Judicial Merit Selection Commission

Post Office Box 142
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M E D I A R E L E A S E
September 3, 2002

The Judicial Merit Selection Commission is currently accepting applications for the judicial office listed below. In order to receive application materials, a prospective candidate must notify the commission in writing that he intends to apply for the specified seat. Correspondence and questions must be directed to the Judicial Merit Selection Commission as follows:

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6630

The commission will not accept applications after **12:00 noon on Wednesday, October 2, 2002**.

A vacancy will exist in the term of the office currently held by the Honorable Gary E. Clary, Judge of the Circuit Court, At-Large Seat 5, upon Judge Clary's retirement on September 30, 2002. The term of this office expires on June 30, 2003.

The Commission is currently accepting applications for a vacancy that will exist in the term of the office of Judge of the Circuit Court, At-Large Seat 5 (currently held by Judge Clary) for a six-year term beginning July 1, 2003. The deadline for applications for this term had previously been set for Monday, September 9, 2002. The Commission has now extended this deadline such that the Commission will not accept applications after 12:00 noon on Wednesday, October 2, 2002.

Applicants may submit a single application for both terms if they should choose to pursue election to both the partial and six-year term.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/judmerit.htm.

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

September 3, 2002

ADVANCE SHEET NO. 31

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Frasier, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Charleston County
John Hamilton Smith, Trial Judge
Alexander S. Macaulay, Post-Conviction Judge

Opinion No. 25524
Heard March 5, 2002 – Filed September 3, 2002

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, of Columbia, for respondent.

JUSTICE BURNETT: Petitioner pled guilty to armed robbery and was sentenced to twenty-one years imprisonment to be served concurrently with a prior sentence. The Court granted a writ of certiorari to review the decision of the post-conviction relief (PCR) judge denying petitioner relief. We affirm.

FACTS

At the plea proceeding, the trial judge questioned petitioner as follows:

> The Court: This is [petitioner], who is accused in this indictment with two different counts, one for armed robbery and one for possession of a shotgun. He's pleading guilty to armed robbery but not to possession of the sawed-off shotgun. Now, for the armed robbery, you could receive a sentence of from ten years up to twenty-five years, and you have to do at least seven under our parole statute. Do you understand that, [petitioner]?
>
> A. Yes, Your Honor.

Although petitioner was parole ineligible because he had a prior conviction for a violent offense, trial counsel neither objected to the judge's statement nor moved the judge to clarify petitioner's parole status.[1]

At the PCR hearing, petitioner testified, prior to the plea, trial

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[1]A person convicted of armed robbery is eligible for parole after service of seven years. S.C. Code Ann. § 16-11-330(A) (Supp. 2001). However, under the 1986 Omnibus Criminal Justice Improvements Act, a person who is convicted of a second or subsequent violent crime as defined in South Carolina Code Ann. § 16-1-60 (Supp. 2001) is ineligible for parole. S.C. Code Ann. § 24-21-640 (Supp. 2001). Section 16-1-60 defines armed robbery as a violent crime.

counsel told him he would face a maximum of twenty-five years imprisonment for armed robbery and would be eligible for parole in seven years. He testified the plea judge's statement concerning parole eligibility was consistent with counsel's advice. Petitioner testified he and counsel discussed the 1986 Omnibus Criminal Justice Improvements Act, but did not discuss the impact of his prior conviction on his parole eligibility. He testified he would not have pled guilty but would have gone to trial had he known he was parole ineligible.

Trial counsel testified it was her general practice not to discuss parole with clients. She admitted she and petitioner did discuss parole as it related to his prior conviction, but testified she could not recollect whether she and petitioner discussed parole as it related to the armed robbery charge. Counsel explained, in negotiating petitioner's plea, her primary concern was to minimize the amount of time petitioner would have to serve.

Counsel testified she knew the 1986 Omnibus Criminal Justice Improvements Act was in effect when petitioner pled guilty. She further stated she knew two convictions for a violent crime precluded parole, however she did not recall whether she specifically contemplated the Act's effect on petitioner.

The PCR judge denied relief. In the Order of Dismissal, the PCR judge held petitioner's "testimony concerning his reliance on parole eligibility information is not credible." Because it was counsel's general practice not to advise clients about parole, the court concluded petitioner did not enter his plea in reliance on parole advice by counsel. The court further concluded the trial judge's comment about parole "concerned armed robbery by itself" and found "there is nothing in the record to indicate a plea fashioned on reliance on parole eligibility."

ISSUE

Is there any probative evidence which supports the PCR judge's decision petitioner was not misinformed about his parole

eligibility and, therefore, counsel's failure to move for clarification of the trial judge's statement did not render petitioner's plea unknowing and involuntary?

DISCUSSION

A PCR applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP.

"Misadvice" Prior to Plea

A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence. Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991). Typically, parole eligibility is considered a collateral consequence of a sentence. However, if trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive PCR. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983).

Probative evidence in the record supports the PCR judge's finding petitioner was not induced to plead guilty based on parole advice prior to the plea. Trial counsel testified it was her general practice not to advise clients as to parole eligibility even though she could not specifically remember what she told petitioner. This evidence supports the PCR judge's finding petitioner did not enter his plea based on any "misadvice" by trial counsel as counsel did not give any advice. Accordingly, we affirm on this sub-issue. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000) (if there is

any probative evidence to support the findings of the PCR judge, those findings must be upheld).[2]

"Misadvice" During Plea

On two occasions, the Court has considered the effect of the plea judge's parole "advice" on the plea. Originally, the Court held a guilty plea is rendered unknowing and involuntary where the plea judge misinforms a defendant he is parole eligible when, in fact, he is parole ineligible. Brown, supra.

Thereafter, the Court modified Brown, holding that where the plea judge "explain[ed] the minimum criteria for parole eligibility as contained in the applicable statute, the fact that the defendant is not actually eligible for parole does not render his guilty plea involuntary or unknowing." Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205-06 (1994), abrogated on other grds. Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998). The Court concluded:

> We still believe that erroneous parole advice from the bench could, on certain facts, mislead a defendant to his detriment; however, it would be wholly impractical to maintain a rule which

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[2]Counsel admitted she and petitioner discussed parole. She explained petitioner had been paroled after serving a portion of a prior sentence and she was in hopes his parole revocation sentence could be served concurrently with his armed robbery sentence. However, counsel testified she did not remember advising petitioner he would be eligible for parole on the armed robbery charge after service of seven years and it was her practice not to advise clients as to parole eligibility. While parole may have been "an issue" in petitioner's decision to plead guilty, as stated by the dissent, there is probative evidence which supports the PCR judge's decision counsel did not advise him he would be eligible for parole after service of seven years. Because the Court is required to affirm the PCR judge's ruling if there is any probative evidence which supports the lower court's decision, the Court must affirm. Id.

> requires the automatic reversal of a guilty plea without something more.

Hunter, 316 S.C. at 109, 447 S.E.2d at 205 (emphasis added).

Petitioner contends he established the "something more" required by Hunter. He claims that in addition to the plea judge's comment, trial counsel advised him prior to the plea that he would be eligible for parole in seven years.

As noted above, the probative evidence of record supports the PCR judge's finding trial counsel did not advise petitioner about parole eligibility. Accordingly, petitioner failed to establish "something more" than the judge's comment regarding parole at the plea. The probative evidence of record supports the PCR judge's finding petitioner did not rely on the plea judge's comment concerning parole in pleading guilty. Because there is probative evidence which supports the PCR judge's finding, we must affirm on this sub-issue. Anderson v. State, supra.

AFFIRMED.

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

JUSTICE PLEICONES: I respectfully dissent. Trial counsel acknowledged that while she generally did not discuss parole eligibility with her clients, she had discussed it with petitioner. Although she could not recall the exact conversation, her testimony supports petitioner's contention that parole was an issue in his decision to plead guilty. In my opinion, this undisputed fact is the "something more" that, coupled with the trial judge's misadvice concerning parole eligibility at the plea, entitles petitioner to post-conviction relief. Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994), *subsequent history omitted*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Auto Now Acceptance Corporation, Respondent,

v.

Catawba Insurance Company, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25525
Heard June 25, 2002 - Filed September 3, 2002

REVERSED

William P. Davis and Holly L. Palmer, both of Baker, Ravenel & Bender, of Columbia; for Petitioner.

Joseph Gregory Studemeyer, of Columbia; for Respondent.

JUSTICE BURNETT: Auto Now Acceptance Corp. ("Auto Now") brought this action against Catawba Insurance Co. ("Catawba") for failing to provide it notice of cancellation of an insurance policy listing Auto Now as loss payee. A divided Court of Appeals affirmed the trial judge's ruling in favor of Auto Now. See Auto Now Acceptance Corp. v. Catawba Ins. Co., 342 S.C. 526, 537 S.E.2d 553 (Ct. App. 2000). We reverse.

FACTS

Catawba issued an automobile insurance policy to Jacqueline D. Robinson and Michelle Jones ("Insured"). Auto Now took assignment of the installment sales contract between Insured and the car dealership. Catawba listed Auto Now as loss payee on Insured's policy. Insured financed the insurance premium with Premium Budget, Inc. ("PBI"). Insured executed a power of attorney granting authority to PBI to cancel the insurance policy upon ten days' notice to Insured in the event of Insured's default in repayment of the premium.

Insured defaulted and PBI mailed Insured notice of its intent to cancel. Following an additional notice to Insured, PBI mailed notice of cancellation to Catawba.[1] Neither PBI, Insured, nor Catawba notified Auto Now of the cancellation. Fire destroyed Insured's automobile two months after PBI cancelled the insurance. Auto Now learned of the policy's cancellation only after Insured defaulted on the loan.

ISSUES

I. Did the Court of Appeals err in finding Catawba was required to notify Auto Now of the cancellation of

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[1] All parties stipulate PBI complied fully with the requirements governing insurance cancellations by premium finance companies.

Insured's policy where the cancellation was effected by PBI?

II. Did the Court of Appeals err by failing to address the two types of loss payee clauses under South Carolina law?

DISCUSSION

I

Failure to Notify a Loss Payee of Cancellation

Catawba argues the Court of Appeals erred in finding it owed a duty to inform Auto Now of the cancellation. Catawba contends it is neither contractually nor statutorily required to notify a loss payee of a cancellation initiated by a premium service company. We agree.

The contract of insurance issued to Insured by Catawba contemplates cancellation either by Insured or by Insurer, Catawba. If Catawba cancelled the policy, the contract requires it notify Insured at least 15 days before the effective date of cancellation. See also S.C. Code Ann. § 38-77-120(a) (Supp. 2000) (requiring insurer to provide 15 days notice before canceling policy). This provision of the contract does not require notice to third parties. However, the contract's loss payable clause requires Catawba, when it cancels a policy, to provide the same 15-day notice of cancellation to a loss payee. If the insured cancels, no notice is required.

The trial court held the insurance cancellation by PBI was not the equivalent of cancellation by Insured. The court concluded the contract's notice provision to loss payees was triggered by PBI's cancellation. Therefore, Catawba was contractually required to notify Auto Now of the cancellation.

On appeal, Catawba argued PBI's cancellation, through its power of attorney granted by Insured, was the equivalent of cancellation by Insured.

The Court of Appeals, affirming the trial court, found "the argument ignores the clear intent of the statute governing cancellation by premium service companies such as PBI." Auto Now Acceptance Corp., 342 S.C. at 530, 537 S.E.2d at 555. The Court of Appeals noted South Carolina limits the ability of PBI as a premium service company to cancel an insurance contract on behalf of Insured. See, e.g., S.C. Code Ann. § 38-39-90 (Supp. 2000).

Catawba argues 25A S.C. Code Ann. Reg. 69-13(V)(B)(3) (1976) provides cancellation by PBI is equivalent to cancellation by Insured. The regulation requires an insurer provide notice of cancellation to an insured before cancellation of a policy. See 25A S.C. Code Ann. Reg. 69-13(V)(A) (1976). Subsection (B)(3) provides an exception to this requirement when a premium service company cancels the policy because "[i]n such a situation the insured will have already been notified of the premium service company's intent to request cancellation, such cancellation by the premium service company is deemed the equivalent of cancellation by the insured himself." 25A S.C. Code Ann. Reg. 69-13(V)(B)(3) (1976).

Catawba contends this language requires we find the Legislature affirmatively recognizes PBI's cancellation as cancellation by Insured, relieving Catawba of notifying Auto Now of the cancellation. Catawba reads the clause too broadly.

The Court of Appeals correctly interpreted the regulation in light of the insurer's duty to notify an insured before cancelling a policy as required by S.C. Code Ann. § 38-39-90 and 25A S.C. Code Ann. Reg. 69-13(V)(B)(3). "[T]he regulation relieves the insurer from providing the insured with any further notice prior to carrying out the cancellation," because "the insured will already have received notice of the premium service company's intent to cancel." Auto Now Acceptance Corp., 342 S.C. at 531, 537 S.E.2d at 556. The regulation does not statutorily recognize a premium service company as the equivalent of an insured. Instead, it relieves the insurer of the burden of notifying the insured of cancellation because the premium company is required to do so. Catawba's interpretation is not reasonable in the light of the regulation's purpose to ensure the insured's notification of cancellation. See Strother v. Lexington County Recreation

Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998) (the cardinal rule of statutory construction is for a court to ascertain the intent of the legislature and to give it effect); Rosenbaum v. S-M-S 32, 311 S.C. 140, 143, 427 S.E.2d 897, 898 (1993) (a court should give a statute a "practical, reasonable, and fair interpretation consonant with the purpose, design and policy of lawmakers."); Mitchell v. Holler, 311 S.C. 406, 410, 429 S.E.2d 793, 795 (1993) ("The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand a statute's operation.").

The Court of Appeals' interpretation of the contract and statutes is equally erroneous. The Court of Appeals observes PBI cancelled the policy because Insured failed to pay premiums, which is one reason an insurer may cancel a policy. See S.C. Code Ann. § 38-75-730 (1989 & Supp. 2001). The Court of Appeals offers if "PBI had not been a party to this transaction, Catawba would have canceled the policy itself for nonpayment...[i]n that case, there is no question but that Auto Now would be entitled to notice under the terms of the insurance contract at issue." Auto Now Acceptance Corp., 342 at 531, 537 S.E.2d at 556.

In adopting the trial court's rationale, the Court of Appeals based its decision on a premise inconsistent with the facts of the case. The fact Catawba would have cancelled Insured's policy for non-payment of premiums is not pertinent to circumstances in which PBI paid Insured's policy premiums in-full to Catawba, and then required Insured to repay PBI under threat of cancellation of Insured's coverage. Assuming hypothetical facts is inconsistent with the provisions of the contract, which are silent as to Catawba's duty to inform loss payees when PBI cancels. See Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976) ("Words cannot be read into a contract which impart intent wholly unexpressed when the contract was executed").

The Court of Appeals further and incorrectly affirmed the trial court by finding a statutory notice requirement independent of Catawba's contractual obligations. The court below based its decision on S.C. Code Ann. § 38-39-90(d) (1976) which provides:

> All statutory, regulatory, and contractual restrictions providing that the insurance contract may not be canceled unless notice is given to a governmental agency, mortgagee, or other third party apply where cancellation is effected under this section. The insurer shall give the prescribed notice in behalf of itself or the insured to any governmental agency, mortgagee, or other third party by the second business day after the day it receives the notice of cancellation from the premium service company and shall determine the effective date of cancellation taking into consideration the number of days' notice required to complete the cancellation.

S.C. Code Ann. § 38-39-90(d)(emphasis added).

The Court of Appeals interprets this statute as requiring Catawba give notice to Auto Now on the second business day after it receives notice of intent to cancel from PBI. We disagree.

Our statute is similar[2] to one reviewed by the Tennessee Court of Appeals in Western Express, Inc. v. Interested Underwriters at Lloyd's of

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[2] The Tennessee statute provided:

> All statutory, regulatory and contractual restrictions providing that the insurance contract may not be cancelled unless notice is given to a governmental agency, mortgagee or other third party shall apply for cancellations effected under the provisions of this section. The insurer shall give the prescribed notice on behalf of itself or the insured to any governmental agency, mortgagee or other third party on or before the second business day after the day it receives the notice of cancellation, taking into consideration the number of days' notice required to complete the cancellation.

Tenn. Code Ann. § 56-37-110(d).

London, 92 S.W.2d 542 (Tenn. Ct. App. 1996). In Western Express, a premium service company paid a yearly premium to an insurer on behalf of an insured. The insurance contract listed the lien holder of the insured's truck as a loss payee. The Court of Appeals concluded: "the quoted statute does not independently obligate the premium finance company or the insurer to give notice to lienholders...[only] that other **statutes**, **regulations** or **contracts** that **do** impose such requirements should be complied with." Id. at 544 (emphasis in original). We concur.

The statute merely requires an insurer, before it may cancel a policy, to provide a notice of intent to cancel to third parties where it is affirmatively required to do so by statute, regulation or contract. Section 38-39-90(d) is not instructive of Catawba's duty to notify Auto Now when Insured or PBI cancels the policy, nor does it provide an independent statutory duty for Catawba to notify Auto Now of PBI's cancellation.

Auto Now advances two additional theories why Catawba had a duty to notify it of PBI's cancellation. The first is Rawl v. American Cent. Ins. Co., 94 S.C. 299, 77 S.E. 1013 (1913), in which we recognized a loss payee's right to receive notice of involuntary cancellation. As the dissent below correctly noted, the loss payee's entitlement to notice in Rawl was created by the insurance policy itself, not by our interpretation of a statute or regulation. See Auto Now Acceptance Corp., 342 S.C. at 533-34, 537 S.E.2d at 557-58 (Huff, J., dissenting). Therefore, while Rawl holds a contract may require an insurer to notify a loss payee of a cancelled policy, it does not mandate such notice as a matter of law.

Secondly, Auto Now contends public policy requires Catawba to forward PBI's notice of intent to cancel to it. Auto Now believes the burden placed on Catawba is warranted because "requiring insurers to notify loss payees of involuntary cancellations of insurance … facilitates the public policy of removing uninsured motorists from the highways of this State." We disagree.

Auto Now does not cite, nor have we found, any cases similar to the case *sub judice* in which a court found an insurer's duty to notify a loss payee

of a third party's cancellation of an insured's contract based on those grounds. We believe a desire to remove uninsured vehicles from the state's roads, though laudable, cannot stand in the face of the explicit language of § 38-39-90(d).

Although we are sympathetic to the plight of loss payees in these circumstances, no contract or any statutory or regulatory provision requires an insurer notify a loss payee when a premium service company cancels an insurance policy. This Court recognizes PBI's capacity to cancel an automobile insurance policy when it acts through a power of attorney granted to it by Insured. See Steele v. Seibels, Bruce and Co., 295 S.C. 206, 367 S.E.2d 695 (1988). Insured irrevocably appointed PBI as their "true and lawful attorney-in-fact with full authority to cancel any or all policies listed . . . in the event of any default in repayment as agreed." When PBI cancelled Insured's policy, it did so as an agent of Insured. PBI's cancellation, therefore, is the equivalent of Insured's cancellation, which relieves Catawba from notifying Auto Now.

II

Two Types of Loss Payee Clauses

Both Catawba and the dissent below assert the majority's decision overlooks the distinction between the two types of loss-payee clauses under South Carolina law. We disagree.

This Court in Nationwide Mutual Insurance Co. v. Hunt, 327 S.C. 89, 488 S.E.2d 339 (1997), recognized the existence of two types of third-party insurance clauses. They are: (1) loss payable clause which merely identifies the person who may collect the insurance proceeds; and (2) a standard mortgage clause which creates an independent contract for mortgagee's interest. Id. at 93, 488 S.E.2d at 341; see Auto Now Acceptance Corp., 342 S.C. at 534, 537 S.E.2d at 558.

Courts rely on the distinction between the two clauses when an **insurer** cancels a policy and the remaining question is whether the insurer

had a duty to notify a third party, in the absence of a contractual obligation to do so. See, e.g., Vargas v. Nautilus Ins. Co., 248 Kan. 881, 811 P.2d 868 (Kan. 1991); Gallant v. Lake States Mutual Ins. Co., 142 Mich. App. 183, 187, 369 N.W.2d 205, 205 (Mich. Ct. App. 1985); Old Kent Bank of Holland v. Chaddock, Winter & Alberts, 197 Mich. App. 372, 495 N.W.2d 808 (Mich. Ct. App. 1993). The distinction is irrelevant here because this case involves a premium service company, standing in the shoes of the insured, cancelling an insurance policy.

CONCLUSION

For the above reasons we REVERSE the Court of Appeals.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John Edward Weik, Appellant.

Appeal From Dorchester County
M. Duane Shuler, Circuit Court Judge

Opinion No. 25526
Heard June 25, 2002 – Filed September 3, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Walter M. Bailey, of Summerville, for respondent.

JUSTICE PLEICONES: Appellant was convicted of first degree burglary and murder, and received a death sentence upon the finding of burglary and physical torture as aggravating circumstances. This opinion combines appellant's direct appeal and this Court's mandatory sentencing review pursuant to S. C. Code Ann. §16-3-25 (1985). We affirm.

Facts

Appellant and the victim had a ten-year-old son who lived with the victim. On April 30, 1998, as he finished his shift at work, appellant told his supervisor that "he was troubled with events going on in his personal life about his son" and that he planned to go to the victim's home that evening to try to resolve the problems. Appellant told his supervisor he might not be at work the next day because he was unsure what would happen. After returning to his home, appellant had a telephone conversation with his son, then left for the victim's trailer. He had a loaded shotgun in his truck.

Appellant and the victim were observed arguing on the victim's porch. Appellant stated that the victim told him he would not be able to see his son anymore. A neighbor observed the victim enter her trailer, and saw appellant go to his truck and return to the trailer carrying the shotgun.

Appellant kicked open the door. Witnesses heard a shot; one heard a scream. Another witness testified that a minute to a minute and a half passed before more shots were fired. When appellant left the scene in his truck, a neighbor entered the trailer and found the victim dead inside. Appellant's son and the victim's young daughter, both of whom were in the trailer during the shooting, were unhurt.

Police officers were notified of the shooting; appellant was stopped not far from the scene. He confessed to two different officers at the roadside, and asked for the death penalty. Appellant gave a taped confession later that evening, and then wrote a statement. He consistently asked for the death penalty, and stated that a voice had told him to shoot the victims. He told

others he had observed the shooting as if watching it on a monitor or screen.

Appellant admitted shooting the victim first in the arm, then in the chest, then the stomach, and again in the upper chest and face. The victim was shot from close range with a 12 gauge automatic shotgun loaded with three inch 00 buck shot. The pathologist identified at least five shotgun wounds, and testified that the arm wound would have been extremely painful.

Issues

Appellant raises six issues on appeal:

1. Whether the trial court erred in finding appellant competent to stand trial following the pretrial Blair[1] hearing?;

2. Whether the trial court erred in refusing to accept appellant's offer to plead guilty but mentally ill (GBMI)?;

3. Whether the trial court erred in refusing to hold a second competency hearing at the conclusion of the evidentiary presentation in the guilt phase of the trial?;

4. Whether the trial court erred in not submitting GBMI as a form of the verdict in the guilt phase?;

5. Whether the court erred in admitting twelve color photographs in the penalty phase of the trial?; and

6. Whether appellant's death sentence is disproportionate to the crime?

We address these issues below.

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[1]State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

1. Competency

The week before appellant's trial commenced the judge conducted a Blair hearing to determine appellant's competency to stand trial. Both the State's experts and appellant's experts agreed that appellant suffers from a mental disorder,[2] and that he was not a malingerer. They disagreed, however, whether appellant's condition rendered him incompetent to stand trial.

The test for determining competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). Competency is required "to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel." Godinez v. Moran, 509 U.S. 389 (1993). The defendant bears the burden of proving his lack of competence by a preponderance of the evidence, and the trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance. State v. Reed, supra.

The trial judge determined appellant was competent to stand trial based on the opinions of the State's experts, and on his own observations of appellant. We find no error. See e.g. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987).

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[2]The State's experts diagnosed appellant as suffering from schizotypal personality disorder while appellant's experts diagnosed paranoid schizophrenia. All agreed that appellant was "hyper-religious," heard voices, and suffered from paranoid beliefs involving the CIA and the Masons.

2. Plea

During the arraignment in the jury's presence, the trial judge asked whether appellant was pleading "guilty" or "not guilty." Appellant's attorneys were permitted to approach, and an off-the-record bench conference was held. One of appellant's attorneys then stated, "Your honor, [appellant] intends to plead guilty, but mentally ill."

The jury venire was qualified, and the potential jurors divided into panels. Before individual *voir dire* began, there was a colloquy between the trial judge and appellant. During this session, appellant told the judge he wanted to plead guilty to murder. When the judge defined the elements of murder, appellant denied he had acted with malice, and the judge declined to accept the guilty plea.

After the jury had been selected, and before opening statements, the judge informed the jury that appellant's attorney had 'misspoken' during the arraignment when he said appellant was pleading GBMI, and that in fact appellant was pleading 'not guilty.'

On appeal, appellant contends the trial judge committed reversible error in refusing to accept the plea, and in telling the jury that appellant's plea had changed from GBMI to not guilty. While appellant now contends he was attempting to enter a GBMI plea, the record reflects the trial judge believed it was intended to be a guilty plea. No attempt was made during this proceeding to comply with the statutory requirement for a GBMI plea.[3] In addition, there was no objection to the judge's refusal to accept the plea nor to the judge's informing the jury that appellant was pleading 'not guilty' rather than GBMI. Since there were no objections made at trial, there is nothing preserved for this Court's appellate review. E.g., State v. Huggins, 336 S.C. 200, 519 S.E.2d 574 (1999) (it is well settled that issues cannot be

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[3]See S.C. Code Ann. §17-24-20(D) (Supp. 2001).

raised for the first time on appeal).

3. Second Competency Hearing

After the defense rested in the guilt phase of trial, court adjourned for lunch. When court resumed after lunch, the trial judge announced that appellant and the attorneys had met in his office because appellant wished to discuss (again) his desire to plead guilty. The judge then questioned appellant in open court whether he wished to plead, and whether appellant understood that, if he did enter a guilty plea, his right to be sentenced by the jury would cease and the trial judge alone would decide the sentence. Following this discussion, the trial judge ordered a recess so that appellant could consult with his attorneys.

When court resumed, appellant's attorneys asked the judge to have appellant reexamined for competency. They explained that appellant was talking about the voices telling him what to do, and they questioned his ability to assist them, and his competency to choose between continuing with the jury trial or entering a plea. The judge denied their request, and explained his decision at great length and in precise detail. The trial judge had observed appellant throughout the guilt phase proceedings**.** He found that appellant's conduct was consistent throughout the proceedings, and that appellant had not decompensated in the manner that his experts had predicted. Accordingly, the trial judge concluded that appellant remained competent.

Whether to order a competency examination rests in the trial judge's discretion, and his decision will not be overturned on appeal absent a clear showing of an abuse of that discretion. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000); see also S.C. Code Ann. §44-23-410 (2002) ("Whenever a judge of the Circuit Court . . . has reason to believe that a person . . . is not fit to stand trial . . . the judge shall [order an examination]. . ."). Appellant has not shown a clear abuse of discretion. We defer to the trial judge, who was able to view appellant's demeanor. See State v. Kelly, supra; State v.

Bell, supra.

4. Jury Instructions

Appellant next contends the trial judge erred when he failed to submit GBMI as a possible form of verdict in the guilt phase. Whether this was an error is not properly before the Court in this direct appeal since appellant neither requested the charge nor called its omission to the attention of the trial judge. State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (contemporaneous objection to omission of charge required to preserve issue even in capital case).

5. Photographs

Appellant contends the trial judge committed reversible error in the sentencing phase when he admitted twelve color photographs of the victim's body, six taken at the crime scene and six at the autopsy.[4] Assuming that appellant adequately preserved his objection,[5] we find no error.

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[4]The photos may be described as follows:
#1: right elbow and forearm wounds
#2: right cheek wound
#3: right foot - heel, arch, ball have bloodstains
#4: left foot - bottom covered with blood
#5: thigh/pelvic wound
#6: thigh/pelvic wound
#7: thigh/pelvic wound
#8: right breast wound
#9: right arm wounds and face wound
#10: body when received for autopsy
#11: remains of right arm
#12: breast and face wounds after blood cleaned up.

[5]Appellant's objection was made during a bench conference called when the

In State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995), the defendant objected to the admission of seventeen crime scene photos and ten autopsy slides during the penalty phase of his trial, contending they were highly prejudicial and designed only to arouse the jury's passion. As in the present case, one of the aggravating circumstances alleged in Franklin was physical torture. We held that crime scene photos were highly relevant to the aggravator, and thus their relevance and probative value outweighed their prejudice. Further, the autopsy slides showing the cleaned-up body served "to more clearly depict the full extent of the pre-mortem physical torture [the victim] suffered and to substantiate the testimony of the pathologist." Id.

Our decision in Franklin controls this issue. Appellant stated the shots were inflicted in this order: (1) right arm; (2) chest; (3) pelvic area; and (4) upper chest and face. According to appellant, the first shot 'tore up her whole arm' and knocked the victim to the floor. There was evidence that the arm wound was extremely painful, that the victim screamed after that first shot, and that as long as a minute and a half elapsed between the first and second shots. The photos illustrate the testimony regarding the location and the severity of the shotgun wounds, and are relevant to the physical torture aggravator. Their relevance and probative value outweigh their prejudicial impact.

We find no abuse of discretion in the admission of these photographs. State v. Franklin, supra.

6. Proportionality

Appellant argues his death sentence should be vacated because his was a crime of passion, and because the aggravators are only 'technically'

State sought to introduce the first two photos. The ground(s) for the objection is not reflected in the record, although inferentially the argument advanced was that the probative value of the photographs was outweighed by their prejudicial effect.

applicable. He also contends that the sentence is capricious in light of his mental disorder. We disagree.

There was evidence from which the jury could have concluded that the victim suffered such that she was physically tortured. Further, the breaking down of the screen door of the trailer while armed with a shotgun was more than a 'technical' burglary. There was evidence from which the jury could have concluded that, despite his mental disorder, appellant planned to confront the victim and to kill her.

Further, the death penalty here is proportionate to other cases where the murder resulted from domestic problems. E.g., State v. Kelly, supra; State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998). Finally, while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant, Atkins v. Virginia, __ U.S. __, 122 S.Ct. 2242, __ L.Ed. 2d __ (2002), the imposition of such a sentence upon a mentally ill person is not disproportionate. State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992).

We have conducted the sentencing review mandated by §16-3-25, and find this sentence proportionate to others arising from domestic disputes. State v. Kelly, supra; State v. Ard, supra. Appellant's conviction and sentence are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Judy Mizell and John Mizell, Petitioners,

v.

Dr. Alfred L. Glover and Alpine Podiatry Center, P.A., Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Lancaster County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 25527
Heard February 21, 2002 - Filed September 3, 2002

AFFIRMED IN PART; REVERSED IN PART.

Randall M. Eason, of Lancaster, and Gilbert Scott Bagnell, of Columbia, for petitioners.

Montieth P. Todd, of Sowell, Todd, Laffitte, Beard & Watson, L.L.C., of Columbia, for respondents.

CHIEF JUSTICE TOAL: Judy and John Mizell ("Mizells") appeal the Court of Appeals' decision affirming the jury's verdict for the defendants, Dr. Alfred L. Glover and Alpine Podiatry Clinic (collectively referred to as "Dr. Glover"), in this medical malpractice suit. *Mizell v. Glover*, 339 S.C. 567, 529 S.E.2d 301 (Ct. App. 2000).

FACTUAL/PROCEDURAL BACKGROUND

On March 2, 1993, Mrs. Mizell visited Dr. Glover for the first time for pain resulting from corns on the fourth and fifth toes of her right foot. The pain began after she started a new job requiring her to stand for long periods of time. On March 11, 1993, just nine days after her first visit, Dr. Glover performed surgery to correct what he diagnosed as "hammertoes." The surgery involved removing the toe joints that were rubbing together and causing the corns, and then disconnecting the tendons to the fourth and fifth toes. Apparently, Mrs. Mizell was surprised to learn exactly what Dr. Glover had done after the surgery. According to her testimony, she believed Dr. Glover was going to file down the bones underneath the corns, not remove the bones, and believed she would be out of work for a few days, not six weeks' as she claims Dr. Glover informed her the day after surgery.

Following the hammertoe surgery, Mrs. Mizell testified she suffered from intense pain, including swelling, discoloration, and alternating differences in the temperature of her foot. These symptoms are reflected in some of Dr. Glover's notes although he seems to attribute them to her inability to tolerate medication for pain and inflammation. Mrs. Mizell continued to suffer pain around the toes already operated on, and, in addition, her second and third toes became painful. According to both Mrs. Mizell and Dr. Glover's accounts, these toes became increasingly contracted in the weeks following her first surgery. Dr. Glover believed the contraction of her second and third toes could be the cause of Mrs. Mizell's lingering pain. To alleviate that pain, on April 27, 1993, he performed

a second surgery to release the contractures in the tendons, allowing the toes to return to their normal position.

After this second procedure, a painful lump developed on the bottom of Mrs. Mizell's foot. Her foot hurt so badly that she would not allow Dr. Glover to touch it. After examining an x-ray of her foot, Dr. Glover preliminarily diagnosed the bump as a Morton's Neuroma. On June 3, 1993, Dr. Glover performed exploratory surgery in which he confirmed the bump was a Morton's Neuroma and removed it. Although the Mizells appear to question whether the bump was a Morton's Neuroma, the pathologist who examined the tissue extracted from Mrs. Mizell's foot testified it was a Morton's Neuroma.

This third surgery provided little relief to Mrs. Mizell, and she continued to complain to Dr. Glover. Dr. Glover sent her to physical therapy around the first of June, but therapy provided no relief. On June 29, 1993, Dr. Glover referred Mrs. Mizell to her family physician, Dr. Still, to rule out any systemic problems, such as lupus or Raynaud's Disease, that could be causing her continued pain. In his letter to Dr. Still, Dr. Glover noted discoloration in Mrs. Mizell's foot and hypersensitivity to cold. On July 13, 1993, Mrs. Mizell returned to Dr. Glover, reporting that Dr. Still had eliminated the possibility of any vascular problems after a full work-up. Dr. Glover gave her a steroid injection in another attempt to resolve the pain, but it was unsuccessful. Finally, on July 27, 1993, Mr. Mizell stated he wanted to take his wife to see an orthopaedist in Charlotte, Dr. Gill. Dr. Glover sent a letter and all his records to Dr. Gill.

On July 29, 1993, Mrs. Mizell visited Dr. Gill. He diagnosed "possible early [Reflex Sympathetic Dystrophy],"[1] gave her a prescription for a custom-

[1]Reflex Sympathetic Dystrophy ("RSD") is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain. It is often triggered by an accident, surgery, or other injury. Early diagnosis and treatment of the condition is critical to curing RSD. If it is not treated early enough, the condition and the pain caused by it can be become permanent.

made orthopaedic shoe, and advised her to walk on her foot as much as possible. Dr. Gill scheduled Mrs. Mizell to return in two months. When she returned, Dr. Gill believed her condition had deteriorated, and he referred her to the Southeastern Pain Clinic for further diagnosis and treatment.

Mrs. Mizell received some treatment at the pain clinic for RSD (including sympathetic blocks), but testified she received no lasting relief from it. She stated the last treatment option the pain clinic gave her was to attach a stimulator box to a wire along her spine through which she might be able to control the pain. She and Mr. Mizell testified they declined the treatment because they were told it carried a risk of paralysis. Dr. Romanoff, an anesthesiologist at the Southeastern Pain Clinic, testified in his deposition (read at trial) that he believed Mrs. Mizell was totally disabled, but that she could have received some relief from the stimulator which she chose not to pursue.

In February 1996, the Mizells brought this medical malpractice and loss of consortium action against Dr. Glover. The Mizells alleged Dr. Glover committed malpractice, breaching the podiatrists' duty of care, by failing to diagnose Mrs. Mizell with RSD during his treatment of Mrs. Mizell. Mrs. Mizell claims she is totally disabled as a result of Dr. Glover's failure to diagnose the RSD. Dr. Glover denied the malpractice allegations and the case went to trial in December of 1997. The jury returned a verdict for Dr. Glover and the Mizells appealed. The Court of Appeals affirmed, and this Court granted certiorari. The following evidentiary issues are before this Court:

I. Are the Mizells entitled to a new trial because Dr. Glover's counsel cross-examined the Mizells' expert witness, Dr. Marne, extensively regarding a jury interrogatory from a separate civil suit against Dr. Marne, and then misstated that jury's finding in his closing statement?

II. Are the Mizells entitled to a new trial because the trial court refused to admit an article written by Dr. Glover's testifying expert, Dr. Buckholz, as an exhibit, but allowed the Mizells' counsel to publish portions of the article during cross-examination?

III. Are the Mizells entitled to a new trial because the trial court permitted a podiatrist, testifying as an expert for Dr. Glover, to comment on the treatment of a medical doctor at the Southeastern Pain Clinic?

LAW/ANALYSIS

I. Jury Interrogatory

The Mizells argue that Dr. Glover's attorney improperly questioned their expert, Dr. Marne, about a jury interrogatory from a separate civil suit against Dr. Marne. The Mizells contend the evidence of the jury's finding was extrinsic evidence prohibited under Rule 608(b) of the South Carolina Rules of Evidence ("SCRE"). The Mizells also argue that questions regarding the jury interrogatory were improper because the case was settled and the interrogatory did not represent a final judgment. We agree that the evidence of the jury's finding was improperly admitted.

The interrogatory in question arose out of a suit by Minnesota Mutual Life Insurance Company ("Minnesota Life") against Dr. Marne for making allegedly false statements regarding a personal disability claim he filed. At trial, a Florida jury was asked by interrogatory if Dr. Marne had made misrepresentations to his insurance company. The jury answered that he had. The jury was then asked if Dr. Marne committed fraud, and they answered that the fraud claim could not survive because of a statute of limitations problem. After the interrogatories were returned, the court entered judgment against Dr. Marne that did not include fraud. While a motion for a new trial was pending, the parties settled the matter. Accordingly, the Mizells argue there was no final judgment.

At the Mizells' trial against Dr. Glover, Dr. Marne, a podiatrist, testified as an expert for the Mizells. The Mizells filed a motion in limine before trial to exclude any evidence relating to Minnesota Life's lawsuit against Dr. Marne. The court denied the motion, and the Mizells renewed their motion immediately

before Dr. Marne's testimony.[2] In arguing against the motion, Dr. Glover's counsel contended the interrogatory in question was admissible under Rule 608, SCRE[3] "as a matter affecting the credibility of the witness." The court denied the motion again, stating it would allow questioning of Dr. Marne regarding the trial for impeachment purposes pursuant to Rule 608, SCRE.

The Court of Appeals' opinion on this issue was split. Judge Goolsby found the question regarding the jury interrogatory did not constitute extrinsic evidence. *Mizell v. Glover*, 339 S.C. 567, 529 S.E.2d 301 (Ct. App. 2000). Judge Connor, joined by Judge Howard, found the issue was not preserved for review. *Id.* Although she declined to address the issue fully, Judge Connor stated she believed, even if the interrogatory was inadmissible extrinsic evidence, that the error was harmless in light of Dr. Marne's other testimony regarding the suit. *Id.*

Dr. Glover argues the Court of Appeals should be affirmed on this issue because it was not preserved for review. We disagree. In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court. *Holy Loch Distributors Inc. v. Hitchcock*, 340 S.C. 20, 531

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[2]The Mizells' counsel argued for exclusion of any evidence of fraud because the final judgment did not make any finding of fraud, but did not mention Rule 608 specifically.

[3]Rule 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness or . . . .

S.E.2d 282 (2000); *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998).

In this case, the Mizells raised this issue - exclusion of the evidence from the Minnesota Life suit - on two occasions. During the arguments on the second motion, Dr. Glover's counsel argued specifically that the interrogatory from the civil suit was admissible under Rule 608, SCRE. The trial court agreed with Dr. Glover and admitted the evidence under Rule 608. We believe this issue was preserved through the Mizells' two motions. Rule 608 was the only ground given by the trial court for admitting the motion. As such, it is only fair that the Mizells be able to argue that the trial court erred when it admitted the interrogatory under that Rule.

Because we find the issue was preserved for review, we must address whether or not Dr. Glover's question in which he recited the jury interrogatory and answer verbatim constituted improper extrinsic evidence (prohibited under Rule 608(b), SCRE). The Mizells argue this question, even without admission of the physical record of the interrogatory, constituted improper extrinsic evidence. To the contrary, Dr. Glover contends there is a distinction between admitting the physical record of the jury interrogatory and admitting the oral record of the interrogatory, and that the oral record does not qualify as extrinsic evidence.

Rule 608(b) permits inquiry into specific instances of a witness' conduct during cross-examination, if such conduct is probative of the witness' truthfulness or untruthfulness. The Rule specifically states that such instances of conduct may not be proved by extrinsic evidence. All parties agree that documentary evidence, such as the record containing the jury interrogatory and response, would be inadmissible as extrinsic evidence.

We believe extrinsic evidence can be oral or written, as it is the source of the evidence that determines whether it is extrinsic, not whether it is introduced in oral or written form at trial. Rule 608 permits questioning about the underlying event from the actor in the event, not rumors or reports of what others perceived about the event. For example, the Mizells concede Dr. Glover could have asked Dr. Marne, "Did you make misrepresentations to your insurance company

regarding a claim?" However, asking whether a *jury found* he made misrepresentations to his insurance company crosses over into the extrinsic evidence category. Essentially, Rule 608(b) allows specific instances of conduct to be *inquired into* on cross, but does not allow those instances of conduct *to be proved* by extrinsic evidence.[4] Reading a jury interrogatory into the record is more than inquiry into past conduct; the purpose of doing so is to prove past conduct. Although Dr. Marne could have been questioned (and was questioned) about the conduct that was the subject of the suit, he should not have been questioned directly regarding what a previous jury allegedly concluded about such conduct.

Although the trial court improperly admitted the evidence of the jury's interrogatory, Dr. Glover argues the error was harmless. We disagree. Although Dr. Glover correctly points out that the Mizells' counsel elicited information from Dr. Marne about the Minnesota Life suit on direct[5] and that he properly

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[4]The Mizells argued at trial and continue to argue before this Court that because the jury finding was not part of a final judgment, it was not an instance of conduct and, therefore, was not admissible. Admitting jury findings from prior civil cases is problematic whether the findings are final or not because the findings are always extrinsic evidence, most likely admitted to *prove* a witness' conduct (exactly what Rule 608(b) is intended to prevent). Rule 609, SCRE, permits admission of evidence of criminal convictions for impeachment purposes, and is pointedly silent as to admission of civil judgments. Further, Rule 803(22) carves an exception to the hearsay rule for admission of *criminal convictions,* and does not mention civil judgments or verdicts. Further, the rules prohibit admission of more than the fact of conviction; they do not permit the record of the trial to be admitted along with the conviction. *See United States v. Robinson,* 8 F.3d 398 (7th Cir. 1993). Admitting an *interrogatory*, a small piece of the verdict, would seem to be prohibited under the same rationale.

[5]In response to a question by the Mizells' counsel on direct, Dr. Marne stated he had been named in six malpractice suits, another lawsuit, and a divorce and explained the circumstances of the suit against him by Minnesota Life, admitting he had to settle with the insurance company for a large sum of money.

impeached Dr. Marne on his professional history and qualifications during cross-examination, he fails to consider the impact of his misstatement of the jury's finding in his closing argument. In closing, Dr. Glover's counsel told the jury Dr. Marne had been found "guilty of fraud by a jury" and admonished the jury "to consider all those things in deciding on the credibility of Dr. Marne." This statement is incorrect and highly prejudicial.

Dr. Marne was the Mizells' only expert witness to testify that Dr. Glover had breached the podiatrists' standard of care.[6] As such, his testimony and credibility were critical to the Mizells' case. Dr. Glover used the alleged jury finding not simply to prove past conduct, but to show what a previous jury had found regarding Dr. Marne. The purpose of introducing this evidence was to argue to this jury that they should be influenced by the actions of a previous jury. Further, Dr. Glover's counsel gave the jury false information when he told them Dr. Marne had been found "guilty of fraud."[7] In light of these circumstances, we do not believe the Mizells received a fair trial.

Moreover, we note the Minnesota Life jury interrogatory was inadmissible on an additional ground as hearsay. We find persuasive the jurisprudence developed by the Fourth Circuit and other federal courts which have recognized that judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial. *See Nipper v. Snipes,* 7 F.3d 415 (4th Cir. 1993); *U.S. Steel, LLC v. Teico,* Inc., 261 F.3d 1275 (11th Cir. 2001); *U.S. v. Jones,*29 F.3d 1549 (11th Cir. 1994); *Blue Cross and Blue Shield v. Philip*

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[6]The Mizzels introduced the deposition of Dr. Romanoff, an anesthesiologist specializing in pain management at the Southeaster Pain Clinic, but he did not testify regarding the podiatrists' standard of care. He reviewed Dr. Glover's records and opined that Mrs. Mizell's chances of recovery would have been better if she had been referred to him earlier. Dr. Romanoff's deposition testimony is discussed in Part III of this opinion.

[7]As discussed, the jury did not find Dr. Marne had committed fraud in the civil context and certainly not that he was guilty of fraud which connotes a criminal conviction.

Morris, Inc., 141 F.Supp. 2d 320 (E.D.N.Y. 2001).[8] In *Nipper*, the Fourth Circuit held that judicial findings constitute hearsay and do not fall within any of the exceptions to the hearsay rule, including the exception for pubic records, Rule 803(8), FRE. *Nipper.* The Fourth Circuit made clear that its holding was firmly rooted in the common law. *Id.* (Citing 5 John H. Wigmore, *Wigmore on Evidence* § 1671a (James H. Chadbourn rev. 1974) (citations omitted)).

The federal courts addressing this issue point to the great weight and obvious prejudicial effect that credibility assessments of witnesses by judges have on subsequent juries. *See Philip Morris,* 141 F.Supp. 2d 320 (denying admission of a judge's statement regarding credibility of expert witness for impeachment of that expert at a subsequent trial). Although *Philip Morris* involved the credibility assessment of a judge and not the assessment of a jury, the jury's factual finding introduced in this case is hearsay nonetheless, and we believe, is equally prejudicial. *See U.S. Steel v. Teico* (finding appellants were prejudiced by the admission of a previous judge's factual opinion into a subsequent trial because appellees relied on the opinion throughout the trial and advised the jury during closing argument to use the opinion to make their own credibility determinations). As discussed, Dr. Glover's counsel told the jury in this case (incorrectly) that Dr. Marne was found "guilty of fraud" and that the jury should consider that in assessing the credibility of Dr. Marne.

We find the jury interrogatory constituted improper extrinsic evidence, the admission of which constituted reversible error. In addition, the jury interrogatory constitutes inadmissible hearsay. We reverse the Court of Appeals on this issue and remand for a new trial.

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[8]Dr. Glover cites several federal cases in support of his argument that credibility assessments by judges are not extrinsic evidence and are admissible in subsequent trials. *See United States v. Amahia*, 825 F.2d 177 (8th Cir. 1987); *United States v. Terry*, 702 F.3d 299 (2d Cir. 1983). Dr. Glover did not discuss the precedent of the Fourth Circuit discussed in the text above. We find the Fourth Circuit employed the correct analysis, and that the jury's response to the interrogatory is a judicial finding constituting inadmissible hearsay.

II. Medical Treatise

The Mizells argue that the trial court improperly denied admission of a chapter in a podiatric textbook, written by Dr. Glover's expert, as an exhibit at trial. We disagree.

At trial, Dr. Glover called Dr. Buckholz, a podiatrist, to testify as an expert. Dr. Buckholz testified that Dr. Glover had not breached the standard of care in his treatment of Mrs. Mizell or in his failure to diagnose RSD. The Mizells claimed Dr. Buckholz's testimony conflicted with an article he wrote cautioning podiatrists to look for the warning signs of RSD. On cross-examination, the Mizells sought to introduce the chapter from the podiatric textbook in which Dr. Buckholz's article appeared. The trial court ruled the document inadmissible, but allowed the Mizells' counsel to cross-examine Dr. Buckholz extensively about his article, reading portions of the article into the questions.

Dr. Glover argues that Rule 803(18), SCRE controls. Rule 803(18) provides that the following works are not excluded by the hearsay rule:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. *If admitted, the statements may be read into evidence but may not be received as exhibits.* This rule is in addition to any statutory provisions on this subject.

(emphasis added).

The Mizells argue the Court of Appeals erred in upholding the trial court's

exclusion of the article itself. The Mizells contend that Rule 803(18), SCRE would apply if the article had been written by someone other than the witness, Dr. Buckhloz, but as it was written by Dr. Buckholz, it should have been admitted to impeach him under *LaCount v. General Asbestos & Rubber Co.*, 184 S.C. 232, 192 S.E.2d 262 (1937).

In *LaCount*, this Court found the trial court committed error by not admitting scientific writings prepared by the testifying experts. However, the Court found the error to be harmless because the court permitted full cross-examination of the witnesses regarding the contents of the articles they had written. *LaCount,* however, does not control in this case. It was decided long before the adoption of the SCRE. Rule 803(18) is directly on point, and it does not distinguish between treatises written by the testifying witness and treatises authored by others. Rule 803(18) applies to both treatises written by the witness and those written by others, barring admission of the treatise itself in both cases.

Therefore, it was proper for the trial court to deny admission of the article as an exhibit, but to allow the Mizells to cross-examine Dr. Buckholz regarding the article, publishing portions of it through their questions.[9] Accordingly, we affirm the Court of Appeals on this issue.

III. Scope of Podiatrist Expert Testimony

The Mizells argue the trial court erred by permitting Dr. Martin, a podiatrist testifying as an expert for Dr. Glover, to testify regarding Mrs. Mizell's treatment with Dr. Romanoff, an anesthesiologist at the Southeastern Pain Clinic. We disagree.

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[9]Although Rule 803(18) controls, we note any error in not admitting the article as an exhibit would be harmless error under *LaCount*. The Mizells' counsel cross-examined Dr. Buckholz regarding the contents of his article extensively, with no limitation by the court. By doing so, the Mizells' counsel "thereby placed the jury in possession of [its] contents," making the court's failure to admit the chapter itself harmless. *LaCount*, 184 S.C. at 242, 192 S.E.2d at 267.

The Mizells' introduced the deposition of Dr. Romanoff, in which he reviewed Dr. Glover's treatment records of Mrs. Mizell, to show that Dr. Glover erred in not diagnosing Mrs. Mizell with RSD earlier. In turn, Dr. Glover called Dr. Martin to cast doubt on Dr. Romanoff's deposition testimony by suggesting that the pain clinic where Dr. Romanoff practices also had trouble diagnosing Mrs. Mizell with RSD. Dr. Martin related his understanding, from reviewing the records, of what took place at the pain clinic.

Dr. Martin testified, in part, "there was a very confusing picture to the pain management doctors. . . ." The Mizells' counsel objected, stating Dr. Martin was only qualified as a podiatrist, not as anesthesiologist capable of treating pain. The court overruled the objection on grounds that Dr. Martin's opinion was based upon a review of the records in the case, permissible under the rules pertaining to experts.

The Court of Appeals found no error in the trial court's ruling, finding Dr. Martin's testimony was merely a recital of the initial treatment at the clinic rather than opinion on the quality and scope of the clinic's treatment. On appeal, the Mizells argue again that Dr. Martin, although an expert in podiatry, was not qualified to testify as an expert in the area of pain management.

Rule 702, SCRE, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This Court has given the trial court wide discretion in determining the qualification of expert witnesses and the admissibility of their testimony. *McGee v. Bruce*, 321 S.C. 340, 468 S.E.2d 633 (1996); *Creed v. Columbia*, 310 S.C. 342, 426 S.E.2d 785 (1993). A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion.

Jenkins v. E.L. Long Motor Lines, 233 S.C. 87, 103 S.E.2d 523 (1958).

For a court to find a witness competent to testify as an expert, the witness must be better qualified than the jury to form an opinion on the particular subject of the testimony. *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 487 S.E.2d 596 (1997). In *Gooding,* this Court found error in the trial court's exclusion of the testimony of an Emergency Medical Technician ("EMT") regarding intubation procedures, finding the EMT had sufficient knowledge of the procedure to give an opinion on a doctor's performance of the procedure. This Court found the disparity in training and education between the EMT and the doctor he testified against was relevant to the EMT's credibility as a witness, but found the difference in qualifications affected only the weight, *not the admissibility,* of his testimony. *Id*.

Under *Gooding* and Rule 702, SCRE, the trial court correctly allowed Dr. Martin to testify regarding Mrs. Mizell's treatment at the pain clinic, even though he was not qualified himself to administer the treatment he recounted. The jury was aware of Dr. Martin's credentials as a podiatrist and of Dr. Romanoff's credentials as an anesthesiologist. Therefore, they could have given Dr. Martin's testimony less weight than Dr. Romanoff's. Accordingly, Dr. Martin's limited opinion regarding Mrs. Mizell's treatment at the pain clinic was correctly admitted and upheld by the Court of Appeals. Therefore, we affirm the Court of Appeals on this issue.

CONCLUSION

For the foregoing reasons, we **AFFIRM IN PART and REVERSE IN PART** the opinion of the Court of Appeals and **REMAND** for a new trial.

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

The Supreme Court of South Carolina

In the Matter of Donald A. Kennedy, Jr., Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the relief sought by Disciplinary Counsel.

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

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

clients. Mr. Haight may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina
August 26, 2002