issue of material fact exists as to whether the two-year statute of limitations bars this action. The grant of summary judgment to the Hospital is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wilma K. Parker, **Respondent,**

v.

Spartanburg Sanitary Sewer District and David Michael Pace, Defendants, of whom Spartanburg Sanitary Sewer District is, **Appellant.**

Appeal From Spartanburg County
Larry R. Patterson, Circuit Court Judge

Opinion No. 3915
Heard December 7, 2004 – Filed January 4, 2005

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Stephen L. Brown and Matthew K. Mahoney, of Charleston, for Appellant.

Kenneth L. Holland, of Gaffney, for Respondent.

ANDERSON, J.: Wilma K. Parker brought suit against David Michael Pace and his employer, the Spartanburg Sanitary Sewer District (the Sewer District), alleging Pace's negligence proximately caused an

automobile accident in which she suffered injuries. The trial judge dismissed Pace from the suit pursuant to the South Carolina Tort Claims Act (the Tort Claims Act), S.C. Code Ann. §§ 15-78-10 to –200 (Supp. 2003). The jury returned a $450,000 verdict against the Sewer District. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

Parker and Pace were involved in an automobile accident in which Parker suffered injuries. At the time, Pace was driving a van owned by the Sewer District. Parker filed a complaint against Pace and the Sewer District averring Pace's negligence was the direct and proximate cause of her injuries. Parker claimed that, because Pace was acting as an employee of the Sewer District when the accident occurred, Pace's liability was imputed to the Sewer District. In her complaint, Parker stated: "This action as to Spartanburg Sanitary Sewer District is brought under section 15-78-40 et seq., S.C. Code of Laws, the 'S.C. Tort Claims Act.'" The Sewer District did not plead the Tort Claims Act as an affirmative defense in its answer.

On the morning of the first day of trial, the Sewer District filed an amended answer, which asserted:

> The Defendants would show the Court that since Defendant Pace was acting within the scope of his employment with the Spartanburg Sanitary Sewer District at the time of the accident complained of and since this action was brought (as to the Spartanburg Sanitary Sewer District) under the South Carolina Tort Claims Act, . . . the Plaintiff is entitled to recover only actual damages not to exceed the maximum amount permitted under the applicable provisions of the South Carolina Tort Claims Act.

During the trial, the circuit judge declared:

> I didn't see the Amended Answer yesterday. I don't think amended pleadings can be filed without permission of the Court, and particularly after the trial has started.
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> . . . .
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> Well, the Answer I have in the file for this trial, there is no defense found.
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> . . . .
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> You cannot file it without leave of the Court under the Rules. I don't believe you can file an Amended Complaint that late or an Amended Answer, without permission of the Court.

The Sewer District then moved to amend its answer to comport with the evidence. The judge denied the motion.

At trial, the Sewer District made two requests to introduce evidence of the amounts actually paid by Medicare for services rendered to Parker as a result of the accident. The trial judge denied these requests.

The jury returned a verdict for Parker in the amount of $450,000. The Sewer District moved to reduce the amount of damages by $150,000 to reflect the monetary statutory cap on recovery provided in the Tort Claims Act. Specifically, the Sewer District asked "for a reduction to the amount of the cap as pleaded by Mr. Holland in his Complaint, less the property damage already paid to his client." The trial judge denied the motion.

LAW/ANALYSIS

I. REDUCTION OF VERDICT

A. Vivacity of Pleading/Accedence at Trial

The Sewer District argues the trial judge erred in denying its request for a reduction in the jury award to comply with the limitation on recovery as set forth in the South Carolina Tort Claims Act. We agree.

The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003); Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998); see also S.C. Code Ann. § 15-78-200 (Supp. 2003) ("Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act,' is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."). South Carolina Code section 15-78-120(a)(1), which pertains to the limitation on liability under the Tort Claims Act, provides:

> (a) For any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:
>
> > (1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

S.C. Code Ann. § 15-78-120(a)(1) (Supp. 2003); see Wimberly v. Barr, 359 S.C. 414, 421, 597 S.E.2d 853, 857 (Ct. App. 2004) ("With some exceptions, the Tort Claims Act limits the amount of damages recoverable for any claim to $300,000."); see also Oliver v. South Carolina Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992) ("The jury awarded Oliver damages in the amount of $3,250,000.00," which the judge reduced to $250,000, "pursuant to the statutory cap" provided in the Tort Claims Act); Jeter v. South Carolina Dep't of Transp., 358 S.C. 528, 532, 595 S.E.2d 827, 829 (Ct. App. 2004) ("By consent order, the trial court reduced the verdicts in accordance with the statutory caps set forth in the [Tort Claims] Act."); Clark v. South Carolina Dep't of Pub. Safety, 353 S.C. 291, 298, 578 S.E.2d 16, 19 (Ct. App. 2002) (in case tried prior to amendment increasing limitation on

liability to $300,000, "[t]he trial court reduced the verdict against the Department to $250,000 in accordance with the limit imposed by the Tort Claims Act"); Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) (noting that proper method to set off damages awarded against Department of Education under Tort Claims Act by amount of pre-trial settlement paid by private defendant was to reduce jury's verdict by amount of settlement allocated to each cause of action, to then further reduce verdict by plaintiff's comparative negligence, and, finally, to **apply damages cap** under Tort Claims Act).

Parker contends "the trial court did not err in refusing to reduce the verdict to the Tort Claims cap amount based on the fact that Defendants had not properly pled the cap as an affirmative defense which means that they waived it." The cases Parker cites in support of this proposition are distinguishable. In Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999), the issue presented on appeal was whether the trial judge erred in denying the defendant's motion for a new trial nisi remittitur, in which it asked the judge to reduce the verdicts for the plaintiffs to $250,000 each under the Tort Claims Act. The Supreme Court noted the case was filed "two days before the reinstatement of the limits [of the Tort Claims Act]." Id. at 402, 520 S.E.2d at 157. In addition, Steinke examined the various statutory exceptions to the waiver of immunity as they related to the defendant. The question of whether the statutory cap is an affirmative defense which is waived if not pled was not discussed. Likewise, Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000), does not analyze the issue presented in this appeal. The defendant maintained the verdict should have been reduced to $250,000 in accordance with the reenactment of the statutory cap. The Pike court explicated: "The instant action was filed on June 23, 1994[, eight days before the reinstatement of the limits]. . . . Pursuant to Steinke, the statutory cap simply does not apply." Id. at 236, 540 S.E.2d at 93. Furthermore, Pike addressed applicability of the exception to the waiver of immunity for discretionary acts under the Tort Claims Act. This discussion is inapposite to the present issue.

Additionally, the Sewer District did not need to plead the Tort Claims Act statutory cap as an affirmative defense in its answer because Parker already conceded the Tort Claims Act applied to her claim. Parker expressly set forth in her complaint that she brought her cause of action pursuant to the Tort Claims Act. Moreover, upon a motion by the Sewer District to dismiss Pace as a defendant pursuant to section 15-78-80 of the South Carolina Code (Supp. 2003), the trial court and Parker's counsel agreed the Tort Claims Act applied to this action:

> [Attorney for the Sewer District]: . . . I would submit that should you direct a motion to dismiss Mr. Pace, then any charge related to punitive damages we would object to as irrelevant, in view of the Tort Claim[s] Act.
>
> . . . .
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> [Attorney for Parker]: . . . **Of course, the Tort Claims Act applies.** In this case, we have alleged at the outset of this case – have established that this gentleman's independent gross negligence brought this about.
>
> That makes his employer responsible under the Tort Claims Act, but I don't know of any structure in the law which shields him from personal responsibility.
>
> The Tort Claims Act is real clear that punitives are not recoverable against a State agency or governmental agency under the Tort Claims Act, but I don't know of an umbrella that David Michael Pace is carrying around that keeps that rainful [sic] from coming down on him.
>
> . . . .
>
> The Court: I'm not sure that the individual – I know of nothing that protects the individual from gross negligence, recklessness or willfulness.

However, **the Tort Claims Act would apply to the Sewer District** in regard to the actual damages.

(Emphasis added).

Subsequent to this discussion on the record, the trial judge stated the Tort Claims Act must be raised as an affirmative defense in the answer. However, the judge then granted the Sewer District's motion to dismiss Pace pursuant to the Tort Claims Act.[1] The trial judge's statement that the Tort Claims Act applies to this action and his dismissal of Pace are inconsistent with the judge's failure to apply the monetary statutory cap set out in the Tort Claims Act. Further, Parker is factually and legally bound by her pleading and trial concession: (1) she declared in her complaint that her cause of action is brought under the Tort Claims Act; and (2) at trial, she conceded the Tort Claims Act applies. See Ex parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995) (by conceding at trial that the complaint was, in part, under the Tort Claims Act, the party could not argue on appeal that the case was not under the Tort Claims Act).

The trial judge committed reversible error in denying the Sewer District's request for a reduction in the jury's verdict to conform to the monetary statutory cap set forth in the Tort Claims Act.

B. Other Jurisdictions

Numerous jurisdictions which have addressed the issue conclude the statutory cap on recovery need not be pled.

In Mitchell v. State of Louisiana, 596 So. 2d 353 (La. Ct. App. 1992), the plaintiffs, who were injured in an automobile accident, sued the State of Louisiana, through the Department of Transportation and Development. On

[1] Parker did not appeal the trial court's ruling regarding the dismissal of Pace.

appeal, the plaintiffs complained "it was error not to rule that the state waived the [statutory] cap . . . by its failure to plead the cap as an affirmative defense." Id. at 354. The court enunciated:

> While we are on the subject of the statutory cap, La.R.S. 13:5106, we will respond to the contention made by the plaintiffs in their answer to the appeal, that the state should not have been permitted to avail itself of the benefit of this cap because of its failure to plead it as an affirmative defense. We find no merit to this argument. The statute does not create an affirmative defense; rather, it imposes a limitation on liability. The plaintiff's petition pleaded general damages. The state in its answer denied the allegations. The subject of the amount of general damages was thus put at issue in the case. The State did not waive its right to invoke the cap by its failure to specifically plead reliance on it as a limitation on its liability.

Id. at 357.

The case of Snyder v. City of Minneapolis, 441 N.W.2d 781 (Minn. 1989), is particularly instructive. Snyder alleged "the limit on municipal liability created by Minn.Stat. § 466.04, [the cap on municipal tort liability,] is an affirmative defense and therefore should have been set forth affirmatively in the City's responsive pleading." Id. at 787 (footnote omitted). He averred the City waived the cap on damages because it failed to plead or raise it prior to the completion of trial. The Supreme Court of Minnesota expounded: "We . . . hold that the cap on municipal tort liability provided by Minn.Stat. § 466.04 is not an affirmative defense but a statutory rule of law that trial courts are obliged to impose whenever damages exceed the statutory limit." Id. at 788.

The Court of Appeals of Texas, in Whipple v. Deltscheff, 731 S.W.2d 700 (Tex. App. 1987), elucidated: "A sovereign does not waive the $100,000 limit of liability imposed by the Texas Tort Claims Act by failure to plead and urge it; the damages are strictly limited to those imposed by the statute." Id. at 705; see also Tarrant County Hosp. District v. Henry, 52 S.W.3d 434,

451 (Tex. App. 2001) ("Further, because a sovereign would have no liability absent legislative consent to suit and liability, a sovereign cannot waive the damage limits imposed by the Legislature by failing to plead them.").

There is absolutely no verbiage articulated within the South Carolina Tort Claims Act, sections 15-78-10 to –200 of the South Carolina Code, mandating that a governmental entity plead the monetary statutory cap included within section 15-78-120. The Tort Claims Act is imbued with public policy considerations limiting and qualifying liability of governmental entities. We conclude that the monetary statutory cap is self-executing and the court is required to apply the monetary statutory cap to any jury verdict exceeding $300,000.

II. MOTION TO AMEND ANSWER

Because this court should address all issues in the event of certiorari review, we analyze the motion to amend the answer on an alternative basis for affirmance.

The Sewer District maintains the circuit judge abused his discretion in refusing an amendment to assert the Tort Claims Act limitation on recoverable damages as an affirmative defense. We agree.

Amendments of pleadings are controlled by Rule 15, SCRCP, which provides in pertinent part:

> **15(a). Amendments.** A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. (Emphasis added).

A motion to amend is addressed to the sound discretion of the trial judge. Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004); City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 599 S.E.2d 462 (Ct. App. 2004). Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997); Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999); Lewis-Davis, 360 S.C. at 232, 599 S.E.2d at 465. The party opposing the amendment has the burden of establishing prejudice. Foggie v. CSX Transp., Inc., 315 S.C. 17, 431 S.E.2d 587 (1993); Pruitt, 330 S.C. at 489, 499 S.E.2d at 253. This rule strongly favors amendments and the court is encouraged to freely grant leave to amend. Jarrell v. Seaboard Sys. R.R., 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987).

In the instant case, the trial judge did not articulate any finding of prejudice with regard to Parker in denying the Sewer District's motion to amend. In addition, statements by Parker's counsel on the record indicate Parker would not be prejudiced by the Sewer District's request to amend. Parker's attorney stated: "Of course, the Tort Claims Act applies." When discussing whether Parker consented to the Sewer District's request to amend, Parker's counsel professed:

> He sent me a copy over the weekend in the mail . . . . Your Honor, I got it and looked at it. I didn't see anything – we did have a conversation, and I didn't see anything new, so I told [counsel for the Sewer District], frankly, in our conversation that I did not have any problem with it at that time.

Parker did not satisfy her burden of establishing prejudice. See Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998). On the contrary, Parker's complaint and her attorney's comments demonstrated just the opposite.

Further, the Sewer District's request was not a surprise to Parker. Parker specifically pled the application of the Tort Claims Act in her complaint. Concomitantly, she was not surprised by the Sewer District's request to limit her amount of recovery pursuant to the Act. The circumstances surrounding the Sewer District's requests to amend were such that justice would be furthered by allowing it to amend its answer and Parker would not be prejudiced as a result of the amendment. The trial judge abused his discretion in denying the Sewer District's motion to amend its answer.

III. MEDICARE PAYMENTS

Finally, the Sewer District asserts the trial judge erred in not allowing it to introduce evidence of amounts actually paid by Medicare toward Parker's total medical bills. The Sewer District argues this evidence was relevant to show Parker's medical expenses were less than the amount reflected in bills she submitted into evidence. The Sewer District complains it was so prejudiced by its inability to introduce this evidence it should be granted a new trial. We disagree.

The decision to admit or exclude evidence is a matter within the sound discretion of the trial judge. See Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); Gamble v. International Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996). The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000). For an appellate court to reverse based on an erroneous exclusion of evidence by the trial court, the appellant must prove both the error of the ruling and resulting prejudice. Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 439 S.E.2d 838 (1994); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

In the case at bar, the trial judge did not err in denying the Sewer District's request to admit evidence of Medicare payments. This case is analogous to Covington v. George, 359 S.C. 100, 597 S.E.2d 142 (2004), a recent South Carolina Supreme Court case. In Covington, the defendant,

Gary George, appealed the trial judge's decision to exclude evidence that the hospital, which treated the plaintiff, accepted as full payment an amount less than what it billed. Id. at 101, 597 S.E.2d at 143. Similar to the case sub judice, George did not object to the plaintiff's introduction of the full amount of the hospital's bill, but thereafter sought to introduce the actual payment amount to challenge the reasonableness of the plaintiff's medical expenses. Id. at 102-03, 597 S.E.2d at 143-44. The supreme court held the amount a hospital accepted as payment was inadmissible under the collateral source rule. The court inculcated:

> The collateral source rule provides "that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer." Citizens & S. Nat'l Bank of South Carolina v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). A tortfeasor cannot "take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is 'an insurance company, an employer, a family member, or other source.'" Pustaver v. Gooden, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002) (citations omitted). In this case, the actual payment amounts were made by a collateral source.

Id. at 104, 597 S.E.2d at 144. The court explained the collateral source rule applied because

> any attempts on the part of the plaintiff to explain the compromised payments would necessarily lead to the existence of a collateral source. Inevitably, the inquiry would lead to the introduction of matters such as contractual arrangements between health insurers and health care providers, resulting in the very confusion which the trial judge sought to avoid in his proper application of Rule 403, SCRE.

Id. at 104, 597 S.E.2d at 144.

In its brief, the Sewer District cited Haselden v. Davis, 353 S.C. 481, 579 S.E.2d 293 (2003), for the proposition that amounts paid by Medicaid may be relevant to determining a reasonable value of medical services and, therefore, this information should be provided to the trier of fact for it to consider in determining damages. Covington, however, specifically limited the holding in Haselden: "The admissibility of the actual payment amount was not an appellate issue in Haselden, but rather the issue was Plaintiff's entitlement to recover the difference between the billed amount and the actual payment amount." Covington, 359 S.C. at 103, 597 S.E.2d at 143-44 (emphasis in original).

Based on the holding in Covington, the trial judge did not err in excluding evidence of the Medicare payments.

CONCLUSION

We find the trial judge committed reversible error in denying the Sewer District's request for a reduction in the jury award to comply with the limitation on recoverable damages set forth under the South Carolina Tort Claims Act. We hold that the liability cap articulated within the Tort Claims Act is **NOT** an affirmative defense and the failure to plead the specific limitation on the amount of recovery allowed under the Tort Claims Act is **NOT** a waiver of the cap. We conclude the trial judge abused his discretion in refusing to allow the Sewer District to amend its answer to assert the Tort Claims Act limitation on recoverable damages as an affirmative defense. Finally, we rule the trial judge did not abuse his discretion in excluding evidence of Medicare payments. Accordingly, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STILWELL and SHORT, JJ., concur.