The Supreme Court of South Carolina

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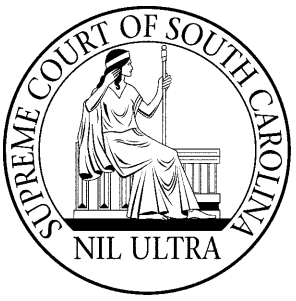
Columbia, South Carolina
January 12, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2
January 12, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William R. Douglas, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT THE COURT APPEALS

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 26577
Heard September 16, 2008 – Filed January 12, 2009

AFFIRMED IN RESULT; REVERSED IN PART

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David Spencer, all of Columbia, and Cecil Kelly Jackson, of Sumter, for Respondent.

JUSTICE WALLER: We granted certiorari to review the Court of Appeals' opinion in State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (2006). We affirm, in result, and reverse in part.

FACTS

Petitioner, William R. Douglas, was convicted of committing a lewd act on a minor. The Victim, who was 10 years old at the time of trial, testified she was molested by Douglas when she was 7 years old. When the Victim told her Grandmother about the abuse one year later, she was taken to see Gwen Herod, the Sumter County Victim's Assistance Officer.

Herod testified at trial that she conducts "forensic interviews" with child victims and follows the children through the court system. Douglas objected to her qualification as an expert, contending there is no such field of expertise. Douglas also asserted Herod's testimony improperly bolstered Victim's testimony and was unduly prejudicial. The court qualified Herod as an expert, finding her testimony relevant and admissible.

Herod testified before the jury that she does "forensic interviewing" using the RATAC method.[1] Herod testified that she had testified in court several times before. Although she did not have a college degree, she had attended a 40-hour training course on forensic interviewing, and had completed two weeks of training classes. She had been a victim's advocate for the solicitor's office for eleven years, and had interviewed hundreds of victims. According to Herod, the RATAC method is used nationwide and is known as forensic interviewing of children.

Herod testified before the jury about the RATAC method, stating:

> During the rapport stage, I'm building a rapport with this child, we are talking about school or things that she enjoys, I'm introducing myself to her, telling her what my role is and going over the rules of the interview, we talk a lot about telling the truth and telling a lie

[1] Herod testified R-A-T-A-C was an acronym for Rapport; Anatomy; Touch; Abuse Scenario; Closure.

> and we make an agreement with each other that I will tell her the truth and that she will tell me the truth, if we get past that, if the child agrees to do that, we go on to name, I find out about their family . . .

Herod then testified she utilized the RATAC method with Victim in this case, and that as a result, she received information which led her to conclude a follow up was necessary, and that the victim needed to go to the Durant Center for a medical evaluation.

The Court of Appeals affirmed the trial court's qualification of Herod as an expert in the field of forensic interviewing. The Court of Appeals further found that, in any event, Herod's testimony was harmless and did not improperly bolster Victim's testimony.

ISSUE

Did the Court of Appeals err in affirming the qualification of Herod as an expert in the field of forensic interviewing, and in affirming admission of her testimony?

DISCUSSION

The Court of Appeals held "the trial court did not abuse its discretion in finding Herod had 'acquired by study or practical experience such knowledge of the subject matter of [her] testimony as would enable [her] to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge.'" Douglas, 367 S.C. at 519, 626 S.E.2d at 70. (Internal citation omitted). The Court of Appeals also found the trial court had sufficient evidence that forensic interviewing was a recognized field, and that, in any event, any error was harmless. Under the facts presented here, we find it was unnecessary for Herod to be qualified as an expert.

Pursuant to Rule 601, SCRE, every person is competent to be a witness unless otherwise provided by statute or the rules. Rule 602, SCRE, prohibits

a witness from testifying to matters unless evidence is introduced sufficient to demonstrate the witness has personal knowledge. Rule 602 is subject to the provisions of Rule 703, SCRE, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge. Rule 701, SCRE; State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996).

Here, Herod testified she had been employed as the Sumter County victim's assistance officer since 1998. Although she did not have a college degree, she had attended a 40-hour training course on forensic interviewing, and had completed two weeks of training classes. She had interviewed hundreds of victims and had testified in court several times before. Herod testified she had been back for follow up courses and advanced courses and that there was a monthly national newsletter in order to enable her to keep up with things going on nationwide regarding the forensic interviewing process.

Herod also testified as to her utilization of the R-A-T-A-C method to establish a rapport with child victims, and testified as to her interview with the victim in this case. Ultimately, Herod testified that based on the interview, it was her opinion the victim needed to go to the Durant Center for a medical exam.

We find the testimony given by Herod in the present case simply was not required to be presented by an expert witness.[2] Herod testified only as to

[2] We are not unmindful that numerous states in recent years have upheld the qualification of expert witnesses in the field of forensic interviewing. See, e.g., Kilby v. Commonwealth, 663

her personal observations and experiences, and her interview with the Victim in this case. Accordingly, we find it was unnecessary for the trial court to have qualified her as an expert. However, although Herod did not need to be so qualified in this case, we nonetheless affirm the result reached by the Court of Appeals, because Douglas suffered no prejudice either as a result of Herod's testimony or by her qualification as an expert.

Douglas contends, in part, that Herod's testimony was unduly prejudicial inasmuch as the jury was likely to give her testimony undue weight simply because of her qualification as an expert. Such a contention is untenable. The same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony. Anderson v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104 (1943). As with any witness, the jury is free to accept or reject the testimony of an expert witness. State v. Milian-Hernandez, 287 S.C. 183, 186, 336 S.E.2d 476, 478 (1985). The fact that Herod was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness.

Douglas further asserts that Herod's testimony could have been construed by the jury as vouching for Victim's veracity, such that it should have been excluded under Rule 403, SCRE, because its prejudicial impact outweighed its probative value. We disagree. Initially, we note that the Court of Appeals concluded that "[t]he only reasonable inference the jury could have drawn from Herod's testimony is that she believed the victim told

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S.E.2d 540 (Va. 2008); Golden v. State, 984 So.2d 1026 (Miss. App. 2008); Lattimer v. State, 2006 WL 1073190 (Miss. Ct. App. 2006), *cert. denied* 951 So.2d 563 (Miss. 2007); Mooneyham v. Mississippi, 915 So. 2d 1102 (Miss. Ct. App. 2005); State v. Speers, 98 P.3d 560, 566 (Ariz.Ct.App.2004); In re A.H., 578 S.E.2d 247 (Ga. Ct. App. 2003); State v. Thompson, 799 A.2d 1126 (Conn. App. 2002); Siharath v. State, 246 Ga.App. 736, 737-738, 541 S.E.2d 71 (Ga. App. 2000) (no abuse of discretion in court qualifying witness as an expert in forensic evaluation); Louisiana v. Hilton, 764 So. 2d 1027 (La. Ct. App. 2000). Under Rule 702, SCRE, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." See Baggerly v. CSX Transport, Inc., 370 S.C. 362, 635 S.E.2d 97 (2006). Although there may be a case in which qualification of an expert in this field is proper, we find no such necessity in the present case.

the truth about being sexually assaulted." 367 S.C. at 520, 626 S.E.2d at 71. This was error. Herod never stated she believed Victim; she did not even state the Victim in this case agreed to tell her the truth, and she gave no indication concerning Victim's veracity. Herod testified only that, in conducting forensic interviews and building a rapport with a child, they talk about things. She stated, "I'm introducing myself to her, telling her what my role is and going over the rules of the interview, we talk a lot about telling the truth and telling a lie and we make an agreement with each other that I will tell her the truth and that she will tell me the truth, if we get past that, if the child agrees to do that, we go on." There is no evidence whatsoever that Herod believed the Victim to be telling the truth. Accordingly, the Court of Appeals' holding that the only reasonable inference is that Herod believed Victim was telling the truth is reversed.

Moreover, the only **opinion** given by Herod was that she concluded Victim needed a medical exam. A pediatric nurse practitioner thereafter examined Victim and determined she had vaginal tearing and scarring consistent with past penetration. In light of this evidence, there is no conceivable prejudice to Douglas from Herod's testimony. Accord State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (probative value of the rape trauma evidence outweighed prejudicial effect).

CONCLUSION

Given the nature of Herod's testimony, which was based upon her own personal observations and discussions with child victims, we find it was unnecessary to qualify her as an expert in this case. Herod testified to the manner in which she conducts interviews, and testified as to her recommendation upon interviewing the Victim in this case. This testimony simply did not need to be in the form of expert testimony. Accordingly, to the extent the Court of Appeals upheld the qualification of Herod as an expert in this case, its opinion is reversed. However, because Herod's testimony did not vouch for the veracity of the Victim, and was not prejudicial to Douglas, we affirm the result reached by the Court of Appeals.

REVERSED IN PART; AFFIRMED IN RESULT.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that the Court of Appeals erred in upholding the qualification of Herod. However, because I find that Herod's testimony was prejudicial to the defendant, I respectfully dissent, and would remand for a new trial.

In my opinion, it was not only unnecessary but improper for the circuit court to qualify Herod as an expert witness. This Court's jurisprudence and Rule 702 of the South Carolina Rules of Evidence emphasize the role of the trial court as the gatekeeper in determining, among other things, whether the expert's testimony consists of scientific, technical, or specialized knowledge that will assist the trier of fact. Fields v. J. Haynes Water Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008); Rule 702, SCRE. In my opinion, while much of Herod's factual testimony was admissible, it did not assist the jury in assessing matters beyond its common knowledge and was therefore not proper expert testimony.

Herod's testimony went to an ultimate issue for the jury: the victim's credibility. Herod testified that in applying the RATAC method, she and the victim "talk a lot about telling the truth and telling a lie and we make an agreement with each other that I will tell her the truth and that she will tell me the truth" and "if the child agrees to do that" Herod continues the interview. Herod testified that after concluding the interview, she determined "that [the victim] needed to go to the Durant Center for a medical exam . . . ." I agree with the Court of Appeals that the only reasonable conclusion to be drawn from Herod's testimony is that, based upon her training, she believed that the victim was being truthful. Juries do not require the assistance of human "truth detectors" in assessing the credibility of testimony.

I cannot agree with the majority that qualifying Herod as an expert was harmless. As in many CSC cases, this case turned primarily on the veracity of the victim. In the instant case, while physical evidence indicated that the victim had been abused, no physical evidence other than the testimony of the victim connected Petitioner to the crime. Notwithstanding that expert testimony is to be assessed utilizing the same tests of credibility applied to that of non-expert witnesses, qualification as an expert clothes the witness with an air of authority that does not attach to "ordinary" witnesses. In his

closing argument, counsel for the State noted "what this comes down to is believability and credibility" and contrasted his "expert" witnesses with witnesses presented by the defense.[3] Given the importance of credibility in this case, Herod's testimony in this regard was not harmless. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) ("An officer's improper opinion which goes to the heart of the case is not harmless.").

For the reasons given above, I respectfully dissent.

[3] In his closing argument, counsel for the State argued: "what this comes down to is believability and credibility. What's believable, the testimony of that little girl and what she told you here in this courtroom, followed up with an expert in interviewing and followed up with an expert in medical examination and confirmed by her grandmother. That's the evidence, not mom who gets on the stand who doesn't ever say anything about this Terry guy and the fact that she was gone to church and other places or James Wandtke, the best friend who['s] here to help my buddy out . . . ."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ross Marine, LLC, Arthur R. Swygert, Jr., Kathy Speights and Swygert Shipyards, Inc., Appellants,

v.

Query, Sautter, & Gliserman, LLC, Respondent.

Appeal from Charleston County
Mikell R. Scarborough, Special Circuit Court Judge

Opinion No. 26578
Heard November 6, 2008 – Filed January 12, 2009

AFFIRMED

William A. Scott, of Pedersen & Scott, of Charleston, for Appellants.

Michael W. Sautter, of Query, Sautter, Gliserman & Price, of Charleston, for Respondent.

JUSTICE PLEICONES: This is an appeal from an order finding no evidence of a conflict of interest. We affirm pursuant to Rule 220(c), SCACR, on the ground relitigation of the alleged conflict is barred by the doctrine of collateral estoppel. See Zurcher v. Belton, 379 S.C. 132, 666 S.E.2d 264 (2008).

FACTS

Attorney Query has represented David Browder since approximately 1984. In 1993, Browder went to work for appellant Ross Marine.[1] Browder recommended attorney Query to Ross Marine, and over the next seven years Query and attorney Gliserman represented Ross Marine in several legal matters. Browder, who was employed by Ross Marine as managing sales representative, was the primary contact between Ross Marine and the attorneys regarding these legal matters: most of the suits were collection actions brought by Ross Marine, although Query defended Ross Marine in a negligence action, and brought a products liability suit on its behalf.

In September 2000 Ross Marine terminated Browder's employment. Attorneys Query and Gliserman formed an LLC (Firm) with attorney Sautter in 2002, and the Firm undertook to represent Browder in a Worker's Compensation proceeding.[2] In August 2003, Browder, represented by the Firm, filed an employment suit against Ross Marine (the Browder case). The merits of Browder were sent to arbitration.[3]

Ross Marine sought to stay the Browder arbitration pending resolution of its request for an injunction preventing the Firm from representing Browder because, Ross Marine claimed, the Firm had a disqualifying conflict of interest. In the Browder case, the circuit court issued an order denying Ross Marine's request to enjoin the Firm from representing Browder, holding, among other things, that:

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[1] We will refer to the appellants collectively as Ross Marine.

[2] The filing of the workers compensation claim preceded the formation of the LLC.

[3] It appears that the arbitration has not yet taken place.

1) Ross Marine has failed to offer any proof that the [Firm]…represented Ross Marine in matters related to Mr. Browder's termination or other claims detailed in the *Browder* complaint;

2) Ross Marine has failed to offer any proof that any of the attorneys of the firm will be called on to use any information acquired in the previous representation to the detriment of Ross Marine, or that the attorneys ever acquired any information in the previous representation that could be used adversely to the interests of Ross Marine or any of the other defendants or for the benefit of Browder in the instant case;

3) I find that Ross Marine has failed to establish that they will suffer irreparable harm if the case moves forward and the [Firm] continues to represent plaintiff David Browder. By review of the entire record, I note that Ross Marine has had the ample time of approximately a year from the filing of this case to the present to fully develop their conflict position and submit the same for the Court's review and consideration, I find that Ross Marine has failed to establish a likelihood of success on the merits of their conflict allegations;

4) I find the defendants have failed to offer any proof that attorney Query is likely to be a material witness in the instant case;

5) I conclude that the [Firm] and their members did not breach or violate Rule 407, SCACR, Rules 1.7 and 1.9 of the South Carolina Rules of Professional Conduct.

Ross Marine appealed this order to the Court of Appeals.

The Court of Appeals heard the Browder appeal in November 2005 and affirmed the circuit court order in an unpublished opinion filed in December 2005. Browder v. Ross Marine, Op. No. 2005-UP-613 (S.C. Ct. App. filed December 8, 2005). This Court denied certiorari in March 2007.

While the Browder case was pending in circuit court, four of the six Browder defendants filed this suit against the Firm, styling it as a request for injunctive and declaratory relief as well as for negligence,[4] seeking: a stay of the Browder arbitration;[5] an injunction disqualifying the Firm from representing Browder in the Browder case; a declaration that there is a disqualifying conflict; damages; and attorneys fees. The circuit court dismissed the suit both on the merits, i.e. that there is no conflict of interest, and because the same issue was pending in the Browder case,[6] denied any further discovery, and awarded the Firm costs. On reconsideration, the special circuit judge reiterated that he was dismissing both the declaratory judgment action and the negligence action for a failure of proof, but deleted the requirement that Ross Marine pay costs.[7] Ross Marine then appealed.

This appeal was filed after the Court of Appeals had decided the Browder appeal, but while certiorari was pending in this Court. The Court of Appeals held the present appeal in abeyance pending this Court's disposition of the Browder certiorari request. After certiorari was denied, the Court of Appeals issued an order permitting the disposition of the Browder appeal and certiorari to be briefed in this appeal, which was subsequently transferred to this Court.

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[4] The negligence claim is predicated on the Firm's alleged breach of its duty to Ross Marine not to engage in representation where there is a conflict of interest.

[5] Note that Browder is not a party to the Ross Marine suit.

[6] Browder was on appeal when the Ross Marine order was filed.

[7] In light of the language used in the order on rehearing, the ruling below is best viewed as one granting summary judgment since the special circuit judge considered matters outside the pleadings in holding there was no evidence of any conflict.

ISSUE/ANALYSIS

The issue in this suit is whether the Firm has a disqualifying conflict of interest, which is the same question litigated in the Browder appeal. As the Browder appeal has been concluded, we affirm the dismissal of this suit on the basis of collateral estoppel. See Rule 220(c), SCACR (court can affirm on any ground appearing in the record). "When an issue has been actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action whether on the same or a different claim." Zurcher v. Bilton, *supra*. Here, the claims are identical: that the Firm has a conflict of interest such that it cannot represent Browder in his employment suit against Ross Marine.

Furthermore, collateral estoppel should not be invoked unless the party was afforded a full and fair opportunity to litigate the issue in the first case. Zurcher, *supra*. In the Browder order, the circuit court judge held that "Ross Marine has had the ample time of approximately a year from the filing of this case until the present to fully develop their conflict position…." On appeal, appellants did not challenge that finding, and it is too late to allege now that they were not afforded a full and fair opportunity to litigate the conflict claim in the Browder case.

CONCLUSION

The issue raised here and in Browder is identical, and Ross Marine had a full and fair opportunity to litigate it in Browder. Accordingly, collateral estoppel bars this suit. Zurcher v. Bilton, *supra*. The circuit court order is

AFFIRMED.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Farm Bureau Mutual Insurance Company, Appellant,

v.

Howard Durham and Cherie Durham, Respondents.

Appeal from Horry County
John M. Milling, Circuit Court Judge

Opinion No. 26579
Heard November 19, 2008 – Filed January 12, 2009

REVERSED

John Dwight Hudson, of Hudson Law Office, of Myrtle Beach, for Appellant.

Dirk Julius Derrick, of Conway, for Respondents.

ACTING JUSTICE MOORE: Appellant South Carolina Farm Bureau Mutual Insurance Company (Appellant) filed this declaratory judgment action seeking a declaration that its policy did not cover the damage to Howard and Cherie Durham's (Respondents) swimming pool when it "floated" after Respondents drained the pool. The parties agreed to

submit the case to the circuit court which found that the policy covered the damage to the pool. We find that the policy exclusions apply and so reverse the order of the circuit court.

FACTS

Respondents' home and in-ground pool are located in Horry County and were covered by a homeowner's policy of insurance issued by Appellant. At one point, Respondents drained the water from their pool to empty it in order to clean the pool. Before the pool was fully emptied, the area experienced rainfall over a four-day period. The pool was then fully emptied and, within two to three days of being fully emptied, the pool "floated" out of its foundation and rose from the ground, causing damage to the pool and deck.

Respondents' expert explained that pressure from underground water, the presence and depth of which varies from place to place, will result in a pool "floating" if the pool is drained. "Floating" can be avoided by unscrewing a plug in the drain system, which allows the ground water that is higher than the base of the pool to enter and relieve pressure upon the pool.

Respondents' filed a claim under their homeowner's policy. Both parties agreed that the policy applied to the swimming pool, but Appellant denied coverage based on two sections of the policy. The relevant language is as follows:

> Section I – Perils Insured Against
>
> Coverage A – Dwelling and
> Coverage B – Other Structures
>
> We insure against risks of direct physical loss to property described in Coverages A and B. However, we do not insure loss:
> . . .
> 2. caused by:

. . .
b. freezing, thawing, pressure or weight of water, ice, hail, snow or sleet, whether driven by wind or not, to a:

(1) fence, pavement, deck, patio, or swimming pool.
. . .
e. these below:
. . .
(6) settling, cracking, shrinking, bulging or expansion of driveways, pavements, patios, foundations, walls, floors, roofs or ceilings.

. . .

Section I – Exclusions

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

3. Water Damage, meaning:
. . .
c. water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

The parties agreed to stipulations on facts and evidence and submitted the case to the circuit court for decision. The court found in favor of Respondents and awarded policy limits. This appeal followed.

ISSUE

Is the damage to Respondents' pool and deck subject to an exclusion in the insurance policy?

STANDARD OF REVIEW

This case raises a novel question of law in South Carolina. In such a case, the appellate court is free to decide the question with no particular deference to the lower court. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-330 (1976 & Supp. 2005).

ANALYSIS

The primary point of contention in this case is what "caused" Respondents' pool to "float." Appellant contends that the pool "floated" because of the presence of underground water pressure in conjunction with Respondents draining the pool without pulling the plug. In Appellant's view, if the water pressure was a factor of any kind in causing the loss, even an indirect or remote one, the language of the policy excludes the loss.

A. The circuit court improperly defined the term "cause."

The circuit court found that the cause of the pool "floating" was the Respondents removing all of the water without removing the plug. The court noted that the word "cause" is not defined in the Policy and cited State Farm Fire & Casualty Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000), for the proposition that "[w]here a term is not defined in an insurance policy, it is to be defined according to the usual understanding of the term's significance to the ordinary person." Id. at 8, 530 S.E.2d at 136. The circuit court then continued, "[t]he meaning of the pivotal word 'cause' has primarily developed in the conte[x]t of tort and insurance law where causation is an essential element in establishing liability" and applied tests utilized in determining legal causation. Citing the reasoning of Bebber v. CAN Insurance Companies, 189 Misc.2d 42, 729 N.Y.S.2d 844 (N.Y. Sup. Ct. 2001), the court found that the draining was a "but for" cause of the "floating" and that the underground water pressure was a natural, static force which could not be an intervening cause. The court also concluded that the rainfall prior to the pool "floating" was not a factor, since the parties

stipulated that the hydrostatic pressure was present both before and after the pool was emptied.

Among other points, Appellant complains that the circuit court incorrectly defined the term "cause" in construing the policy. We agree. The circuit court correctly noted that the term "cause" is not defined by the policy and that in such case the court must define the term according to the usual understanding of the term's significance to the ordinary person. However, rather than attempting to ascertain the understanding to the ordinary person, the court looked instead to tort law and tests "utilized in determining legal causation."

"Cause" in the context of an insurance policy and in the usual understanding of the term's significance to the ordinary person is not the same as legal causation. See 7 Couch on Insurance 3d § 101:40 (Steven Plitt, et al., eds., 2008). The circuit court noted that "[a] circumstance which merely 'sets the state' is not regarded as being a proximate cause merely because the circumstance made possibl[e] the subsequent loss." (citing Couch on Insurance, 2nd, sec. 74.713; Bebber, supra). Yet the usual understanding of the word "cause" does not require that an event or condition be the proximate cause. The American Heritage Dictionary defines "cause" as "[s]omething that produces an effect, result, or consequence" and "[t]he person, event, or condition responsible for an action or result." In applying this definition of "cause" the "but for" test is appropriate. While it is true, as the Bebber court noted, that "but for" the plaintiff's drainage of the pool the damage would not have occurred, it is also true that "but for" the underground water pressure, the damage would not have occurred. Therefore, the underground water pressure was a "cause" of the damage.

However, the pressure was certainly not the sole cause of the "floating." Case law from other jurisdictions demonstrates two main tests for determining coverage where the loss is the result of multiple causes. The majority of jurisdictions follow the efficient proximate cause doctrine which provides that in circumstances with two or more identifiable causes, the court looks to the cause which is determined to have set the chain of events in motion. See Amherst Country Club, Inc. v. Harleysville Worcester Ins. Co.,

561 F.Supp.2d 138, 150 (D.N.H. 2008). If this "efficient proximate cause" is covered under the terms of the policy, then the loss is covered. Id. The minority rule is the concurrent cause rule, which asks whether one of the causes of a loss is covered. Id. If so, then the loss is covered notwithstanding the fact that there is also an excluded cause in the chain of causation. Id. In the instant case, neither doctrine applies since the policy contains an anti-concurrent causation clause. The exclusion provides that "[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." Consequently, though the underground water pressure was not the sole cause of the loss or even the efficient proximate cause, it was a cause of the loss and so, the exclusion applies.

B. Exclusion applies to loss resulting from a condition existing at the time at which the policy was made.

In finding coverage, the circuit court found that the exclusion regarding water damage did not contemplate Respondents' situation, since the definitions of water damage describe events or conditions not existing at the time the policy was written, such as floods, waves, etc. We find that the language of the water damage exclusion does not support the circuit court's interpretation.

The water damage provision excludes coverage for loss caused by "water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a . . . swimming pool or other structure." Nothing in the language excludes an existing condition as a cause. Moreover, the use of the word "exerts" in the present tense suggests that an existing condition is contemplated by the exclusion.

CONCLUSION

Underground water pressure was at least one cause of the damage to Respondents' pool. Under the exclusions and anti-concurrent causation clause of the policy, the loss is excluded from coverage. We therefore reverse the order of the circuit court.

REVERSED.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William Rhett Snowdon, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26580
Heard January 6, 2009 – Filed January 12, 2009

DISMISSED AS IMPROVIDENTLY GRANTED

Chief Appellate Defender Joseph L. Savitz, III, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R. J. Shupe, all of Columbia, and Solicitor Robert Mills Ariail, of Greenville, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Snowdon, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., WALLER, PLEICONES, BEATTY, JJ., and Acting Justice E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Adam Bickham, Appellant.

Appeal from Lexington County
John C. Few, Circuit Court Judge

Opinion No. 26581
Heard October 7, 2008 – Filed January 12, 2009

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE PLEICONES: This is an appeal from the acceptance of an Alford plea to the charge of criminal sexual conduct with a minor (CSCM) in

the first degree. Appellant entered guilty pleas to two counts of CSCM in the second degree and entered an Alford plea to one count of CSCM in the first degree. The plea judge accepted the pleas and sentenced Appellant. Appellant contends that the plea judge erred in refusing to allow Appellant to withdraw his Alford plea to CSCM in the first degree. We disagree and affirm.

FACTS

Appellant was indicted on two counts of CSCM in the second degree and one count of CSCM in the first degree. The assistant solicitor (Solicitor) offered Appellant the option to plead guilty to the two counts of CSCM in the second degree and to plead under North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), to CSCM in the first degree. Solicitor stated that if Appellant did not accept the plea deal, then he would proceed to call the cases to trial separately in order to subject Appellant to sentence enhancements and punishment of life without the possibility of parole under S.C. Code Ann. § 17-25-45.[1]

Appellant pled guilty to the charges of CSCM in the second degree and entered an Alford plea to CSCM in the first degree. The judge explained to Appellant that by pleading to the crimes, he faced a possible sentence of between zero and 70 years in prison and that he must serve at least 85 percent of the sentence.

[1] Section 17-25-45 provides that upon a conviction for a "most serious offense" a person must be sentenced to life imprisonment without the possibility of parole if the person has a prior conviction for a "most serious offense." Section 17-25-45(C) provides that both CSCM in the first and second degree are "most serious" offenses. Both Solicitor and Appellant's counsel believed that Appellant could have received a sentence for life without parole under § 17-25-45 if convicted separately on the three charges of CSCM. We express no opinion as to the application of the statute to Appellant's situation as that matter is not before us.

The plea judge then found that Appellant's decisions to plead guilty to the charges of CSCM in the second degree were knowingly, voluntarily, and intelligently made, and accepted both pleas. The judge then began to address Appellant's Alford plea, at which point Appellant's counsel (Counsel) interjected and, after lengthy discussion, moved to withdraw the Alford plea. Counsel explained her position to the court:

> Counsel: Judge, [the motion for withdrawal] is based on the fact that if I had ever been presented with an option to separate [the charges] in any way, I would have always believed we should have gone to trial on [the charge of CSCM in the first degree] and have entered guilty pleas to the two C.S.C. seconds. I have not only not been given that option; I have been told repeatedly I do not have that option. He either pleads two guilties and one Alford or the solicitor is going to proceed in a different manner on the two firsts. I understand we're in front of the court now and we may be in a different posture, but that's why we're standing in front of you like this because I was told that was not an option and that if I wanted . . .
>
> The Court: The options that you were given were what to present to me. Nobody controls my options as to what plea I accept or don't accept.
>
> Counsel: No, judge, but the option I was given is that he could plead on the first one and then under the new law [the State] was going to serve him with life without parole notice and he had a slam-dunk case on that other one. The girl is pregnant, no question about it, and he would - - he would get life without parole. That was essentially what was presented to me, and there was no variation from that other than us enter these pleas as we are in the process of trying to do today.
>
> . . .

The Court: And so you advised your client that those were the potential consequences if he didn't plead to all of them as a package.

Counsel: Yes, sir.

The Court: And so when he made the decision to plead guilty [sic] to the charge against - - involving [the charge of CSCM in the first degree] and up until the point where . . . the solicitor was no longer able to call . . . the July to September charge [of CSCM in the second degree] as the second charge, up until that point it was his intention and his desire to plead guilty [sic] to the charge involving [CSCM in the first degree]. Correct?

Counsel: Yes, sir, based - - yes, sir.

The plea judge offered to refuse to accept all three pleas, but Counsel declined. Ultimately, the judge refused to allow Counsel to withdraw only the Alford plea and instead accepted the plea.

ISSUE

Did the plea judge err in denying Appellant's motion to withdraw his Alford plea?

STANDARD OF REVIEW

The withdrawal of a guilty plea is generally within the sound discretion of the trial judge. State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002).

ANALYSIS

Appellant bears the burden on appeal of showing an abuse of discretion. Appellant has made no such showing and so, we affirm.

Solicitor offered Appellant the chance to enter an Alford plea to the charge of CSCM in the first degree as part of a package deal. Upon Counsel's interjection, the plea judge advised that he would not allow withdrawal of only the Alford plea, but rather would allow same in conjunction with withdrawal of all three pleas, so as to retain the integrity of the package. Counsel declined, and admitted that if Solicitor had the power to call all three cases, then Appellant intended to follow through with his Alford plea. The plea judge did not abuse his discretion in retaining the package deal by refusing to allow withdrawal of only the Alford plea.[2]

CONCLUSION

The plea judge did not abuse his discretion in refusing to allow withdrawal of the Alford plea alone. Therefore, we affirm.

AFFIRMED.

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[2] Appellant also seems to argue that he did not understand the consequences of the plea since Counsel and Solicitor stated that he faced life without parole (LWOP) if he did not accept the State's "all-or-nothing" deal. Appellant contends that he was, in fact, not eligible for LWOP under then-existing law and therefore, the judge abused his discretion in refusing to allow Appellant to withdraw the plea. This argument is not properly preserved since it was not presented at Appellant's plea hearing. See State v. McKinney, 278 S.C. 107, 108, 292 S.E.2d 598, 599 (1982) (failure to assert before trial court that plea was not knowing and intelligent precludes consideration of the issue on appeal).

WALLER, J., concurs. KITTREDGE, J., concurring in a separate opinion in which TOAL, C.J. and BEATTY, J., concur.

JUSTICE KITTREDGE: I concur in result. Prior to formal acceptance of the *Alford* plea, the plea judge formally accepted Appellant's guilty plea to two counts of criminal sexual conduct with a minor in the second degree. Appellant sought to withdraw the *Alford* plea prior to formal acceptance of that plea. I write separately because, in my judgment, in a typical guilty plea a defendant has a right to withdraw a guilty plea prior to formal acceptance by the plea judge. *Harden v. State*, 453 So.2d 550, 550-51 (Fla. Dist. Ct. App. 1984) ("Until formal acceptance has occurred, the plea binds no one: not the defendant, the prosecutor, or the court . . . . [F]ormal acceptance of a plea occurs when the trial court affirmatively states to the parties, in open court and for the record, that the court accepts the plea.") (internal citations omitted); *State v. Creamer*, 161 S.W.3d 420, 425 (Mo. Ct. App. 2005) ("Up until acceptance of the guilty plea by the trial court, a defendant has unfettered latitude to withdraw his plea."); *see also* FED. R. CRIM. P. 11(d)(1) ("A defendant may withdraw a plea of guilty or nolo contendere . . . before the court accepts the plea, for any reason or no reason . . . ."). Withdrawal of a guilty plea prior to formal acceptance is, therefore, generally a matter of right and not a matter within the plea judge's discretion. This case, however, does not present the typical situation. In light of the package deal associated with all charges and the plea judge's offer for Appellant to withdraw all pleas, I agree with the result reached by the majority.

TOAL, C.J., and BEATTY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kevin Mercer, Appellant.

Appeal From Lexington County
John C. Few, Circuit Court Judge

Opinion No. 26582
Heard October 7, 2008 – Filed January 12, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, and Melissa Jane Reed Kimbrough, of Kimbrough & Taggart, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE KITTREDGE: This is a mandatory appeal from a sentence of death. On March 16, 2002, Army recruiter Sergeant First Class Tracy Davis was gunned down outside his apartment in Lexington County, South Carolina. Kevin Mercer (Mercer) was convicted of murder, armed robbery, and possession of a firearm in the commission of a violent crime, and sentenced to death. In his appeal, Mercer challenges: (1) the disqualification of a juror; (2) the exclusion of evidence, both in the guilt and sentencing phases; (3) the denial of his post-trial motion for additional funds to test gloves for gunshot residue; and (4) the denial of his post-trial motion for a new trial based on after-discovered evidence. We affirm.

I.

Prior to his death, Sergeant First Class Tracy Davis (Davis) lived near Columbia, South Carolina, where he served as an active-duty member of the United States Army. He was attached to Fort Jackson where he trained Army recruiters.

On the evening of March 16, 2002, Davis arrived home at approximately 11:30 P.M. to the Raintree Apartments. As was his custom, he backed his vehicle, a white Lincoln Navigator, into a parking spot outside his apartment. According to a witness, after exiting his truck, Davis encountered a man and words were apparently exchanged.

The witness to the encounter was Davis's roommate, Sergeant First Class Clifton Magwood (Magwood). Magwood witnessed the confrontation from an apartment window. Magwood's room is on the second floor of the apartment, and his window looks out over the parking lot. Magwood testified that he heard a disturbance, got out of bed, looked through his blinds and observed Davis with a heavyset man, apparently armed with a handgun, demanding the keys to Davis's vehicle. Magwood saw the robber forcing Davis toward the rear of the vehicle and heard Davis tell the armed man, "All right. I'll give it to you."

Magwood left his vantage point to call 911 and summon help. The 911 call was logged at 11:32 P.M. Shortly thereafter, while running downstairs to help his roommate, Magwood heard a gunshot; he hurried outside to find Davis lying in the bushes near the parking lot. Magwood saw Davis's Navigator leaving the apartment complex. Davis died as a result of a gunshot to the back of the head.

Magwood only saw one individual confront Davis with a gun. Although Magwood only saw the individual from the back, he provided an immediate and detailed description of the assailant to law enforcement. The suspect was described as "a black male"; "broad shoulders"; "heavy build, muscular"; anywhere from 5'11'' to 6'2" and weighing "215 to 225." Magwood further described the suspect's clothing as "a dark outfit, could be jean or denim or some type of dark outfit with a dark hat."

Magwood's detailed description of the killer, along with a description of the Navigator, was dispatched to all officers in the vicinity, by way of a "be on the lookout," commonly referred to as a BOLO. Deputy Dennis Stazer of the Lexington County Sheriff's Office responded to the BOLO broadcast by positioning his patrol car (at 11:42 P.M.) at what he believed could be an intercept position on a nearby interstate, I-20. Within minutes, a white Navigator drove past Deputy Stazer's location. Deputy Stazer pulled in behind the suspect vehicle and initiated a traffic stop at 11:50 P.M.

There were two black males in the Navigator, Mercer in the driver's seat and Marcus Thompson in the front passenger's seat. Deputy Stazer utilized his patrol car's "light bar . . . to light up the interior of the [Navigator]." Deputy Stazer approached the driver's side and asked the driver (Mercer) for his license and registration. Mercer produced his license, but could not find the vehicle registration. Mercer eventually located a receipt from a car dealership and handed it to Deputy Stazer. The receipt confirmed that the Navigator belonged to the murder victim, Davis. Mercer and Thompson were taken into custody.

Inside the Navigator, a .357 caliber handgun was retrieved from under the driver's seat.[1] Testing matched the handgun to the bullet removed from Davis during the autopsy. Gunshot residue (GSR) testing done on Mercer's hands revealed materials considered to be consistent with GSR, although the test results were not conclusive. Testing done on Thompson's hands resulted in a negative test for GSR. Four gloves (two pairs) were found in Thompson's possession but were not tested for GSR. As Thompson was removed from the vehicle, a plastic bag containing fourteen .357 bullets "fell out of his pants legs."

Mercer matched the detailed description of the assailant furnished by Magwood. Mercer is 5 feet 10 inches tall and weighs 220 pounds.[2] The officers on the scene of the arrest confirmed that Mercer is a broad-shouldered, muscular individual, consistent with Magwood's description. Mercer was arrested wearing a "dark[,] . . . like a denim . . . jean jacket outfit"; he was also wearing "a black . . . baseball style cap."

Conversely, Thompson is "very slender" and "narrow-shouldered" and weighs about 150 pounds. At the time of his arrest, Thompson was wearing "a black tee shirt that was over a white tee shirt," with the white tee shirt conspicuously sticking out from the black tee shirt. Thompson was not wearing a hat.

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[1] Deputy Stazer did not testify to seeing a handgun when he first approached the driver's window. Moreover, Deputy Stazer, who "had to keep [his] eyes on both of them," saw no movement from either Mercer or Thompson. Deputy Stazer testified that had there been any movement in the vehicle he considered as a threat, he would have responded with deadly force. This testimony concerning the lack of movement, especially by Thompson, acquires relevance when read in context with Mercer's post-trial motion for a new trial based on after-discovered evidence.

[2] This height and weight is taken from Mercer's driver's license which he produced to Deputy Stazer. There is nothing in the record that contradicts this description.

Mercer and Thompson were charged with murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. Based on the State's view of the evidence, Thompson pled guilty to accessory before the fact of armed robbery, and accessory after the fact of murder, and armed robbery; he was sentenced to 28 years in prison. Mercer's charges proceeded to trial with the State seeking the death penalty. Mercer pursued a third-party guilt defense, pointing to Thompson as the shooter. The jury convicted Mercer, with the jury ultimately recommending a sentence of death, from which Mercer appeals.

II.

Mercer raises six issues on appeal, which we place in four categories:

(1) Whether the trial court abused its discretion in finding a juror not death penalty qualified under *Wainwright v. Witt.*
(2) Whether the trial court abused its discretion during the guilt phase by excluding the testimony of Thompson's attorney "that Thompson was charged as only an accessory after the fact and that he was released on bond."
(3) Whether the trial court abused its discretion during the penalty phase by (a) precluding Dr. John Steedman from opining that a "SPECT Scan" of Mercer's brain revealed an "abnormality"; and (b) precluding Dr. Steedman from offering expert psychiatric opinion testimony.
(4) Whether the trial court abused its discretion in denying Mercer's post-trial motions, one seeking additional funds to test Thompson's gloves for gunshot residue; and a second motion for a new trial based on after-discovered evidence that Thompson confessed to a cellmate that he committed the murder.

III.

Juror John Doe[3] and *Wainwright v. Witt*

Mercer claims the disqualification of Juror John Doe violated his Sixth and Fourteenth Amendment rights. We disagree. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court stated that the critical issue regarding the disqualification of a capital juror is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The *Wainwright* Court observed that a juror's bias need not be "proved with 'unmistakable clarity' . . . [because] bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424. Finally, the *Wainwright* Court noted that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . [and that] is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 425-26. It is with this standard in mind that we address whether the trial court abused its discretion in disqualifying Juror John Doe.

We have carefully reviewed the lengthy colloquy involving Juror Doe. While it is possible to cherry-pick certain responses and perhaps conclude that Juror Doe is qualified, a review of the totality of the responses reveals a potential juror vacillating and struggling with his strong convictions against the death penalty. Juror Doe, without hesitation, expressed an ability to impose a life sentence. Conversely, when the trial court asked if the juror could vote for a sentence of death, Juror Doe responded, "I'm not sure, sir."

The State followed the court's questioning by pursuing the same line of inquiry, to which Juror Doe responded that "it's just hard to judge, you know, someone else . . . for something that they've done."

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[3] We use the pseudonym John Doe.

Following up, the State zeroed in on Juror Doe's reservations, asking whether Juror Doe could sign his name to a death penalty verdict, to which Doe responded, "I don't think so, sir."

Defense counsel attempted to rehabilitate Juror Doe, but without much success. Doe stated he would "try" to consider both options. The trial court permitted both sides to vet Juror Doe thoroughly. Doe answered, "probably so," when asked if his feelings would interfere with serving on the jury. And when Doe was asked, "if you were convinced that a death sentence was appropriate that you could sign that form along with the other jurors," he answered, "[t]hat goes back to like having to put my name on the line you said when -- for a death sentence. I'd still have to think about that."

The trial court concluded that Juror John Doe was not qualified under *Wainwright*:

> I think the juror is not qualified. . . . There's several things that I think need to be mentioned, and the first is the juror's demeanor. . . . I believe that . . . this juror's views on capital punishment would substantially impair his ability to perform his duties as a juror in accordance with the instructions that I would give him.
>
> . . . A lot of times I think we see jurors who hesitate . . . [and] I feel as though I can get a sense as to whether the juror is hesitating because they are trying to think deeply and be completely open and honest with us or are they hesitating because they are troubled by the . . . issue that they're about to discuss.
>
> I did not get the impression, as I do sometimes, that this juror hesitated because he was trying to be clear about his feelings. I got the impression that he hesitated because he was troubled by . . . what he thought would be the question of whether or not he would be able to impose the death penalty. . . . And in the end I am left . . . with the impression that . . . this juror's views on the death penalty would substantially impair his performance of his duty to . .

. follow the instructions that I would give him. And so I find that he is disqualified.

We find the trial court acted well within its broad discretion in finding Juror Doe's views would substantially impair his ability to follow his oath and the court's instructions on the law. *See Uttecht v. Brown*, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate [which necessarily involves granting the trial court broad discretion] because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."); *State v. Wood*, 362 S.C. 135, 141, 607 S.E.2d 57, 60 (2004) (adhering to the rule that a "trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis . . . [to] conclude[] that the juror would not have been able to faithfully discharge his responsibilities as a juror"); *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999) (following the rule that unless unsupported by the evidence, "determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge"). Even the cold record before us reflects Juror Doe's hesitancy and profound unease with the prospect of performing his duties as a juror in accordance with his oath and the court's instructions. *State v. George*, 323 S.C. 496, 503, 476 S.E.2d 903, 908 (1996) (finding that the trial court acted correctly by disqualifying a juror that "declared that she did not think she could sign a form recommending the death penalty"); *State v. Longworth*, 313 S.C. 360, 366, 438 S.E.2d 219, 222 (1993) (disqualifying a juror who initially stated "he 'probably could' consider" the death penalty but later stated he did not "think so"). We affirm the disqualification of Juror John Doe.

IV.

Exclusion of Marcus Thompson's Lawyer's Testimony

During the guilt phase, Mercer sought to introduce testimony from Thompson's lawyer regarding the reduced charges against

Thompson.[4] Specifically, Mercer wanted to introduce testimony that he and Thompson were initially charged with the same offenses, but later Thompson's charges were reduced and he was released on bond. Mercer claimed the information was relevant as part of his defense of third-party guilt. The State objected to this testimony, asserting that it was not relevant to third-party guilt or otherwise. The trial court sustained the objection. Finding the proffered testimony of Thompson's attorney concerning Thompson's reduced charges and bail status not relevant to any issue before the jury, including third-party guilt, we affirm pursuant to Rule 220(b)(1), SCACR.[5]

V.

Exclusion of Expert Mitigation Evidence

Mercer retained numerous well-credentialed experts for the penalty phase, including a neurologist, a forensic psychiatrist, a pharmacologist, a sociologist licensed as a clinical social worker, and a corrections expert. During the penalty phase, the defense presented a comprehensive review of Mercer's troubled life.

The mitigation evidence revealed much about Mercer. A sampling of the evidence reveals that Mercer has a "damaging disability in terms of . . . making judgment[s] and inferences" and that he suffers from "untreated depression." The experts opined that Mercer's abusive upbringing resulted in post-traumatic stress disorder and anxiety disorder, which "are connected with previous trauma,

[4] Neither the State nor Mercer called Thompson as a witness.

[5] Although this evidence was not admissible, we do recognize that defense counsel, in her opening remarks to the jury, referred to Thompson's reduced charges and bond status. According to counsel's opening statement, "We don't know where [Thompson] is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was."

nightmares[,] . . . distressive recollections" and substance abuse. Beyond Mercer's life experiences, he suffered from a myriad of cognitive deficiencies, including neurological dysfunction and learning disabilities. Because Mercer struggled from an early age to function in life and hold regular employment, he was found to be disabled by the Social Security Administration.

Against this backdrop of a thorough mitigation presentation, we are presented with two challenges to the trial court's exclusion of expert testimony in the penalty phase. "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (internal citations omitted).

We first address the claim that the trial court abused its discretion in preventing Dr. John Steedman from opining that a "SPECT Scan" of Mercer's brain revealed an "abnormality." While we agree that it was clear error to exclude this testimony, we do not find that Mercer was prejudiced by the error. Next is the assignment of error in connection with the trial court precluding Dr. Steedman from offering psychiatric opinion testimony. Again, we find no reversible error.

A. "SPECT Scan"

Dr. Steedman is a medical doctor who is board certified in neurology and psychiatry. Dr. Steedman analyzed a "SPECT Scan" conducted on Mercer's brain.[6] The SPECT Scan was initially reviewed

[6] SPECT is an acronym for single-photon emission computerized tomography. Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 121 (2006). According to Dr. Steedman, "a SPECT Scan is a . . . nuclear medicine study. It is . . . a way of looking at the function of somebody's brain in terms of how much blood flow is running through the cortex. It's mainly useful in detecting whether

by a radiologist who noted a "questionable abnormality." Dr. Steedman was prepared to render a stronger finding of an abnormality. The State objected strenuously against such testimony, claiming surprise and prejudice. After an offer of proof and lengthy discussion, the trial court sustained the objection on the basis of Rule 403, SCRE, and a so-called "discovery order" violation. This ruling rises to the level of an abuse of discretion.

Application of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence.[7] The probative value of Dr. Steedman's excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise. Reliance on the so-called "discovery order" cannot withstand even minimal scrutiny, for there was no formal

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there are asymmetries and regional differences in blood flow . . . to parts of the brain which indicates . . . how hard those parts of the brain are working." An abnormal SPECT Scan means there is either increased or decreased blood flow to a certain area in the brain. A decreased flow of blood to a particular region of the brain may be referred to as an abnormality and may be associated with general cognitive deficiencies and learning disorders.

[7] This Court reminds the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence. *See Council v. State*, __ S.C. __, __ S.E.2d __ (2008), Op. No. 26543 (S.C. Sup. Ct. filed Sept. 8, 2008) (Shearouse Adv. Sh. No. 35 at 35) (relying in large part upon *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court determined that counsel's failure to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence.

discovery order.[8] In any event, Dr. Steedman was disclosed to the State, as was the general substance of his testimony.

We nevertheless find no reversible error. When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged—the SPECT Scan abnormality—was already in evidence without objection.

Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function. . . . But what it does, it's a . . . picture of how your brain functions, and that test came back abnormal. There's a . . . small area that's not normal on there. . . ." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad

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[8] In this case, the State repeatedly asked the trial court to order Mercer to disclose his experts and to require a written report from his experts. The trial court refused to order defense experts to produce written reports. *State v. Northcutt*, 372 S.C. 207, 216-17, 641 S.E.2d 873, 878 (2007) (holding that Rule 5, SCRCrimP, provides no basis for a trial court to require the creation of written defense expert reports for disclosure to the State). The trial court ultimately relented to the State's discovery requests by ordering the parties to meet and attempt to resolve the impasse. This was done, and because defense counsel failed to hit the bull's eye concerning Dr. Steedman's precise opinion regarding the SPECT Scan study, the State cried foul. The State's claim of unfair surprise is meritless.

brain in the sense that he's got a learning disability and . . . we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts. We therefore find the trial court's error in excluding Dr. Steedman's opinion testimony was harmless beyond a reasonable doubt. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)) (noting that an error is harmless when it "'could not reasonably have affected the result of the trial'").

B. Exclusion of Dr. Steedman's psychiatric opinion

As noted, Dr. Steedman is board certified in both neurology and psychiatry. When Mercer sought to elicit brief testimony from Dr. Steedman as a psychiatrist, the State objected, claiming Dr. Steedman was only disclosed as an expert in neurology. The basis of the State's objection arose from the nonexistent discovery order, discussed above. The trial court entertained the objection, and Mercer proceeded to make an offer of proof. The offer of proof of Dr. Steedman's psychiatric opinion comprises a mere half page in this voluminous record. The thrust of Dr. Steedman's psychiatric opinion was that the "types of [Mercer's] abnormalities . . . are a cumulative effect on poor judgment, depression, anxiety, thought disorders, [and] paranoia." The State's objection was sustained, and Dr. Steedman was prevented from rendering a psychiatric opinion.

Although the basis of the State's objection was specious, no reversible error is present. The excluded evidence was presented to the jury through other witnesses, especially Dr. Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly . . . mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

VI.

Denial of Mercer's Post-trial Motions

We finally address Mercer's two post-trial motions. These motions cannot be properly understood and evaluated in a vacuum, for they naturally flow from Mercer's efforts to create a reasonable doubt in the State's case by pointing to Marcus Thompson as the shooter.

The centerpiece of Mercer's guilt phase defense was third-party guilt—Thompson as the triggerman. As defense counsel asserted in the opening statement to the jury:

> One of the key factors in this case was omitted [from the solicitor's opening remarks], and that is riding in the Lincoln Navigator was a second person. Ladies and Gentlemen that second person is not here today. We don't know where he is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was.
>
> . . . .
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> . . . Suffice it to say Marcus Thompson was in the Navigator and he's not here today, and we believe that Marcus Thompson, in fact, was the shooter. That's our theory. It's pretty simple.

This theme was pursued throughout the trial, as the defense sought to create a reasonable doubt that Mercer was the triggerman. This approach was directly linked to what Mercer characterized as a "tunnel vision" approach to the investigation. One example comes from the gloves taken from Thompson that were not tested for gunshot residue (GSR). Counsel for Mercer argued forcefully that the State's decision not to test the gloves for GSR demonstrated the State's myopic view to focus on Mercer at the expense of a thorough and

proper investigation. The following excerpts from the closing argument illustrate this defense strategy:

> [The State does not] want to talk about Marcus Thompson. . . . You know, we had to dig and bring out the things about Marcus Thompson. They didn't want to show you any evidence about him. They wanted to ignore anything about him that would give you the full picture of what happened on May 16, 2002. . . . We had to pull it out of them.
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> . . . .
>
> . . . But do we know that it wasn't Marcus Thompson with gloves on that pulled that trigger in that dimly-lit parking lot?
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> . . . .
>
> They didn't show you the gloves because it points directly to Marcus Thompson being the shooter.
>
> . . . .
>
> . . . And we'd know . . . if they had sent those gloves to the [State Law Enforcement Division] lab. We'd know if they were full of barium, antimony, and lead. We'd know that.
>
> . . . .
>
> . . . Maybe Marcus Thompson with his gloves on shot Sergeant Davis and then went and got Kevin [Mercer]. It's up to the State to prove it, and they haven't done it.
>
> . . . .
>
> They chose to declare Kevin Mercer the shooter and ignore the other evidence, ignore the other possibilities, ignore Marcus Thompson and his gloves.

A. Denial of funding post-trial to test Thompson's gloves

Mercer's post-trial motion for funds to test Thompson's gloves for GSR was denied. The matter of authorizing funds to capital defendants lies within the sound discretion of the trial court. S.C. Code

Ann. § 16-3-26(C)(1) (2003) (authorizing the trial court to award funds where court determines requested funds are "reasonably necessary"); *see also State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) (holding that the decision to award funds to capital defendants is a matter within the trial court's discretion). Before trial, the trial court authorized $53,000 for Mercer's defense. The trial judge went further and invited defense counsel to request additional funds "if what I have authorized in this order is not going to get you all the way to trial." The record discloses no additional funding request prior to this post-trial motion.

Of particular significance to a proper resolution of this post-trial funding request is the fact that Mercer retained a GSR expert for trial. The expert, Jeffrey Hollifield, is a chemist, formerly employed with the South Carolina State Law Enforcement Division. Hollifield was assigned the limited task of analyzing the inconclusive results of the GSR test conducted on Mercer. For apparent strategic reasons, Hollifield was not tasked with testing the gloves found in Thompson's possession. As discussed above, the defense opted to challenge the adequacy of the State's investigation, pointing to the State's failure to test Thompson's gloves. Having elected not to test Thompson's gloves for trial purposes, there is no abuse of discretion in the denial of Mercer's post-trial motion for additional funding.

B. Denial of new trial motion based on after-discovered evidence

Following the trial, and while the case was initially on appeal, Solicitor Myers received a letter from Kevin Fuller, who had been one of Thompson's cellmates at the Lexington County Detention Center. In a second letter to Solicitor Myers, Fuller asked for "help" and "some probation" with his pending charges. According to Fuller, Thompson had admitted to shooting the victim. Solicitor Myers promptly forwarded Fuller's letters to defense counsel, who filed a motion for a new trial based on after-discovered evidence. Because this information came to light after the filing of the appeal, we remanded the matter to the trial court to conduct an evidentiary hearing. The trial court heard

the matter fully and, in a detailed order, denied the new trial motion, both as to the guilt and sentencing phases. Mercer assigns error to the denial of his new trial motion.

The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion. *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). Having carefully considered the new trial motion, fully cognizant of Mercer's third-party guilt defense, we find no abuse of discretion in the denial of his motion.

In order for Mercer to prevail in his new trial motion premised upon after-discovered evidence, he must show the after-discovered evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). The State concedes that all elements are met, save the first element.

In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.[9] *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); *State v. Deese*, 266 S.C.

[9] The analytical framework at play in this post-trial motion (imposing on the trial judge a gate-keeping role in making credibility determinations) stands in stark contrast to the admissibility of third-party guilt evidence at trial. Provided threshold admissibility is met, third-party guilt evidence may not be excluded based on the trial court's view of the evidence or the perceived "strength" of the State's case. *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006) (reversing the exclusion of evidence in a criminal trial and holding that the trial court may not exclude evidence of third-party guilt based upon a determination of the strength of the State's evidence).

534, 538, 225 S.E.2d 175, 176 (1976) (noting that the trial court is tasked with assessing the new evidence in a motion for a new trial); *State v. Pierce*, 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) (quoting *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)) ("The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."). On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.

The after-discovered evidence is limited to Fuller's testimony that Thompson admitted to being the triggerman. Thompson's participation in, and first-hand knowledge of, the crime, was clearly known to Mercer and the State from the beginning. With the proper standard of review in mind, we review the trial court findings.

We begin with the trial court's conclusion concerning Fuller's testimony:

> I carefully observed Fuller's demeanor and listened to his testimony. In my view, the inconsistencies in his own stories, the differences between his version and that of Thompson and Johnston, and the inconsistency of Fuller's story with known facts did not result from mistake or failure of recollection, but rather from intentional, calculated misrepresentations. I believe Fuller fabricated the story about Thompson admitting to shooting Sergeant Davis. I believe Fuller purposefully made different statements about this at different times when Fuller's view of what version of the story suited Fuller's interests best had changed. Finally, apart from the factors listed above, Fuller simply left me with the clear impression he was not telling the truth. Fuller's testimony has very little credibility.

Fuller's criminal record includes multiple convictions for burglary, aggravated assault and battery, and criminal domestic violence. Fuller characterized his criminal history as a "nice record." We recognize that all the key participants in the post-trial hearing have extensive criminal records.

More relevant to the inquiry is careful scrutiny of the actual statements Fuller attributes to Thompson. Given the inconsistencies with Fuller's story, there is a basis to sustain the trial court's lack of credibility finding. For example, on cross examination at the evidentiary hearing, Fuller gave varying versions as to when Thompson confessed to the murder. Concerning the substance of the various statements, when Fuller was confronted with the inconsistency "about what happened to the gun," he said he "miswrote" the initial statement because he "was in a hurry."[10] Another inconsistency is found in Fuller's account of where Davis was shot—as Davis was exiting his vehicle (which is Fuller's account) versus outside the vehicle.

Fuller informed investigators in a July 19, 2006, interview that another cellmate could corroborate Thompson's alleged confession. The other cellmate, Timothy Johnston, did testify, but he denied Fuller's account of the Thompson confession. The trial court found Johnston's testimony credible.

Fuller's credibility may be assessed not only by internal inconsistencies within his statements and testimony, but also by contrasting the purported Thompson confession against what are fairly solid facts. First, the only witness to the crime, Magwood, provided a physical description of the assailant, a description that closely matched the much bigger Mercer and not the slender Thompson. Second, Magwood saw Davis being forced, apparently at gunpoint, by the heavyset assailant toward the rear of the Navigator; Magwood found

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[10] This inconsistency concerns Mercer's possession of the murder weapon immediately after the murder as he exited the apartment complex in Davis's Navigator.

Davis lying in the bushes next to the parking lot. This is at odds with the Fuller account of the murder occurring in the area of the driver's door. Third, Fuller testified to a blood smear on the Navigator; the vehicle was stopped only minutes after the murder and no blood was found in or on the vehicle. Fourth, according to Fuller, Thompson shot Davis "pointblank . . . behind his ear." The pathologist opined that, because of the absence of soot or stippling around the wound, the fatal shot came from a distance of "at least two feet away from the skin of the victim." Fifth, according to Fuller, Thompson moved the murder weapon during the traffic stop and placed it under Mercer's seat. This is at odds with the testimony of Deputy Stazer, who pulled the vehicle over and saw no such movement in the vehicle.

To be sure, Mercer may challenge the certitude of these so-called facts, but their cumulative effect informed the judgment of the trial court in assessing the post-trial motion based on after-discovered evidence.

Having thoughtfully considered the evidence, the trial court determined that "there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed to shooting Sergeant Davis." This finding of course is beyond the applicable "would probably change the result" standard. *Spann*, 334 S.C. at 619, 513 S.E.2d at 99. In denying the post-trial motion as to the guilt phase, the trial court observed that the jury was charged, without objection, on the law of "the hand of one is the hand of all." In denying the post-trial motion as to the sentencing phase, the trial court observed that the jury was charged that it could recommend a death sentence only if it found that Mercer was the triggerman.[11]

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[11] The trial court charged the jury:

> Now, you will recall that in the guilt phase of the trial I charged you on the concept of the hand of one is the hand of all. That concept does not apply in this penalty phase of the trial. . . . Before you may consider imposing the death penalty, you must first find that the State has proven

Mercer takes issue with the denial of his post-trial motion. Mercer posits a different view of the facts. Mercer, in essence, invites this Court to make different credibility determinations, especially with respect to Fuller. Beyond Fuller, it is argued that the trial court had a valid reason not to believe cellmate Johnston over Fuller, for Johnston was facing life imprisonment with a pending burglary first-degree charge.[12] We respectfully decline Mercer's invitation to engage in *de novo* fact finding. We further reject the suggestion to ignore the trial court's gatekeeping role in post-trial after-discovered evidence motions.

> The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion.

> beyond a reasonable doubt that the defendant, Kevin J. Mercer, fired the shot that killed the victim. If you find that the State has failed to prove that Kevin J. Mercer fired that shot, then you may not impose the death penalty but you must impose a life sentence.

[12] As between Johnston and Fuller, the trial court recalled Johnston's testimony to the effect that "Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis." While the record confirms that Fuller was seeking "help" with his charges, Johnston did not testify to any such "fabrication" admission by Fuller. Mercer is correct in challenging the trial court's erroneous finding in this regard. We view the error as insignificant. The strong findings of the trial court against Fuller's credibility cannot reasonably be said to be dependent on this one finding. This finding does not form a meaningful part of the trial court's order, for it stands alone in an otherwise coherent analysis.

Mayfield, 235 S.C. at 34-35, 109 S.E.2d at 729.

To accept Mercer's premise that a jury must weigh the conflicting evidence ignores the *State v. Spann* factors and the gatekeeping role of the trial court as outlined in many cases, including *State v. Mayfield*. Moreover, the approach advanced by Mercer confuses the applicable standard in post-trial after-discovered evidence motions with the admissibility of third-party guilt evidence at trial.

The question before us, then, is whether the trial court's denial of the post-trial motion amounts to an abuse of discretion. We hold it does not. In so ruling, we are sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt. This sensitivity forms part of our consideration. We have drawn the line, however, with Mercer's desire to use Fuller's testimony for "residual doubt" as to guilt in the sentencing phase. *Franklin v. Lynaugh*, 487 U.S. 164, 172-74 (1988) (clarifying Eighth Amendment jurisprudence by noting that a state is not constitutionally required to allow a capital defendant to submit "residual doubt" mitigation evidence in the sentencing phase of a capital case). We affirm the denial of Mercer's post-trial motion based on after-discovered evidence.

VII.

We have conducted the statutorily mandated review under S.C. Code Ann. § 16-3-25 (2003). We find the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further find that the evidence supports the jury's finding of a statutory aggravating circumstance, and that the sentence of death is proportionate to sentences imposed under similar situations. *State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996). Mercer's convictions and sentence of death are

AFFIRMED.

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

The Supreme Court of South Carolina

In the Matter of William H. Jordan, Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent, who practices law in Charleston, South Carolina, on interim suspension pursuant to Rule 17(a) and (b), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that J. Sidney Boone, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Boone shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Boone may make disbursements from respondent's

trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that J. Sidney Boone, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Boone's office.

Mr. Boone's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina
January 5, 2009

The Supreme Court of South Carolina

In the Matter of Donald Loren Smith, Petitioner.

ORDER

On March 14, 2005, the Court placed petitioner on interim suspension. In the Matter of Smith, 363 S.C. 345, 611 S.E.2d 234 (2005). On December 5, 2005, the Court indefinitely suspended petitioner from the practice of law. In the Matter of Smith, 366 S.C. 524, 623 S.E.2d 94 (2005).

Petitioner filed a Petition for Reinstatement. The matter was referred to the Committee on Character and Fitness (CCF) pursuant to Rule 33(d), RLDE, Rule 413, SCACR. The CCF issued a Report and Recommendation recommending petitioner be reinstated to the practice of law on the conditions that he execute an additional two (2) year monitoring contract with Lawyers Helping Lawyers (LHL) and attend and complete an anger management course. Neither petitioner

nor the Office of Disciplinary Counsel filed exceptions to the CCF's Report and Recommendation.

The Petition for Reinstatement is granted subject to the following conditions:

> 1) after the date of this order, petitioner shall attend and successfully complete an anger management course; thereafter, petitioner shall submit an original signed statement from the course provider certifying that he successfully completed an anger management course to the Office of Bar Admissions; after receipt of the statement, the Office of Bar Admissions shall schedule petitioner to be sworn in as a member of the South Carolina Bar at the next scheduled admission ceremony;
>
> 2) no later than ten (10) days after his admission, petitioner shall execute an additional two (2) year monitoring contract with LHL which shall include drug testing, a mentoring program, and any other terms and conditions suggested by LHL;
>
> 3) LHL shall provide an executed copy of the monitoring contract to the Commission on Lawyer Conduct (the Commission) and shall, thereafter, provide quarterly reports to the Commission concerning petitioner's progress; and
>
> 4) should petitioner fail to comply with the terms of the monitoring contract, LHL shall immediately notify the Commission.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

January 8, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Bickerstaff, M.D. and
Barbara Magera, M.D., Appellants,

v.

Roger Prevost d/b/a Prevost
Construction, Inc., Respondent.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4439
Heard June 4, 2008 – Filed September 25, 2008
Withdrawn, Substituted and Refiled January 7, 2009

AFFIRMED

Patrick J. McDonald and Steven L. Smith, both of Charleston, for Appellants.

Frank M. Cisa, of Mt. Pleasant, for Respondent.

HEARN, C.J.: Charles Bickerstaff and Barbara Magera (collectively Appellants) appeal the circuit court's award of prejudgment interest to Roger Prevost and Prevost Construction Company (Prevost). We affirm.

FACTS

Appellants entered into a contract with Prevost for interior remodeling of their home. The home experienced significant water damage when a broken water line to the washing machine flooded the first floor of the residence. Thereafter, Appellants brought an action against Prevost alleging negligence and breach of implied warranty of workmanship as a part of the remodeling work. Prevost answered Appellants' complaint, and counterclaimed for breach of contract, implied contract/quantum meruit, and foreclosure of its previously filed mechanic's lien. Included in Prevost's counterclaims was a request for interest on any payment due pursuant to the contract, at the agreed-upon "daily rate of 1%."

A jury trial resulted in a verdict in favor of Prevost in the amount of $6,437.62. After the jury had been excused, Prevost made a post-trial motion for attorneys' fees and prejudgment interest under the contract. The contractual provision at issue stated: "Payment due under this Contract but not paid shall incur a daily interest rate of 1% from the date the payment is due." The circuit court took the matter under advisement and then issued an order awarding Prevost prejudgment interest as defined under the contract. The award of prejudgment interest is the only issue before us on appeal.

LAW/ANALYSIS

I. Entitlement to Prejudgment Interest/Question of Fact for the Jury

Appellants contend the issue of prejudgment interest was a question of fact that should have been submitted to the jury. Additionally, Appellants contend the circuit court's award of prejudgment interest to Prevost under the contract was in error. We disagree.

Initially, we note neither party appears to have argued during the presentation of evidence that the issue of prejudgment interest should be

submitted to the jury. The circuit court issued a post-judgment order granting Prevost prejudgment interest as specified in the contract, but did not make a finding as to whether the prejudgment interest was a question of law or fact.[1] Appellants made no Rule 59(e), SCRCP, motion to alter or amend the judgment requesting the court rule on its finding. However, Appellants' argument also fails on the merits. It is well settled in this state that the award of prejudgment interest is a function of the trial court, and has never been held to be an issue of fact requiring its submission in a jury trial. See Smith-Hunter Constr. Co. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005); Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993).

South Carolina law permits prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty. Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421 (citing Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993)). As explained in a recent supreme court case, "prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties . . . [t]he fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006). Thus, "[t]he proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421.

Here, Appellants and Prevost entered into a contract found by the circuit court to be for a definite amount of $27,865; therefore, the measure of recovery was fixed by conditions existing at the time the claim arose. It is of no consequence that each party claimed damages under the contract, or that the jury returned a verdict for less than the liquidated damages requested by

[1] It is presumably implicit in its order granting interest that the court found this issue to be a question of law.

Prevost. Therefore, we find the circuit court properly considered the applicable law on prejudgment interest, and was correct in its determination that Prevost is entitled to interest on the amount of damages awarded by the jury.

II. Consumer Protection Code Prohibits the Interest Rate under the Contract; Interest Rate Is Punitive In Nature, and Violates the Constitution and the Public Policy of This State

Appellants next contend the South Carolina Consumer Protection Code prohibits the imposition of interest in excess of twelve percent per annum. Additionally, they maintain the award of interest at the rate of one percent per day was grossly disproportionate to the amount of the principal, making it punitive in nature, and violative of the United States Constitution and the public policy of this state. Appellants present these arguments for the very first time on appeal. As a result, they were not ruled upon by the circuit court, and are not preserved for our review. See Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939) (stating the questions presented for appellate review must first have been fairly and properly raised in the circuit court and passed upon by that court); see also State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) (finding constitutional arguments are no exception to the rule, and if not raised to the trial court are deemed waived on appeal).

AFFIRMED.[2]

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[2] We note this court is not blind to the inequity that results from the imposition of the rate of one percent daily interest on this jury award. The circuit court found interest was due under the contract beginning on June 1, 2004, a finding that was not appealed, and the jury award of $6,437.62 in damages occurred 725 days later, on May 26, 2006. If the provision is interpreted to provide prejudgment interest on any payment due under the contract as a one percent daily penalty fee, i.e. taking an amount of one percent of the award due each day according to the circuit court's order, then the prejudgment interest due on the award would be $46,672.75 (calculated simply by multiplying one percent of the award by 725). However, if the provision is interpreted to provide daily one percent compounding interest,

KONDUROS, J., concurs. SHORT, J., concurs in part, dissents in part in a separate opinion.

SHORT, J., (concurring in part, dissenting in part): I concur in part and respectfully dissent in part.

I agree with the majority that Appellants' Consumer Protection Code and constitutional arguments are not preserved for review. However, I find the issue of whether the prejudgment interest should have been presented to

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then the prejudgment interest due on the award would be $8,744,225.12 (calculated by multiplying the $6,437.62 award, by 1.01 to the 725th power). The circuit court's order does not set out a method for calculating the interest, nor does it quote the actual dollar interest award. Appellants estimate the interest at $60,000-plus, failing to explain how they arrived at that number, and Prevost does not state a number in its brief. Although the contractual interest rate term itself is potentially ambiguous, as opposed to the academic argument of entitlement to prejudgment interest, and although a court could find alternatively that the term is unconscionable or would lead to an absurd result, we are nonetheless confronted with the insurmountable obstacle that Appellants neither made these arguments below, nor presented them to us on appeal. See I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating an appellate court may affirm for any reason appearing in the record, but may reverse only for a reason raised to and ruled upon by the trial court and argued on appeal); see also Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984) rev'd on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."); contra State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) (addressing an issue sua sponte); 15 SC Juris Appeal and Error §§71-73 (1992 and Supp. 2007) (outlining the rules and exceptions for preserving and presenting error for appellate review).

the jury is not preserved for review.[3] Furthermore, I would remand the action for the trial court to set the amount of prejudgment interest.

As noted by the majority in footnote 2, the issue of the amount of interest due is still unsettled. As there is something remaining to be done prior to full resolution of this case, I would remand to the Honorable Deadra L. Jefferson for a hearing to determine the amount of prejudgment interest to award Prevost. See TranSouth Fin'l Corp. v. Cochran, 324 S.C. 290, 297, 478 S.E.2d 63, 66-67 (Ct. App. 1996) (remanding for an additional hearing to determine the amount of the final judgment where the parties disputed, inter alia, the prejudgment interest due on an undisputed principal amount due). See generally Adams v. South Carolina Dep't of Health & Envtl. Control, 303 S.C. 251, 255, 399 S.E.2d 788, 790 (Ct. App. 1990) (remanding case due to legal error because agency failed to make critical findings).

The inequity arising from an award of prejudgment interest calculated by multiplying one percent of the judgment by 725, as is the case here as calculated by the majority, and the parties' confusion as to the amount of the judgment including prejudgment interest, requires me to respectfully concur in part and dissent in part.[4]

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[3] After the jury returned its verdict, Appellants argued the prejudgment interest rate was a matter for the jury. The trial judge stated: "I am inclined to believe, although I'm not fixed in that opinion, that the one percent that would be due on the debt is a matter of law for the Court." The judge required the parties to submit orders on the issue of, inter alia, prejudgment interest. In the final order, the court concluded Prevost was entitled to prejudgment interest at the contract rate without ruling on the issue of whether the interest should have been decided by the jury. Appellants filed no post-trial motions. See Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (stating a party must file a motion to reconsider when an issue has been raised, but not ruled on, to preserve issue for appellate review).

[4] I recognize parties are free to contract for higher interest rates within legal limits. See Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, 372 S.C. 89, 99, 641 S.E.2d 459, 464 (Ct. App. 2007). However, the prejudgment

interest rate here is clearly beyond any legal rate of interest and is unconscionable. See S.C. Code Ann. § 34-31-20(A) (Supp. 2007) (setting legal rate of interest on accounts stated at 8.75 percent per annum).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vista Antiques and Persian Rugs, Inc., Respondent,

v.

Noaha, LLC, Luxomnia Corporation, Gary A. Anglin, Jr., Patrick F. Anglin, and Gary A. Anglin, Sr., Appellants.

Appeal From Richland County
Casey L. Manning, Circuit Court Judge

Opinion No. 4446
Heard September 18, 2008- Filed October 17, 2008
Withdrawn, Substituted and Refiled January 9, 2009

AFFIRMED IN PART AND REVERSED IN PART

Charlotte B. Perrell, of Atlanta; Tucker S. Player, of Columbia, for Appellants.

Tobias G. Ward, Jr., of Columbia, for Respondent.

KONDUROS, J.: This appeal concerns the circuit court's ruling that Noaha, LLC, Luxomnia Corporation, Gary A. Anglin, Jr., Patrick F. Anglin, and Gary A. Anglin, Sr. (collectively Noaha) breached the terms of a settlement agreement as read into open court by failing to make an unconditional tender of settlement. We affirm in part and reverse in part.

PROCEDURAL BACKGROUND/FACTS

Vista Antiques and Persian Rugs, Inc. (Vista) filed suit against Noaha alleging inter alia breach of contract. After the selection of a jury, but before opening arguments in the trial, the parties reached a settlement. The record of this agreement as read by Vista's attorney in open court is as follows:

> Your Honor, the settlement that's been reached is that this case will be dismissed with prejudice by an order of dismissal with prejudice to be consented to by the parties and signed by your honor.
>
> Furthermore, the defendants, each and every one of them, will consent to and sign and deliver to me a confession of judgment which will provide for the payment of $165,000 within 18 months. And there will be additional payment terms in there, $25,000 of the 165 within 30 days.
>
> Further, in kind consideration, in addition to the 165,000 the return of 15 rugs, three of which shall be room size Herizes, the confession of judgment will have an attorney's fee provision that in the event of default, that the cost of enforcing the judgment or collecting the judgment will be recoverable.
>
> And, finally, the confession of judgment will have a no contest stipulation. If it's required to be domesticated in some state other than South Carolina, the defendants agree not to contest the domestication.

Vista prepared a consent order and confession of judgment, which it forwarded to Noaha for execution. The order stated: "The Defendants agree to pay the Plaintiff $165,000 within 18 months, $25,000 of which shall be paid by February 3, 2006, and the balance of $140,000 in 4 equal installment payments of $35,000 plus interest beginning June 10, 2006." The confession indicated Noaha agreed to pay Vista "an attorney's fee of 25% of the amount then due in the event of any default in payment or performance under the Order."

Noaha tendered the $25,000 payment[1] to Vista accompanied by a letter stating it "had every intention of fulfilling the terms of the Settlement Agreement as expressed in Court . . . ." However, the letter further stated "Defendants do not agree with your attempt to add interest payments or to require any payment schedule beyond the initial payment and the remaining amount due within 18 months."

Vista filed a motion asking the court to award it the full settlement amount. Vista argued Noaha tendered the $25,000 but the tender was conditional thereby violating the settlement agreement. The circuit court judge[2] determined Noaha did not timely tender unconditional payment of the $25,000 as they had "agreed to 'additional terms' in open court and upon the record that were to be agreed upon, but have failed to agree to any such terms." The court ordered Noaha to pay the full $165,000 plus interest pursuant to section 34-31-20(A) of the South Carolina Code (Supp. 2007) from February 2, 2006, the day the initial payment of $25,000 was tendered, to the date of the entry of judgment.[3] This appeal follows.

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[1] Noaha also gave Vista the rugs contemplated by their agreement, and there is no dispute on that point.

[2] The trial was before Judge Reginald Lloyd who had been appointed as U.S. Attorney for South Carolina at the time of Vista's motion to enforce the settlement agreement. The motion was heard by Judge Casey L. Manning.

[3] The payment of $25,000 was tendered on February 2, 2006. The parties agree that payment was due on or before February 3, 2006.

LAW/ANALYSIS

I. Breach of Settlement Agreement

Noaha contends the circuit court erred in finding it failed to make an unconditional tender to Vista. We agree.

Rule 43(k) of the South Carolina Rules of Civil Procedure provides no agreement between counsel shall be binding unless reduced in writing and entered into the record or "unless made in open court and noted upon the record." The purpose of Rule 43(k) is:

> [T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character.

Ashfort Corp. v. Palmetto Constr. Group, Inc., 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995) (quoting 83 C.J.S. Stipulation § 4 (1953)); see also Motley v. Williams, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (Ct. App. 2007) (stating the application of Rule 43(k) will help avoid disputes regarding the terms of settlement).

Settlement agreements are reviewed by the circuit court in much the same way as contracts. Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007). When "an agreement is clear and capable of legal construction, the courts [sic] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." Messer v. Messer, 359 S.C. 614, 628, 598 S.E.2d 310, 317 (Ct. App. 2004). When an agreement is plain and unambiguous, the court does not have the authority to modify its terms. Patricia Grand Hotel, 372 S.C. at

640, 643 S.E.2d at 695. "However, where 'the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intentions of the parties.'" Id. (quoting Mattox v. Cassady, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986)).

Vista relies on the phrase "additional payment terms" to support its contention that the parties agreed to negotiate certain additional terms including a payment schedule, interest, and attorney's fees. Noaha claims it never agreed to additional terms and such terms were not part of the agreement as they were not read into the record.

The circuit court held a very brief hearing regarding Vista's motion to enforce the settlement agreement on the record. In this hearing, Noaha contended it never agreed to any terms other than what was specifically read into the record in open court. The circuit court judge then heard the parties in chambers so that any other evidence regarding intentions is not before us for review. Therefore, we are left primarily with the transcript of the settlement agreement to consider.

In this case, to read additional specific terms into the agreement, without evidence such terms were contemplated by the parties, seems to reach beyond our judicial purview. It is possible no actual meeting of the minds occurred in this case. See Patricia Grand Hotel, 372 S.C. at 638-39, 643 S.E.2d at 694-95 (discussing Ozyagcilar v. Davis, 701 F.3d 306 (4th Cir. 1989) wherein the appellate court reversed the district court's enforcement of a settlement agreement upon a party's request when there was no meeting of the minds as to the specifics of the settlement agreement). However, neither party argues there was no meeting of the minds or seeks to have the agreement set aside in this case.

In Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (2001), the court considered whether attorney's fees were contemplated under a settlement agreement. The defendants offered $20,000 to the plaintiffs to settle all claims. Id. at 178, 557 S.E.2d at 711. The plaintiffs accepted the offer. Id. The court concluded no other terms were added, and the court was without the power to add them. Id. "We are without authority

to alter a contract by construction or to make new contracts for the parties. Our duty is limited to the contract made by the parties themselves 'regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" Id. (quoting C.A.N. Enters. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988)).

Looking at the settlement agreement, we believe Noaha made an unconditional tender of $25,000 to Vista and thereby did not breach the settlement agreement as read into the record.

II. Interest

Additionally, Noaha maintains the circuit court erred in awarding interest to Noaha from the date of the judgment. We agree.

A major point of contention in this case is if and when interest was due to Vista on the $165,000 settlement. Full payment of the $165,000 was due by July 6, 2007, eighteen months from the date of settlement, under either interpretation of the agreement.[4] Neither party disputes that this total sum was due under the settlement. Noaha contends that interest was not a part of the agreement, because it was not a term read into the record. However, interest is provided for by statute. Section 34-31-20(A) of the South Carolina Code (Supp. 2007) provides "[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."

Had Noaha breached the settlement agreement by placing conditions on the $25,000 tender, then payment of interest would accrue from the time of that breach, February 3, 2006. However, because we find Noaha made an unconditional tender that Vista refused, the running of interest stopped. See Ruscon Constr. Co. of Fla. v. Beaufort-Jasper Water Auth., 259 S.C. 314, 320, 191 S.E.2d 715, 717 (1972) ("It is a long recognized principle in our

[4] Noaha did not pay the settlement amount to Vista on or before July 6, 2007, nor did Noaha pay the money into the court pending the resolution of this litigation.

courts that a valid tender stops the running of interest."). Therefore, statutory interest applies, and it would not commence until the date the full payment was due to Vista, July 6, 2007.

CONCLUSION

We find Noaha did not breach the settlement agreement and made a valid tender of $25,000 to Vista in accordance with the terms of the agreement as read in open court. We agree with the circuit court that Vista is entitled to statutory interest pursuant to section 34-31-20(A) of the South Carolina Code. However, we find the statutory prejudgment interest began to run from July 6, 2007, when the full amount of the settlement was due. Accordingly, the order of the circuit court is

AFFIRMED IN PART AND REVERSED IN PART.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated — Respondent,

v.

Greenville County, a Political Subdivision of South Carolina, Phyllis Henderson, Scott Case, Eric Bedingfield, Dozier Brooks, Joseph Dill, Cort Flint, Lottie Gibson, Judy Gilstrap, Mark Kingsbury, Xanthene Norris, Stephen Selby, and Robert Taylor, — Appellants.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4449
Heard September 17, 2008 – Filed October 22, 2008
Withdrawn, Substituted and Refiled January 7, 2009

VACATED AND DISMISSED

Boyd B. Nicholson, Jr. and Joel M. Bondurant, both of Greenville, for Appellants.

James G. Carpenter, of Greenville, for Respondent.

PIEPER, J.: Greenville County appeals the trial court's order striking down a portion of the previous county procurement code for being inconsistent with Section 11-35-50 of the South Carolina Code (2007). We vacate the trial court's order and dismiss this case as moot.

FACTS

The relevant facts of this case are largely undisputed. The trial court consolidated four cases by Edward A. Sloan (Sloan) challenging procurements made by Greenville County (County) between August 2002 and March 2004, which utilized the competitive sealed proposal (Proposal) procurement method rather than the competitive sealed bidding (Bidding) method. The gravamen of Sloan's action was to declare sections of the former Greenville County Procurement Code (GCPC) unlawful for allowing the determination to use Proposals as an alternative to the preferred procurement method of Bidding without memorializing or justifying the decision in writing, regardless of whether the GCPC includes such a writing requirement.

The previous GCPC provided in part as follows:

§ 7-304 Methods of Source Selection.

> Unless otherwise required by law, all County contracts shall be awarded by competitive sealed bidding, pursuant to § 7-305 (Competitive Sealed Bidding), except as provided herein:
>
> . . . .
>
> (2) Section 7-307 (Competitive Sealed Proposals).
>
> . . . .

§ 7-305 Competitive Sealed Bidding.

(1) Conditions for Use. Contracts amounting to $25,000 or more shall be awarded by competitive bidding except as otherwise provided in § 7-304 (Methods of Source Selection).

. . . .

§ 7-307 Competitive Sealed Proposals.

(1) Conditions for use. When the Purchasing Manager determines that the use of competitive sealed bidding is either not practicable or not advantageous to the County, a contract may be entered into by use of the competitive sealed proposals method.

Unlike the South Carolina Procurement Code or the South Carolina Local Model Procurement Code, the GCPC did not require the procurement officer's determination to use Proposals rather than Bidding to be in writing.

Section 11-35-50 of the South Carolina Code (2007) states in part as follows:

> Political subdivisions required to develop and adopt procurement laws.
>
> All political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983. The Budget and Control Board, in cooperation with the Procurement Policy Committee and subdivisions concerned, shall create a task force to draft model ordinances, regulations, and manuals for consideration by the political subdivisions . . . .

S.C. Code Ann. § 11-35-50 (2007).

On November 18, 2004, the parties stipulated to consolidation of all four claims to be decided on the following two issues:

(1) Whether the County's Procurement Code requires a written determination in order for the County to use the [Proposal] procurement method, and by extension, whether the lack of a written determination for these projects in which the County used the [Proposal] method violated the County's procurement Code; and

(2) If the County's Procurement Code does not require a written determination in order to use the [Proposal] procurement method, does it violate State law, and in particular, South Carolina Code Ann. § 11-35-50?

After the trial court hearing on December 3, 2004, but before the order was issued on January 8, 2007, the County amended the GCPC on October 17, 2006. The new GCPC section titled "Methods of Source Selection" now reads in part as follows:

> Unless otherwise required by law, all County contracts amounting to $25,000 or more shall be awarded by competitive sealed bidding, pursuant to § 3-202 (Competitive Sealed Bidding), or by competitive sealed proposals, pursuant to § 3-204 (Competitive Sealed Proposals), whichever is determined to be more advantageous to the County . . . .

As such, the amended GCPC differs from the previous version because, among other things, it now has two equally preferred methods of procurement for source selection, Bidding and Proposals.

On January 8, 2007, the trial court found that the claims were moot on the basis that all of the contracts involved were either completed or cancelled; however, citing the public interest exception to the mootness doctrine, the trial court proceeded to rule on whether the former GCPC embodied sound principles of appropriately competitive procurement by not requiring a determination to be in writing before using the Proposal method rather than the preferred method of Bidding. The court concluded that the former version of the GCPC did not "embody sound principles of appropriately competitive" procurement because it failed to require a determination in

writing before the use of Proposals rather than the preferred method of Bidding. This appeal followed.

ISSUES ON APPEAL

I. Did the Greenville County Procurement Code violate § 11-35-50 when the GCPC's sealed proposal method of procurement set forth a procedure that even the plaintiff acknowledged was appropriately competitive, but did not require a written determination to document why this method was chosen?

II. Whether the trial court was correct to decide the issue above "for future guidance" under the public importance exception to mootness, when the preference for sealed bids that necessarily forms the basis of the written determination requirement no longer exists?

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001) (internal citation omitted). To make this determination, an appellate court must look to the essential character of the cause of action. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action. Low Country Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 406, 656 S.E.2d 775, 779 (Ct. App. 2008). The issue of statutory interpretation is a question of law for the court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). We are free to decide questions of law with no deference to the trial court. Id.

DISCUSSION

We first address the issue of mootness since this issue necessarily affects our disposition of this case.

The court does not concern itself with moot or speculative questions. Sloan v. South Carolina Dep't of Transp., Op. No. 26534 (S.C. Filed Aug. 25, 2008) (Shearouse Adv. Sh. No. 33 at 43). An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Id. Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief. Id.

However, there are three exceptions to the mootness doctrine. Id. at 568, 549 S.E.2d at 596. First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. Id.; see also Sloan v. South Carolina Dep't of Transp., 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005); Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis, 345 S.C. at 568, 549 S.E.2d at 596 (emphasis added). Application of the public interest exception requires the question at issue to be (1) of "public importance," and (2) of "imperative and manifest urgency." See Sloan v. Greenville County, 361 S.C. 568, 570-71, 606 S.E.2d 464, 465-66 (2004). Third, "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." Curtis, 345 S.C. at 568, 549 S.E.2d at 596; accord Sloan, 365 S.C. at 303, 618 S.E.2d at 878. The utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically

invoked.[1] Compare, e.g., Sloan v. Greenville County, 356 S.C. 531, 553-55, 590 S.E.2d 338, 350-51, with Sloan, 361 S.C. at 571-72, 606 S.E.2d at 468; cf. 1A C.J.S. Actions §78 (2008).

Neither party has challenged the court's preliminary conclusion that these cases are moot since the contracts were already completed or cancelled.[2] Therefore that conclusion, right or wrong, is the law of the case. See Sloan, 365 S.C. at 307, 618 S.E.2d at 880 ("[A]n unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct.") (quoting Town of Mt. Pleasant v. Jones, 335 S.C. 295, 298-99, 516 S.E.2d 468, 470 (Ct. App. 1999)). Thus, the next question before us is whether this case is suitable for discretionary review of the issue presented under the public interest exception to the mootness doctrine.[3]

County contends that since the GCPC no longer contains the preference for sealed bids that necessarily formed the basis of the trial court's order, the trial court erred in determining that the case should be decided under the public interest exception to mootness. We agree.

The trial court found the case moot for the initial reason that the contracts at issue had already been performed or cancelled; it then found the public interest exception applied to that point of mootness. However, the court did not fully address the public interest exception of the mootness doctrine to the suit after the change in the GCPC was brought to its attention; specifically, the trial court failed to address whether the suit remained one of "imperative and manifest urgency" after passage of the amended ordinance. See Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006) ("[T]he issue must present a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in 'matters

[1] Sloan conceded at oral argument that application of an exception to the mootness doctrine is discretionary rather than mandatory by an appellate court.

[2] Both parties agree in their briefs that the four cases at issue were moot at the time of the final hearing.

[3] The public interest exception was the only exception asserted to the trial court.

of important public interest.' This evaluation must be made based on the facts of each individual situation.") (internal citation omitted). Here, after opining in a footnote that its analysis of the "public importance" exception would not change due to passage of the amended ordinance, the trial court "[found] it necessary to go ahead and rule on the issue of whether such a determination must be in writing under the former version of the code." (emphasis added). Therefore, the second prong of the public interest exception was never satisfied; the trial court failed to consider the impact of the amended ordinance on the suit through the lens of "imperative and manifest urgency," and erred in utilizing that exception to review the issue presented under the previous ordinance.[4]

Sloan also argues there is an imperative and manifest urgency compelling this court to find § 11-35-50 requires a written determination whenever a political subdivision selects the Proposal method over Bidding, regardless of whether the political subdivision designates the two methods as equally preferable, in order for the procurement to be "appropriately competitive." As previously indicated, although the trial court briefly acknowledged this supplementary argument in a footnote of its opinion, it specifically refused to rule upon the issue in regard to the amended version of the GCPC. We find the record before us insufficiently developed to exercise our discretion under a mootness exception to address Sloan's ancillary

[4] Additionally, we note this court has provided some judicial guidance as to the meaning of § 11-35-50 in Glasscock Co. v. Sumter County, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004). Id. at 490, 604 S.E.2d at 721 (stating § 11-35-50 does not mandate or require local governments to adopt specific methods of procurement or the process by which to apply them, and that it "clearly was intended to afford local governments needed flexibility to determine what is 'appropriately competitive' in light of the public business they must transact."); see also Sloan, 361 S.C. at 571-72, 606 S.E.2d at 466 (holding there is no imperative or manifest urgency in obtaining an advisory opinion on the application of an obsolete procurement ordinance to completed projects when the ordinance was subsequently altered addressing the existing controversy, and when judicial guidance on the matter already exists). Because this finding is not dispositive of our decision herein, we need not reach this issue.

argument regarding co-preferred methods of procurement. Moreover, we take judicial notice of our own docket and note that this very issue is currently on appeal in Sloan v. Greenville Hospital System, et al., Case Nos. 03-CP-23-3785, 04-CP-23-5223, and 05-CP-23-0586 (appeal filed June 12, 2008). Sloan acknowledges this fact in his appellate brief. In that case, one of the main issues litigated and ruled upon was whether a written determination is required to select Proposals over Bidding when both are co-preferred procurement methods; as such, that case, as opposed to this case, is arguably more suitable for review and adjudication of the issue.

CONCLUSION

Due to the significant change in the ordinance, we find it unnecessary to decide the issue presented to the trial court of whether the County's former procurement code was valid; passing judgment upon this matter would only result in an advisory opinion on the application of an obsolete procurement ordinance to completed or cancelled contracts. We also decline to address Sloan's alternate argument under the amended ordinance since the trial court never addressed the effect of the amended ordinance.

Accordingly, the trial court's order is vacated and the case is dismissed as moot.

VACATED AND DISMISSED.

SHORT and THOMAS, JJ., concur.