The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

S.C. Code Ann. § 34-31-20 (B) (Supp. 2017) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 2, 2018, the first edition after January 1, 2018, listed the prime rate as 4.50%. Therefore, for the period January 15, 2018, through January 14, 2019, the legal rate of interest for judgments and money decrees is 8.50% compounded annually.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
January 4, 2018

The Supreme Court of South Carolina

In the Matter of Michael W. Miller, Petitioner.

Appellate Case No. 2017-002536

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 1, 1997, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

Petitioner has now submitted his resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
January 4, 2018

The Supreme Court of South Carolina

In the Matter of David M. Barron, Petitioner.

Appellate Case No. 2017-002558

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 17, 2003, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is a regular member of the Bar in good standing.

Petitioner has now submitted his resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
January 4, 2018

The Supreme Court of South Carolina

In the Matter of Caroline Anne Habakus

Appellate Case No. 2017-002610

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 2013, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

Petitioner has now submitted her resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
January 4, 2018

The Supreme Court of South Carolina

In the Matter of Karena Kirkendoll, Petitioner

Appellate Case No. 2017-002549

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 6, 1992 Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

Petitioner has now submitted her resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
January 8, 2018

The Supreme Court of South Carolina

In the Matter of Marc J. Atchley

Appellate Case No. 2017-002604

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1997, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

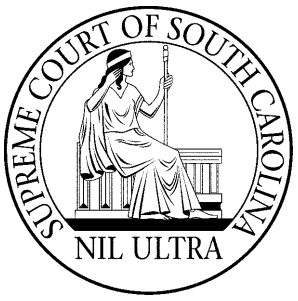
Petitioner has now submitted his resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
January 4, 2018



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2
January 10, 2018
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Paul Winford Owen, Jr., Respondent

Appellate Case No. 2017-001453

Opinion No. 27760
Submitted July 11, 2017 – Filed January 10, 2018

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Charlie Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand. We accept the Agreement and issue a public reprimand.[1] The facts, as set forth in the Agreement, are as follows.

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[1] Respondent's disciplinary history includes an admonition in February 2007, citing the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client; competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation), Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client), Rule 1.4 (a lawyer shall communicate in a reasonable manner with a client), 8.4(a) (it is professional

Facts

In March 2011, respondent filed a civil action in the circuit court in Orangeburg County, alleging various claims against a company that sold above-ground swimming pools. Respondent issued seventeen subpoenas for the production of documents to other customers of the company, certifying in each subpoena that it was issued in compliance with Rule 45 of the South Carolina Rules of Civil Procedure (SCRCP) and that notice as required by Rule 45(b)(1) had been given to all parties. However, respondent failed to provide prior notice to opposing counsel, and in fact, did not provide copies of the subpoenas to opposing counsel until July 2011, after multiple requests from opposing counsel.

Law

Respondent admits that he failed to comply with the requirements of Rule 45, SCRCP. He also admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.4(c)(a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists); Rule 4.1(a)(in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 8.4(d)(it is professional misconduct for a lawyer to engage in conduct involving dishonesty,

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misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), and 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice); a letter of caution in September 2014, citing Rule 1.3, RPC; and a public reprimand in July 2016, *see In the Matter of Owen*, 417 S.C. 85, 789 S.E.2d 48 (2016), citing Rule 1.1, Rule 3.1 (a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law), Rule 3.3 (a lawyer shall exercise candor toward the tribunal), Rule 3.4 (a lawyer shall not engage in conduct that is unfair to an opposing party or counsel), and Rule 8.4(a), (d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation), and (e), RPC. *See* Rule 2(r), RLDE; Rule 7(b)(4), RLDE.

fraud, deceit or misrepresentation); and Rule 8.4(e)(it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Finally, respondent admits he has violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, which provides that it is a ground for discipline for a lawyer to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers.

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marion Bowman, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-213468

ON WRIT OF CERTIORARI

Appeal from Dorchester County
James E. Lockemy, Post-Conviction Relief Judge

Opinion No. 27761
Heard April 13, 2017 – Filed January 10, 2018

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Appellate Defender David Alexander, both of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General J. Robert Bolchoz, Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia, for Respondent.

JUSTICE KITTREDGE: Petitioner Marion Bowman sought post-conviction relief (PCR) from his sentence of death for the murder of Kandee Martin in February of 2001. The essence of Petitioner's claim is that trial counsel was deficient in failing to object to the State's cross-examination of prison-adaptability expert James Aiken. The PCR court denied Petitioner's application. We issued a writ of certiorari to review the order of the PCR court. We conclude there is evidence to support the PCR court's findings, and we affirm.

I.

Around 7:55 p.m. the evening of February 16, 2001, a motorist was traveling down Nursery Road in the rural, northwestern portion of Dorchester County near the Orangeburg County line, when he spotted a small, four-door sedan parked unusually along the shoulder of the road. As the motorist slowed down and pulled alongside the car to take a look, he noticed that some of the windows were down and the lights were off, but no one was in sight. Although this struck him as an odd way to leave a vehicle unattended, he did not investigate further.

Several minutes later, a neighbor who lived on Nursery Road was watching television in his living room when he heard a loud noise outside. He muted the television, and within fifteen seconds, he heard three gunshots. Suspecting someone was night-hunting, the neighbor got in his car and drove in the direction of the noise to investigate; however, after driving along Nursery Road, he was unable to find anything unusual. He returned home, continued watching television, and went to sleep around midnight. Shortly after 3:30 a.m., he was awakened by what initially sounded like more gunshots. He again got in the car to investigate down Nursery Road, this time spotting a small, four-door sedan positioned on a tractor path between the tree line and a field approximately seventy-five feet from the paved road. The vehicle was engulfed in flames extending almost five feet around and more than fifteen feet above; no other vehicles or persons were anywhere in sight. The neighbor immediately returned home and reported the vehicle fire.[1]

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[1] At trial, the State's arson investigation expert explained the loud noise that awakened the neighbor was mostly likely the explosion of either a tire or a helium-filled component of the vehicle's suspension system.

The local fire department responded to the scene. After putting out most of the fire, firefighters were able to open the trunk of the smoldering car, where they discovered the scorched remains of a human body. The vehicle's charred license plate was recovered, and police discovered the car was registered to twenty-one-year-old Kandee Martin (the Victim) and her mother.[2]

Arson investigators concluded the fire was intentionally set. The autopsy revealed the Victim was not burned alive, but rather suffered two fatal gunshot wounds—one to the head and one to the torso—before her body was placed in the trunk of her car and set on fire. No projectiles were recovered from the Victim's body; however, police found six spent .380 shell casings in the middle of Nursery Road next to a pool of blood, which contained some hair and the back of an earring. A trail of bloodstained grass and ruffled pine straw led investigators approximately thirty feet into the woods where they discovered a woman's black dress shoe next to bloodstained pine straw and branches. Through DNA testing, police identified the blood on the road, pine straw, and branches as belonging to the Victim, and the Victim's mother identified the black dress shoe found in the woods as her daughter's.

Later that morning, Petitioner Marion Bowman was arrested on an outstanding warrant after police learned he was with the Victim the night before. He was subsequently indicted for murder and third-degree arson, and shortly thereafter, the State served upon defense counsel a notice of intent to seek the death penalty. The case was tried in May 2002, and the following summarizes the State's evidence at trial.

Less than two weeks before the murder, Petitioner, accompanied by his first cousin Taiwan Gadson and his childhood friend Travis Felder, purchased a High Point .380 automatic pistol from "[a] dude in Orangeburg." On the afternoon of the murder, Petitioner and several others gathered at a friend's house to socialize and drink alcohol. Petitioner carried his .380 pistol to the party in a brown paper bag,

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[2] An x-ray was taken during the autopsy in an attempt to identify the body through dental records; however, investigators were not able to identify the body except through a DNA comparison with the Victim's family members.

then stashed it in a 55-gallon drum/fire barrel upon arrival. Shortly thereafter, Petitioner left the party to pick up some groceries. At some point while he was gone, Petitioner's first-cousin Hiram Johnson relocated the stashed gun, ostensibly for safety purposes. According to six different witnesses, Petitioner became confrontational when he returned and learned his gun had been moved, but Johnson quickly intervened, explained that he moved the gun, and returned the gun to Petitioner. After looking over the gun to ensure it was still in working order, Petitioner tucked the gun in his back pocket.

Sometime later, Petitioner left the party again to run errands with his sister Yolanda Bowman (Yolanda) and their cousin, Katrina West. As they drove through downtown Branchville, they spotted the Victim sitting in her car talking with a man standing outside the Victim's driver's window. Evidently, the Victim owed Petitioner some money. Petitioner, who was sitting in the back seat, asked Yolanda to pull the car over so he could speak to the Victim. Yolanda complied, and Petitioner rolled down his window and tried to get the Victim's attention. The Victim was mid-conversation with the man standing outside her car, and she asked Petitioner to wait a minute. Petitioner then cursed at the Victim and, in front of three witnesses, said he was going to kill the Victim that evening.[3]

Around 7:30 p.m. that evening, Petitioner returned to the party with the Victim; the Victim drove herself and Petitioner in her Ford Escort, a small, four-door sedan. Gadson got in the car with Petitioner and the Victim, they stole some gas from a convenience store, and Petitioner directed the Victim to drive out to Nursery Road. Once they reached Nursery Road, Petitioner instructed the Victim to pull over and turn off the vehicle lights. The Victim remained in the car while Petitioner and Gadson exited the vehicle and began walking down Nursery Road; as they walked, Petitioner told Gadson he intended to kill the Victim because he believed she was wearing a wire. A few minutes later, the Victim got out of the car and caught up with them, she grabbed Petitioner by the elbow and said she was scared because it

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[3] All three witnesses consistently relayed the general sentiment of Petitioner's statement; however, there were minor discrepancies regarding the precise wording: "Fuck waiting a minute, I'm about to kill this bitch"; "Fuck it, that bitch be dead by dark"; "Fuck that ride. That bitch will be dead by dark fall." At the time of Petitioner's statement, the sun had not yet set.

was extremely dark outside. Just as the Victim was pleading to leave, the threesome saw a car coming down the road, so they all ran and hid in the woods until the car passed.

The Victim then started walking back down the road with Petitioner following. As Gadson came out of the woods behind them, he saw Petitioner fire three times at the Victim. The Victim ran towards Gadson, but turned to face Petitioner and begged, "Please, [Petitioner], don't shoot me no more. I have a baby to take care of." Petitioner then fired twice more and the Victim fell to the ground. Gadson testified he jumped in the car while Petitioner dragged the Victim's body by her feet into the woods. Petitioner later returned, got into the driver's seat of the Victim's car, and stated "I shot that bitch in the head. Heard her head hit the ground." The two then returned to Branchville in the Victim's car, and on the way back, Petitioner threatened Gadson that if he ever told anyone what happened, he would blow Gadson's brains out.

Sometime after midnight, Petitioner drove himself, Gadson, Johnson, and Darrien Williams to a nightclub in the Victim's car. Petitioner stated the car was stolen and instructed everyone to wear gloves to avoid leaving fingerprints. At the club, Petitioner attempted to sell the Victim's car with no success. Thereafter, Petitioner drove the group back to Branchville in the Victim's car; as he drove, he had the murder weapon sitting in his lap and remarked, "I killed Kandee, heh heh heh."

Shortly after 3:00 a.m., Petitioner knocked on Felder's door and asked Felder to give him a ride. Felder testified that he got in his own car and followed Petitioner, who was driving the Victim's car, back to Nursery Road. Petitioner pulled over on the side of the road and went into the woods for a minute. Then, Felder saw Petitioner dragging a body out of the woods by the feet. As Petitioner opened the trunk and put the body inside, Felder recognized the Victim's face by the trunk light. Petitioner looked back at Felder and said "You didn't think I would do it, did you? I killed Kandee Martin." Petitioner instructed Felder to reposition his car while Petitioner drove the Victim's car into a field. Felder watched as Petitioner lit a fire and tossed it in the car, which immediately became engulfed in flames. Felder then drove Petitioner back to Branchville and returned to his girlfriend's house.

When Petitioner was arrested the following day, the Victim's wristwatch was found in the pocket of the pants Petitioner wore the previous night. A few days later, Petitioner's wife found the murder weapon stuffed in a couch in the couple's living room; upon this discovery, she enlisted the help of Petitioner's sisters and father, who dropped the gun off a bridge into the Edisto River. Petitioner's DNA was identified in the vaginal swabs taken from the Victim during autopsy.[4] The gun was recovered by a team of divers and the shell casings recovered at the scene matched the pistol. Additionally, the arson investigator testified that a heavy petroleum product—not gasoline—was found on Petitioner's pants, but the items retrieved from the burning car had gasoline on them.

II.

Petitioner proceeded to trial. Although the fact that the Victim had been murdered was indisputable, the defense theory in the guilt phase was that it was not Petitioner but some other person who killed her and burned her body. Ultimately, a jury found Petitioner guilty of murder and arson.

During the sentencing phase of the trial, the State incorporated all of the evidence introduced in the guilt phase and presented evidence of Petitioner's 1998 third-degree burglary and petit larceny convictions. The State introduced additional photographs of the Victim's charred corpse in the trunk of her car and presented further testimony from the forensic pathologist who performed the autopsy as to the gruesome condition of the Victim's body. The State also introduced pictures of the Victim celebrating family occasions and elicited victim-impact testimony from the Victim's mother and father before resting its case. The State did not present any evidence during the sentencing phase regarding Petitioner's potential to adapt to prison or conditions of prison.

Petitioner followed by presenting extensive mitigation evidence, including

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[4] It is unclear when or under what circumstances Petitioner and the Victim had sexual contact. Although no reference was made in front of the jury, the record suggests that Petitioner may have had sex with the Victim's corpse after he shot and dragged her into the woods. There is also some indication that Petitioner provided the Victim with crack in exchange for sex and/or oral sex at a mutual friend's house on the afternoon of the murder.

testimony of Petitioner's mother and older sister concerning Petitioner's troubled childhood and abusive upbringing. The defense also presented testimony of Alice Baughman, an adult education teacher at the Dorchester County Detention Center where Petitioner was held awaiting trial. Baughman testified Petitioner had become one of her teaching assistants and had never exhibited any inappropriate behavior during classes. The defense also presented testimony of two detention center guards, one of whom described Petitioner as "just as polite as can be." The other, however, testified that Petitioner occasionally refused to cooperate "depend[ing] on what kind of day [Petitioner] was having," but that Petitioner had never become violent or caused her to feel threatened.

Additionally, the defense presented the testimony of forensic social work expert Jeffrey Youngman, who testified in detail to Petitioner's upbringing. As part of Youngman's testimony, he educated the jury on many aspects of Petitioner's life, including being born to a teenage mother, domestic violence between his parents that eventually led to their divorce, and prolonged and extreme financial hardship. Moreover, the mitigation evidence included Petitioner's low IQ and difficulties in school, his family history of alcohol and drug abuse (including his mother's conviction for drug distribution), his mother's debilitating health issues that required Petitioner to provide care for her at the age of nine, and Petitioner's experience selling drugs beginning at age 14. Youngman observed that these myriad factors combined to undermine Petitioner's ability to develop good judgment skills. On cross-examination, Youngman explained that people who sell drugs engage in certain behavior patterns to protect their image and opined "I think part of this whole process was him protecting his image" as a drug dealer.

Petitioner thereafter presented the testimony of James Aiken, a correctional consultant who testified about the classification of prisoners and Petitioner's adaptability to prison. It is counsel's failure to object when Aiken's testimony transitioned from a discussion of prison adaptability into one about general prison conditions that lies at the heart of this PCR case.

Aiken opined that Petitioner had adjusted well to prison in the past, and relayed the security measures at correctional facilities—including gun towers, fences, bars, concrete structures, constant supervision, and no possibility of parole. Aiken did not believe Petitioner would pose a risk of future dangerousness. On cross-examination, the Solicitor elicited testimony from Aiken about the various levels

of security that exist within a prison environment (i.e. minimum, medium, maximum, and "super max") and that inmates may be assigned to less restrictive environments within prison as an incentive for their good behavior. Aiken acknowledged that while in prison, Petitioner would have the ability to move within the facility, including to perform work duties and access secure outdoor recreation areas; however, Aiken explained that, due to the seriousness of the offense of which Petitioner had been convicted, he would never be eligible for work release and would never be permitted to leave the prison facility.

In response to the Solicitor's question regarding what incentive Petitioner would have to follow the rules, Aiken explained,

> The incentive that he has is . . . that the management of that prison system has authority to ensure that his behavior is appropriate. And that's anywhere from sanctioning him . . . [to] using lethal force against that individual . . . We are not in the business of motivation when you deal with a life without parole [sentence]. Our business is incapacitation. We're not preparing you to go anywhere. You're going to stay with us as long as you are breathing, so we're not talking about trying to prepare you for anything. What we're talking about is that we do a good job of keeping you behind bars and behind fences and in gun towers for the remainder of your life.

On redirect examination by defense counsel, Aiken gave a more detailed description of super max confinement and testified that Petitioner would not be going to a "kiddy camp" or a place where he would be "mollycoddled" or have "picnic lunches outside the gate." Aiken explained that all inmates are expected to work to perform cheap labor to reduce the burden on taxpayers and repay society and reiterated, "I don't care how well he does, he will never get out of that prison." Nevertheless, Aiken explained that Petitioner could salvage the rest of his young life and have some redeeming qualities.

On re-cross, the Solicitor attempted to elicit information about how often inmates generally escape from prison, but defense counsel's objection to this irrelevant evidence was sustained. Following a curative charge by the judge as to the escape question, the Solicitor elicited from Aiken testimony about general prison conditions, asking "what is he adapting to, what is going on there?" Aiken

described the daily routine an inmate would likely have including going to work, eating meals, and sleeping, cautioning "you have to understand that this is in a prison environment and this is not in a community environment . . . . It's just like the police being in your home and writing you up for any violation." Aiken explained that inmates are under 24-hour supervision and inmates are cited for administrative violations such as speaking too loudly, being disrespectful, or disobeying a direct order. Then the Solicitor asked:

> Q. And are there recreational facilities available?
>
> A. Yes, sir.
>
> Q. What type of recreational facilities?
>
> A. An inmate can play basketball, an inmate can exercise, you know, on his own, but to understand, again, to give it in a complete context as briefly as I can, you're doing it around very dangerous predator people.
>
> Q. My question is related to the recreational facilities and we understand prison is dangerous people. In addition to that are there libraries they go to, to read books?
>
> A. Yes, sir. As guaranteed by the constitution.
>
> Q. Are there movies they can watch?
>
> A. Yes, sir.
>
> Q. Television?
>
> A. In some instances, yes, sir.
>
> Q. Softball, do they play softball?
>
> A. I don't know. It's some type of recreation such as that.

Q. Thank you. That's all I have.

It is counsel's failure to object to this particular prison-conditions exchange upon which Petitioner's ineffective assistance of counsel claim is based.

Ultimately, the jury found the evidence supported two aggravating factors—the murder was committed during the commission of a kidnapping and the murder was committed during the commission of a larceny with the use of a deadly weapon—and recommended death. The trial judge sentenced Petitioner to death for murder and ten years for arson.

On direct appeal, Petitioner challenged the admission of Aiken's testimony regarding general prison conditions. *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). This Court found that because defense counsel failed to contemporaneously object to the solicitor's prison-conditions line of questioning, the issue of its propriety was not preserved for appellate review, and we affirmed Petitioner's convictions and sentences. In so holding, however, we reminded the bench and the bar that evidence of general prison conditions is irrelevant to the jury's determination of whether a defendant should be sentenced to death or life imprisonment and thus should not be permitted. *Id*. at 498–99, 623 S.E.2d at 387.

This application for post-conviction relief (PCR) presents the claim that trial counsel was deficient in not objecting to the State's re-cross examination of Aiken concerning general prison conditions. The PCR judge denied relief. This appeal followed.

III.

Petitioner argues defense counsel was deficient in failing to object to the Solicitor's questioning of defense prison expert Aiken regarding general prison conditions and that, pursuant to this Court's decision in *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007), he is relieved of his burden of showing he was prejudiced by this deficiency. We address these arguments in turn.

"The United States Supreme Court has set forth a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, *and* (2) the deficient performance prejudiced

the defense." *McHam v. State*, 404 S.C. 465 473–74, 746 S.E.2d 41, 46 (2013) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Holden v. State,* 393 S.C. 565, 713 S.E.2d 611 (2011)).

"On certiorari in PCR cases, the Court applies an any evidence standard of review." *McHam*, 404 S.C. at 472–73, 746 S.E.2d at 45 (citing *Terry v. State,* 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011)). "'This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them,' and it 'will reverse the PCR judge's decision when it is controlled by an error of law.'" *Id*. at 473, 746 S.E.2d at 45 (quoting *Suber v. State,* 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007)).

At the intersection of Petitioner's claims, we find three factors present. First, we acknowledge the wide path extended to a capital defendant to introduce mitigation evidence pursuant to the Eighth Amendment to the United States Constitution. Second, we must recognize our state law that draws a sharp admissibility dividing line between prison adaptability evidence and general prison condition evidence. Third, we must consider the practical, strategy decisions made by trial counsel. The confluence of these factors does not lead to a straightforward, formulaic response, and as we address these factors, we are mindful of the deferential standard of review that applies to factual determinations in PCR matters.

A.

Cognizant of the practicalities of an actual death penalty trial, we observe that here, trial counsel was forced to confront two realities: the gruesome nature of the murder and the overwhelming evidence of Petitioner's guilt. At the PCR hearing, counsel testified at length to the mitigation strategy. Part of the mitigation approach was, of course, a thorough examination of Petitioner's troubled upbringing and abusive family environment. Counsel also made the strategic decision to introduce evidence that Petitioner would adapt well to prison, hence the decision to call Aiken as a witness. Counsel made this decision after much thought and reflection.

Counsel explained that he put James Aiken on the stand to show that there were sufficient security measures in prison such that Petitioner would never pose a threat to society again if Petitioner did not receive the death penalty. Counsel

stated that the strategy was to show the jury that "this is going to be so horrible the rest of his life that this is going to be sufficient punishment and you don't have to give him death." Counsel further explained:

> [Y]ou have your academic believers on the subject but I guess I was kind of focusing on the fact that since you knew you were going to be getting that life without parole charge,[5] you considered in sentencing your best shot was to convince this jury that life in prison was going to be just as bad if not worse for [Petitioner] than giving him the death penalty[.] Yes, it is. I'm not trying to be cruel to [Petitioner]. Yes, I don't know how long his natural life is going to be but everyday you're in a six by eight cell, you can't go get an ice cream cone when you want one and you darn sure are not going to enjoy any of the benefits of this earth. You are in a cell, you are behind wire and you're living with whatever is next door, whatever he's in for next door, and I just had a case with a guy, sliced and diced and killed another man in prison, 22 year old kid. It is a predatory place. So, yes, paint a picture, paint it nasty for them.

When cross-examined about his strategy underlying his decision to put up the adaptability expert, defense counsel explained:

> [H]ow else do you argue about somebody having a chance to live in prison? I mean, I don't argue academically. . . . I want everybody to read this record one day and say what are you going to do for the guys who are in the pits, who are doing this in action, with the guns blazing, you're in there trying to save a young kid's life and all you have to work with is trying to convince twelve people he can adapt to

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[5] Just a few months before Petitioner's trial, the United States Supreme Court decided *Kelly v. South Carolina*, 534 U.S. 246 (2002), finding that where future dangerousness is at issue and the jury's only two sentencing alternatives are death or life imprisonment, due process requires that the jury be informed of the defendant's parole ineligibility. This Supreme Court decision, and the Legislature's subsequent codification of the requirement that life without parole be charged in all death penalty cases, ended the years-long debate over whether capital defendants were entitled to such a jury charge.

> prison . . . .

Counsel admitted he

> made the calculated decision that it was better to go down the road of saying life in prison is so horrible that it is good enough punishment for [Petitioner] knowing full well there was a risk that [the Solicitor] might come back a little bit and say, "Well, you know, prison ain't as bad as all that." . . . [T]his case was kind of on that new frontier, we had just recently had the life without parole charges were mandatory in every death penalty case, so we're kind of on the frontier in dealing with that and how it could be litigated and used by both the State and the defense in the sentencing phase of the capital trial.

Counsel explained that, given the testimony he elicited on the issue, he did not see a valid objection to the solicitor's own limited questioning on prison conditions—except when the solicitor went outside the scope into questioning about escape, to which counsel successfully objected. Indeed, it was not until several years after Petitioner's trial that this Court decided *Burkhart*, upon which Petitioner's PCR claim is primarily based.

The PCR court found that counsel's strategy was reasonable under the circumstances. The PCR court noted counsel is not required to be clairvoyant or foresee changes in the law subsequent to Petitioner's trial and that counsel testified he took the calculated risk that he would gain more with his stark portrayal of a life-without-parole sentence than with no prison-related evidence. *See Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (observing "We have never required an attorney to be clairvoyant or anticipate changes in the law").

Petitioner argues that counsel was deficient for failing to object to Aiken's testimony since this Court made clear long ago that such evidence was irrelevant. Petitioner further contends this evidence was "highly prejudicial in the eyes of the jury" and that counsel's failure to object to it "barred consideration of this winning issue on petitioner's direct appeal."

Before we review the PCR court's findings under the two-pronged *Strickland* analysis, we must first address the constitutional framework surrounding the admissibility of mitigating evidence in the sentencing phase of a capital case.

B.

"Where the State imposes the death penalty for a particular crime, . . . the Eighth Amendment imposes special limitations on that process." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). In relevant part, a state "'cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty.'" *Id*. (quoting *McCleskey v. Kemp*, 481 U.S. 279, 305–06 (1987)). "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (internal citation omitted). "'The sentencer cannot be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *McCleskey*, 481 U.S. at 304 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). In short, the Eighth Amendment demands that a capital defendant be given wide latitude to present any relevant evidence of potentially mitigating value that might convince the jury to impose a sentence of life in prison instead of death.

We begin by acknowledging the unique distinction South Carolina jurisprudence has drawn between evidence of prison adaptability, which we have held is relevant and admissible, and evidence of general prison conditions, which we have held is not. The rationale we have offered for excluding evidence of general prison conditions is that it does not "bear on a defendant's character, prior record, or the circumstances of his offense." *State v. Koon*, 278 S.C. 528, 537, 298 S.E.2d 769, 774 (1982) (affirming the exclusion of evidence of future adaptability to prison life as irrelevant to the jury's sentencing determination), *abrogated by Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding evidence of adjustability to life in prison is constitutionally relevant), *as recognized by Chaffee v. State*, 294 S.C. 88, 91, 362 S.E.2d 875, 877 (1987).

Although we have acknowledged it "'is essential that the jury have before it all possible relevant information about the individual whose fate it must determine,'" *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) (quoting *Barefoot v. Estelle*, 463 U.S. 880 (1983)), we have nevertheless eschewed evidence regarding the "controlled environment of life imprisonment." *Id*. (citing *Koon*, 278 S.C. at 536, 298 S.E.2d at 773). We justified this distinction by reasoning:

> A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at [prison].

Id. at 15, 313 S.E.2d at 627. Although the United States Supreme Court has characterized this distinction as "elusive" and stated "its precise meaning and practical significance" are "difficult to assess," we have nevertheless clung to this division. *Skipper*, 471 U.S. at 7.

Even as recently as 2007, we have stated that "'determinations as [to] the time, place, manner, and conditions or execution or incarceration are reserved to agencies other than the jury.'" *State v. Burkhart*, 371 S.C. 482, 487–88, 640 S.E.2d 450, 453 (2007) (quoting *Plath*, 281 S.C. at 15, 313 S.E.2d at 627) (emphasis omitted). In doing so, we observed this Court has "long held that evidence in the sentencing phase of a capital trial must be relevant *to the character of the defendant or the circumstances of the crime*." *Id*. at 487, 640 S.E.2d at 453 (emphasis added). The point we have repeatedly emphasized—namely, that only the character of the defendant and circumstances of the crime are relevant in the sentencing phase of a capital trial—evolved from cases decided in the wake of the United States Supreme Court's landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (two Justices opining that capital punishment was unconstitutional *per se*; four Justices opining that it was not; and three Justices declining to reach the issue, concluding instead that Georgia's statutory scheme was unconstitutional as applied). The constitutional concerns expressed in *Furman* were that the system of imposing the death penalty must be "structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987) (citing *Furman*, 408 U.S. at 238).

In response to *Furman*, most state legislatures—including Georgia's and South Carolina's—redesigned existing capital sentencing statutory schemes to address the concerns the Supreme Court expressed in *Furman*.[6] *See* 1974 Act No. 1109 §§ 1–3 (codified at S.C. Code Ann § 16-3-20); *see also* 1977 Act. No. 177 (codified at S.C. Code Ann. §§16-3-20, -25 to-28 (2015)) (setting forth, among other things, lists of aggravating and mitigating circumstances to guide the jury's individualized sentencing inquiry; the requirement that at least one statutory aggravating circumstance be found beyond a reasonable doubt as a prerequisite to the imposition of the death penalty; and mandatory review by this Court to ensure proportionality of the death sentence to the facts of the crime and that the death sentence was not the result of "passion, prejudice, or any other arbitrary factor").

Four years later, the Supreme Court examined Georgia's post-*Furman* statutory revisions, and a majority of the Supreme Court concluded that, in the context of Georgia's new procedural safeguards, "the punishment of death does not invariably violate the Constitution" and that the procedural mechanisms included in Georgia's revised statutory scheme satisfied the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

In so holding, the Supreme Court observed that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," and specifically noted that in "the determination of sentences, justice usually requires that there be taken into account the *circumstances of the offense* together with the *propensities of the offender*." *Gregg*, 428 U.S. at 189–90 (emphasis added) (internal quotation marks and citation omitted); *accord Woodson*, 428 U.S. at 304 (holding "the Eighth Amendment requires consideration of the *character and record of the individual offender* and the *circumstances of the particular offense* as a constitutionally indispensable part of the process of inflicting the penalty of death" (emphasis added) (internal citation omitted)).

In reconciling the constitutional requirement for individualized sentencing determinations in capital cases with the countervailing requirement that juries not

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[6] *Gregg v. Georgia*, 428 U.S. 153, 179 n.23 (1976) (listing the thirty-five states in which legislative bodies took action to amend capital sentencing schemes in response to *Furman*).

be given unfettered sentencing discretion to avoid "wholly arbitrary and capricious action," the Court emphasized the difference between "arbitrary grants of mercy," which are perfectly constitutional, and arbitrary impositions of the death penalty, which are not. *Gregg*, 428 U.S. at 189, 199–200. Further, the Court flatly rejected a challenge to the "wide scope of evidence and argument allowed" during the sentencing phase and found "[s]o long as the evidence introduced and the arguments made at the [sentencing] hearing do not prejudice a defendant, it is preferable not to impose restrictions. *We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision*." *Gregg*, 428 U.S. at 203–04 (emphasis added).

Thus, the character of the defendant and the circumstances of the crime are certainly a part of the individualized sentencing hearing the Eighth Amendment demands. However, there is nothing in the constitution or federal jurisprudence that forbids the consideration of *anything* which might serve as a mitigating circumstance. *Skipper*, 476 U.S. at 4 ("[T]he sentencer may not refuse to consider or be precluded from considering *any* relevant mitigating evidence" (emphasis added)); *Caldwell v. Mississippi*, 472 U.S. 320, 330–31 (1985) (observing a capital defendant has a constitutional right to the consideration of "'those compassionate or mitigating factors stemming from the diverse frailties of humankind,'" including a plea for mercy (quoting *Woodson*, 428 U.S. at 304)).

Rather, the determination of what evidence is admissible during a capital sentencing hearing is left to the states, subject of course to the limitations of the constitution, including the Eighth Amendment. *See, e.g.*, *Simmons v. South Carolina*, 512 U.S. 154, 168 (1994) (acknowledging that the federal courts will generally "defer to a State's determination as to what a jury should and should not be told about sentencing"). Viewing as a whole both federal and state jurisprudence on this issue, we believe retaining this state-law distinction serves the purpose of preventing both the State and the defense from engaging in immaterial forays into the microscopic details of a defendant's prison experience. However, in acknowledging this distinction as the general rule applicable in the vast majority of cases, we also acknowledge that in certain cases the Eighth Amendment may not forbid but rather *require* that a defendant be permitted to present certain relevant evidence in this regard. *See State v. Torres*, 390 S.C. 618, 624–26, 703 S.E.2d 226, 229–30 (2010) (finding video recording of capital defendant in prison did not introduce an arbitrary factor into sentencing); *Burkhart,*

371 S.C. at 488, 640 S.E.2d at 453 (acknowledging that at times there may be some overlap between evidence of a defendant's adaptability to prison and prison conditions generally and cautioning that prison conditions evidence should be "narrowly tailored"). Thus, in reaffirming the rule forbidding evidence of general prison conditions, we simply note that it is not without exception.

With this background in mind, we turn now to an examination of the particular prison conditions evidence at issue here.

C.

"It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page*, 378 S.C. 476, 482–83, 663 S.E.2d 357, 360 (Ct. App. 2008) (citations omitted). Indeed, "[c]onduct that would otherwise be improper may be excused under the 'invited reply' doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense." *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). "[T]he idea of an invited response is used not to excuse improper comments, but to determine their effect on the trial as a whole." *Id*. "Once the defendant opens the door, the solicitor's invited response is appropriate so long as it is does not unfairly prejudice the defendant." *Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) (citation omitted). Unless the State's response is inappropriate or unfairly prejudicial, counsel is not deficient for failing to object. *Id*.

As noted, at the PCR hearing, counsel testified his decision to elicit testimony that Petitioner was not going to a "kiddy camp" and that he would not be "mollycoddled" was a strategic choice, and counsel acknowledged that he expected the solicitor to respond with questions about some of the less harsh conditions of confinement.

In examining the issue, the PCR court noted that most of the cases admonishing against prison conditions evidence were decided after Petitioner's trial, and although *Plath* had been decided prior to Petitioner's trial, this Court held in *Plath* that the defense had opened the door to the otherwise inadmissible evidence and therefore its admission was not reversible error.

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . The State was entitled to make this response.

Plath, 281 S.C. at 15–16, 313 S.E.2d at 627–28. The PCR court also noted the United States Supreme Court's decision in *Kelly v. South Carolina*, 534 U.S. 246 (2002), which was decided just months before Petitioner's trial and which held that due process requires the jury to be informed that a life sentence meant life without the possibility of parole. This recent legal development influenced counsel's calculated choice to use the unambiguous "without parole" aspect of that sentence as part of the mitigation strategy.

Counsel's testimony at the PCR hearing is revealing. He acknowledged the risk of opening the door to otherwise inadmissible prison condition evidence. Counsel, however, believed the potential benefit outweighed the risk. It follows that counsel exercised judgment, as he testified, "in the pits, . . . doing this in action, . . . trying to save a young kid's life." Simply stated, counsel weighed the benefits to Petitioner as well as the potential prejudice in deciding whether to present the testimony of Aiken.

The PCR court carefully evaluated the law and all the circumstances, concluding that, given the state of the law at the time of Petitioner's trial, counsel was not deficient in his strategic choice to elicit limited testimony on prison conditions as part of his strategy to portray life imprisonment as a particularly harsh sentence and viable sentencing alternative. The PCR court further found that counsel was not deficient in acquiescing to the solicitor's limited responsive questioning on the same subject, noting counsel's testimony that he believed the defense would gain more through a stark portrayal of a life-without-parole sentence than it lost through any response.

Given all this, is there evidence to support the PCR court's determination that counsel was not deficient? By myopically considering our state's nuanced and unique distinction between prison adaptability and general prison condition

evidence, it might appear a finding of deficient representation is warranted.[7] While we acknowledge that a close question is presented, in light of the state of the law at the time of Petitioner's trial and the narrowly tailored scope of the prison conditions evidence elicited, we find there is evidence in the record to support the PCR court's finding. There is evidence that counsel articulated a valid reason for employing this strategy, and because the State's response was proportional and confined to the topics to which counsel had opened the door, we affirm the finding that counsel was not deficient in failing to object to the State's line of questioning. *Ellenburg*, 367 S.C. at 69, 625 S.E.2d at 226 (finding counsel is not deficient for failing to object to evidence where counsel opened the door); *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.") (citing *Stokes v. State,* 308 S.C. 546, 419 S.E.2d 778 (1992)); *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.") (citing *Goodson v. United States,* 564 F.2d 1071 (4th Cir. 1977)).

D.

Ordinarily, having found counsel was not deficient, we would not reach the prejudice prong. This case, however, presents a degree of overlap on the deficient representation and resulting prejudice prongs, for counsel carefully evaluated the potential for prejudice in pursuing his strategy. Indeed, woven into the PCR court's finding of no deficient representation is counsel's calculus of the potential benefits and risks associated with his strategic decision. We, therefore, turn now to the issue of prejudice to take the opportunity to correct Petitioner's misreading of our *Burkhart* decision.

Shortly after this Court affirmed Petitioner's conviction and sentence on direct appeal, we decided *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007), in which a majority of this Court reversed a death sentence, finding that evidence of

[7] We reiterate that the prison adaptability versus general prison condition distinction is a creation of state law and is not mandated by the Eighth Amendment or other constitutional provision.

prison life in general introduced an arbitrary factor into the jury's consideration in violation of section 16-3-25(C) of the South Carolina Code. In a concurring opinion, Justice Pleicones went beyond the majority and opined that such statutory violations were not subject to harmless error analysis and stated "[o]nce improper evidence of any kind injects an arbitrary factor into the jury's consideration, this Court cannot uphold the death sentence under § 16-3-25(C)(1)" and "a review for harmless error is unnecessary because by definition, evidence that implicates an arbitrary factor is prejudicial." *Id*. at 490, 640 S.E.2d 454. Although the Court's lead opinion was silent as to the applicability of harmless error analysis, in the decade since *Burkhart* was decided, the *Burkhart* concurrence has inexplicably been construed by some as the Court's holding.

In this PCR matter, Petitioner relies on the concurrence in *Burkhart*, which was a direct appeal, to argue that prejudice must necessarily be presumed in a PCR setting whenever a violation of section 16-3-25(C)(1) occurs.

We now clarify *Burkhart* and flatly reject the suggestion that a violation of section 16-3-25(C)(1) precludes a harmless error analysis in all circumstances. As previously noted, section 16-3-25(C)(1) was enacted in the wake of *Furman* and requires the Court to determine whether a sentence of death "was imposed under the influence of passion, prejudice, or any other arbitrary factor." The constitutional concerns this statute was enacted to address relate broadly to the procedural process through which juries arrive at sentencing conclusions during the penalty phase of a capital trial—namely, a bifurcated sentencing proceeding guided by specified aggravating and mitigating factors. Neither the Supreme Court in *Furman* nor the South Carolina General Assembly in the wake of *Furman* envisioned this statute as requiring this Court to evaluate for arbitrariness every infinitesimal evidentiary ruling throughout a lengthy death penalty trial.

The parameters of section 16-3-25(C)(1) are broad, and in some cases, the improper factor may also be a structural error. In such a circumstance, a harmless error analysis is not permitted. Conversely, a section 16-3-25(C)(1) violation may be evidence-based and the error's "influence" on the trial (or lack thereof) may be properly assessed by way of a harmless error analysis. We hold that section 16-3-25(C)(1) requires reversal of a death sentence only when the death sentence is *influenced* by an arbitrary factor; not every irrelevant piece of evidence introduced during the course of a sentencing proceeding may be viewed as *influencing* the

jury's decision. Whether improperly admitted evidence influenced the outcome must be determined on a case by case basis, and where the error is deemed harmless beyond a reasonable doubt, reversal is not required.

In any event, *Burkhart* provides no support for Petitioner's claims in this matter, as this is a PCR claim, which is evaluated under the two-pronged approach of *Strickland v. Washington*, 466 U.S. 668 (1984). "When challenging a death sentence, a petitioner must show that 'there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones v. State*, 332 S.C. 329, 341, 504 S.E.2d 822, 828 (1998) (quoting *Waldrop v. Jones,* 77 F.3d 1308, 1312 (11th Cir. 1996)).

In this regard, the PCR court found there was "no reasonable probability of a different result if a few pages of questioning on this issue during a multi-day sentencing hearing had been excluded." We agree. *See Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001) (finding ineffective assistance of counsel claims based on statutory violations in capital sentencing procedures are subject to both the deficiency and the prejudice prongs of the *Strickland* analysis). Because the evidence of guilt and aggravating factors is overwhelming,[8] there is ample evidence to support the PCR court's determination that Petitioner failed to establish prejudice. *Cf. Humphries v. State*, 351 S.C. 362, 376, 570 S.E.2d 160, 168 (2002) (finding petitioner was not prejudiced by solicitor's improper comments in the sentencing phase of a capital murder trial where there was strong evidence of guilt and the petitioner presented a full mitigation case).

Accordingly, we affirm the denial of PCR.

AFFIRMED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice James E. Moore, concur.

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[8] The facts of the crime are especially heinous, as described above. Evidence pointing to Petitioner as the murderer was overwhelming, including eyewitness testimony and other evidence linking Petitioner to the murder and arson.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Laurens and Newberry Counties. Effective January 16, 2018, all filings in all common pleas cases commenced or pending in Laurens and Newberry Counties must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Clarendon
Colleton	Edgefield	Georgetown	Greenville
Hampton	Horry	Jasper	Kershaw
Lee	Lexington	McCormick	Oconee
Pickens	Saluda	Spartanburg	Sumter
Williamsburg	**Laurens and Newberry—Effective January 16, 2018**		

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
January 4, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert L. Harrison, Employee, Appellant,

v.

Owen Steel Company, Inc., Employer, and Old Republic Insurance Company c/o Gallagher Bassett Services, Inc., Carrier, Respondents.

Appellate Case No. 2015-002093

Appeal From The Workers' Compensation Commission

Opinion No. 5528
Heard October 3, 2017 – Filed January 10, 2018

AFFIRMED

Frank Anthony Barton, of West Columbia, for Appellant.

Jason Wendell Lockhart, of McAngus, Goudelock & Courie, LLC, of Columbia, and Helen F. Hiser, of McAngus, Goudelock & Courie, LLC, of Mount Pleasant, for Respondents.

GEATHERS, J.: Robert Harrison, an employee of Owen Steel Company, appeals the decision of the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) denying his claim for compensation for injuries sustained from an admitted workplace accident occurring on September 17, 2008. Harrison argues the

Appellate Panel erred in finding his claim was barred by the doctrine of laches and the occurrence of intervening accidents. We affirm.

FACTS/PROCEDURAL HISTORY

In September 2008, Harrison suffered an admitted workplace injury to his neck while working for Owen Steel Company as a gantry welder. Harrison indicated he had neck pain that radiated behind his left shoulder blade down his left arm to his elbow. Owen Steel provided medical treatment through Dr. Thomas Holbrook, who performed a cervical-spine fusion at C5-C6 in November 2009. After the surgery, Harrison returned to work on light duty.

Harrison was then involved in a motorcycle accident in April 2010. As a result of the accident, Harrison suffered a left clavicle fracture and abrasions to the left side of his head, right arm and palm, and both knees. However, the emergency room doctor's notes indicate Harrison denied having pain in his head or neck.

In July 2010, Dr. Holbrook released Harrison at Maximum Medical Improvement (MMI) with a fifty-pound lifting restriction and "a 25% impairment to the whole person." Dr. Holbrook's notes indicate Harrison was doing well and had no radicular arm pain but, going forth, might occasionally experience some discomfort that could be relieved with aspirin. Harrison returned to work full time as a welder.

Dr. Donald Johnson performed an independent medical evaluation of Harrison in September 2010. Dr. Johnson noted Harrison had returned to work as a welder and observed Harrison had degenerative changes to his spine above the cervical fusion, specifically C3-C4 and C4-C5. On September 29, similar to Dr. Holbrook, Dr. Johnson believed Harrison had reached MMI and assigned him a 25% impairment rating to the whole person.

In early October 2010, Harrison reinjured his neck at work. The doctor's notes from the emergency room visit state that Harrison lifted a fifty-pound roll of wire and felt a sharp pain in his neck that "radiated down to his upper back and down his left arm." Dr. Raymond Sweet examined Harrison a month after Harrison's second workplace injury. Dr. Sweet knew of Harrison's previous surgery by Dr. Holbrook. Dr. Sweet noted Harrison stated he had never completely recovered and still had pain in his left arm that was getting worse. At a follow-up visit two weeks later, Dr.

Sweet reevaluated Harrison and recommended against a posterior fusion, further noting that Harrison was experiencing reduced neck pain and no arm pain. Dr. Sweet released Harrison at MMI with a 15% whole-person impairment and allowed Harrison to return to work with a restriction not to lift more than thirty pounds.

Harrison returned to work on light duty, working in the tool room for the entirety of 2011. During that time, Harrison filed a workers' compensation claim for his 2010 workplace injury. Owen Steel settled the claim in August 2011 for $42,193.63. Sometime near the end of 2011, Harrison transitioned back to work as a welder.

In February 2012, Harrison suffered another injury while picking up his young daughter, who had fallen off of a porch. As a result of the injury, Harrison went to Doctors Express. The records from that visit indicate Harrison's chief complaint was neck pain. Harrison had a follow-up visit with Dr. Holbrook a month later. Dr. Holbrook's notes indicate Harrison complained of pain in his neck and right arm that radiated down into his hand with numbness and tingling in his fingers. Harrison contends he never complained of neck pain.

Harrison became a shop foreman, a supervisory position with higher pay, in August 2012. Although his position is less physically demanding, Harrison is occasionally required to perform the tasks he supervises, including welding, turning beams, and cleaning up.

On April 18, 2013, Harrison filed a Form 50 seeking compensation for injuries sustained in his 2008 workplace injury.[1] Owen Steel argued, among other things, Harrison had failed to file the claim within the applicable two-year statute of limitations. After a hearing, the single commissioner found Harrison's claim was barred by the two-year statute of limitations. Harrison appealed to the Appellate Panel, which reversed the single commissioner and found Harrison had complied with the statute of limitations by filing a claim letter in September 2009. The Appellate Panel remanded the case "for findings with regard to issues of intervening accidents, laches, and permanency."

[1] Harrison has been involved in two motor vehicle accidents since the filing of his claim, one in July 2013 and one in March 2014. Harrison visited a doctor for the 2014 accident and the medical notes indicate Harrison had "pain from the top of his neck to the top of his right buttocks."

On remand, the single commissioner found Harrison's claim was barred by the doctrine of laches. The single commissioner also found that even if laches did not bar Harrison's claim, it would be impossible to determine Harrison's entitlement to permanent partial disability benefits because of intervening accidents. Further, the single commissioner found Harrison had "not met his burden of proving by [a] preponderance of the evidence as to what his causally related condition was as a result of" his 2008 workplace injury. The Appellate Panel affirmed. This appeal followed.

ISSUES ON APPEAL

1. Did the Appellate Panel err in considering the affirmative defense of laches?

2. Did the Appellate Panel err in concluding Harrison's claim was barred by laches?

3. Did the Appellate Panel err in concluding Harrison's claim was barred by intervening accidents?

4. Did the Appellate Panel err in concluding Harrison was not entitled to an award of permanent partial disability or continuing medical benefits?

STANDARD OF REVIEW

An appellate court may reverse a decision by the Appellate Panel if it is affected by an error of law or is clearly erroneous in view of the substantial evidence. S.C. Code Ann. § 1-23-380(5)(d)–(e) (Supp. 2017). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that [the Appellate Panel] reached or must have reached" to support its order. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Law v. Richland Cty. Sch. Dist. No. 1*, 270 S.C. 492, 495–96, 243 S.E.2d 192, 193 (1978)).

"The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact." *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007). When "there

are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive." *Id.* "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). An appellate court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." § 1-23-380(5).

LAW/ANALYSIS

The Appellate Panel denied Harrison's claim for permanent partial disability benefits associated with his 2008 workplace injury. We affirm this ruling, albeit for reasons different from those underlying the Appellate Panel's decision and the parties' arguments. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision[,] or judgment upon any ground(s) appearing in the Record on Appeal."); *see also Bartles v. Livingston*, 282 S.C. 448, 465, 319 S.E.2d 707, 717 (Ct. App. 1984) (stating an appellate court "is not limited to the *reasoning* of the parties or the trial court in addressing" the issues before it); *id.* ("If we were bound to conform our opinions strictly to the arguments and reasoning of the parties, the result would often be bad decisional law. . . . To confine ourselves solely to the reasoning of the parties would be an abdication of our duty as judges to decide cases independently and impartially in accordance with the law."). Although the Appellate Panel relied on laches in making its ruling, we find laches does not apply.[2]

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[2] "Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999). "The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice." *Richey v. Dickinson*, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004). "In order to constitute laches, the delay in bringing suit must have caused some injury, prejudice[,] or disadvantage to the party claiming laches." *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). The Appellate Panel found Owen Steel had been prejudiced because Harrison had suffered multiple successive injuries to the same body part making it difficult to determine his entitlement to disability benefits without speculating. We disregard this reasoning because Dr. Holbrook and Dr. Johnson examined Harrison before any of his successive injuries and determined

Harrison argues this court should focus solely on the impairment ratings issued by Dr. Holbrook and Dr. Johnson for Harrison's first injury and disregard the impairment rating issued by Dr. Sweet for Harrison's second injury to the same body part. He argues the reports of Dr. Holbrook and Dr. Johnson conclusively established he suffered a 25% whole-person impairment from his September 2008 injury. We disagree.

We are unable to discover any cases similar to the unique posture of this case—an employee who suffers two workplace injuries to the same body part, receives compensation for the second injury first, suffers additional non-workplace injuries to the same body part, then seeks compensation for the first workplace injury.[3] However, our supreme court's opinion in *Medlin v. Greenville County*, 303 S.C. 484, 401 S.E.2d 667 (1991) is instructive. In *Medlin*, the court found "that an employee who has suffered a fifty percent or more loss of use of his back and has received total and permanent compensation for this loss, is not entitled to any further total and permanent benefits for successive injuries to that same body part." 303 S.C. at 488–89, 401 S.E.2d at 669. The court's rationale was that any additional compensation would create a windfall because the person has already received compensation for total loss of use of the body part. *See Stephenson v. Rice Servs., Inc.*, 323 S.C. 113, 118 n.2, 473 S.E.2d 699, 702 n.2 (1996). The *Medlin* court further stated, "Only if [the] employee had suffered less than fifty percent loss of use to his back in the first accident, would he have been entitled to compensation *for the degree of disability [that] would have resulted from the later accident*." 303 S.C. at 488, 401 S.E.2d at 669 (emphasis added); *see Hopper v. Firestone Stores*, 222 S.C.

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he had suffered a 25% whole-person impairment as a result of his September 2008 injury.

[3] This procedural posture was purposeful. Harrison's counsel conceded at oral argument that former counsel sought compensation for the second injury before the first injury in order to circumvent sections 42-9-150 to -170 of the South Carolina Code (2015), which, if Harrison had received compensation for the first injury before the second injury, would have entitled Owen Steel to credit for the permanent disability benefits it would have paid for Harrison's first injury. *See Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 165–66, 584 S.E.2d 390, 396–97 (Ct. App. 2003) (finding an employer was not entitled to credit for previously paid disability benefits pursuant to sections 42-9-150 to -170 because there was no evidence the claimant had previously suffered a permanent injury).

143, 153, 72 S.E.2d 71, 76 (1952) (finding language from the predecessor of section 42-9-150 stating an employee "shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed" clearly evidenced "legislative intent to prevent double compensation"). This indicates that for a claimant to be entitled to additional permanent partial disability compensation for a second injury, when the claimant has already received permanent partial disability compensation for a previous injury to the same body part, the evidence must show the degree of disability attributable only to the second injury in order to avoid double compensation.

Our worker's compensation law refers to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (5th ed. 2000) (AMA Guides) to determine whole person impairment ratings when an employee has an unscheduled injury. *See* S.C. Code Ann. Regs. 67-1101(B) (2012); *Therrell v. Jerry's Inc.*, 370 S.C. 22, 28, 633 S.E.2d 893, 896 (2006). The AMA Guides also recognize that impairment ratings can change from prior ratings—"unanticipated changes may occur: the condition may have become worse as a result of aggravation or clinical progression, or *it may have improved*." AMA Guides at 21. (emphasis added). The AMA Guides address how to determine the impairment rating attributable to a second injury to the same body part: "[T]he most recent permanent impairment rating is calculated, and then the prior impairment rating is calculated and deducted." *Id.* at 12. The AMA Guides provide an example related to successive spine impairments:

> [I]n apportioning a spine impairment, first the current spine impairment rating is calculated, and then an impairment rating from any preexisting spine problem is calculated. The value for the preexisting impairment rating can be subtracted from the present impairment rating to account for the effects of the intervening injury or disease.

Id. at 21.

Our courts have not previously had an opportunity to address the issue, but the Supreme Court of Appeals of West Virginia, referring to the Fourth Edition AMA Guides, has addressed apportioning impairment between two successive

workplace injuries to the same body part.[4] *Wagner v. Workers' Compensation Div.*, 517 S.E.2d 283, 284, 287–88 (W. Va. 1998); *see also* 8 Lex K. Larson, *Larson's Workers' Compensation* § 92.02D[6] (Matthew Bender, Rev. Ed.) (listing decisions of various jurisdictions regarding successive injuries to the same body part). In *Wagner*, an employee injured her back at work and was awarded a 22% impairment rating for permanent partial disability. 517 S.E.2d at 284. Eleven years later, the employee reinjured her back. *Id.* Two doctors opined the employee had a current whole person impairment rating of at least 10%. *Id.* at 287. The first doctor was of the opinion that the previous injury had "very little" effect on the current injury and, therefore, the employee was entitled to 10% additional impairment. *Id.* The second doctor determined, however, that because the injuries occurred at the same location, the employee's current impairment rating had to be apportioned. *Id.* "[T]o calculate the impairment caused by an injury sustained at the same location as an earlier injury, the physician first determines the patient's whole person impairment and then subtracts the amount of impairment caused by the earlier injury. The amount remaining is attributable to the newer injury." *Id.* at 284. Applying this standard, the doctor determined the employee had no additional impairment as a result of her second injury because deducting the previous impairment (22%) from the current impairment (10% or 15%) would result in a negative number. *Id.*; *see, e.g.*, *Cummings v. Omaha Pub. Schs.*, 574 N.W.2d 533, 540 (Neb. Ct. App. 1998) (finding a claimant was entitled to receive compensation for only the additional 5% disability attributable to his subsequent injury because he was already compensated for his prior disability to the same body part).

The *Wagner* court affirmed the finding of the Workers' Compensation Appeal Board that the first doctor's opinion was unreliable because it failed to account for the previous 22% disability—stating the first doctor disregarded the permanency of the employee's previous disability and seemingly opined the disability had cured itself. 517 S.E.2d at 287. The court stated the only reliable evidence was the second doctor's report, which found, pursuant to the AMA Guides, the employee had suffered no additional impairment as a result of her second injury. *Id.*

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[4] South Carolina law has discussed apportionment in another context not relevant here. *See Geathers v. 3V. Inc.*, 371 S.C. 570, 576–79, 641 S.E.2d 29, 32–34 (2007) (rejecting apportionment of liability as a solution to the "successive-carrier problem," occurring "when a worker suffers successive workplace injuries with an intervening change of employers or" insurance carriers, and adopting the "last injurious exposure" rule).

Here, days after Dr. Johnson determined Harrison reached MMI from his 2008 injury, assigning a 25% whole person impairment, Harrison re-injured his cervical spine at work and was examined by Dr. Sweet. Dr. Sweet acknowledged Harrison's spinal fusion by Dr. Holbrook and Harrison's fifty-pound lifting restriction. Dr. Sweet determined Harrison had reached MMI from his 2010 injury and pursuant to the AMA Guides, assigned Harrison a 15% whole person impairment rating. Harrison filed and settled a compensation claim based on Dr. Sweet's report.[5]

We find Harrison is not entitled to any additional permanent partial disability benefits. *Medlin* and *Hopper* support the proposition that an employee, if compensated for a first injury to the back, is entitled to compensation for the degree of disability associated with only the second injury. The logical corollary is that the order in which an employee settles two compensable injuries would not matter so long as the injuries are distinguishable. The AMA Guides require physicians to distinguish successive injuries to the same body part and acknowledge that impairment ratings, although permanent, can change because the employee has improved. Following *Wagner's* approach to the AMA Guides—the second doctor's finding of a lesser impairment percentage reflected the employee's current condition after both injuries—Harrison is entitled to only the compensation he received for his second injury because the 15% impairment represents the totality of his impairment resulting from his 2008 and 2010 workplace injuries. Indeed, Dr. Sweet's recognition of Harrison's previous injury yet his issuance of a lower impairment rating is telling. *Cf. Burnette v. City of Greenville*, 401 S.C. 417, 423, 737 S.E.2d 200, 203 (Ct. App. 2012) (noting a doctor increased the initial impairment rating he assigned to an employee, from 10% cervical spine impairment to 28% whole person impairment, after learning the employee had previous impairments including a lumbar spine injury).

We acknowledge the purpose of workers' compensation law is to compensate a worker for injuries occurring in the course and scope of employment and that the law must be construed in favor of coverage. *See James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010) ("[W]orkers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the

[5] Harrison received $43,193.63 in compensation—Dr. Sweet's 15% whole-person impairment rating converted to a 28% loss of use of the back, representing eighty-four weeks of compensation at Harrison's average weekly wage.

Act . . . ."). However, this policy is not implicated because Harrison has received compensation for the combined effect of his workplace injuries. Moreover, additional compensation is not warranted considering our courts' express proscription against double recovery. *See Hopper*, 222 S.C. at 153, 72 S.E.2d at 76 (finding language from the predecessor of section 42-9-150 stating an employee "shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed" clearly evidenced "legislative intent to prevent double compensation").

We doubt the legislature intended to allow an employee, who has suffered successive injuries to the same body part close together in time, to circumvent the operation of statutes entitling an employer to credit for previously paid permanent disability benefits by seeking compensation for the second injury before seeking compensation for the first injury. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("A choice of language in [an] act will not be construed with literality when to do so will defeat the lawmakers' manifest intention, and a court will reject the ordinary meaning of words used in a statute when, to accept the ordinary meaning, will lead to a result so plainly absurd that it can not possibly have been intended by the legislature." (quoting *S.C. Bd. of Dental Exam'rs v. Breeland*, 208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946))); *id.* ("[T]his [c]ourt has interpreted statutes in accord with legislative intent despite contrary literal meaning in cases where there has been an oversight by the legislature that is clearly in conflict with the overall intent of the statute . . . .").

Therefore, we affirm the Appellate Panel's decision denying Harrison's claim for permanent partial disability benefits associated with his 2008 workplace injury.

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc., Appellant,

v.

Builders FirstSource - Southeast Group, LLC, and Builders FirstSource, Inc., and Joseph Naccari, Individually and d/b/a Master Framers, Defendants,

Of whom Builders FirstSource - Southeast Group, LLC, and Builders FirstSource, Inc., are the Respondents.

Joseph Naccari, Individually, and d/b/a Master Framers, Third-Party Plaintiff,

v.

Jaime Arreguin d/b/a Maya Construction, Third-Party Defendant.

Appellate Case No. 2015-001238

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5529
Heard April 18, 2017 – Filed January 10, 2018

AFFIRMED

Neil S. Haldrup of Wall Templeton & Haldrup, PA, and Peden Brown McLeod, Jr., McLeod Fraser & Cone, LLC, both of Charleston, for Appellant.

James Taylor Anderson, III, of Taylor Anderson Law Firm, LLC, of Charleston, and Mary Bass Lohr, of Howell, Gibson & Hughes, PA, of Beaufort, for Respondents.

LOCKEMY, C.J.: D.R. Horton, Inc. (D.R. Horton) appeals the circuit court's order granting Builders FirstSource's (BFS) motion for summary judgment on D.R. Horton's claim for contractual indemnification and contribution. D.R. Horton argues on appeal the circuit court erred by 1) reading additional terms into the indemnification agreement, 2) finding it was equitably estopped from pursuing its contractual rights, 3) finding it was collaterally estopped from asserting its contractual rights, 4) finding the indemnification clause violated section 32-2-10 of the South Carolina Code (2007), and 5) finding that it did not sustain tort liability. We affirm.

FACTS

On February 5, 2001, D.R. Horton and BFS entered into a contract for BFS to construct several aspects of a home on Daniel Island. The contract included the following indemnification clause:

> To the fullest extent permitted by law, contractor hereby agrees to protect, defend, indemnify, and hold owner, its parent corporation, subsidiaries and affiliates, and any of their respective officers, directors, partners, employees, agents and insurers, . . . free and harmless from and against any and all claims, demands, causes of actions,

> suits, or other litigation of every kind and character (including all costs thereof and attorneys' fees), . . . on account of bodily or personal injury, death, or damage to or loss of property, . . . in any way occurring, incident to, arising out of, or in connection with: (I) a breach of the warranties, representations, obligations, and covenants provided herein by contractor; (II) the work performed or to be performed by contractor or contractor's personnel, agents, suppliers, or permitted subcontractors; or (III) any negligent action and/or omission of the indemnitee related in any way to the work, even when the loss is caused by the fault or negligence of the indemnitee.

The agreement also required "all notices required pursuant to this Agreement or otherwise shall be in writing."

On June 12, 2008, Patricia Clark filed suit against D.R. Horton for damages resulting to her home after discovering alleged construction defects. In her complaint, Clark alleged D.R. Horton failed to properly install 1) the "siding and exterior wall system;" 2) "rough opening flashing and other flashing;" 3) a moisture barrier; 4) kick-out flashing; 5) framing; 6) the slab and driveway; 7) the roof and shingles; 8) and a gas hot water heater. Based on these allegations, Clark asserted claims against D.R. Horton for negligence, breach of contract, multiple breaches of warranty, and a violation of the South Carolina Unfair Trade Practices Act.

On April 1, 2009, the circuit court referred Clark's claims to arbitration. After a two day arbitration on December 10 and 11, 2009, the arbitrator awarded Clark $150,000. The arbitration award did not indicate what damages the arbitrator found compensable; rather, the award noted, "Counsel for the parties have requested an [o]rder containing a monetary award only."

Subsequently, D.R. Horton filed a complaint seeking contractual indemnification and contribution from BFS for recovery of the arbitration award and attorney's fees D.R. Horton incurred defending the Clark action. D.R. Horton alleged BFS was responsible, "in whole or in part," for the damages Clark suffered.

BFS answered D.R. Horton's complaint and thereafter filed a motion for summary judgment alleging D.R. Horton's claims for contribution "fail because [D.R. Horton's] actions in arbitrating the [Clark action], and specifically requesting that the arbitrator not make findings of fact or conclusions of law, have rendered it impossible to ascertain" what damages D.R. Horton incurred as a result of BFS's actions. BFS asserted D.R. Horton's claims for contractual indemnity fail because the indemnity clause purports to require BFS to indemnify D.R. Horton for D.R. Horton's own negligence, and the lack of specificity in the arbitration award made any attempt to determine damages speculative. The circuit court denied the motion by Form 4 order on September 30, 2013.

BFS filed a motion to reconsider the circuit court's order. After a hearing, the circuit court granted BFS's motion to reconsider and granted partial summary judgment in favor of BFS on D.R. Horton's claims for indemnity and contribution. In its order, the circuit court found "it is undisputed that some of the allegations in the [Clark action] related to work performed by [BFS] and other allegations in the [Clark action] were related to the work of others." According to the circuit court, "[t]he plain reading of the indemnity clause is that [BFS] is only required to indemnify [D.R. Horton] with regard to lawsuits arising out of [BFS's] work. Further, to the extent that the indemnity clause does purport to require [BFS] to indemnify [D.R. Horton] for defects in the work of others the clause violates the public policy of South Carolina and violates the provisions of S.C. Code Ann. § 32-3-10." Accordingly, the circuit court granted BFS summary judgment for the portions of the arbitration award and attorney's fees attributable to the negligence of other contractors.

BFS filed a second motion for summary judgment on July 24, 2014. BFS alleged "[D.R. Horton] made a strategic decision to obtain an unreasoned 'monetary' arbitration award in the Clark [action]. . . . [BFS] is entitled to summary judgment on the basis of waiver, equitable estoppel, and on the basis that any award of damages would be unreasonably speculative." After a hearing, the circuit court granted BFS's motion. The circuit court found "[t]he record before the [c]ourt does not contain any finding of tort liability from the [Clark action] and therefore [D.R. Horton] is not entitled to contribution." The circuit court noted, "[b]ecause the arbitration award contains no findings of fact or conclusions of law, it is impossible for the [c]ourt to determine what defects the arbitrator found at the residence." The circuit court found "[a]ny attempt to determine what portions of

the [arbitration award] [are] attributable to the joint negligence of [BFS] and [D.R. Horton] would be an exercise in impermissible guesswork."

With respect to D.R. Horton's claims for contractual indemnity, the circuit court also granted BFS summary judgment. The circuit court reasoned that because there were no findings of law or fact in the arbitration award, there was no evidence that the award was attributable to property damage caused by defects in the materials supplied and installed by BFS. The circuit court also found D.R. Horton's contract with BFS provided BFS with the right to defend any suit implicating the indemnity provisions. Because the circuit court found D.R. Horton failed to provide written notice to BFS of the arbitration, the circuit court found D.R. Horton lost its right to indemnification. The circuit court also found D.R. Horton's failure to provide BFS with written notice of the arbitration acted as a waiver of D.R. Horton's right to indemnification, and that D.R. Horton was equitably estopped from requesting indemnification. As a matter of law, the circuit court found the indemnification clause violated section 32-2-10 as it purported to require BFS to indemnify D.R. Horton for D.R. Horton's own negligence; therefore, the clause was unenforceable. Finally, the circuit found D.R. Horton could not relitigate the issues it previously litigated in the Clark action. Accordingly, the circuit court granted BFS's motion for summary judgment on all claims. This appeal followed.

INDEMNIFICATION

D.R. Horton asserts the trial court erred by incorporating extra terms into the indemnification agreement and failing to require BFS pay the entire arbitration award and attorney's fees. We disagree.

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id*. (quoting *Fleming*, 350 S.C. at 493, 567 S.E.2d at 860). "To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.'" *Id*.

(quoting *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). "A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity." *Id.* "A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally." *Id*.

"As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008). "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Id*. (quoting *Piggy Park Enters., v. Schofield*, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968)).

D.R. Horton alleges the indemnification agreement requires BFS to pay for all $150,000 in damages awarded by the arbitrator and attorney's fees because at least one of the homeowner's claims involved BFS's work. D.R. Horton asserts "[t]he indemnification provision only requires a claim by a homeowner on account of damage to property arising out of the work of D.R. Horton's subcontractor." D.R. Horton essentially argues once a homeowner files suit regarding any work done by a subcontractor, and damages are awarded in that suit, the subcontractor is responsible for all damages awarded. We need not interpret the contract in question here because even under D.R. Horton's interpretation, it still could not recover based on the unreasoned[1] arbitration award here.

The trial court determined D.R. Horton's indemnification agreement violates section 32-2-10. That statute provides:

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[1] While we refer to this award as "unreasoned" we acknowledge there was evidence to support the award. We labeled it "unreasoned" for purposes of this opinion because the monetary award does not indicate what evidence the arbitrator used in coming to the decision.

> Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

This statute allows D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree. However, we agree that the indemnification clause is void as against public policy to the extent it purports to require BFS to indemnify D.R. Horton for damages caused by its negligence or the negligence of its subcontractors. We recognize our supreme court has generally held that a contract of indemnity may require a party to indemnify an indemnitee against its own negligence if the "intention is expressed in clear and unequivocal terms." *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (quoting *Fed. Pac. Elec. v. Carolina Production Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)). However, "[a]n illegal contract is unenforceable." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002). The indemnification agreement in this case purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10. Because the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.[2]

[2] D.R. Horton did not appeal the circuit court's finding that this provision violated the statute. Rather, D.R. Horton only argues the remaining indemnification

The inclusion of the illegal contractual indemnification term, along with an unreasoned award for damages only, proves fatal to D.R. Horton's claim for indemnification. The record is devoid of any evidence presented to the arbitrator, and any attempt to devine the reasoning for the arbitrator's award would be an exercise in speculation. *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010) ("Because the verdict was a general verdict it is impossible to determine how the jury allocated damages . . . ."); *id*. ("We will not speculate as to how the jury allocated damages."). D.R. Horton cannot ask the arbitrator to conceal its reasons for an award, which may have included damages caused by its own negligence, then ask the circuit court to award it damages that would be barred by statute. Because it is impossible to determine whether, and to what extent, the arbitrator's award included damages for D.R. Horton's own negligence, indemnification is inappropriate in this case.

CONTRIBUTION

D.R. Horton also alleges the trial court erred in finding it did not sustain tort liability, which is necessary for a contribution claim, because the claims in the Clark action were based, in part, on code violations. D.R. Horton asserts allegations of code violations would be considered negligence per se, subjecting it to tort liability.

The circuit court found "[t]he record before the [c]ourt does not contain any finding of tort liability from the [Clark action] and therefore [D.R. Horton] is not entitled to contribution." The allegations in the Clark action included causes of action for breach of contract, breach of warranty, negligence, and violation of the South Carolina Unfair Trade Practices Act. Because D.R. Horton failed to procure a specific verdict, opting instead for a general damages verdict, this court cannot determine whether D.R. Horton sustained tort liability. *See Jenkins*, 391 S.C. at 221, 705 S.E.2d at 463 ("Because the verdict was a general verdict it is impossible to determine how the jury allocated damages . . . ."); *id*. ("We will not speculate as to how the jury allocated damages."). Furthermore, it would be impossible for a new jury to speculate on which defendant caused the awarded damages in order to determine the extent of any tort liability and whether D.R. Horton has paid more

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provisions should require BFS to indemnify it regardless of the court's decision finding this provision unlawful.

than its fair share. S.C. Code Ann. § 15-38-20(B) (2005) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability . . . .").

CONCLUSION

Based on the foregoing, we find the circuit court properly granted summary judgment to BFS because D.R. Horton cannot prove what damages it would be entitled to under the contractual indemnification provisions or pursuant to the contribution statute.[3] Accordingly, the order of the circuit court is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

[3] Because our resolution of the contribution and indemnification issues are dispositive, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).