# The Supreme Court of South Carolina

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ORDER

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The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who remain administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. Pursuant to Rule 419(e), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall, within twenty (20) days of the date of this order, surrender their certificates to practice law in this State to the Clerk of this Court.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 11, 2003

SUSPENSIONS-
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2002 REPORT OF COMPLIANCE
AS OF APRIL 3, 2003

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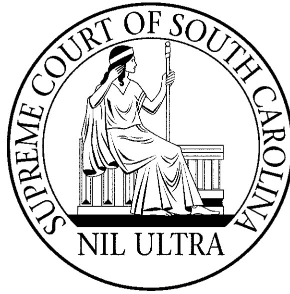


# OPINIONS

**OF**

# THE SUPREME COURT

**AND**

# COURT OF APPEALS

**OF**

# SOUTH CAROLINA

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**FILED DURING THE WEEK ENDING**

**April 14, 2003**

**ADVANCE SHEET NO. 13**

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

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# The Supreme Court of South Carolina

The State, Respondent,

v.

Franklin Benjamin, Petitioner.

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ORDER

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This Court originally affirmed the decision of the Court of Appeals by a vote of 3-2. State v. Benjamin, Op. No. 25572 (S.C. Sup. Ct. filed January 13, 2003). We granted petitioner's request for rehearing in this matter, and ordered it be reheard. Prior to the reargument, Chief Justice (Ret.) Gregory, who participated in the original case, and who was a member of the three-person majority, passed away. Circuit Judge (Ret.) Edward Cottingham was appointed to sit as an Acting Justice on rehearing.

We have now reheard the matter. The Court remains divided 3-2, with Acting Justice Cottingham joining the majority opinion. Accordingly, the original opinion and dissent shall be republished, the only change being the substitution of Acting Justice Cottingham as a signatory to the majority opinion.

s/James E. Moore A.C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

s/Edward B. Cottingham A.J.

Columbia, South Carolina

April 7, 2003

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

---

The State, Respondent,

v.

Franklin Benjamin, Petitioner.

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

---

Appeal From Orangeburg County
Luke N. Brown, Jr., Circuit Court Judge

---

Opinion No. 25572
Heard May 30, 2002 - Filed January 13, 2003
Reheard April 2, 2003 - Filed April 7, 2003

---

**AFFIRMED**

---

Katherine Carruth Link, and the South Carolina Office of Appellate Defense, all of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Walter M. Bailey, Jr., of Summerville, for Respondent.

---

**JUSTICE PLEICONES:** We granted certiorari to review a decision of the Court of Appeals holding that petitioner Benjamin was properly sentenced to life without the possibility of parole (LWOP) following an armed robbery conviction. State v. Benjamin, 341 S.C. 160, 533 S.E.2d 606 (Ct. App. 2000). We affirm.

## FACTS

Benjamin and another individual robbed a Citgo convenience store. In the course of this armed robbery, a Citgo employee was shot and killed. Approximately four hours later, the two men robbed a Dodge's convenience store at gunpoint. The charges arising from the Citgo incident were tried first, and Benjamin was convicted of murder and armed robbery. He received an LWOP sentence for murder and a thirty-year sentence for the armed robbery. See State v. Benjamin, 345 S.C. 470, 549 S.E.2d 258 (2001) (affirming these convictions and sentences). Both murder and armed robbery are defined as "most serious offenses" under the "two strikes" law. S.C. Code Ann. §17-25-45(C)(1) (Supp. 2001).

Following the Citgo trial, Benjamin was tried and convicted of armed robbery of the Dodge's convenience store. South Carolina Code Ann. §17-25-45(A) (Supp. 2001) provides "Notwithstanding any other provision of law…upon a conviction for a most serious offense as defined by this section, a person must be sentenced to [LWOP] if that person has one or more prior convictions for: (1) a most serious offense . . . ."

Benjamin was sentenced to LWOP for the armed robbery of the Dodge's store over his objection that the legislature did not intend that §17-25-45(A) apply to convictions arising from a single crime spree. The Court of Appeals affirmed this sentence, and we granted certiorari to review that decision.

## ISSUE

> Does S.C. Code Ann. §17-25-45(A) apply so as to require an LWOP sentence for a subsequent conviction where all convictions arise from a single crime spree?

## ANALYSIS

Benjamin contends that the legislature did not intend that recidivist statutes such as §17-25-45 apply to individuals who engage in a single continuous course of criminal conduct. In support of this contention, Benjamin points to an alleged ambiguity in §17-25-45(F), and to S.C. Code Ann. §17-25-50 (1985). We find no ambiguity in subsection (F), and find Benjamin's reliance on §17-25-50 misplaced.

Section 17-25-45(F) provides:

> For the purpose of determining a prior conviction under this section only, a prior conviction shall mean the defendant has been convicted of a most serious offense or a serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication.

Benjamin contends this section is ambiguous because it may be read to say either (1) that the commission of the prior most serious offense must have occurred on an earlier, separate occasion, or (2) that the conviction occurred "on a separate occasion," "prior to the instant adjudication."

We agree with the Court of Appeals that the language of §17-25-45(F) is plain and unambiguous. Benjamin's first reading of the statute is simply unsupported by the statutory language. There is no reference in §17-25-45(F) to the time of the prior offense's commission; rather, the only temporal reference is to the prior conviction. In clear and unambiguous language, this subsection defines a prior conviction for purposes of §17-25-45 as a serious or most serious conviction, on a separate occasion, prior to the instant adjudication. E.g., State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991)(when statute's terms are clear and unambiguous, court must apply them literally).

At the time of the Dodge's armed robbery conviction, Benjamin had already been convicted, on a separate occasion, of the most serious offenses of murder and armed robbery that occurred at the Citgo. An LWOP sentence was, therefore, mandated by §17-25-45(A).

Benjamin argues, however, that we must construe §17-25-45 in light of §17-25-50, which provides:

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

Our precedents required us to consider together both original recidivist statutes, §17-25-50 and the predecessor to §17-25-45, §17-25-40. See State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Muldrow, 259 S.C. 414, 192 S.E.2d 211 (1972). After these cases were decided, the legislature revised the statutory scheme. These pre-1982 precedents must nevertheless be considered in light of the current statutes.

When the General Assembly repealed §17-25-40[1] in 1982 and replaced it with §17-25-45, it fundamentally altered the relationship between the recidivist statutes. The 1982 act explicitly provides "Notwithstanding any other provision of law [certain defendants] shall be sentenced to life in prison." 1982 Act No. 358, §1.A. This language, specifically barring consideration of any other statute, has been retained in the current version of §17-25-45. See §17-25-45(A) and (B) (Supp. 2001). That the legislature intends that §17-25-45 be construed independent of any other statute is reinforced by the introductory language of subsections (E) and (F), both of which begin "For purposes of determining a prior conviction under this section only…." It is no longer necessary or appropriate to harmonize or reconcile §17-25-45 and §17-25-50 in light of the General Assembly's unmistakable instruction that §17-25-45 be applied without regard to any other provision of law.[2]

---

[1] 1982 Act No. 358, §3.

[2] To the extent the Court of Appeals reaches a different conclusion in State v. Woody, 345 S.C. 34, 545 S.E.2d 521 (Ct. App. 2001), that decision is overruled.

## CONCLUSION

Benjamin was properly sentenced, pursuant to §17-25-45(A), to LWOP for the armed robbery of the Dodge's convenience store. The decision of the Court of Appeals upholding that sentence is

**AFFIRMED.**

**BURNETT, J., and Acting Justice Edward B. Cottingham, concur. WALLER, J., dissenting in a separate opinion in which MOORE, A.C.J., concurs.**

**JUSTICE WALLER (**dissenting)**:** I respectfully dissent. In my view, the Legislature did not intend that individuals, such as Benjamin, who commit several crimes during a single, continuous crime spree be subjected to recidivist sentencing.[3]

A recidivist is "a habitual criminal. A criminal repeater. An incorrigible criminal. One who makes a trade of crime." Black's Law Dictionary, 1269 (6th Ed. 1990). Recidivist legislation attempts to encourage offenders to stay out of trouble and punishes those who refuse to be deterred even after a conviction. Commonwealth v. Eyster, 585 A.2d 1027, 1031 (Pa. 1991). Recidivists are persons who continue to commit criminal, antisocial behavior after incarceration for an earlier offense. Recidivist statutes aim at punishing those who have shown they are incorrigible offenders. Shannon Thorne, One Strike and You're Out: Double Counting and Dual Use Undermines the Purpose of California's Three-Strikes Law, 34 U.S.F.L.Rev. 99 (1999). The purpose of requiring separate offenses is to ensure that those offenders being sentenced under the harsh provisions of a recidivist sentencing statute have not been classified as habitual offenders because of multiple convictions arising from a single criminal enterprise; it provides the state with some certainty that the offender has participated in multiple criminal trials and, despite these opportunities to understand the gravity of his behavior and abide by the law, has continued to engage in criminal conduct. Daniel Rogers, People v. Furman and Three Strikes: Have the Traditional Goals of Recidivist Sentencing Been Sacrificed at The Altar of Public Passion?, 20 Thomas Jefferson L. Rev. 139, 156 (Spring 1998).

In my view, the recidivist statute is aimed at career criminals, those who have been previously sentenced and then commit another crime, not at persons like Benjamin whose recidivist status is premised solely upon acts occurring within a four-hour period.

Contrary to the majority's contention, section 17-25-45 cannot, in my opinion, be read in isolation, but must be read in conjunction with section 17-25-50.

---

[3] The majority does not dispute that all of Benjamin's convictions arose from a single crime spree.

Section 17-25-50 provides:

> In determining the number of offenses for the purpose of imposition of sentence, the court **shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense**, notwithstanding under the law they constitute separate and distinct offenses. (Emphasis supplied).

Section 17-25-45(A) provides, in part, "[n]otwithstanding any other provision of law. . . upon a conviction for a most serious offense . . ., a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for. . . (certain specified offenses)."

This Court has recognized that the predecessor to section 17-25-45 (17-25-40) and section 17-25-50 must be construed together. See State v. Stewart, 275 S.C. 447, 452, 272 S.E.2d 628, 631, n. 2 (1980) (recognizing that section 17-25-50 must be read in conjunction with section 17-25-40, the predecessor to section 17-25-45). Accord State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999)(recognizing section 17-25-40 is the predecessor to section 17-25-45). See also State v. Muldrow, 259 S.C. 414, 192 S.E.2d 211 (1972) (statute directing trial court to treat as one offense any number of offenses committed at times so closely connected in point of time that they may be considered as one offense is applicable only for purpose of sentencing under recidivist statute).

The majority points to the "notwithstanding any other provision of law" language of section 17-25-45(A), as an indication of legislative intent that it is no longer appropriate to construe sections 17-25-50 and 17-25-45 together. I disagree. In State v. Woody, 345 S.C. 34, 545 S.E.2d 521 (2001), the Court of Appeals held sections 17-25-45(F) and 17-25-50 could be reconciled such that both apply under the recidivist statute. The Woody court found "nothing to suggest section 17-25-45(F) somehow abrogates section 17-25-50." 345 S.C. at 37, 545 S.E.2d at 522. I agree.[4]

[4] The majority overrules Woody; I would affirm Woody.

It is a well-accepted principle of statutory construction that statutes which are part of the same legislative scheme should be construed together. Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001). Statutes must be read as a whole and sections that are part of the same general statutory scheme must be construed together and each given effect, if reasonable. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). Furthermore, the court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. South Carolina Coastal Council v. South Carolina State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the legislature or would defeat the plain legislative intention. Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998).

As the Court did in Stewart and Muldrow, it is our duty to construe the statutes as a whole, and in Benjamin's favor. Doing so here, it is patent that Benjamin's single course of conduct should be treated as one offense. I would hold that Benjamin's four-hour crime-spree was simply not the type of recidivism the Legislature had in mind when it enacted section 17-25-45. State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 671-72 (1993)(statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers).

Moreover, to read section 17-25-45 in isolation, as the majority does here, permits the solicitor unfettered discretion to treat similarly situated defendants differently, based solely upon whether the solicitor elects to try the charges together, or separately, such that there is a "prior conviction. For example, if two defendants commit multiple offenses at one time, such as armed robbery, burglary, kidnapping, and murder, then whether each defendant is subject to a LWOP sentence depends entirely upon whether the solicitor elects to try the offenses separately, in which case there is a "prior conviction," or jointly, in which case there is not. Further, under this factual

situation, one defendant may be subjected to a LWOP sentence while another, equally culpable defendant is not. Not only could such a scenario give rise to equal protection violations, but, in my opinion, the Legislature clearly could not have intended such a result.[5]

I would hold that Benjamin is not eligible for an LWOP sentence for the robbery of Dodge's store; I would reverse the Court of Appeals' opinion.

**MOORE, A.C.J., concurs.**

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[5] Further evidence that the Legislature could not have intended such a result is found in S.C. Code Ann. § 24-21-640 (Supp. 2001), governing circumstances warranting parole, which provides, in part, relative to granting parole to persons serving a second or subsequent conviction of a violent crime, "[p]rovided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense." In my view, it would be incongruous to require the parole board to treat offenses committed within a 24-hour period as one offense for purposes of determining parole, while simultaneously holding that such offenses constitute multiple offenses for purposes of a life without parole sentence under section 17-25-45.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Lamar W. Dawkins and George W. Chisholm, Respondents,

v.

Richard E. Fields; Louis O. Dore; Margaret W. Lesesne, Personal Representative of the Estate of Theodore Lesesne; Mildred Bobo, Personal Representative of the Estate of William Bobo; Herbert A. DeCosta, Jr., Juanita J. Washington; Richard N. Whitney; R.M. Stiney, Jr.; James Vickers; Agatha Cooper; Harold Lesesne; DIA-Dick Realty Company; and Seaside Development Corporation, Petitioners.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Beaufort County
Gerald C. Smoak, Jr., Circuit Court Judge

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Opinion No. 25624
Heard January 23, 2003 - Filed April 7, 2003

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**REVERSED**

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Stephen P. Groves, Sr., John Hamilton Smith, Sr., Stephen L. Brown, of Young, Clement, Rivers & Tisdale, L.L.P., of Charleston, for Petitioners.

Blaney A. Coskrey, III, and Wilmot B. Irvin, both of Columbia; for Respondents.

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**JUSTICE WALLER:** This Court granted the petition for a writ of certiorari to review the Court of Appeals' opinion in Dawkins v. Fields, 345 S.C. 23, 545 S.E.2d 515 (Ct. App. 2001). We reverse.

## FACTS / PROCEDURAL HISTORY

Respondents Lamar W. Dawkins and George W. Chisholm, shareholders of Seaside Development Corporation (Seaside), brought suit against Seaside's directors and officers and a shareholder corporation, alleging common law breach of fiduciary duty, violation of statutory standards for directors, corporate oppression, and violation of preemptive rights. The trial court granted petitioners' motion for summary judgment. Dawkins and Chisholm appealed, and the Court of Appeals reversed and remanded. Dawkins, supra.

Seaside was formed in 1959 for the purpose of acquiring and holding real property on Hilton Head Island. Seaside purchased a large tract of land along Burkes Beach Road. The intent was to subdivide the land on the north side of Burkes Beach Road for individual residential purposes but to keep intact, and eventually sell, the 18-plus acres on the south side. In January 1996, Seaside agreed to sell the south side tract to the Town of Hilton Head Island for $1.2 million.

Respondents allege in their complaint that Seaside's directors schemed to increase their proportional interest in the shares of the corporation. Respondents challenge the propriety of three different stock issuances – 180 shares in August 1995, 205 shares in January 1996, and 330 shares in July 1996. Respondents allege the share price, although issued at the par value of $100, was "grossly inadequate" and that the authorization of the stock sales was without an appropriate business purpose. Respondents contend that Seaside's directors failed to adequately disclose the nature of the transactions thereby diluting other shareholders' rights in the corporation. In addition, respondents maintain that as part of the scheme, Seaside declared a 100% dividend on all shares in September 1996 and again in October 1997.

Respondents filed their complaint in July 1998. Within four months of the complaint being filed, the trial court heard argument on the summary judgment motion. During that time, respondents filed discovery requests, moved to compel discovery, and also moved for a continuance.[1] On November 16, 1998, the trial court heard petitioners' summary judgment motion and respondents' continuance motion. On this same day, petitioners answered respondents' discovery requests.

In support of their motion for summary judgment, petitioners submitted an affidavit from petitioner Richard E. Fields[2] and an "exhibit book" which contained numerous corporate documents supporting their motion. According to the Fields affidavit, both respondents were notified of the stock sales. The documents in the exhibit book showed that Seaside had several debt obligations, including taxes on the property and Dawkins' mortgage on part of the property, which it wanted to satisfy by selling stock. In opposition to the motion for summary judgment, respondents submitted their verified complaint and the affidavit of Professor John Freeman, a law professor and expert in corporations and securities.

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[1] Respondents wanted the trial court to continue the hearing for summary judgment, or deny the summary judgment motion as premature, because they had not yet had an opportunity to conduct discovery.

[2] Fields is Seaside's president and chairman of the board.

In April 1999, the trial court denied respondents' motion for a continuance and granted summary judgment for petitioners. The trial court refused to consider respondents' expert affidavit, concluding the affidavit contained legal opinions and conclusions rather than specific facts. Regarding the motion for continuance, the trial court decided "further discovery by [respondents] is not likely to create a genuine factual issue for trial."

Respondents moved to alter or amend the order, arguing that, *inter alia*, the trial court erred in (1) excluding the expert affidavit, and (2) failing to consider their verified complaint as an affidavit for purposes of the summary judgment motion. In denying this motion, the trial court concluded that the verified complaint was not an appropriate substitute for an affidavit and, in any event, contained merely conclusory allegations. Regarding the expert affidavit, the trial court concluded again that the affidavit constituted an opinion on the law which improperly invaded the trial court's own role to decide the summary judgment motion.

On appeal, the Court of Appeals reversed, finding that summary judgment was erroneously granted to petitioners. The Court of Appeals decided: (1) a verified complaint is the equivalent of an affidavit for purposes of summary judgment; (2) the trial court erred in refusing to consider Professor Freeman's affidavit; and (3) there were genuine issues of material fact. The Court of Appeals did not address respondents' argument that, because of the lack of discovery, the trial court erred in even hearing the motion for summary judgment. Dawkins, supra.

**ISSUES**

1. Did the Court of Appeals err in finding the trial court improperly refused to consider the expert affidavit?

2. Did the Court of Appeals err in holding that a verified complaint is a proper substitute for an affidavit for purposes of summary judgment?

3. Did the Court of Appeals err in finding that genuine material issues of fact preclude summary judgment?

4. Did the trial court err in granting summary judgment for petitioners without allowing additional time for discovery?

## 1. EXPERT AFFIDAVIT

Petitioners argue the Court of Appeals erred in finding that the trial court erroneously refused to consider Professor Freeman's expert affidavit. Specifically, petitioners maintain that the affidavit was not based on personal knowledge and improperly attempted to explain the law to the trial court.

The rule governing summary judgment provides that "[s]upporting and opposing affidavits shall be made **on personal knowledge**, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP (emphasis added). Nonetheless, "[a]n expert witness may state an opinion based on facts not within his firsthand knowledge.… He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions." Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 529 S.E.2d 45, 50 (Ct. App. 2000) (citations omitted); see also Rule 703, SCRE.[3]

The Court of Appeals found that the affidavit was based on Professor Freeman's personal knowledge because he stated he had reviewed the pleadings, the summary judgment motion, and the documents petitioners submitted in support of their motion. Dawkins, 345 S.C. at 31, 545 S.E.2d at 519. We agree with the Court of Appeals that the "personal knowledge"

[3] Rule 703 states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

requirement, as to an expert witness, was satisfied in the instant case. See Hundley, supra.

The Court of Appeals also concluded that the expert affidavit should have been considered by the trial court despite the fact that it contained an opinion on the ultimate issue. Dawkins, 345 S.C. at 31, 545 S.E.2d at 519. However, because Professor Freeman's affidavit primarily contained **legal** arguments and conclusions, we hold the trial court properly refused to consider the affidavit.

Rule 702, SCRE, provides that "[i]f … 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." While it is true that "an opinion … is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," Rule 704, SCRE, Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment. See O'Quinn v. Beach Assocs., 272 S.C. 95, 106-07, 249 S.E.2d 734, 739-40 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court).

In general, expert testimony **on issues of law** is inadmissible. See generally Note, *Expert Legal Testimony*, 97 Harv.L.Rev. 797, 797 (1984); see also Askanase v. Fatjo, 130 F.3d 657, 673 (5th Cir. 1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "[s]uch testimony is a legal opinion and inadmissible."); United States v. Sinclair, 74 F.3d 753, 758 n.1 (7th Cir. 1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

Recently, this Court decided the issue of whether expert testimony from a criminal defense attorney on whether trial counsel was deficient could be admitted at a post-conviction relief (PCR) hearing. Green v. State, 351 S.C.

184, 198, 569 S.E.2d 318, 325 (2002). Green argued that Rule 702 required the PCR judge to admit the expert opinion testimony. We disagreed, and stated the following:

> The expert offered no factual evidence. He proffered his opinion, assuming certain facts, [that] trial counsel's actions fell below acceptable legal standards of competence. **The testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence.** Such "testimony" falls outside of Rule 702, SCRE.

Id. (emphasis added).

Green is instructive to the instant case. Here, Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual information,[4] the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise. See Green, supra; O'Quinn, supra.

### 2. VERIFIED COMPLAINT

Petitioners argue that the Court of Appeals erred in holding that respondents' verified complaint should have been allowed by the trial court as a substitute for an affidavit.

Discussing this novel issue, the Court of Appeals stated the following:

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[4] For instance, Professor Freeman offered his opinion that based on the value of the south side tract, Seaside's stock value per share was approximately $800, and therefore, selling the stock for $100 per share was improper.

> Although our courts have not specifically addressed whether a verified complaint is the equivalent of an affidavit for purposes of summary judgment, Rule 56 of the South Carolina Rules of Civil Procedure is identical to its federal counterpart. …
>
> Federal courts addressing the issue have held that for the purposes of summary judgment, a verified complaint is the equivalent of an affidavit, **provided that the verified complaint meets the requirements of Rule 56(e)**. … Likewise, numerous state courts have held that a verified complaint is the equivalent of an affidavit for summary judgment purposes. … Moreover, our review of South Carolina cases leads us to believe that such a result is consistent with South Carolina law. … Accordingly, we hold that for summary judgment purposes, a verified pleading is equivalent to an affidavit, **provided it meets the requirements of Rule 56(e)**.

Dawkins, 345 S.C. at 28-30, 545 S.E.2d at 518-19 (emphasis added, footnotes and citations omitted).

We agree with the Court of Appeals' well-supported[5] conclusion that a verified complaint is an acceptable substitute for an affidavit at the summary judgment phase as long as the pleading satisfies Rule 56(e). Petitioners argue, however, that respondents' verified complaint did not meet the requirements of Rule 56(e). We agree.

Rule 56(e) requires that affidavits: "[1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP. "Few pleadings will satisfy these requirements, even when verified." 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 3d § 2738 (1998).

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[5] See cases cited at Dawkins, 345 S.C. at 29 nn.7 & 8, 545 S.E.2d at 518 nn.7 & 8.

In the instant case, both respondents verified the complaint as follows:

> PERSONALLY APPEARED before me, [respondent's name], who being duly sworn, deposes and says: that he is one of the Plaintiffs, in the foregoing action, that he has read the within Complaint, **and that the facts are true of his own knowledge, except those matters and things therein alleged upon information and belief, and as to those, he believes them to be true**.

(Emphasis added).

Allegations made upon information and belief do not meet the "personal knowledge" requirements of Rule 56(e). See, e.g., Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir. 1991); Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965); Seay v. Allstate Ins. Co., 296 S.E.2d 30 (N.C. Ct. App. 1982). Likewise, because of the abundance of conclusory allegations found in respondents' verified complaint, it simply is not an appropriate substitute for an affidavit. See Sheinkopf, supra; Fowler, supra; see also Wright, Miller & Kane, § 2738 ("ultimate or conclusory facts and conclusions of law, as well as statements made on … 'information and belief,' cannot be utilized on a summary-judgment motion").

In sum, we find the Court of Appeals correctly held that a verified pleading **may** substitute for an affidavit at the summary judgment phase; however, it erred in finding that respondents' verified complaint met Rule 56(e)'s requirements. Id. Accordingly, the trial court appropriately refused to accept respondents' verified complaint as an affidavit for purposes of summary judgment.

### 3. ISSUES OF FACT / FULL AND FAIR OPPORTUNITY FOR DISCOVERY

Petitioners argue the Court of Appeals erred in finding there were genuine material issues of fact. Respondents, on the other hand, contend the

Court of Appeals correctly found there were issues of fact precluding summary judgment. Moreover, respondents argue as an additional sustaining ground that the motion for summary judgment was premature because they were deprived of a full and fair opportunity to conduct discovery.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). In reviewing the grant of a summary judgment motion, the Court applies the same standard as the trial court under Rule 56(c), SCRCP: "summary judgment is proper when 'there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'" Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 114-15 410 S.E.2d 537, 545 (1991). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. Id. at 115, 410 S.E.2d at 545.

Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Id. at 112, 410 S.E.2d at 543. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is "not merely engaged in a 'fishing expedition.'" Id. at 112, 410 S.E.2d at 544.

The Court of Appeals found numerous issues of fact. However, in doing so, the Court of Appeals relied heavily on Professor Freeman's opinions and likewise found the verified complaint should have been considered as an affidavit. Given our rulings above, the record before the trial court properly consisted of the pleadings, Fields' affidavit, and the accompanying "exhibit book." Our review of the record before the trial court compels a finding that summary judgment was properly granted. See Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) ("Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant

summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law.").

The record unequivocally shows that Seaside had corporate debts, properly notified its shareholders of the intent to satisfy the debts through a stock issuance, and fairly offered stock to all the shareholders. There is simply no factual support for respondents' claims; instead, all the evidence before the trial court shows that the stock was issued in good faith and for a proper business purpose. See Roper v. Dynamique Concepts, Inc., 316 S.C. 131, 447 S.E.2d 218 (Ct. App. 1994) (the issuance of additional shares of stock as a last ditch effort to raise capital for a financially troubled corporation was sufficient to overcome a claim of oppression because the shares had been issued in good faith).

Although we are bound to review the record in a light most favorable to respondents, "[a] court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.'" Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citation omitted). It is undisputed that Dawkins participated in meetings where these issues were discussed and received notice of the stock offerings. Likewise, the only logical inference from the record is that Chisholm either was on notice of the stock offerings, or by his own conduct, prevented himself from receiving the notice. As to the value of the stock and respondents' allegations that the stock was undervalued, we note the stock was issued at par value. In addition, respondents knew the value of the south side tract exceeded $1 million because, in the early 1990's, Seaside had received a $1.75 million offer for the land.

We find the trial court appropriately ruled that respondents failed to present any "specific facts" establishing a genuine issue for trial. Respondents are not permitted to simply rest on the allegations in their complaint, especially where, as here, the majority of the factual allegations are conclusory in nature. See Rule 56(e), SCRCP ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

As to respondents' argument that summary judgment was premature because they did not have a full and fair opportunity for discovery, we hold that under the unusual circumstances of this case, the trial court appropriately granted summary judgment. See Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (affirming summary judgment where appellants "advance[d] no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment"). Furthermore, we agree with the trial court that further discovery was unlikely to create any genuine issue of material fact. See Baughman, 306 S.C. at 112, S.E.2d at 544 (nonmoving party must demonstrate that further discovery will likely uncover additional relevant evidence); see also George v. Fabri, 345 S.C. at 452, 548 S.E.2d at 874 (purpose of summary judgment is to dispose of cases which do not require a fact finder).

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is

**REVERSED**.

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

**JUSTICE PLEICONES:** I agree with the majority that at the summary judgment phase, a verified complaint is an acceptable substitute for an affidavit, as long as the pleading satisfies Rule 56(e), SCRCP. However, I respectfully disagree that there was no genuine issue of material fact that precluded summary judgment. In my opinion, the factual averments of respondents' verified complaint raised a genuine issue whether petitioners breached their fiduciary duty. The complaint alleged that the shares were issued for inadequate compensation. And that there was no legitimate business purpose for issuing the shares, as evidenced by the 100% dividend, returned on those shares only a few months later. I would therefore affirm the Court of Appeals.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Charles W. Bailey, Respondent,

v.

Ralph W. Segars, Jr., Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Darlington County
Paul M. Burch, Circuit Court Judge

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Opinion No. 25625
Heard April 1, 2003 - Filed April 7, 2003

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**DISMISSED AS IMPROVIDENTLY GRANTED**

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Louis D. Nettles, of Nettles, McBride, Hoffmeyer, PA, of Florence, for Petitioner.

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, both of Richardson, Plowden, Carpenter & Robinson, PA, of Columbia; and Paul V. Cannarella, of Hartsville, for Respondent.

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**PER CURIAM:** We granted certiorari to consider the decision of the Court of Appeals in Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001). We now dismiss that writ as improvidently granted.

**DISMISSED AS IMPROVIDENTLY GRANTED**.

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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James R. Hinkle and Emily Hinkle, Respondents,

v.

National Casualty Insurance Company, Appellant.

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Appeal From Florence County
Paul M. Burch, Circuit Court Judge

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Opinion No. 25626
Heard March 19, 2003 - Filed April 14, 2003

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**REVERSED**

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Thomas C. Salane, of Columbia, for Appellant.

William P. Hatfield and Reginald C. Brown, Jr., both of Florence, for Respondents.

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**JUSTICE PLEICONES:** Appellant (Insurance Company) appeals a jury verdict awarding the Hinkles (respondents) $1,500 actual damages and $280,000.01 punitive damages on their claim of negligent

nonrenewal of a homeowner's insurance policy.[1] Insurance Company argues it was entitled to a directed verdict or to a judgment notwithstanding the verdict (JNOV) for several different reasons; that the punitive damage award was excessive as a matter of law; and that it was entitled to a new trial because of flaws in the jury charge. We find the trial judge erred in denying the Insurance Company's directed verdict motion and reverse.

## FACTS

Respondents own a mobile home manufactured in 1980. They have financed improvements to the home by remortgaging it. In 1992, respondent Emily Hinkle (Emily) approached the Foster Insurance Agency about purchasing a homeowner's policy to cover the trailer. She told the agent the respondents needed flood coverage because the mobile home was located in a flood zone near a creek.[2] The insurance application contains this notation in the agent's handwriting "Include VSI & Fed Flood."

The declaration page for the period 8/21/92 to 8/21/93 includes a $3 charge for 'Flood' as an optional coverage. It is undisputed that, from the Insurance Company's perspective, this $3 optional flood coverage was meant only to protect the lender's interest in case the trailer was totally destroyed in a flood. The respondents believed they had flood coverage.

The policy was issued only after the agent responded to Insurance Company's request for more information, including verification that the mobile home was not in a flood area. Respondents supplied the agent with a copy of an appraisal done by the trailer's lien holder that indicated that the

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[1] The case was also submitted to the jury on a bad faith failure to renew claim. The verdict on that claim was for the respondents, but $0 damages. The parties agree this was a 'perverse' defense verdict, and this claim is not the subject of this appeal.

[2] Since the appeal comes before the Court on a claim of entitlement to a directed verdict/JNOV, we review the facts in the light most favorable to respondents. E.g., Sabb v. South Carolina State Univ., 305 S.C. 416, 567 S.E.2d 231 (2002).

mobile home was not in a FEMA flood hazard area. The agent forwarded the appraisal to the Insurance Company. The agent testified she could submit any application whether or not it met Insurance Company's underwriting guidelines, but that it was Insurance Company's decision whether to bind the policy.

It is undisputed that had the Insurance Company known that the mobile home was, in fact, located in a flood zone, respondents' insurance application would have been rejected under the Insurance Company's underwriting guidelines. Further, Emily testified that she understood there was no assurance that the policy would be renewed, but that the decision to offer a renewal would be made anew each year.

The first policy period ran from August 1992 until August 1993. On January 19, 1993, the home was flooded, but not destroyed. The agent submitted the respondents' claim to the Insurance Company, which paid them approximately $7,290. This claim was paid despite the fact that, under the policy, the only flood coverage provided that the lender would be paid in full if the trailer were totally destroyed.

In March 1993, the Insurance Company sent a notice of nonrenewal to the respondents. This notice was triggered by the Insurance Company's erroneous attribution of a theft claim to the respondents' policy. The Insurance Company, virtually simultaneously, sent respondents a renewal notice. The Insurance Company honored the renewal notice, and the respondents purchased a second policy covering the period August 1993, to August 1994. They received a renewal notice and purchased a third policy for the period August 1994, to August 1995.

On December 23, 1994, during the third policy year, the respondents' mobile home was again flooded. This time, Insurance Company denied the claim on the ground that there was no coverage. The denial of this claim led to respondents suing Insurance Company for bad faith refusal to pay, a suit that resulted in a verdict for respondents.

Following this second flood loss, Insurance Company sent a timely notice of nonrenewal to respondents stating as the reason for the nonrenewal "loss frequency." The respondents testified they had a difficult time getting homeowner's insurance from another company, paid that company higher premiums for less coverage, and suffered emotional upset as the result of the loss of coverage. Since their home is located in a flood plain, respondents are unable to obtain private flood insurance and apparently have chosen not to participate in the federal flood program.

## ISSUE

> Whether the trial court erred in denying Insurance Company's motion for a directed verdict on the negligent nonrenewal claim?

## ANALYSIS

When considering a directed verdict or a JNOV motion, the trial court is required to view the evidence and the inferences that can be drawn from that evidence in the light most favorable to the nonmoving party. Sabb v. South Carolina State Univ., 305 S.C. 416, 567 S.E.2d 231 (2002). This Court will reverse the trial court's rulings on these motions only where there is no evidence to support the rulings or where the rulings are controlled by an error of law. Id.

Respondents have styled their legal theory here as 'negligent nonrenewal of a homeowner's insurance policy.' As the Insurance Company pointed out at trial and in its brief, there was nothing 'negligent' about its decision not to renew the respondents' policy: it was an intentional act.[3] Nevertheless, this case was tried and is argued as if negligence were the issue.

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[3] It appears that respondents' theory here is actually that of a 'retaliatory nonrenewal in violation of S.C. Code Ann. § 38-75-790 (2002).'

As noted above, a negligence claim is premised on the defendant's breach of a duty owed to the plaintiff. Sabb v. South Carolina State Univ., *supra*. Generally, unless the insurance policy provides otherwise or in the absence of a statutory requirement, there is no legal duty to renew a policy. E.g., 44 C.J.S. Insurance § 344 (1993). Therefore, the first question here is the source of the duty alleged to have been negligently breached by Insurance Company.

There is no contention that any renewal obligation is found in the contract. In brief, respondents allege the duty breached is found in § 38-75-790. Section 38-75-790 provides:

> No insurer may nonrenew a policy of homeowners insurance because the insured has filed a claim with that insurer for damages resulting from an act of God.

At the nonsuit stage, however, respondents maintained:

> We also previously intended to go forwards [sic] on the violation of the statute 38-75-790 as creating we believe, a private right of action for the insurance companies [sic] nonrenewal in violation of the statute because that was a [sic] act of God occurrence. An [sic] while we believe our position is strong so that the record is pristine in this case, we are not going to pursue that claim except as it relates to the bad faith claim.

Insurance Company's attorney responded to this statement by asking what, then, was the basis of the negligence claim, since the only evidence was that the nonrenewal was intentional. The trial judge denied the Insurance Company's request for a nonsuit on the negligence claim.

It is clear, however, that the only possible source of a duty here is § 38-75-790. As noted above, however, at the nonsuit stage, respondents maintained the statute was only relevant to their bad faith claim.[4]

At the directed verdict stage, the following exchange occurred between the attorneys:

> Insurance Company: With regard to my understanding of the [negligence] claim which is a quasi violation of a statute or statute creating a duty negligence [sic] and meeting that duty, the complaint alleged a violation of 38-75-790. Do I understand that [respondents are] not asserting that independent cause of action for a violation of section 38-75-790?
> Respondent: Is that a question?
> Insurance Company: Yes.
> Respondent: I'm sorry. I was conferring with [co counsel].
> Insurance Company: Do I understand correctly that you've withdrawn the second cause of action for violation of the statute 38-75-790?
> Respondent: As a private cause of action we have.

Insurance Company again sought to require respondents to specify the basis of their negligence theory. Respondents stated they were relying upon their arguments made at the nonsuit hearing to oppose the Insurance Company's directed verdict. They then argued that there was conflicting evidence whether the Insurance Company had a firm policy of declining to insure all trailers in flood zones or whether there was some flexibility in this process.[5] Nowhere was there any mention of a duty or any reference to § 38-75-790. The judge denied the directed verdict motion.

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[4] Respondents did not appeal from the 'perverse' defense verdict on this cause of action.

[5] This argument was premised on a mischaracterization of the agent's testimony. The agent testified while she could submit any application, whether or not it met the underwriting guidelines, it was the Insurance

Insurance Company then objected to numerous aspects of respondents' request to charge. It pointed out that the first reference to § 38-75-790 mis-paraphrased the statute; the trial judge responded by saying he understood that part of the charge to have been withdrawn because it went to the private cause of action claim. The Insurance Company then objected to the entire charge on 'negligent nonrenewal,' in part because it twice referred to § 38-75-790, and in part because it charged that a violation of that statute constituted negligence per se. Insurance Company also objected to another charge on the effect of a violation of § 38-75-790, and respondents agreed to withdraw it.

Insurance Company objected to yet another reference to § 38-75-790, and to the charge's paraphrase of that statute. Respondents again alleged that the repetition of the statute at this point in the charge was necessary to instruct the jury fully on their bad faith claim. As the discussion continued, respondents agreed to omit all references to § 38-75-790 in connection with their negligent nonrenewal claim.

Following the jury verdict for respondents on their 'negligent nonrenewal' cause of action, Insurance Company filed a timely post-trial motion. It sought a JNOV on the ground that there was no private cause of action under § 38-75-790. Respondents' return to the JNOV concedes they withdrew that claim at trial, but nonetheless asserts the statute "clearly establishes a duty of care by this defendant to the plaintiffs."

For purposes of this appeal, we assume that a decision not to renew a homeowner's policy because the homeowner made a claim for damages resulting from an act of God[6] would support a tort claim.[7] Therefore, the

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Company's decision whether to bind the coverage. Recall that Insurance Company asked whether respondents' trailer was in a flood zone before binding the contract, and the respondents supplied their lender's appraisal showing the property was not in a flood area.

[6] We also assume for purposes of this opinion that respondents suffered floods that qualified as an act of God.

dispositive question is whether there is any evidence that Insurance Company 'negligently' nonrenewed respondents' homeowner's policy. We hold that there is none.

There is no evidence that the Insurance Company's decision to nonrenew was based on a negligent breach of duty. Rather, the repeated claims put the Insurance Company on notice that the flood risk for this particular site was excessive, and it subsequently determined respondents' trailer was located in a flood zone. Insurance Company's underwriting guidelines prohibited issuance of a homeowner policy for a mobile home located in such a zone. Accordingly, the decision not to offer to renew respondents' policy was made.

The respondents would have the Court adopt a rule that an insurance company, having mistakenly issued a policy based on the insureds' misrepresentation (innocent or not) of the risk, is bound to renew this policy in perpetuity. While § 38-75-790 prevents an insurance company from nonrenewing a homeowner's policy in retaliation for a claim predicated upon an act of God, nothing in that statute precludes an insurer from reassessing the risk of a particular insured property, and from declining to renew the policy upon a determination that the property does not meet the insurer's underwriting guidelines.

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> A flood of unprecedented or extraordinary nature is an "act of God" in the legal sense, but such a flood is held not to be so where it could be anticipated by ordinary foresight and prudence…
> Baynham v. State Highway Dep't, 181 S.C. 435, 187 S.E.2d 528 (1936).

We question whether respondents' trailer, located in a flood zone and subject to regular flooding, suffers from 'act of God' floods, rather than from floods that can be anticipated by ordinary foresight and prudence.

[7] Insurance Company maintained at oral argument that the only cause of action that would lie for a breach of this statute would sound in contract.

The trial judge erred in denying the Insurance Company's directed verdict and JNOV motions because there is no evidence that Insurance Company negligently breached any duty owed to respondents. Accordingly, the verdict for the respondents is

REVERSED.

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Ray H. Chewning, Jr., Respondent,

v.

Ford Motor Company,
David J. Bickerstaff, and
David J. Bickerstaff and
Associates, Inc., Defendants,

of whom Ford Motor
Company is Petitioner.

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ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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Appeal From Kershaw County
James R. Barber, Circuit Court Judge

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Opinion No. 25627
Heard February 20, 2003 - Filed April 14, 2003

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**AFFIRMED**

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Joel H. Smith and Susan M. Glenn of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia; and Paul F. Hultin and Edward C. Stewart, of Wheeler Trigg & Kennedy, of Denver, Colorado, for petitioner.

A. Camden Lewis, Mark W. Hardee, and Ariail E. King, of Lewis, Babcock, & Hawkins, of Columbia, for respondent.

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**JUSTICE BURNETT:** We granted a writ of certiorari to review the decision of the Court of Appeals which reversed a lower court order dismissing an action for "fraud upon the court" and an "independent action in equity for fraud" pursuant to Rule 12(b)(6), SCRCP. Chewning v. Ford Motor Co., 346 S.C. 28, 550 S.E.2d 584 (Ct. App. 2001). We affirm.

## FACTS

In 1992, Respondent, Ray H. Chewning, Jr., (Chewning) brought a products liability action against Respondent Ford Motor Company (Ford). He alleged that defects in his Ford Bronco II caused a rollover accident in which he sustained personal injuries. After a trial in 1993, the jury returned a verdict in Ford's favor.

In 1998, Chewning filed this action in state court against Ford, its expert witness, David J. Bickerstaff, and David J. Bickerstaff and Associates, Inc., asserting various causes of action. In essence, Chewning alleged Bickerstaff committed perjury during his 1993 trial and Ford concealed documents from him during the course of discovery.

Ford removed the action to federal court. The federal court granted Ford's motion to dismiss all claims, except for Chewning's cause of action for fraud upon the court. The federal court remanded the fraud upon the court claim "and such other related claims in equity, if any, as the state court may allow to be added by amendment." Chewning v. Ford Motor Co., 35 F.Supp. 2d 487, 492 (D.S.C. 1998).

Chewning refiled his case in state court asserting causes of action for fraud upon the court and an independent action in equity for fraud. In his amended complaint, Chewning alleged Ford's attorneys hired Bickerstaff to

testify falsely on Ford's behalf in various Bronco II actions.[1] In addition, Chewning alleged Ford's attorneys withheld critical documents during discovery. Chewning asserted the judgment in his original action should be vacated as a result of the defendants' activities.

Concluding Chewning's complaint was untimely and asserted allegations of intrinsic fraud which could not be used to set aside the earlier verdict, the trial judge dismissed the complaint pursuant to Rule 12(b)(6), SCRCP. In addition, the trial judge determined Chewning's amended complaint failed to allege fraud with particularity as required by Rule 9(b), SCRCP, as it "does not identify any allegedly perjured testimony by Bickerstaff in the underlying products liability trial, only subsequent cases after Chewning's." Chewning appealed.

The Court of Appeals reversed. Chewning v. Ford Motor Co., supra. It held Chewning's claim was timely and, further, the complaint sufficiently stated a claim for fraud upon the court. Id.

## ISSUES

I. Did the Court of Appeals err by holding the subornation of perjury and concealing of documents by an attorney during the course of litigation may constitute fraud upon the court?

II. Did the Court of Appeals err by finding Chewning's complaint alleged fraud upon the court with sufficient particularity?

## DISCUSSION

### I.

Ford contends the Court of Appeals erred by holding the subornation of perjury and concealing of documents by an attorney during

[1] Ford's present attorneys did not represent Ford during the underlying litigation.

litigation constitutes fraud upon the court.[2] It contends these actions constitute intrinsic, rather than extrinsic, fraud and, therefore can not form the basis of Chewning's claim for fraud upon the court. We disagree.

Fraud Upon the Court

Our Court has not previously defined fraud upon the court in connection with setting aside a final judgment.[3] In Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988), the Court of Appeals noted one commentator described "fraud upon the court" as "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." (citing H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 408 (2nd ed. 1985).

Other jurisdictions describe fraud upon the court as follows:

> Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on

[2] Chewning's amended complaint alleged two claims against the defendants: fraud upon the court and an independent action in equity for fraud. The trial judge dismissed both causes of action. Chewning appealed the dismissal of his fraud upon the court cause of action; this was the only cause of action addressed by the Court of Appeals. Chewning v. Ford Motor Co., supra.

[3] In Davis v. Davis, 236 S.C. 277, 113 S.E.2d 819 (1960), the Court considered the effect of an attorney's statement to the lower court during a divorce action. The Court determined that, by representing to the court that a party was in default when she was not, "[t]his reasonably may be held to have been extrinsic fraud upon her and upon the court" and vacated a prior judgment as a result. Id. S.C. at 281, S.E.2d at 821 (1960). The Court noted the attorney's representation was a "bona fide mistake" and, "therefore, constructive, rather than actual, fraud." Id. at 281, S.E.2d at 821-22.

> the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.

Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978) citing United States v. Int'l Telephone & Telegraph Corp., 349 F.Supp. 22, 29 (D. Conn. 1972) (internal citations omitted).

Fraud upon the court is a "serious allegation . . . involving 'corruption of the judicial process itself'." Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., supra 827 F.2d at 986 quoting In re Whitney-Forbes, 770 F.2d 692, 698 (7th Cir. 1985).

> . . . '[F]raud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing - - what can properly be characterized as a deliberate scheme to defraud - - before relief from a final judgment is appropriate. . . . Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself sufficient basis for setting aside a judgment for 'fraud on the court.'

United States v. Buck, 281 F.3d 1136, 1342 (10th Cir. 2002) quoting Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir. 1995).

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), is the United States Supreme Court's leading "fraud upon the court" decision. In that decision, an attorney for Hartford drafted an article in support of a particular glass manufacturing process, had an officer of the glass-workers' union sign the article as its author, and then had the article published in a trade journal. The article was included in support of Hartford's controversial patent application. The patent was granted. Hartford then initiated a patent infringement suit against Hazel-Glass. In finding Hazel-Glass had infringed upon Hartford's patent, the Third Circuit Court of Appeals relied on the article. Ultimately, the true identity of the

author was discovered. In upholding Hazel-Glass' suit, the USSC Court emphasized:

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed to have been guilty of perjury. Here, . . .we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. . . . This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id. U.S. at 245-46 (internal citations omitted).

Intrinsic/Extrinsic Fraud

In considering collateral attacks on final judgments, a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute. See Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). In most circumstances, there is a time limitation upon a party who seeks to reopen a final judgment. Rule 60(b), SCRCP, provides, in part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.**
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken . . .This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order, or proceeding, or to set aside a judgment for fraud upon the court.

(Underline added).

There is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court. Rule 60(b), SCRCP; see Hagy v. Pruitt, supra (court has the inherent authority to set aside a judgment on the ground of extrinsic fraud in spite of any facially applicable statute of limitations). In order to secure equitable relief on the basis of fraud, the fraud must be extrinsic. Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951). (extrinsic fraud is necessary in order to secure equitable relief vacating a prior judgment).

Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Hilton Head Ctr. of South

Carolina v. Public Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Hilton Head Ctr. v. South Carolina Pub. Serv. Comm'n, supra.

Perjury by a party or a witness is intrinsic fraud. Rycroft v. Tanguay, 279 S.C. 76, 302 S.E.2d 327 (1983). "[O]rdinarily there is no ground for equitable interference with a judgment in the fact that perjury or false swearing was committed by such party or his witnesses at trial, at least where the perjurious or false evidence was not accompanied by any extrinsic or collateral fraud, and related to issues or matters which were or could have been considered in the original cause." Bryan v. Bryan, supra 220 S.C. at 168, 66 S.E.2d at 610. In addition, the failure to disclose to an adversary or court matters which would defeat one's own claim is intrinsic fraud. Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n, supra. [4]

[4] Like South Carolina, federal courts recognize that perjury or use of a fraudulent document, without more, does not constitute fraud on the court. See United States v. Throckmorton, 98 U.S. (8 Otto) 61, 66 (1878) (". . . the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence. . . ."); Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1996) (". . . perjury alone, absent allegation of involvement by an officer of the court . . . has never been sufficient [to constitute fraud upon the court justifying collateral attack]") (citing numerous cases); Great Coastal Express v. Int'l Bhd. of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982) (". . . courts confronting the issue have consistently held that perjury or fabricated evidence are not grounds for relief as 'fraud on the court'.") (citing numerous additional cases).

> Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable; relief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action.

Bryan v. Bryan, supra S.C. at 168, S.E.2d at 610.

"Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments." Mr. G. v. Mrs. G., 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995).

Ford claims the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney do not constitute extrinsic fraud because they do not defeat the opposing party's opportunity to litigate the matter. Ford further asserts, because perjury and discovery abuse should be ferreted out during the course of litigation, disappointed parties should not be permitted to reopen final judgments on this basis. We disagree.

The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court.[5] These actions by an attorney constitute extrinsic fraud.[6]

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[5] See In the Matter of Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983) (attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony).

[6] In Bankers Trust Co. v. Braten, 317 S.C. 547, 455 S.E.2d 199 (Ct. App. 1995), the Court of Appeals declined to find extrinsic fraud where it

Moreover, we note that, while their analysis does not turn on the categorization of fraud as intrinsic or extrinsic, numerous jurisdictions hold an attorney's subornation of perjury and/or the intentional concealment of documents constitute fraud upon the court. See Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072 (2d Cir. 1972) (institution of action by attorney who knew that there was complete defense to action might be fraud upon the court); Great Coastal Express, Inc., v. Int'l Brotherhood of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982) ("[I]nvolvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court."); Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987) ("A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony."); Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) (fabrication of evidence where attorney is implicated is fraud upon the court); H.K. Porter Co. v. Goodyear Tire & Rubber, 536 F.2d 1115, 1119 (6th Cir. 1976) ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court."); Dixon v. Comm'n of Internal Revenue, 2003 WL 1216290 (9th Cir. 2003) (fraud on the court occurred where attorneys entered into secret settlement agreements with taxpayers in exchange for false testimony); Synanon Found., Inc., v. Bernstein, 503 A.2d 1254 (D.C. 1986) (attorney subornation of perjury and false statements to trial court constitute fraud upon the court); Porcelli v. Joseph Schlitz Brewing Co., 78 F.R.D. 499 (E.D. Wis. 1978) (noting distinction between perjury involving officers of the court and witness or

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was alleged an attorney had perpetrated fraud upon two courts in earlier litigation. The Court of Appeals noted the defending party was aware of the alleged misrepresentations when they occurred and, in fact, challenged the misrepresentations in one proceeding. Accordingly, the Court of Appeals concluded there was no evidence the alleged fraud prevented the defending party from presenting his case in full.

The Court of Appeals' analysis is consistent with our decision today. A party does not have a claim for extrinsic fraud if he failed to exercise due diligence in discovering the existence of facts or documents during the underlying litigation.

party); see 12 James Wm. Moore et al., Moore's Federal Practice ¶ 60-21[4][b] (3d ed. 2002).

Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs.[7]

## II.

Ford contends the Court of Appeals erred by finding Chewning's complaint sufficiently alleged fraud upon the court. Specifically, Ford claims Chewning's amended complaint is fatally deficient because it fails to allege Bickerstaff offered any perjured testimony suborned by Ford's attorneys in Chewning's trial. Furthermore, Ford asserts Bickerstaff offered opinion, rather than fact, testimony and, therefore, his testimony can not form the basis of a fraud claim. We disagree.

In his amended complaint, Chewning alleged Ford, its attorneys, and Bickerstaff had a "secret strategy to deal with the defense" of numerous actions against Ford concerning the design of the Bronco II. Chewning claimed that "Ford's attorneys knowingly purchased and used the false testimony [of Bickerstaff] . . . and concealed this from Plaintiffs." Specifically, Chewning asserted "[Ford] would use the favorable and untruthful testimony of Bickerstaff fraudulently to create evidence that the Bronco II was designed in a safe and reliable manner." Additionally, he averred "Ford and its attorneys would hide and cover up any unfavorable engineering documents characterized as 'critical' and/or field tests [of the Bronco II]."

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[7] We note, because fraud upon the court is an affront to the administration of justice, a litigant who has been defrauded need not establish prejudice. Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra; Dixon v. Comm'n of Internal Revenue, 2003 WL 1216290 (9th Cir. 2003) (" . . . the perpetrator of the fraud [upon the court] should not be allowed to dispute the effectiveness of the fraud after the fact.").

The amended complaint refers to two specific documents which Chewning alleges were improperly withheld from him during the course of discovery in his underlying action. One of these documents is denominated the "Bickerstaff letter." This letter, dated June 20, 1990, is from Bickerstaff to two of Ford's attorneys. The letter states, in part: "I feel I should be reimbursed my current rate. I would suggest you retain our services to assist you in preparing myself, in Ford's favor, as we discussed per our phone conversation of 6/18/90."

Chewning alleged Bickerstaff had been identified as a fact witness in an earlier Bronco II case (the Rosenbusch case).[8] According to Chewning, Ford's attorneys met with Bickerstaff prior to his July 1990 deposition in that case and agreed to represent him personally. The amended complaint alleges the Bickerstaff letter, which was "not disclose[d] to any attorneys for plaintiffs in any case until years later," is evidence Bickerstaff offered to testify falsely on Ford's behalf in return for substantial sums of money and Ford, through its attorneys, Anderson and Seitz, agreed to pay money, "disguised as payments on purchase orders for 'consulting' work" unrelated to his Bronco II testimony. Chewning alleged Bickerstaff testified falsely in at least thirty Bronco II cases, including his own, and specifically referred to his untruthful testimony in the Cammack and Crenshaw cases. A second document, the "Vehicle Design and Testing Memo," is a memorandum from Ford to the Arizona Proving Ground acknowledging jacking, stability, and design problems with the Bronco II. Part of this memorandum states it was impossible for Ford to develop specific test criteria to assess the Bronco II's adequacy. At trial, however, Ford presented a computer model which established the Bronco II was stable. Chewning asserts, if he had had the Vehicle Design and Testing Memo, he could have attacked the computer model.

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[8] By way of background, the amended complaint explains Bickerstaff was an engineer for Ford who worked on the design and testing of the Ford Bronco II; it alleges he was critical of the Bronco II's stability, became "disaffected," and left Ford prior to the production of the first Bronco II.

Chewning's amended complaint contains sufficient allegations of fraud upon the court. Although it fails to identify any specific portion of Bickerstaff's trial testimony as perjurious, the amended complaint alleges Ford's attorneys hired Bickerstaff to testify falsely during numerous Bronco II trials.[9] Under this allegation, most all of Bickerstaff's testimony -- including that presented at Chewning's trial -- was perjurious. Moreover, assuming Bickerstaff testified as an expert for Ford and gave his opinion on the stability of the Bronco II, his testimony would nonetheless be untruthful if he was hired to testify falsely for Ford. Contrary to Ford's claims, if Ford's attorneys hired Bickerstaff to testify falsely and knowingly withheld critical documents in Bronco II trials, including Chewning's trial, Chewning would have been prevented from fully exhibiting and presenting his case. The attorneys' misconduct would constitute extrinsic fraud. If proven by clear and convincing evidence, the attorneys' actions would constitute fraud upon the court. The Court of Appeals properly found Chewning's amended complaint sufficiently stated a claim for fraud on the court so as to survive Ford's Rule 12(b)(6) motion to dismiss. Toussaint v. Ham, supra (Rule 12(b)(6) motion may not be sustained if facts alleged and reasonable inferences would entitle the plaintiff to any relief on any theory of the case).

## CONCLUSION

We recognize that important benefits are achieved by the preservation of final judgments. This opinion, with its unique facts, in no way alters the Court's longstanding policy towards final judgments. Again, any claim of fraud upon the court must be accompanied by particularized allegations. Claims which are not made in good faith are subject to sanction pursuant to Rule 11, SCRCP.

The remaining issue is affirmed pursuant to Rule 220, SCACR and the following authorities: Id., 292 S.C. 415, 357 S.E.2d 8 (1987) (Rule 12(b)(6) motion may not be sustained if facts alleged and inferences

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[9] Furthermore, whether Bickerstaff's June 20, 1990, letter supports Chewning's claim that Ford's attorneys hired him to testify falsely does not go to the sufficiency of the complaint, but to the sufficiency of the evidence.

reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case); Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001) (in review of motion to dismiss pursuant to Rule 12(b)(6) appellate court applies the same standard of review implemented by the trial court).

The Court of Appeals' decision is **AFFIRMED.**

**TOAL, C.J., MOORE and WALLER, JJ., and Acting Justice John W. Kittredge, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**Georgia-Carolina Bail Bonds, Inc., Appellant,**

**v.**

**County of Aiken and Liz Godard, Clerk of Court for Aiken County, Respondents.**

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**Appeal From Aiken County**
**Rodney A. Peeples, Circuit Court Judge**

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**Opinion No. 3621**
**Heard March 12, 2003 – Filed April 7, 2003**

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**REVERSED**

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**Robert T. Williams, Sr., of Lexington, for Appellant.**

**W. Lawrence Brown and Robert M. Bell, both of Langley, for Respondents.**

**ANDERSON, J.:** Georgia-Carolina Bail Bonds brought an action seeking to enjoin the Aiken County Clerk of Court from assessing a $150 fee for each license their bondsmen possessed. After a non-jury proceeding, the circuit court refused to enjoin the Clerk of Court from charging the fee. We reverse.

## FACTS/PROCEDURAL BACKGROUND

Georgia-Carolina Bail Bonds ("Carolina") is a corporation organized, incorporated, and doing business in Aiken County pursuant to the laws of South Carolina. Carolina employs several surety bondsmen who operate as agents for multiple insurance companies that guarantee the bonds they write. The bondsmen have an independent license for each insurance company for which they are an agent. These separate licenses are filed with the Aiken County Clerk of Court. The Clerk of Court is required to process, file, and record additional documents for each filed license. The Clerk of Court collects licensing fees pursuant to South Carolina law. The Clerk of Court collects $150 dollars annually for each license held by Carolina's bondsmen.

Carolina filed an action seeking to enjoin the Clerk of Court from collecting $150 for each individual license held by a bondsman, arguing South Carolina law only empowers the Clerk of Court to charge $150 a year per individual holding a license, not for each individual license. The parties agreed to a non-jury trial on the pleadings and stipulated to the facts of the case. The circuit court denied the injunction, ruling that the statute enables the Clerk of Court to collect $150 for each license held by a bondsman.

## ISSUE

Does S.C. Code Ann. section 38-53-100(D) authorize the Clerk of Court to collect only $150 per year per individual or $150 per year per license held by that individual?

## LAW/ANALYSIS

Carolina argues the circuit court erred when it denied its action to enjoin the Aiken County Clerk of Court because S.C. Code Ann. section 38-53-100(D) only entitles the Clerk of Court to collect $150 dollars for each bondsman who holds a license and not $150 for each license a bondsman holds. We agree.

### I. Statutory Construction

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002); City of Camden v. Brassell, 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997); see also Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 205, 544 S.E.2d 38, 44 (Ct. App. 2001) ("The quintessence of statutory construction is legislative intent."). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Daisy Outdoor Adver. Co. v. South Carolina Dep't of Transp., 352 S.C. 113, 120, 572 S.E.2d 462, 466 (Ct. App. 2002); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). The determination of legislative intent is a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995); Olson, 344 S.C. at 207, 544 S.E.2d at 45.

The legislature's intent should be ascertained primarily from the plain language of the statute. Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen, 324 S.C. at 339, 478 S.E.2d at 77. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. v. Leatherman, 309 S.C. 174, 420 S.E.2d

843 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582. The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. Smith, 350 S.C. at 87, 564 S.E.2d at 361. A statute must receive a practical and reasonable interpretation consistent with the "design" of the legislature. Id. "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Adoptive Parents v. Biological Parents, 315 S.C. 535, 446 S.E.2d 404 (1994); Hudson, 336 S.C. at 246, 519 S.E.2d at 581; see also Santee Cooper Resort v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation."). Dictionaries can be helpful tools during the initial stages of legal research for the purpose of defining statutory terms. Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. S. Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 412 S.E.2d 377 (1991); Hudson, 336 S.C. at 246, 519 S.E.2d at 581. Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; see also Stephen, 324 S.C. at 340, 478 S.E.2d at 77 (Statutory provisions should be given reasonable and practical construction consistent with the purpose of the entire act). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992).

If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Cowan v. Allstate Ins. Co., 351 S.C. 626, 631, 571 S.E.2d 715, 717 (Ct. App. 2002); Olson, 344 S.C. at 207, 544 S.E.2d at 45; see also Brassell, 326 S.C. at 561, 486 S.E.2d at 495 ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994); Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999); see also Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995) (Where the terms of a relevant statute are clear, there is no room for construction.). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 503 S.E.2d 465 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 475 S.E.2d 762 (1996); Worsley Cos. v. South Carolina Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970) (Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language.). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the

statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; Brassell, 326 S.C. at 561; 486 S.E.2d at 495; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002); Adams v. Texfi Indus., 320 S.C. 213, 464 S.E.2d 109 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494.

**II. Section 38-53-100(D)**

The statutory provision in question reads:

> [A] professional or surety bondsman shall pay to the clerk of court of his home county the sum of one hundred fifty dollars annually for each licensee to be paid directly to and retained by the clerk. In addition, each bondsman and runner shall pay to any other county where he is doing business, the sum of one hundred dollars to be paid and retained by the clerk. The fee must be paid annually and directly to the clerk of court who shall deposit it in an account maintained by the clerk.

S.C. Code Ann. § 38-53-100(D) (2002).

Although not binding or controlling, this court gives deference to the opinion of a state agency charged with the duty and responsibility of enforcing a state statute. The South Carolina Department of Insurance is given general oversight responsibility in regard to the licensing of a bondsman. Willie Seawright, the Licensing Coordinator for the South Carolina Department of Insurance, who is not an attorney, has offered his interpretation that "[t]his charge can only be assessed one time a year, regardless of the number of licenses that a bondsman register [sic] in your county." Additionally, David K. Avant, Assistant Attorney General, opined: "It is also my opinion that each person licensed under Chapter 53 of Title 38

is subjected to one fee under Section 38-53-100(D), no matter how many licenses that person holds."

South Carolina has long recognized the rule that an opinion or construction of a statute by an agency that is in charge of enforcing the statute should be given great deference. "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. South Carolina Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)); see also Nucor Steel, a Div. of Nucor Corp. v. South Carolina Public Serv. Comm'n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) ("Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason."); Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999).

The circuit court established that "licensee" meant "one to whom a license is granted." The circuit court also noted that the legislature did not intend to apply the fee to the individual bondsman or it would have used the term "bondsman" exactly as it did in the following sentence of the statute. In examining the legislative purpose of the statute, the circuit court found the intent of the legislature was to

> create a system whereby fees would be generated to offset the expense of registering and monitoring the qualifications of bail bondsmen and runners in a given county. . . . Additionally, the court finds that the increased time and effort required to maintain records and supervise bondsmen with multiple licenses warrants a separate charge for each license that the bondsman holds in the county.

The circuit court felt such a ruling was equitable because "[a]llowing the Clerk to collect only one fee for [the] registration of multiple licenses for an

individual bondsman would not be logical or fair. Bondsmen with multiple licenses would pay a proportionately smaller fee for registration of each license than would a bondsman with a single license."

We disagree with the circuit court's interpretation of the statute. The term licensee encapsulates both bondsmen and runners as evidenced by the second passage in the statute. The statute directs a bondsman operating in another county to pay a $100 fee without regard to the number of licenses he or she holds. If the legislature had intended for the fee to be $150 for each license, the legislature could have articulated this requisite with exactitude. Instead, the statute as written requires a licensee to pay $150 to the clerk without specific reference to any number of licenses a bondsman or a runner holds. We acknowledge that the legislative purpose of the statute is to obtain fees to defray the costs of monitoring and licensing bondsmen. However, the legislature, in penning this statute, had sound reasons for circumscription of the fee to the **licensee**. An obvious legislative policy response was that an open-ended per license charge would make the process expensive for a bondsman to enter and remain in the profession. In any event, it is not necessary to bestow the rules of statutory interpretation because it is clear that the term **licensee** encompasses bondsman and the statute only orders the licensee to pay $150 to the clerk without any mention of the number of individual licenses the licensee holds.

## CONCLUSION

Utilizing the "plain meaning" rule of statutory construction, we hold that S.C. Code Ann. section 38-53-100(D) requires a bondsman to pay the $150 fee as a **licensee** and does not require an additional fee for each license the bondsman owns. The circuit court erred when it denied Carolina's action to enjoin the Clerk from assessing a $150 fee for each license a bondsman has. Accordingly, the decision of the trial court is

**REVERSED.**

**HUFF, J., and MOREHEAD, Acting Judge, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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| The State, | Respondent, |
| v. | |
| Jimmy Dodd, | Appellant. |

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Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

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Opinion No. 3622
Heard February 25, 2003 – Filed April 7, 2003

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**AFFIRMED**

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Chief Attorney Daniel T. Stacey, of the SC Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H.

Richardson, Assistant Attorney General W. Rutledge Martin, of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg; for Respondent.

**HEARN, C.J.:** Jimmy Dodd was indicted for the armed robbery of a convenience store. The trial judge denied his motion for directed verdict, and the jury found Dodd guilty of armed robbery. He was sentenced to life without parole. Dodd appeals, arguing the state failed to prove the *corpus delecti*[1] of armed robbery *aliunde*[2] his confession. We affirm.

## FACTS/PROCEDURAL HISTORY

At trial, the State produced evidence that Dodd entered a Li'l Cricket store and told the clerk to get down on the floor or he would kill her. The clerk testified that she did not know what Dodd was going to kill her with and that the only thing she saw in his hand was a rolled up t-shirt. The State also presented the following statement from the defendant:

> I just want to see that lady at Li'L Cricket and hug her and apologize to her for coming in the store and robbing her on Monday night. I did not mean to hurt her and never pointed **the gun** at her. I just threatened her to scare her. I took my shirt off right before I walked in the store because I was hot and was on drugs. I've had a drug problem and I feel like it controls everything I do. (emphasis added)

The defense moved for a directed verdict, and the motion was denied. The jury found Dodd guilty of armed robbery.

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[1] "The body of a crime." Black's Law Dictionary 344 (6th ed. 1990).

[2] "From another source." Id. at 73.

## DISCUSSION

Dodd argues that his motion for directed verdict should have been granted because the State's evidence failed to provide sufficient evidence *aliunde* his confession of the *corpus delicti* of armed robbery.

The "corroboration rule" requires that extra-judicial confessions of a defendant be corroborated by proof *aliunde* of the *corpus delicti*. State v. Osborne, 335 S.C. 172, 175, 516 S.E.2d 201, 202 (1999). "The [rule] is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred." Id. at 180, 516 S.E.2d at 205.

"[G]enerally speaking, the term '*corpus delicti*' means, when applied to any particular offense, that the specific crime has actually been committed." State v. Teal, 225 S.C. 472, 474, 82 S.E.2d 787, 788 (1954) (citations omitted). The State may prove the *corpus delicti* of armed robbery by establishing that a robbery was committed and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object. See S.C. Code Ann. § 16-11-330(A) (Supp. 2001); State v. Muldrow, 348 S.C. 264, 268-269, 559 S.E.2d 847, 849 (2002).

Considering the second prong first, we note that although Dodd threatened to kill the store clerk, he never alleged that he was armed nor used an item to represent a deadly weapon. Therefore, this prong of the statute was not satisfied.

The question, then, is whether Dodd's admission that he had a gun coupled with the clerk's testimony that he threatened to kill her, satisfied the first prong of the statute, which requires that the State prove Dodd was armed with a deadly weapon. We believe that it does.

Once Dodd confessed to having a gun during the commission of his robbery, the State only needed to present sufficient independent evidence to corroborate those statements so that a jury could reasonably believe an armed robbery occurred. See Osborne. 335 S.C. at 180, 516 S.E.2d at 205; see also State v. Trexler, 342 S.E.2d 878, 880 (N.C. 1986) (finding that the corroboration rule only requires the State's independent evidence to "touch or be concerned with the *corpus delicti*" and, standing alone, it need not prove any element of the crime).

Here, Dodd's confession to having a gun was corroborated by his threat to the clerk that he would kill her if she did not do as he told her. Although his threat, unaccompanied by any representation of a deadly weapon, would not independently be sufficient to establish the element of a deadly weapon, the threat is sufficient to corroborate Dodd's confession to being armed. See Muldrow, 348 S.C. 264 at 268, 559 S.E.2d at 849 (holding that the State did not sufficiently prove the defendant was armed when the only evidence against him was that he handed a clerk a note that read: "Give me all your cash or I'll shoot you," and there was no confession to having a gun). When there is any evidence tending to establish the *corpus delicti* of a crime, it is the trial judge's duty to pass that question to the jury. See Osborne, 335 S.C. at 180, 516 S.E.2d at 205; State v. Williams, 321 S.C. 381, 385, 468 S.E.2d 656, 658 (1996). Therefore, the trial judge did not err in denying Dodd's motion for a directed verdict.

Accordingly, Dodd's conviction for armed robbery is

**AFFIRMED.**

**GOOLSBY and SHULER, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**Vergie W. Fields, Individually and as the Personal Representative of Thomas Edison Fields, Deceased,** **Appellant,**

**v.**

**Regional Medical Center Orangeburg South Carolina and F. Simons Hane, M.D.,** **Defendants,**

**Of whom F. Simons Hane, M.D. is** **Respondent.**

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

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**Opinion No. 3623**
**Heard March 12, 2003 – Filed April 14, 2003**

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**REVERSED AND REMANDED**

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**J. Marvin Mullis, Jr., of Columbia, for Appellant.**

**Julius W. McKay, II and Kathleen Devereaux Schultz, of Columbia, for Respondent.**

**ANDERSON, J.:** Vergie Fields brought an action individually and on behalf of her husband's estate against Orangeburg Regional Medical Center ("hospital") and Dr. Simons Hane for wrongful death and medical malpractice. Fields claimed the hospital and Hane were negligent and committed medical malpractice leading to her husband's death. During the trial, the circuit court excluded the testimony of one of Fields's experts regarding his credentials. Additionally, the circuit court refused to allow Fields to use a treatise to cross-examine Hane. Fields argues these are reversible errors which entitle her to a new trial. We reverse and remand for a new trial.

## FACTS/PROCEDURAL BACKGROUND

On September 14, 1994, Thomas Fields called his wife, Vergie Fields, at her job and asked her to take him to the hospital because he was experiencing severe chest pains, which radiated down into both arms. Fields was a forty-nine-year-old smoker with a family history of heart disease. In 1976, Fields became disabled when he received severe injuries from falling at work. From 1976 to 1994, Fields suffered from a variety of physical and psychiatric ailments and made numerous trips to the emergency room at the hospital. He was hospitalized several times to treat his psychiatric problems during this period.

Fields had previously experienced bouts of chest pain. From 1981 until his death in 1994, the hospital performed fifteen EKGs on Fields. In 1993, Fields's doctor arranged a cardiac catheterization to evaluate whether Fields had coronary artery disease. The results were negative and were in Fields's files at the hospital's emergency room.

When Fields arrived at the hospital's emergency room on September 14, 1994, Dr. Fisher saw him. Fisher ran an EKG and ordered a chest X-Ray, which read normal. Fisher diagnosed Fields with gastrointestinal reflux and

chronic back pain. Fisher prescribed Fields a G.I. cocktail, which was administered in the emergency room, and advised Fields to consult his family doctor. Before Fields left, he informed Fisher the G.I. cocktail had provided some relief. Fields saw his psychiatrist the same week and made an appointment to see his family physician the following week.

On September 18, 1994, Fields awoke during the early morning hours once again hurting from severe chest pain, which radiated down both arms. Fields went to the hospital's emergency room in the middle of the night where Hane examined him. When Fields arrived, he asked Hane for another G.I. cocktail. Fields was in so much pain on this occasion that he was sobbing. Hane ran an EKG and reviewed the results from the X-Ray and EKG from September 14th as well as the other records contained within Fields's file, including the results of the 1993 catheterization. The hospital placed Fields on a heart monitor for approximately forty-five minutes to an hour. The monitor kept track of Fields's cardiac activity during that time, all of which appeared normal. Hane diagnosed Fields with histrionics and gastrointestinal pain. Fields received a G.I. cocktail and a shot of Vistaril and Nubain to treat the histrionics. Hane released Fields at 3:50 a.m. and instructed him to return to the emergency room if the condition persisted or worsened and to consult his family physician.

When Fields and his wife left the hospital, his pain intensified one or two miles away from the hospital. They stopped for a drink at a gas station and decided to drive to the Palmetto Baptist Hospital in downtown Columbia, about forty-five minutes away. When they reached Baptist, Vergie Fields informed the emergency room staff that she thought her husband was having a heart attack. The Baptist emergency physicians performed an EKG which confirmed Fields was having a heart attack. The cardiologist at Baptist decided not to treat Fields with clot buster drugs but instead had Fields transported by helicopter to Providence Hospital to have an emergency cardiac catheterization performed. While undergoing the procedure, one of Fields's coronary arteries dissected, a known risk of the procedure. He died shortly thereafter.

Vergie Fields brought a wrongful death suit against the hospital and Hane, contending they were negligent and committed medical malpractice by failing to admit Fields on September 18th. The case went to trial, and the jury returned a verdict in favor of the hospital and Hane. Vergie Fields appeals, alleging the circuit court erred by not admitting testimony regarding the credentials of one of her expert witnesses and failing to allow her to use a treatise during Hane's cross-examination. After Vergie Fields filed this appeal, she reached a settlement with the hospital.

## LAW/ANALYSIS

### I. Expert Witness Qualifications

In order for a plaintiff to recover for medical malpractice, he must illustrate the physician failed to exercise the degree of care and skill which is ordinarily employed by the profession under similar conditions and like circumstances. Jernigan v. King, 312 S.C. 331, 333, 440 S.E.2d 379, 381 (Ct. App. 1993); Bonaparte v. Floyd, 291 S.C. 427, 434, 354 S.E.2d 40, 45 (Ct. App. 1987); Welch v. Whitaker, 282 S.C. 251, 258, 317 S.E.2d 758, 763 (Ct. App. 1984). This must be established by expert testimony unless the subject matter is of common knowledge or experience. Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990); Pederson v. Gould, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986); Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978); Bonaparte, 291 S.C. at 434, 354 S.E.2d at 45; 61 Am. Jur. 2d Physicians, Surgeons § 318 (2002).

Qualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of discretion. Payton v. Kearse, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998); Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 923 (Ct. App. 2001); Small v. Pioneer Mach., Inc., 329 S.C. 448, 469-70, 494 S.E.2d 835, 846 (Ct. App. 1997). To warrant reversal, the appellant must prove both the error of the ruling and resulting prejudice. Burroughs v. Worsham, 352 S.C. 382, 391, 574 S.E.2d 215, 219 (Ct. App. 2002). An abuse of discretion occurs when

there is an error of law or factual conclusion that is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987); Burroughs, 352 S.C. at 391, 574 S.E.2d at 219; Hedgepath v. Amer. Tel. & Tel. Co., 348 S.C. 340, 353, 559 S.E.2d 327, 334 (Ct. App. 2001); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). A court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair. Gates, 348 S.C. at 166, 558 S.E.2d at 924. The appellant must show prejudice for the Court of Appeals to reverse a judgment. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997); Commerce Ctr. of Greenville v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001).

To be competent as an expert, a witness must have acquired, by reason of study or experience, or both, such knowledge and skill in a business, profession, or science that he is better qualified than the fact finder to form an opinion. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997); Ott v. Pittman, 320 S.C. 72, 76, 463 S.E.2d 101, 104 (Ct. App. 1995); Hall v. Clarendon Outdoor Adver., Inc., 311 S.C. 185, 188, 428 S.E.2d 1, 2 (Ct. App. 1993); Rule 702, SCRE ("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."). It is incumbent that the party offering the expert manifest that the witness possesses the necessary learning, skill, or practical experience to enable him to give opinion testimony. State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 410-11, 563 S.E.2d 109, 113 (Ct. App. 2002). The test is a relative one, depending on the particular witness's reference to the subject. Gooding, 326 S.C. at 253, 487 S.E.2d at 598; Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995). An expert is not limited to any class of persons acting professionally. Gooding, 326 S.C. at 253, 487 S.E.2d at 598; Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984). There is no exact requirement concerning how knowledge or skill must be acquired. Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988).

Usually, if opinion testimony is offered by a physician or surgeon, his competency to testify as an expert is sufficiently established by the fact that he has been duly licensed to practice medicine or surgery. State v. Moorer, 241 S.C. 487, 129 S.E.2d 330 (1963) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)); Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545 (1943). A physician or surgeon is not incompetent to testify as an expert merely because he is not a specialist in the particular branch of his profession involved in the case. Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993). The fact that the physician is not a specialist in the particular area affects only the weight of the witness's testimony and affords no basis for completely rejecting it. Hill, 204 S.C. at 109, 28 S.E.2d at 555; Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985).

A proper technique for attacking an expert's testimony is to impeach him on his limited experience in the area about which he has testified. Any defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony, but not its admissibility. State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); Ott, 320 S.C. at 76, 463 S.E.2d at 104. An expert is not limited to any class of persons acting professionally, for the test for qualifying as an expert is a relative one that is dependent on the particular witness's reference to the subject. See Gooding v. St. Francis Xavier Hosp., 317 S.C. 320, 324, 454 S.E.2d 328, 330 (Ct. App. 1995), rev'd in part on other grounds, 326 S.C. 248, 487 S.E.2d 596 (1997) (an emergency room technician who was licensed to perform intubations and had taught the procedure was qualified to testify about the proper way to intubate a patient in a medical malpractice suit against a board-certified anesthesiologist); McMillan v. Durant, 312 S.C. 200, 439 S.E.2d 829 (1993) (a neurosurgeon who was also a teacher in nursing was qualified to testify about the appropriate standard for nursing care).

One of Fields's experts was Dr. George Podgorny. Podgorny's testimony was taken by video deposition and was introduced during the trial. The deposition showed that Podgorny specialized in emergency medicine and had practiced emergency medicine for twenty-five years. Fields's counsel

asked Podgorny whether he was board-certified in emergency medicine. Podgorny answered that he was not and sought to explain his answer. **"The reason [why I'm not board-certified] is that I was the first president of the Board of Emergency Medicine and was instrumental in development of the examination, and then served for many years as the editor of both the written and the oral exam."** Hane objected to the reason coming before the jury on hearsay grounds. The circuit court agreed it was hearsay and excluded it. Fields proffered Podgorny's remaining testimony regarding this issue. **"[T]he opinion of legal counsel was that there may be a conflict of interest if I [had taken] the exam [because it would have been perceived] that I knowed [sic] all the answers."**

Fields maintains the circuit court erred by excluding Podgorny's testimony regarding his explanation for not being board-certified in emergency medicine and is entitled to a new trial. We agree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Proof of a statement introduced to show a party heard and acted upon information is not objectionable hearsay. Webb v. Elrod, 308 S.C. 445, 449, 418 S.E.2d 559, 562 (Ct. App. 1992); 31A C.J.S. Evidence § 259 (1996) ("[T]estimony is not hearsay where it relates to what the witness himself did in reliance on, or in response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of statements on the listener, the fact that something was said, or identifying what was said.").

Podgorny's statement is a classic example of showing an action based upon information and is not offered for the truth of the matter asserted. The statement was not offered to prove that the counsel was correct in showing that there would be a conflict of interest if Podgorny took the test, but rather explained why Podgorny did not take the test and therefore, was not board-certified.

This case presented the quintessential battle of the experts. Fields's experts, including Podgorny, contended the hospital and Hane failed to reach

an appropriate level of care. Fields specifically avowed they committed malpractice by failing to take an adequate history and failing to admit Fields in light of his history. The hospital's and Hane's experts professed that because they were so familiar with Fields and had reviewed so many of his prior medical records, they met a reasonable level of care by not admitting Fields. In this scenario, the credentials of the experts are critical when the jury is determining the credibility of the competing expert witnesses.

Hane protests that even if the statement was not hearsay, its exclusion was harmless error. We disagree. Each expert was asked whether he was board-certified in emergency medicine when testifying during the trial. Even Hane was asked if he was board-certified during his testimony. During the closing arguments, Hane's counsel asserted that his expert, Bartlett, was board-certified in emergency medicine and was a true expert as opposed to Podgorny, who was not board-certified. **"Remember Dr. Bartlett . . . This man is a true expert. He knows what he's talking about. Dr. Podgorny, what evidence is there that Dr. Podgorny writes the test? Ridiculous! Dr. Podgorny never took the test to be board certified."**

Hane's closing argument shows that Fields was irrefutably prejudiced by the exclusion of this testimony. Since the statement was not hearsay, the jury was entitled to hear Podgorny's response to the question of why he had never taken the test for board certification in emergency medicine. This case demonstrated the paradigmatic example of "clashing experts and debatable qualifications." It was reversible error to exclude Podgorny's testimony.

## II. Admission of Learned Treatise

During Hane's cross-examination, Fields's counsel queried Hane whether he thought a single isolated EKG, as opposed to continued monitoring with multiple EKGs, was appropriate. Hane stated he thought it was appropriate. Fields then asked Hane if he was familiar with a textbook of emergency medicine authored by Tintinalli, Krome and Ruiz. Hane responded that he was familiar with the treatise since it was used as a reference text in the emergency room. Hane admitted the book was an authority in emergency medicine. Fields's counsel noticed the text was

sitting on Hane's table and asked whether Hane had reviewed the text prior to his testimony. Fields sought to question Hane on the contents contained in the text.

Hane's counsel objected to the question referring to the text on the basis of an improper foundation and the text was not referred to in the answer to interrogatories, which asked what treatises or materials Fields would use during the trial. The circuit court sustained Hane's objection on the grounds that Fields failed to list the treatise in the answer to interrogatories.

Fields asserts the circuit court committed reversible error when it sustained Hane's objection and prohibited Fields from questioning Hane about the text of the treatise. We agree.

Parties are allowed to cross-examine an expert witness about a treatise used or relied upon by the expert witness to support his opinion in direct examination. 31A Am. Jur. 2d Expert and Opinion Evidence § 104 (2002).

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert 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 testimony or by judicial notice [are not excluded by the hearsay rule.]

Rule 803(18), SCRE.

There is no question in this case that the Tintinalli book is a recognized treatise. Hane acknowledged the book is a commonly used reference in the emergency room and he admitted reviewing the text prior to his testimony. There was certainly a sufficient foundation established for its use.

Hane's interrogatories propounded to Fields asked: "Give the title, author, date, volume and page, where appropriate, of any periodical, journal, text, paper or other publication of any kind, to which [Fields] intends to refer,

or about which [Fields] intends to ask any questions, during the examination o[r] cross-examination of any witness at trial or during any deposition." Fields responded, "Plaintiff has not yet identified any specific journals, text of learned treaties. [sic] The Plaintiff reserves the right to supplement this interrogatory at a later date once an expert witness has been identified or once discovery from the other parties has been completed." Fields did not supplement her answers and stated she was not aware of the Tintinalli treatise until the morning of the trial.

Rule 37(b)(2), SCRCP allows a court to impose a variety of sanctions for failure to comply with a discovery order.

> [T]he court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > **(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> >
> > **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
> >
> > **(C)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
> >
> > **(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

> **(E)** Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply show that he is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(b)(2), SCRCP. The circuit court sanctioned Fields by disallowing the use of the Tintinalli treatise during Hane's cross-examination.

The decision of what kind and whether to impose discovery sanctions is left to the sound discretion of the circuit court. Griffin Grading & Clearing v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999); Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987); McGaha v. Mosley, 283 S.C. 268, 277, 322 S.E.2d 416, 466 (Ct. App. 1984). In deciding what sanction to impose, the circuit court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997); Moran v. Jones, 281 S.C. 270, 276, 315 S.E.2d 136, 139 (Ct. App. 1984). A circuit court's failure to exercise discretion is itself an abuse of discretion. In re Robert M., 294 S.C. 69, 71, 362 S.E.2d 639, 640 (1987); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981); State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000); Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App. 1990).

Failure to disclose a witness in answer to an interrogatory when only discovered several days before trial does not show willfulness. Martin v. Dunlap, 266 S.C. 230, 239, 222 S.E.2d 8, 12 (1976); Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974). The purpose of interrogatories is to promote

full and fair disclosure to prevent surprise to either party. South Carolina State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973); see also Reed v. Clark, 277 S.C. 310, 316, 286 S.E.2d 384, 388 (1982) ("Disclosure of information between the parties before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing.").

In this case, Fields stated she only found out about the treatise on the day of the trial. Concomitantly, there was no showing of willfulness. Hane had a copy of the treatise with him during the trial and admitted using it to prepare for his testimony. Therefore, Hane could certainly not be surprised by being asked about this treatise as it was the very same one he was using himself. This negates any contention that Hane was prejudiced by Fields's failure to supplement her interrogatories. The only factor the judge discussed when excluding questions involving the treatise was the nature of the interrogatory: "That's the reason we have interrogatories so we won't have surprises in trials, right?"

In Samples v. Mitchell, the court instructed: "In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." 329 S.C. at 112, 495 S.E.2d at 216 (citing Laney, 262 S.C. at 60, 202 S.E.2d at 15 (1974); Moran, 218 S.C. at 276, 315 S.E.2d at 139-40). The circuit court failed to exercise discretion. "A failure to exercise discretion amounts to an abuse of that discretion." Samples, 329 S.C. at 112, 495 S.E.2d at 216 (citing Fontaine, 291 S.C. at 538, 354 S.E.2d at 566 ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); Balloon Plantation, 303 S.C. at 155, 399 S.E.2d at 441 (quoting Smith, 276 S.C. at 498, 280 S.E.2d at 202 ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."))). We find the circuit court erred when it disallowed Fields from using the Tintinalli treatise in cross-examining Hane.

## <u>CONCLUSION</u>

Based on the foregoing, the decision of the circuit court is

**REVERSED AND REMANDED**.

**HUFF, J., and MOREHEAD, Acting Judge, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Sharon D. Moody, Appellant,

v.

Dairyland Insurance Company, Respondent.

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

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Opinion No. 3624
Submitted March 10, 2003 - Filed April 14, 2003

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**AFFIRMED**

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Thomas M. Gagne, of Greenville, for Appellant.

Robert W. Buffington, of Greenville, for Respondent.

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**HOWARD, J.**: Sharon D. Moody brought a declaratory judgment action against her automobile insurance carrier, Dairyland Insurance Company ("Dairyland"), claiming her insurance policy should be reformed to include underinsured motorist ("UIM") coverage up to the policy's statutory minimum liability limits ("statutory minimum limits") because Dairyland failed to make a meaningful offer of UIM coverage. The

circuit court granted Dairyland's motion for summary judgment. Moody appeals. We affirm.

## FACTS/PROCEDURAL HISTORY

On June 14, 2000, Moody purchased an automobile insurance policy with the statutory minimum limits from Dairyland.[1] Dairyland offered Moody UIM coverage only in an amount equal to the statutory minimum limits of her policy. Moody expressly rejected Dairyland's offer of UIM coverage.

Subsequently, Moody was involved in an automobile accident in which she alleged the other driver was at fault. She claimed she was entitled to proceeds from her policy's UIM coverage because her damages exceeded the limits of the at-fault driver's liability insurance policy. Dairyland denied the claim, stating Moody's policy contained no UIM coverage.

Moody filed this declaratory judgment action, seeking to have her insurance policy reformed to include UIM coverage. She argued Dairyland failed to make a meaningful offer of UIM coverage in amounts less than the statutory minimum limits. Dairyland moved for summary judgment. Dairyland argued, pursuant to South Carolina Code Annotated section 38-73-470 (Supp. 2002), it was not required to offer UIM coverage in amounts less than the statutory minimum limits. The circuit court agreed and granted Dairyland's motion. Moody appeals.

[1] See S.C. Code Ann. § 38-77-140 (Supp. 2002) (stating the minimum liability coverage limits are "fifteen thousand dollars because of bodily injury to one person in any one accident . . . , thirty thousand dollars because of bodily injury to two or more persons in any one accident, and ten thousand dollars because of injury to or destruction of property of others in any one accident" or 15/30/10).

## STANDARD OF REVIEW

Summary judgment is granted "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). When reviewing a grant of summary judgment, this Court must use "the same standard applied by the trial court pursuant to Rule 56, SCRCP." Lanham v. Blue Cross & Blue Shield of South Carolina, Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Moreover, "[o]n appeal from an order granting summary judgment, [this Court] will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002).

## DISCUSSION

Moody argues the circuit court erred in granting Dairyland's motion for summary judgment, asserting Dairyland did not make a meaningful offer of UIM coverage because it failed to offer coverage in amounts less than the statutory minimum limits.[2] We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., Op. No. 25592 (S.C. Sup. Ct. filed Feb. 3, 2003) (Shearouse Adv. Sh. No. 5 at 11, 19). Moreover, "[w]here the terms of the statute are clear, [this Court]

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[2] Our supreme court has adopted a four-part test to determine whether an insurer has made a meaningful offer of optional insurance coverages: "(1) the insurer's notification process must be commercially reasonable . . . ; (2) the insurer must specify limits of optional coverage and not merely offer additional coverage in general term; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium." State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

must apply those terms according to their literal meaning." Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); see also Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) (holding when "interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation").

In relevant part, section 38-73-470 provides "[t]here is no requirement for an insurer or an agent to offer underinsured motorist coverage at limits less than the statutorily required bodily injury or property damage limits."[3] Dairyland asserts this amendment specifically alleviated the requirement that insurers offer UIM coverage in any amount below the statutory minimum limits.

However, Moody argues the language of section 38-73-470 "basically states a contract principle which states that no one had to make any offer [at all]." Furthermore, Moody asserts South Carolina Code Annotated section 38-77-160 (Supp. 2002) (requiring automobile insurance carriers to offer UIM coverage "up to the limits of the insured liability coverage") and the cases interpreting this section, required Dairyland to offer UIM coverage at amounts less than the statutory minimum limits. In each of the following cases, Butler v. Unisun Ins. Co., 323 S.C. 402, 407, 475 S.E.2d 758, 761 (1996), Norwood v. Allstate Ins. Co., 327 S.C. 503, 489 S.E.2d 661 (Ct. App. 1997), and Osborne v. Allstate Ins. Co., 319 S.C. 479, 488, 462 S.E.2d 291, 296 (Ct. App. 1995), the central holding was section 38-77-160 mandates an insurer to offer UIM coverage in amounts less than the statutory minimum limits.

Both of Moody's arguments fail. First, we decline to accept Moody's particularly parsed and strained reading of section 38-73-470. The relevant statutory language in this section is unambiguous and conveys a clear and definite meaning that insurance carriers are under no duty to offer UIM coverage at any amount less than the statutory minimum limits.

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[3] This portion of section 38-73-470 was added in 1997 by Act No. 154 § 3.

Moreover, Moody's reliance on section 38-77-160 and the cases interpreting it is misplaced. Butler, Norwood, and Osborne were decided prior to the effective date of the 1997 amendment to section 38-73-470. Thus, these cases were correctly decided under the then-existing law. However, these cases are no longer controlling because each was decided prior to the 1997 amendment.

## CONCLUSION

For the foregoing reasons, the circuit court's order granting Dairyland's motion for summary judgment is

**AFFIRMED.**[4]

**CURETON and STILWELL, JJ., concur.**

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[4] Because oral argument would not aid the Court in resolving any issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.