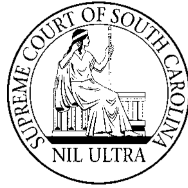

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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N O T I C E

IN THE MATTER OF DENNIS C. GILCHRIST, PETITIONER

Dennis C. Gilchrist, who was definitely suspended from the practice of law for a period of eighteen months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

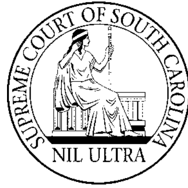
The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, September 24, 2004, beginning at 11:15 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

September 13, 2004



The Supreme Court of South Carolina

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TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF GEORGE K. LYALL, PETITIONER

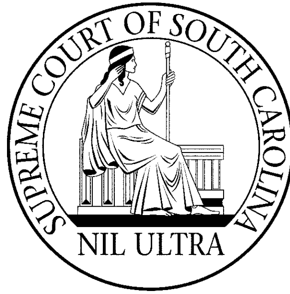
George K. Lyall, who was definitely suspended from the practice of law for a period of nine months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, September 24, 2004, beginning at 12:15 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
September 13, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36

September 13, 2004

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward Huggler, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Lancaster County
Paul E. Short, Jr., Trial Judge
Kenneth G. Goode, Post-Conviction Relief Judge

Opinion No. 25867
Submitted June 23, 2004 - Filed September 7, 2004

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, Capital and Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General David Spencer, all of Columbia, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Edward Huggler (Respondent) was convicted of two counts of criminal sexual conduct with a minor and sentenced to concurrent sentences of nine years for each count.[1] Respondent appealed and the court of appeals dismissed the case. *State v. Huggler*, 98-UP-492 (S.C. Ct. App. filed November 9, 1998). Respondent applied for post-conviction relief (PCR). After a hearing, the PCR judge found that trial counsel was ineffective for (1) failing to object to the admission of written statements given by the victims to the police, describing the sexual abuse and (2) failing to conduct a meaningful cross-examination of the testifying victims. Accordingly, the PCR judge granted a new trial. We granted the State's petition for certiorari and now reverse.

FACTUAL/PROCEDURAL BACKGROUND

Mother[2] invited 33-year-old Edward Huggler (Respondent) to live with her and her family in order to help out with transportation and childcare. Respondent was a friend of Mother's brother and, at the time, Respondent had no place to live. Also living with Mother were her mother, her husband, 14-year-old daughter Jane, 10-year-old son John, and 12-year-old stepdaughter Jill.

One afternoon, when Respondent was watching the children, the children, Respondent, and Jane's friend Lisa[3] began to play a game of "truth or dare." Although the game began with innocent dares, the dares eventually became sexual in nature. Lisa testified that Jane "sucked [Respondent's] private part," and then Jane dared Lisa to do the same. Lisa declined and

---

[1] Before trial, defense counsel negotiated a plea, which allowed Respondent to plead to two counts of assault and battery of a high and aggravated nature. Respondent decided not to plead guilty to this lesser charge, and the trial proceeded as a criminal sexual conduct case.

[2] Given the sensitive nature of this matter, we have chosen not to disclose Mother's name and to use pseudonyms for the minors' names.

[3] Lisa was 13-years old at the time of trial and was either 12 or 13-years old at the time the alleged incident occurred.

then Jane dared Jill to do it, and she did. Lisa also testified that "[Respondent] licked Jane's private part."

Jane also testified as to what happened during the game. Jane testified that the game first became sexual with dares including kisses on the cheek and french kissing. Later, the dares involved oral sex and were carried out in the bathroom, with all the children present. After one of the "rounds" in the bathroom, Respondent and the children returned to the living room, and Respondent asked Jill "to do something about a man in a boat." Respondent then began masturbating himself, and Jill masturbated herself as well.

John, Jane's 10-year-old brother, testified that Respondent dared John to "moon" Lisa, and John did so. He also testified that Respondent "made Jane and Jill suck [Respondent's] private parts." Finally, John testified that he did not engage in sexual activity with Respondent.

Lastly, Jill, who is John and Jane's stepsister and who lived with them at the time, testified that the game went from dares of kissing to "eating each other out." She also testified that Respondent bit her breast.

The "game" ended when Mother returned home. The front door was locked, so Mother knocked on the window, asking "Why can't I get in?" The children did not tell Mother why the door was locked or about what had happened while she was away. Soon thereafter, Respondent moved out, and eventually the children told Mother about the sexual activity with Respondent. Mother contacted the police.

The police took written statements from all three children.[4] In their written statements, the children detailed sexual acts that they engaged in with Respondent. During trial, each of these written statements was entered into evidence, and defense counsel affirmatively stated, each time, that he did not object to the statements' admission. In addition, defense counsel did not

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[4] The police did not take a statement from Lisa, Jane's friend who was present during the game, but who apparently stopped participating after she kissed Respondent.

cross-examine John or Jill.[5] Counsel did, however, cross-examine Lisa and Jane.

After the State finished presenting its case, defense counsel announced that he was not presenting any witnesses, including Respondent, and requested thirty minutes—instead of fifteen minutes, as the judge offered—to give his closing argument. In closing, defense counsel presented a chart outlining the inconsistencies between the children's live testimonies and their written statements. In addition, he argued that the State failed to adequately investigate the case. Finally, he argued that the children made up the allegations to get out of trouble for smoking cigarettes.

The jury found Respondent guilty on two counts of criminal sexual conduct with a minor, and he was sentenced to nine years imprisonment for each count, to be served concurrently. After his appeal was dismissed, Respondent applied for PCR, and on October 17, 2000, a hearing was held. Defense counsel did not attend the hearing.[6] Although the PCR judge left the record open so that defense counsel could be deposed at a later date, defense counsel was never located, and his deposition was never taken.

At the hearing, PCR counsel argued that defense counsel "fell below the standard" by allowing the children's written statements to be admitted into evidence without adequately cross-examining the children when they were on the witness stand. PCR counsel further argued that the written statements improperly bolstered the children's testimony on direct. If it were

[5] Again, John was 10-years old at the time, and in both his testimony and his written statements, he did not allege that Respondent touched him. And although defense counsel did not cross-examine Jill, he did attack her credibility by having the State explain, on the record, that Jill had accused someone else of criminal sexual conduct in the past and that the case had been dismissed.

[6] By order dated August 13, 1999, this Court placed defense counsel on incapacity inactive status. *In re Banks*, 336 S.C. 334, 520 S.E.2d 316 (1999). A year and a half later, this Court disbarred counsel for engaging in check kiting, improperly converting funds, and violating record keeping requirements. *In re Banks*, 344 S.C. 17, 19-20, 542 S.E.2d 721, 722 (2001).

not for this "fatal flaw," PCR counsel argued, there was "a reasonable possibility that the jury could have reached a different verdict had the case been tried correctly."

The PCR judge agreed and granted relief based, in part, on the following rationale:

> This Court has great concerns that [Respondent's] attorney agreed or otherwise did not speak against the introduction of the three statements. Normally statements of witnesses are not allowed into evidence, they not being confessions of the [Respondent]. Also, normally juries have to decide verdicts from their oral remembrance, not a writing that bolsters one side.

Moreover, the PCR judge stated:

> To forego cross-examination of any witness and let the same witness' statement be admitted into evidence is not effective representation. To challenge credibility in closing argument without any cross-examination to establish inconsistencies is not effective representation and not trial strategy.

This Court granted the State's petition for certiorari, and the State now raises the following issue for review:

Did the PCR judge err in finding counsel ineffective?

LAW/ANALYSIS

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support

the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)).

DISCUSSION

The State argues that the PCR court erred in finding counsel ineffective. We agree.

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052 (1984); *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

When reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. Consequently, courts apply a "highly deferential" standard of review. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citations omitted). Counsel's strategy will be reviewed under "an objective standard of reasonableness." *Id.*

In the present case, the PCR judge's finding that defense counsel rendered ineffective assistance was based on two grounds: (1) defense counsel erred by not objecting to, or otherwise speaking out against, the admission of the witnesses' written statements that were taken by the police during the investigation; and (2) defense counsel failed to adequately cross-examine the victims. In sum, the PCR judge had "great concern" that counsel allowed the written statements to be admitted and found that it was not "trial strategy" for defense counsel to argue inconsistencies between the written

statements and the testimonies during closing; instead, such inconsistencies should have been highlighted during cross-examination.[7]

First, as to counsel's failure to object to the admission of the victims' written statements, we find that even though the statements likely constituted inadmissible hearsay and were improperly admitted, the outcome of Respondent's case was not prejudiced by their admission.

The rule against hearsay prohibits the admission of out-of-court statements used to prove the truth of the matter asserted unless an exception to the rule applies. *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (citing *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994)). A well-settled exception in criminal sexual conduct cases allows the admission of limited corroborative testimony. *Id.* When the victim testifies and is subject to cross-examination, the victim's prior consistent statement is admissible and is *not* hearsay, provided the statement is limited to the time and place of the incident. Rule 801(d)(1)(D), SCRE; *State v. Jeffcoat*, 350 S.C. 392, 395-396, 565 S.E.2d 321, 323 (Ct. App. 2002). Therefore, when a victim testifies and is subject to cross-examination, the details of the victim's complaint or report are not admissible. *State v. Cox*, 274 S.C. 624, 627-628, 266 S.E.2d 784, 786 (1980).

In the present case, the police obtained written statements from each of the three child witnesses, recounting, in detail, the sexual activity that occurred with Respondent. After each witness testified on direct, the State introduced the witness's corresponding written statement into evidence, and defense counsel affirmatively stated that he did not object. Because the victims testified and were subject to cross, and because the victims' written statements went beyond describing the time and place of the incident, the statements constituted inadmissible hearsay. Therefore, defense counsel's failure to object to their introduction fell below an objective standard of reasonableness. *Dawkins*, 346 S.C. at 156, 551 S.E.2d at 263; *but see Sanchez v. State*, 351 S.C. 270, 569 S.E.2d 363 (2002) (Burnett & Toal, JJ.,

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[7] We note that defense counsel did not appear at the PCR hearing, was subsequently unreachable for deposition, and thus has never testified as to the trial strategy employed in Respondent's case.

dissenting) (noting that there are circumstances where it may be reasonable trial strategy for counsel to decline to object to inadmissible hearsay testimony in a case involving criminal sexual conduct).

But given that the witnesses' testimonies on direct provided overwhelming evidence that sexual abuse did in fact occur, counsel's failure to object to the admission of the written statements did not prejudice the outcome of Respondent's case. The evidence of abuse was overwhelming even without the content in the written statements.

Second, as to counsel's failure to adequately cross-examine the child victims, we find that the inconsistencies between the testimony and the written statements were not substantial enough to warrant a cross-examination beyond that which defense counsel conducted.

All of the children who participated in the "game" testified and were subject to cross-examination. Counsel cross-examined two of the four witnesses. During cross, counsel did not focus on the inconsistencies between the direct testimonies and the written statements; instead counsel raised the inconsistencies in his closing argument. The gist of counsel's closing argument was that the written statements were more descriptive than the live testimonies (and vice versa), and therefore the witnesses lacked credibility. After reviewing each of the inconsistencies cited by counsel in closing, we find that the inconsistencies were insignificant, relating, for example, to the number of times a particular sexual act occurred or whether it occurred in the bathroom or in the living room. Therefore, it may have been reasonable for counsel to highlight the inconsistencies in closing rather than attempt to use them for impeachment purposes. Moreover, given that this was a sexual abuse case involving children, it may have been prudent for counsel to limit cross-examination to the issues he thought were most important, without picking apart the witnesses' testimonies based on meaningless inconsistencies.

Nonetheless, because we do not have the benefit of counsel's testimony as to why he limited cross and instead raised the inconsistencies during closing, we cannot scrutinize counsel's trial strategy. As a result, we focus on whether counsel's assistance prejudiced Respondent's case as required

under *Strickland v. Washington*. In light of the overwhelming evidence presented by the State, namely the live, consistent testimonies of four witnesses who testified, in detail, that sexual abuse occurred, and our findings that (1) Respondent's case was not prejudiced by the admission of the witnesses' written statements, and (2) counsel's decision to attack witness credibility in closing rather than in cross does not, on its face, constitute error, we find that there is not a "reasonable probability" that but for counsel's error, the outcome of Respondent's case would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

CONCLUSION

Because there is no evidence of probative value sufficient to support the PCR court's finding that counsel was ineffective, the PCR court's decision is REVERSED.

MOORE, WALLER, and BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that the post-conviction relief judge erred in granting respondent a new trial. It is apparent from the trial record that counsel's strategy was to exploit in closing argument the only weakness in the State's case, that is, the inconsistencies between the victims' written statements and their trial testimony. Having concluded that counsel's performance was not objectively unreasonable, I find it unnecessary to reach the second prong of an ineffective assistance of counsel claim, that is, whether respondent was prejudiced as a result of counsel's actions.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

David Mark Hill, Appellant.

Appeal from Aiken County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 25868
Heard January 22, 2004 - Filed September 13, 2004

AFFIRMED IN PART; VACATED IN PART; REVERSED IN PART

Assistant Appellate Defender Robert M. Dudek and Jeffrey P. Bloom, both of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody J. Brown, all of Columbia, and Solicitor Barbara R. Morgan, of Aiken, for respondent.

CHIEF JUSTICE TOAL: Appellant was convicted of capital murder and related charges for killing three employees at the Aiken County Department of Social Services (DSS) on September 16, 1996. We affirm appellant's murder convictions and three death sentences, vacate his conviction for attempted murder, and reverse his conviction for burglary.

FACTUAL/PROCEDURAL BACKGROUND

When these murders took place, appellant was married and had three children: a three-year-old daughter who was a quadriplegic[1] and twin two-year-old boys. DSS became involved with the family because of concern about the parents' abuse of prescription drugs. The children were eventually removed from the home.

On the morning of September 16, 1996, appellant had a telephone conversation with his caseworker, James Riddle. Appellant then called his sister-in-law, Tammy Campbell, to ask for a ride to the DSS office. Tammy and her husband gave appellant a ride to the Business & Technology Center where the DSS office was located. On the way, appellant said that he was tired of people "playing God" with his children. The Campbells dropped appellant off at the front of the building.

Sometime before 2:00 p.m., several DSS workers returned to work after a birthday luncheon. Annette Michael was walking towards her cubicle in the DSS office area when another worker, Josie Currie, approached with her hands up. Appellant was behind Josie with a gun. Josie asked Annette where James Riddle's office was. When Annette motioned with her hand, appellant told her to step in behind Josie. The three of them walked down the aisle to James's cubicle. James was seated at his desk speaking on the telephone. Josie stepped into the cubicle and said, "This man would like to see you."

Appellant fired a shot into the cubicle, hitting James in the head. He then pointed the gun over Annette's shoulder and shot Josie in the head. Annette fell with Josie as a third shot was fired. Annette saw James fall over in his chair and she saw a hole in his forehead before she fainted on the floor. Another DSS worker, Michael Gregory, was found dead of a gunshot wound in the men's restroom. Both Josie and James died within the next few hours. Annette was not injured.

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[1] The daughter was injured when appellant's wife had a car accident less than a year earlier.

The next morning, police were still searching for appellant. At around 9:20 a.m., appellant was found lying on the railroad tracks behind the building with his gun nearby. He had a bullet hole through the roof of his mouth and an exit wound in the top of his skull. Although he was seriously injured, appellant was able to speak. After he was taken to the hospital, he was given *Miranda* warnings. Appellant admitted to the shootings. He said he first shot Michael Gregory in the restroom because Gregory had seen him. He shot James Riddle because Riddle was his caseworker. He shot Josie Currie "because she was black."

At trial, defense counsel conceded appellant was guilty of the shootings and urged that the real issue was the penalty to be imposed. Appellant was convicted of three counts of murder, one count of attempted murder, kidnapping, second-degree burglary, and weapon charges. At the penalty phase, the jury found four aggravating circumstances: (1) murder while in commission of a burglary, (2) kidnapping, (3) two or more persons murdered, and (4) risk of death of two or more persons in a public place. The jury returned three death sentences.

As to the guilt phase of the trial, appellant raises the following issues for review:

1. Did the trial judge properly find appellant competent to stand trial?

2. Did the trial court have subject matter jurisdiction on the attempted murder charge?

3. Did the trial judge properly deny a motion for directed verdict on the burglary charge?

4. Did the trial judge properly admit appellant's statement regarding Josie Currie?

As to the penalty phase, appellant raises the following issues for review:

5. Did the trial judge properly charge section 16-3-20(A) as requested?

6. Did the trial judge properly restrict *voir dire*?

LAW/ANALYSIS

1. Competence

Appellant contends the trial judge erred in finding him competent to stand trial because of his memory loss surrounding the murders. We disagree.

The test for determining competency to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. *State v. Weik*, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002), *cert. denied*, 539 U.S. 930 (2003); *State v. Bell*, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. *Weik*, 356 S.C. at 81, 587 S.E.2d at 685. The trial judge's decision as to whether the defendant is competent to stand trial will be upheld if supported by any evidence. *Id.*

At the competency hearing, Dr. Evans testified appellant had frontal lobe damage from the gunshot wound to his brain and some resulting memory loss after the trauma. Dr. Bellard testified appellant had difficulty with his memory during the time leading up to the crime but admitted "it is possible [appellant] does remember what happened during the crime." Dr. Bellard further stated appellant understood the charges against him and could follow the proceedings if he paid attention. The State's expert testified appellant was competent.

The trial judge found appellant failed to prove by a preponderance of the evidence that his alleged memory loss rendered him incompetent. The evidence, which indicates that appellant understood the charges and the proceedings, supports this ruling.

2. Attempted murder charge

Appellant was indicted for assault with intent to kill (AWIK) and "attempted murder" for shooting at Annette Michael, whom he shot at but missed. Because both charges involved the same victim, the State elected to proceed on the attempted murder charge rather than AWIK. The indictment for AWIK was *nol-prossed.* Appellant was convicted of attempted murder and sentenced to life. He contends the trial court did not have subject matter jurisdiction of this charge under this Court's decision in *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000). We agree.

In *State v. Sutton*, the Court of Appeals held attempted murder is not a recognized offense in South Carolina. 333 S.C. 192, 194, 508 S.E.2d 41, 42 (Ct. App. 1998). This decision was filed October 26, 1998, and we granted certiorari on July 8, 1999. Appellant's trial commenced February 7, 2000. On May 15, 2000, we affirmed as modified the Court of Appeals' ruling in *Sutton*, holding that attempted murder is not a recognized offense in South Carolina. 340 S.C. at 398, 532 S.E.2d at 286.

The State argues that in affirming the Court of Appeals, we did not reiterate the Court of Appeals' analysis that such an offense "never existed," but instead clarified the definition of AWIK and concluded the offense of attempted murder is unnecessary. The State claims our decision is therefore a new rule that should apply prospectively only. We disagree. A decision announcing a new rule of law will be given retroactive effect to all cases pending on direct review. *State v. Jones*, 312 S.C. 100, 102, 439 S.E.2d 282, 282 (1994). Accordingly, we vacate the attempted murder conviction and the five-year sentence for possession of a firearm during the attempted murder.

3. Burglary conviction

Appellant was convicted of second-degree burglary under S.C. Code Ann. section 16-11-312(B)(1) (2003), which provides:

> (B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:

> (1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with a deadly weapon or explosive; or
> (b) Causes physical injury to any person who is not a participant in the crime; or
> (c) Uses or threatens the use of a dangerous instrument; or
> (d) Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm.

Under section 16-11-310(1)(b), "building" includes a structure where people assemble for purposes of business or government. Further, the same section states:

> Where a building consists of two or more units separately occupied or secured, each unit is deemed both a separate building in itself and a part of the main building.

(emphasis added).

Appellant contends the trial judge erred in denying appellant's motion for directed verdict on the burglary charge because there is no evidence he entered without consent. The State contends the DSS office area was "separately secured" from the public area and, because appellant had no authority to enter that area, his entry was without consent.

The DSS offices are located in the Business & Technology Center, also referred to as the "BTC building." Glass front doors are at the main entrance to the building and these open onto the main hall that runs down the length of the building with an exit at the end. DSS has its own outside entrance on the right side of the building that leads into the DSS lobby. There is also a

locked employee entrance that opens directly into the office area of DSS. From the main building hallway, there are two inside entrances to the DSS area, one to the DSS lobby and one to the DSS office area, which apparently was a locked door with a buzzer.

Within the DSS area, there is a door between the lobby and the office area. Typically, clients enter the DSS lobby, and the receptionist calls the DSS worker who comes to the lobby and escorts the client back to the worker's office cubicle. Clients generally are told they are not to go back into the office area unescorted. There is no evidence, however, that this door was locked or even closed on the day of the shootings. In addition, there is no sign posted telling clients not to enter.

Britt Campbell, who gave appellant a ride to the DSS office on the day of the shootings, testified he saw appellant go to the front glass doors of the BTC building, open the door, and take a step inside before Campbell drove away. After the shootings, Appellant himself told police that he "entered the side door and exited the back door."[2] There is no eyewitness testimony indicating how appellant got into the DSS office area. The first time he was seen, he was already in the office area.

The State's theory to support appellant's burglary conviction rests on the statutory definition of "building," which includes a unit in a building that has two or more units where each unit is "separately occupied or secured." S.C. Code Ann. § 16-11-310(1)(b). At least one other court has applied this statutory term to find an area within a building to be separately secured if the unit requires a separate key for entry. *Hawaii v. Vowell*, 837 P.2d 1308, 1311-1312 (Haw. 1992); *see also State v. Vinyard*, 78 P.3d 1196, 1198 (Kan. App. 2003) (holding separate businesses in a shopping mall are separate buildings). In light of our rule that a penal statute must be strictly construed against the State, *State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002), we construe "separately occupied or secured" to require some objective manifestation that the unit is secure.[3]

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[2] A maintenance worker saw appellant exit the back door of the building at the end of the main hallway.

In this case, the evidence indicates that at least one entry into the DSS office area was not secured—the entry from the DSS lobby into the office area. There was no sign refusing admittance, no evidence the door was secured, and no evidence appellant was denied entry. We find the DSS office area does not qualify as a separate building for purposes of the burglary statute and reverse the denial of a directed verdict on this charge.

4. Admission of statement

Appellant contends his statement that he killed the third victim, Josie Currie, "because she was black," should have been suppressed as an involuntary statement because police told him he was dying and because of his mental condition due to his brain injury. We disagree.

When appellant was found on the railroad tracks, he had a bullet wound in the top of his head. The arresting officers did not tell him he was dying. Agent McAlhany testified he thought appellant was dying but did not tell him. Agent Otterbacher did not recall telling appellant he was dying but did ask him if he believed in God and, if so, he needed to ask God's forgiveness.

Appellant was then taken to the hospital where he was interviewed, with the doctors' permission, after being given *Miranda* warnings. Appellant was coherent and indicated he understood his rights when he gave the contested statement.

A defendant's mental condition in and of itself does not render a statement involuntary in violation of due process. Absent coercive police

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[3] We are aware that other courts addressing the issue of burglary in a public building have held that consent to enter a public building is limited to the purpose for which the building is open and therefore any unlawful act is without consent as a matter of law. *See, e.g., People v. Blair*, 288 N.E.2d 443, 445 (Ill. 1972); *State v. Adams*, 581 P.2d 868, 869 (Nev. 1978). This approach has been criticized, however, because it elevates every crime committed in a public building, such as shoplifting, to a burglary. *State v. Hall*, 3 P.3d 582, 585 (Kan. App. 2000), *aff'd*, 14 P.3d 404, 409 (Kan. 2000).

conduct causally related to a confession, there is no basis for finding a confession constitutionally involuntary. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986); *State v. Hughes*, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999); *see also State v. Doby*, 273 S.C. 704, 709, 258 S.E.2d 896, 899 (1979) (under state law, a confession is not inadmissible because of mental deficiency alone).

Agent Ottenbacher's suggestion that appellant ask God's forgiveness does not, on its face, rise to the level of police coercion. In addition, there is no testimony in the record that appellant felt coerced by this statement. Appellant's mental condition alone does not support a finding of involuntariness absent evidence of police coercion. Accordingly, we conclude that the trial judge properly admitted the statement. *State v. Owens*, 346 S.C. 637, 660, 552 S.E.2d 745, 757 (2001) (conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion).

5. Section 16-3-20(A)

During the penalty phase of trial, the defense put up an extensive case, including mental health experts who testified as to appellant's mental illnesses[4] and prison officials who testified as to his good behavior while incarcerated.

Captain Angie Pinkney, a shift supervisor at Lee Correctional Institute, described prison conditions for inmates according to their classification. "Safekeepers" are inmates in maximum security. They are kept in lockdown for twenty-three out of twenty-four hours and escorted everywhere. This was appellant's classification. On cross-examination, Captain Pinkney was asked if "general lifers" were treated differently from those in maximum security. She answered that the level of freedom changes and inmates "have much more flexibility out there in the yard, they can leave at their leisure, go to work, school, they have a job. . . ."

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[4] Appellant was diagnosed with post-traumatic stress disorder, panic disorder, and major depression.

When the case was submitted to the jury, the trial judge properly charged that life imprisonment means life without the possibility of parole. After the jury began deliberations, it returned with a question:

> [Captain Pinkney] stated something to the fact that with a life sentence Mr. Hill can go to school, work, etc. Please reiterate the response to the solicitor's question. What's the difference between life in prison and super max.

The trial judge then had Captain Pinkney's testimony replayed. He refused defense counsel's request that an additional charge be given based on S.C. Code Ann. section 16-3-20(A) (Supp. 2003), which in pertinent part provides:

> A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. . . .No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, *nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.*

(emphasis added). The trial judge ruled that the italicized language expressed only the legislature's intent that the mandatory term not be reduced and does not prohibit a person sentenced to life imprisonment from working or seeking an education.

A plain reading of the statute supports the trial judge's interpretation. The statute speaks strictly in terms of prohibiting *credit* for certain activities but does not prohibit those activities in the day-to-day life of an inmate sentenced to life imprisonment. We find no error in refusing the additional charge.

6. Jury *voir dire*

During *voir dire*, the trial judge refused defense counsel's request to ask jurors whether they would give up their vote in order to go with the majority. Appellant contends this was error under *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997). We disagree.

In general, the scope of *voir dire* and the manner in which it is conducted are within the trial judge's sound discretion. *State v. Wise*, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004) (citations omitted). To constitute reversible error, a limitation on questioning must render the trial "fundamentally unfair." *Morgan v. Illinois*, 504 U.S. 719, 730, 112 S. Ct. 2222, 2230 (1992); *State v. Hill*, 331 S.C. 94, 104, 501 S.E.2d 122, 127 (1998). On review, a juror's responses must be examined in light of the entire *voir dire*, with the primary consideration being that the juror is unbiased, impartial, and capable of following instructions on the law. *State v. Green*, 301 S.C. 347, 354, 392 S.E.2d 157, 161, *cert. denied*, 498 U.S. 881, 111 S. Ct. 229 (1990).

In *Bennett*, we found a juror unqualified who, when asked, stated he could not go against the majority if the eleven other jurors voted for death. We held that the juror's statement indicated he would not have been able to follow the law as explained to him and his earlier generalized statement that he could follow the law did not cure this deficiency. *Bennett*, 328 S.C. at 257, 439 S.E.2d at 848.

But *Bennett* does not determine whether it is appropriate, much less mandatory, for defense counsel to ask the "go with the majority" question. In fact, the appropriateness of the question was not at issue in *Bennett*; instead, the ultimate inquiry in *Bennett* was whether the juror was "unbiased, impartial, and able to carry out the law as explained to him." *Id.* Considering the *voir dire* as a whole, we determined that the juror was not impartial. *Id.*

In the present case, however, a review of the entire *voir dire* reveals that the defendant had an impartial jury. Prior to qualification, the judge asked all potential jurors to read summaries of three potential juror types: (1) one who would feel required to give the death penalty in every case where

murder had been proved; (2) one who would not give the death penalty under any circumstance, including when the defendant had been found guilty of murder; and (3) one who would not have his or her mind made up in advance concerning punishment—this person would need to hear the facts and circumstances in aggravation and mitigation, and would want to listen to and follow the law as charged before making a decision. Qualified jurors indicated that they were like the third type of juror—the kind of juror who would listen to all the circumstances and follow the judge's instructions on the law. They were repeatedly questioned by the State and the defense as to whether they understood the nature of this category of potential jurors.

Moreover, there is no indication that the limitation on questioning affected the selection of an impartial jury. Appellant does not point to a single juror whose responses vacillated or whose responses suggested that the juror was incapable of hearing all of the evidence before making a decision. Further, unlike the question asked in *Bennett*, the question asked in the present case does not probe whether jurors would automatically vote for death regardless of their view on the evidence and therefore reveals little, if anything, about juror impartiality. In sum, a review of the entire *voir dire* indicates that the jurors were unbiased, impartial, and capable of following instructions on the law.

In the final analysis, what is constitutionally mandated is the selection of a fair and impartial jury. No particular formula of questions is mandated to achieve this goal. In our justice system, the trial judge has the discretion and the duty to monitor the *voir dire* so as to ensure that the jury selected measures up to the constitutional standard. The judge's ruling in this case, disallowing defense counsel to question jurors about their propensity to go with the majority, did not render the trial "fundamentally unfair." Therefore, we affirm the trial judge's decision on this issue.

CONCLUSION

Appellant's murder convictions and three death sentences are affirmed, the convictions for attempted murder and the related weapon charge are vacated, and the conviction for second-degree burglary is reversed. Appellant's remaining issues are without merit: *See* Issue 4: *State v. Taylor*,

333 S.C. 159, 508 S.E.2d 870 (1998) (prejudice must be shown from erroneous admission or exclusion of evidence); Issues 8 & 9: *State v. Foye*, 335 S.C. 586, 518 S.E.2d 265 (1999) (jury is presumed to follow instructions); *State v. Prince*, 279 S.C. 30, 301 S.E.2d 471 (1983) (mistrial should not be granted except in cases of manifest necessity); Issue 10: *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000) (trial judge's ruling on scope of cross-examination will be reversed only if showing of prejudice); Issue 11: *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000) (trial judge has broad discretion in determining whether to admit demonstrative evidence including charts and diagrams which are not direct evidence and have only secondary relevance); Issue 12: *State v. Colf*, 337 S.C. at 625, 525 S.E.2d at 247-48 (no reversible error from cross-examination without showing of prejudice); Issue 13: *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988); *State v. Ivey*, 325 S.C. 137, 481 S.E.2d 125 (1997) (where trial judge's instructions defining life imprisonment were sufficient to ensure jurors' proper understanding, the question was properly disallowed); Issue 14: *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998) (where general question covers the subject of mitigating circumstances, more specific questions need not be allowed); Issue 15: *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992) (whether juror is qualified to serve on a death penalty case is within sole discretion of trial judge and is not reviewable on appeal unless wholly unsupported by the evidence); *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1998) (trial judge's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which trial judge could have concluded the juror would not have been able to faithfully discharge her responsibilities as a juror).

AFFIRMED IN PART; VACATED IN PART; REVERSED IN PART.

BURNETT and Acting Justice James E. Brogdon, Jr., concur. MOORE, J., dissenting in a separate opinion in which WALLER, J., concurs.

JUSTICE MOORE: Because I disagree with the majority's holding that juror voir dire was properly limited, I respectfully dissent.

In my view, our decision in State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997), is controlling here. In Bennett, we found unqualified a juror who stated he could not go against the majority if the eleven other jurors voted for death. We concluded the juror's earlier generalized statement that he could "follow the law" did not cure this deficiency. Our holding in Bennett compels the conclusion that a juror's general statement that he or she could follow the law does not satisfy the specific inquiry defense counsel requested here. *Cf.* State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998) (fundamental fairness not violated by limited voir dire where other questions covered request).

Further, as noted by the United States Supreme Court, "The measure of a jury is taken by reference to the impartiality of each individual juror. . . . each of these jurors must stand equally impartial in his or her ability to follow the law." Morgan v. Illinois, 504 U.S. 719, 735 (1992). A juror's ability to decide the case independently of the majority is particularly relevant under our capital sentencing scheme because even one vote for life will defeat a death sentence. *See* S.C. Code Ann. § 16-3-20 (Supp. 2003) (where jury fails to return unanimous verdict, the judge must impose a life sentence).[5] It is therefore crucial that the defendant be able to inquire whether a juror has a propensity to follow the majority.

In light of our sentencing scheme, I would hold that fundamental fairness requires that the defense be allowed to probe a juror's ability to vote independently of the majority. Accordingly, I would reverse and remand for a new sentencing proceeding.

WALLER, J., concurs.

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[5]The jury, however, need not be told the consequences of its failure to agree. Jones v. United States, 527 U.S. 373 (1999). Here the jury was charged it must be unanimous in imposing a life or death sentence.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hattie Rose Elam, Respondent,

v.

South Carolina Department of Transportation, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Allendale County
Daniel E. Martin, Sr., Circuit Court Judge

Opinion No. 25869
Heard November 19, 2003 - Filed September 13, 2004

REVERSED

Pete Kulmala, of Harvey & Kulmala, of Barnwell, for Petitioner.

H. Woodrow Gooding, Jr. and Mark B. Tinsley, of Gooding and Gooding, of Allendale, for Respondent.

JUSTICE BURNETT: We granted the petition for a writ of certiorari to review the Court of Appeals' unpublished order dismissing the appeal of the South Carolina Department of Transportation (SCDOT) as untimely. Elam v. South Carolina Dep't of Transp., S.C. Ct. App. Order dated July 25, 2002. We reverse.

FACTUAL AND PROCEDURAL HISTORY

Respondent Hattie Rose Elam (Elam) sued Petitioner (SCDOT) under the South Carolina Tort Claims Act[1] for personal injuries and property damage sustained by Elam in a single-car accident which occurred in March 1998. Elam alleged the accident was caused by SCDOT's improper maintenance of a highway, which allowed excessive rain water to accumulate on the highway.

At the conclusion of Elam's case, SCDOT moved for a directed verdict on various grounds. The trial court denied the motion and submitted the case to the jury on January 10, 2001. The jury returned a verdict for Elam for $250,000. Immediately thereafter, SCDOT made oral motions for judgment notwithstanding the verdict (JNOV) and a new trial absolute, or in the alternative, for a new trial nisi remittitur. SCDOT's motions were denied by the trial judge in an oral ruling from the bench, and a one-page Form 4 order was filed with the clerk on January 11, 2001, effecting entry of the jury's verdict.

SCDOT timely filed a written motion pursuant to Rule 59(e), SCRCP. The trial court denied the Rule 59(e) motion in a written order dated April 6, 2001. SCDOT served its notice of appeal on April 27, 2001, and in its appeal contested the trial court's denial of its motions for JNOV and new trial.

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[1] S.C. Code Ann. §§ 15-78-10 to -200 (Supp. 2003).

The Court of Appeals, sua sponte, raised the issue of the timeliness of SCDOT's appeal in light of Quality Trailer Products v. CSL Equipment Co., 349 S.C. 216, 562 S.E.2d 615 (2002), and directed the parties brief the issue. The Court of Appeals subsequently concluded SCDOT's Rule 59(e) motion merely repeated grounds previously raised to and ruled on by the trial judge as a result of SCDOT's oral JNOV/new trial motions. Therefore, the Rule 59(e) motion did not stay the running of the thirty-day deadline to appeal and SCDOT's appeal was dismissed as untimely.

ISSUES

I. Did the Court of Appeals err in finding SCDOT's appeal untimely because its written Rule 59(e) motion, which repeated grounds previously raised to and ruled on by the trial judge as a result of oral JNOV/new trial motions made immediately after the jury's verdict, did not stay the time to appeal?

II. Did the trial court err in denying SCDOT's motion to amend its answer and its post-trial motions?

DISCUSSION

I. Timeliness of SCDOT's appeal

We take this opportunity to clarify the limits and rationale of Quality Trailer, *supra*, and two Court of Appeals' opinions, Coward Hund Const. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), and Collins Music Co. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002). We conclude the Court of Appeals in the present case and in Matthews v. Richland County School Dist. One, 357 S.C. 594, 594 S.E.2d 177 (Ct. App. 2004) has extended the holdings and rationale of those three cases in a manner which unnecessarily complicates post-trial and appellate practice.

Post-trial motions such as a JNOV or new trial motion "shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." Rules 50(e) and 59(b), SCRCP. In actions tried without a jury or with an advisory jury, a party may move the court to

amend its findings or judgment or for a new trial not later than 10 days after receipt of written notice of entry of judgment. Rule 52(a), SCRCP.

The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), SCACR. The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985). A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion. See Rule 203(b)(1), SCACR; Rules 50(e), 52(c), and 59(f), SCRCP.

The Court of Appeals in 1999 took the first step toward Quality Trailer in Coward Hund, 336 S.C. 1, 518 S.E.2d 56. In that case, the trial court by written order granted summary judgment to the defendants. Appellant Coward Hund timely served a written "motion for reconsideration" pursuant to Rule 59(e), SCRCP. The trial court heard oral arguments on the Rule 59(e) motion and issued a written order denying the motion. Coward Hund subsequently filed a second, written motion for reconsideration pursuant to Rule 59(e), seeking clarification of the court's ruling on an issue on which the court had ruled. After a telephone conference, the trial court issued a supplemental written order again denying Coward Hund's Rule 59(e) motion. Coward Hund served its notice of appeal within thirty days of receipt of written notice of entry of the order denying its second Rule 59(e) motion. The issue, then, was whether Coward Hund's filing of a second, written Rule 59(e) motion stayed the time for serving a notice of appeal.

Finding no South Carolina case directly on point, the Court of Appeals endorsed the prevailing view espoused by federal courts that a second motion for reconsideration under Rule 59(e) is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration. The Court of Appeals reasoned

nothing in the written order denying Coward Hund's first Rule 59(e) motion altered anything in the written summary judgment order. Thus, the finality of the summary judgment order was restored and the time for serving a notice of appeal began to run upon Coward Hund's receipt of written notice of entry of the order denying its first Rule 59(e) motion. The Court of Appeals held Coward Hund's second Rule 59(e) motion did not stay the time for appeal and consequently dismissed the appeal as untimely. Coward Hund, 336 S.C. at 4, 518 S.E.2d at 58.

In Quality Trailer, decided three years later, a jury returned a verdict in favor of Quality Trailer. Appellant I Corp. timely served a written post-trial motion for JNOV and a new trial. The trial court issued a written order denying the motion and explaining the reasons for the denial. I Corp. then filed a written motion pursuant to Rules 52, 59, and 60, SCRCP, which was virtually identical to its written JNOV/new trial motion. The only changes I Corp. made were to caption the Rule 59(e) motion differently and to change the relief sought in the Rule 59(e) motion's final paragraph to coincide with the Rule 59(e) motion's caption. I Corp.'s Rule 59(e) motion did not identify a single issue raised but not ruled on, but merely recited, verbatim, the arguments made in the written JNOV/new trial motion.

We held the filing of a written, successive, virtually identical post-trial motion – raising issues which already had been raised to and ruled on by the trial court in a previous written order – does not stay the time for serving notice of appeal. "The time for filing appeal is not extended by submitting the same motion under a different caption." Quality Trailer, 349 S.C. at 220, 562 S.E.2d at 618. We dismissed I Corp.'s appeal as untimely because its written, successive, virtually identical post-trial motion did not stay the time for serving a notice of appeal.

Thus, Quality Trailer took Coward Hund a step further. Coward Hund barred as untimely an appeal from a second, written Rule 59(e) motion raising the same issues on which a ruling had been obtained by virtue of a previous, written Rule 59(e) motion; Quality Trailer barred as untimely an appeal from a first, written Rule 59(e) motion raising the same issues,

verbatim, on which a ruling had been obtained in a previous, written JNOV/new trial motion.

The Quality Trailer view of successive post-trial motions has been applied in only two other published opinions by the Court of Appeals: Collins Music, 353 S.C. 559, 579 S.E.2d 524, and Matthews, 357 S.C. 594, 594 S.E.2d 177.

In Collins Music, the Court of Appeals found that an appeal was not timely by relying on Quality Trailer and Coward Hund. From a verdict in favor of Collins, appellant IGT timely filed and served written post-trial motions for JNOV, new trial, and new trial *nisi remittitur*, asserting twenty-eight grounds as support for its requested relief. The trial court denied all IGT's post-trial motions in a written order "after carefully reviewing the matter."

Seven days later, IGT served a substantively identical Rule 59(e) motion to alter or amend the judgment, asking the court to make specific rulings on each ground raised in the earlier motions. The trial court issued a written order denying IGT's Rule 59(e) motion and specifically stating IGT failed to raise any issue not already considered. IGT served a notice of appeal within thirty days of receipt of written notice of entry of the order denying its Rule 59(e) motion.

The Court of Appeals concluded IGT's written Rule 59(e) motion merely restated the same twenty-eight grounds and arguments the trial court had denied in its written order made in response to IGT's initial, written JNOV/new trial motions. Therefore, the time to appeal began to run from the date IGT received written notice of entry of the order denying its initial JNOV/new trial motions. Consequently, the Court of Appeals dismissed IGT's appeal as untimely. Collins Music, 353 S.C. at 565, 579 S.E.2d at 526-527. Collins Music is similar to Quality Trailer because it barred an appeal as untimely from a first, written Rule 59(e) motion raising the same issues on which a ruling had been obtained in a previous, written, virtually identical JNOV/new trial motion.

In Matthews, the defendant school district appealed a verdict in favor of Matthews. The Court of Appeals, acting *sua sponte* because it correctly recognized the timeliness of an appeal is a jurisdictional requirement, raised the Quality Trailer issue even though the parties had not.

The school district, immediately following the verdict, made oral motions for JNOV and new trial *nisi remittitur*, which the trial court orally denied. The school district received a written copy of entry of the judgment almost a month later, at which time the school district timely filed a first, written Rule 59(e) motion.

The school district's written Rule 59(e) motion restated its oral arguments made at the conclusion of the trial for remittitur of the verdict. Matthews submitted a response to the motion, requesting the verdict stand or, in the alternative, a new trial *nisi* to allow her to recover attorney's fees. The trial court reduced the verdict and awarded attorney's fees to Matthews. The school district appealed the award of attorney's fees.

The Court of Appeals concluded the school district had restated the same grounds in its first, written Rule 59(e) motion as it had in its oral JNOV/new trial motion made at the end of the trial. The trial court lacked jurisdiction to entertain an identical, successive post-trial motion. Relying on Quality Trailer, Collins Music, and Coward Hund and finding the case before it factually similar, the Court of Appeals held the school district had filed a successive post-trial motion that did not raise any new issue, but merely repeated the same arguments made in an earlier motion.

Although the trial court had granted the school district's successive motion – unlike precedent in which the successive motion was denied – the Court of Appeals reasoned that distinction made no difference in the outcome. The school district's first, written Rule 59(e) motion, which followed oral JNOV/new trial motions in which the same issues had been raised and ruled on, was not proper and did not toll the time for appeal. The school district's appeal was dismissed as untimely. Matthews, 357 S.C. at 597-600, 549 S.E.2d at 178-180.

Matthews is similarly postured to the case now before us. In both cases, the Court of Appeals has expanded the reach of Quality Trailer and Collins Music by applying them to cases in which a first, written Rule 59(e) motion was deemed to raise issues and arguments which already had been raised to and ruled on by virtue of previous, oral JNOV/new trial motions.

We conclude Coward Hund correctly stated and applied the prevailing view among federal courts that a second Rule 59(e) motion which raises the same issues and arguments made in a previous Rule 59(e) motion does not toll the time to appeal. *E.g.*, Aybar v. Crispin-Reyes, 118 F.3d 10, 13-14 (1st Cir. 1997) (subsequent Rule 59 motion served within 10 days after denial of initial Rule 59 motion for reconsideration, but more than 10 days after entry of original judgment, does not toll time for appeal); Glinka v. Maytag Corp., 90 F.3d 72, 74 (2d Cir. 1996) ("[a]llowing subsequent motions to repeatedly toll the filing period for a notice of appeal would encourage frivolous motions and undermine a fundamental canon of our legal system, to promote the finality of judgments"; court noted this view is "well-established" in federal circuits); Wright v. Preferred Research, Inc., 891 F.2d 886, 889 (11th Cir. 1990) ("the language and purpose of [federal] Rule 4(a)(4) indicate that the time for appeal is postponed only by an *original* motion of the type specified. *I.e.,* a motion to reconsider an order disposing of such a motion will not further postpone the time to appeal") (emphasis in original); 12 Moore's Federal Practice § 59.32[2] (3d ed. 2003); 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2817 (1995). However, "if the disposition of the first motion results in a judgment which is substantively altered, a subsequent motion will again postpone the appeal period." Wright, 891 F.2d at 889; 12 Moore's Federal Practice §§ 59.35 and 59.37.

We further conclude Quality Trailer and Collins Music – which involved written JNOV/new trial motions, a written ruling by the trial court, followed by a first, written, virtually identical Rule 59(e) motion – were correctly decided. See Ex parte Mutual Sav. Life Ins. Co., 765 So.2d 649 (Ala. 1998) (in case involving successive written motions, court explained the recourse following denial of a party's own post-judgment motion is by timely appeal because the rules do not provide for a "motion to reconsider"

such a denial; however, a motion to reconsider is proper and will toll the time for appeal when post-judgment motion is granted and new judgment is entered); Wenzoski v. Central Banking System, Inc., 736 P.2d 753 (Cal. 1987) (in case involving successive written motions, appeal was untimely because second separate motion for new trial, filed because party feared his first motion was filed too early, did not toll time to appeal); Sears v. Sears, 422 N.E.2d 610 (Ill. 1981) (successive written post-trial motion which repeats what was raised or could have been raised in first written motion is not authorized by rules and does not extend time for appeal; losing litigant is not entitled to return to trial court indefinitely hoping for change of heart or a more sympathetic judge, or string out arguments one at a time over months because "[t]here must be finality, a time when the case in the trial court is really over and the loser must appeal or give up"); State ex rel. Douglas v. Bible Baptist Church of Lincoln, 353 N.W.2d 20 (Neb. 1984) (in case involving successive written motions, appeal was untimely because second motion for new trial, based in part on events which occurred after denial of first motion for new trial, was not proper and did not toll time for appeal); Kaufman v. Oregonian Pub. Co., 245 P.2d 237 (Or. 1952) (in case involving successive written motions, a party may not extend time for appeal from an order denying a motion for reinstatement of action by filing a second, substantively identical motion with a different judge); Gassaway v. Patty, 604 S.W.2d 60 (Tenn. App. Ct. 1980) (in case involving successive written motions, appeal was untimely where a party filed second post-judgment motion seeking reconsideration of order denying first post-judgment motion; rules are meant to prevent filing of repetitive post-trial motions and avoid undue delays); 5 Am.Jur.2d Appellate Review §§ 303-310 (1995).

Accordingly, we reaffirm the rationale and principles expressed in Coward Hund, Quality Trailer, and Collins Music. An appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. Coward Hund. An appeal also may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – recaptions a written JNOV/new

trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59(e) motion. Quality Trailer, Collins Music.[2]

We have found no foreign case similarly postured to the present case or Matthews, *i.e.*, a case in which a court held a written Rule 59(e) motion following an oral JNOV/new trial motion did not toll the time for appeal. At least one court has drawn a distinction between "perfunctory" oral motions made at the end of trial and more thoughtful written post-trial motions, concluding the former will not bar the latter or result in an appeal being dismissed as untimely. Sherrod v. Nash Gen. Hosp., Inc., 500 S.E.2d 708, 710-711 (N.C. 1998).

After studied review, we reject the rationale and result reached by the Court of Appeals in the present case and in Matthews. We conclude a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court. Again, we caution a party who files post-trial motions to note carefully the

[2] We are aware that a party may attempt to file both a Rule 59 motion and a notice of appeal. If this does occur, one or the other will be inappropriate depending on whether the motion is both timely under Rule 59 and permissible under our ruling today. Cf. Hudson v. Hudson, 290 S.C. 215, 349 S.E.2d 341 (1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature). It is, of course, the party's responsibility to determine whether a Rule 59 motion or notice of appeal is appropriate under the facts of the case, and we caution parties not to attempt to avoid this responsibility by the simple expedient of filing both.

exceptions to this general rule as expressed in Coward Hund, Quality Trailer and Collins Music.

We believe this view of the propriety of post-trial motions to be the correct approach for several reasons. First, it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. See, e.g., Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"); Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"); James Flanagan, South Carolina Civil Procedure 474-475 (2d ed. 1996). There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.

Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.[3] Neither contains any provision for a motion for "reconsideration." However, federal courts consider it appropriate

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[3] Rule 59(e), SCRCP, provides:

Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

Rule 59(e), FRCP, provides:

Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

for a party to make a "motion for reconsideration" under Rule 59(e) even though the rule mentions only a "motion to alter or amend a judgment." This view holds true even when a party mislabels a post-trial motion. See Blair v. Equifax Check Services, Inc., 181 F.3d 832, 837 (7th Cir. 1999) (Rule 4(a)(4), FRAP, restates long-accepted practice of considering motions for reconsideration, a practice independent of any appellate rule); 12 Moore's Federal Practice § 59.30[2][a] and[7]; 11 Wright, Miller & Kane § 2810.1; 20 Moore's Federal Practice §§ 304.13[2] and 304.13[4][b] (3d ed. 2003). "[T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed" for the practice of freely allowing a motion for reconsideration. Blair, 181 F.3d at 837.

In fact, the United States Supreme Court explicitly has described a motion under federal Rule 59(e) as one which "involves *reconsideration* of matters properly encompassed in a decision on the merits." Osterneck v. Ernst & Whinney, 489 U.S. 169, 174, 109 S.Ct. 987, 990, 103 L.Ed.2d 146, 154 (1989) (a request relating to discretionary prejudgment interest is a part of the plaintiff's compensation and thus a part of the decision on the merits, which means a Rule 59(e) motion raising prejudgment interest tolled the time for appeal; Court cited precedent in which Rule 59(e) motions relating to attorney's fees and case costs are deemed collateral issues, thus such motions did not toll the time for appeal) (emphasis added). The Court explained its decision furthered the goals of avoiding piecemeal appeals and fostering informed appellate review. Osterneck, 489 U.S. at 177-178, 109 S.Ct. at 992, 103 L.Ed.2d at 156.

The commentators explain that the approach taken in today's rules allowing a motion for reconsideration which addresses the merits of the case at hand originated in the common law. "It is absolutely necessary *to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial." 11 Wright, Miller & Kane § 2801 (quoting a 1757 opinion written by an English judge) (emphasis in original); 12 Moore's Federal Practice § 59 App. 102 (even before 1946 amendment adding subdivision (e) to Rule 59, courts routinely found that motions seeking such relief as rehearing or reconsideration were proper under Rule

59, although the motions were not literally or technically motions for a new trial).

Second, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

In recently clarifying the law on the presentation and use of additional sustaining grounds in an appeal, we emphasized we did not "mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000);[4] see also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 55-60 (2002).

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[4] In discussing the need for a Rule 59(e) motion, we explained that

> [t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower

continued . . .

Third, our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Fourth, South Carolina appellate courts do not recognize the "plain error rule," under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party. Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002); Kennedy v. South Carolina Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001). Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely.

> court and obtain a ruling before an appellate court will review those issues and arguments. . . .
>
> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. . . . Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

I'On, 338 S.C. at 422, 526 S.E.2d at 724.

Fifth, civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, but a careful consideration of this issue has led us to conclude that is precisely the effect of an unwarranted expansion of Quality Trailer. Cf. Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989) (stating rules applicable to post-conviction relief actions should not be construed in manner which operate as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition); Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place.[5]

Turning to the present case, SCDOT argued, *inter alia*, in its first, written Rule 59(e) motion, which followed oral JNOV/new trial motions made immediately after the jury's verdict, the trial court misapplied the appropriate standard for notice. SCDOT asserted that notice of a hazard is "interrupted" by responsive action to correct the defect. SCDOT contended, although the trial court had instructed the jury correctly on its notice theory, the court in denying SCDOT's JNOV/new trial motions considered evidence of notice at any time sufficient to create a factual issue for the jury, regardless

[5] We are presented in this case with a party which believed a Rule 59(e) motion was necessary and appropriate. We do not mean to imply by our emphasis on the potential importance of such a motion that one is necessary or desirable in every case. An aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to simply file and serve a timely notice of appeal.

of whether the notice occurred before or after the remedial work. SCDOT in its Rule 59(e) motion also raised other issues and arguments it had previously addressed in its JNOV/new trial motions.

While SCDOT in its written Rule 59(e) motion may have revisited some issues and arguments raised in its oral JNOV/new trial motions, we conclude the Rule 59(e) motion was proper for the reasons we explain today. This case is not factually similar to Coward Hund because it involves a first, written Rule 59(e) motion, not a second one. It is not factually similar to Quality Trailer or Collins Music because SCDOT did not simply resubmit a virtually identical, written Rule 59(e) motion raising the same issues on which it already had obtained a ruling by virtue of a previous, written JNOV/new trial motion.

SCDOT timely served its notice of appeal within thirty days after receipt of written notice of entry of the order denying its Rule 59(e) motion. Consequently, we reverse the Court of Appeals' order dismissing SCDOT's appeal as untimely. We also overrule Matthews, 357 S.C. 594, 594 S.E.2d 177, because it is inconsistent with the view of post-trial motions we set forth today.

II. Denial of SCDOT's motions

In the interest of judicial economy, we address the merits of SCDOT's appeal. See Floyd v. Horry County School Dist., 351 S.C. 233, 234, 569 S.E.2d 343, 344 (2002); Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 328, 566 S.E.2d 536, 543 (2002).

SCDOT argues (1) the trial court erred in denying its motion for new trial absolute based upon the excessiveness of the verdict; (2) the trial court erred in denying it's motion for leave to amend to assert the statutory defense of immunity for design; and (3) the trial court erred in denying its motions for a directed verdict and judgment notwithstanding the verdict based upon the absence of proof of causative negligence on the part of SCDOT and the absence of notice of defect to SCDOT after its remedial actions and prior to Elam's accident. We disagree.

When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. Allstate Ins. Co. v. Durham, 314 S.C. 529, 431 S.E.2d 557 (1993). The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal. South Carolina State Highway Dep't v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976). We conclude the record reflects the jury was presented with uncontradicted evidence that, as a result of the accident, Elam suffered physical and mental injuries sufficient to support the jury's verdict. The trial court did not abuse its discretion in denying SCDOT's motion for a new trial absolute based on the amount of the verdict.

Further, the trial court did not err in denying SCDOT's motion for leave to amend to assert the statutory defense of immunity of design. During Elam's case in chief, SCDOT moved the trial court to allow it to amend its answer to assert the design defense of S.C. Code Ann. § 15-78-60(15) (Supp. 2003). SCDOT sought to amend its answer to conform to the evidence presented that the water on the roadway, which allegedly caused Elam's accident, was a result of an inadequate drainage pipe. The trial court ruled there was no competent evidence the water on the highway was due to a design error. The decision whether to allow a party to amend a pleading to conform to the evidence is left to the sound discretion of the trial judge. Foggie v. CSX Transp., Inc., 313 S.C. 98, 431 S.E.2d 587 (1993). We conclude the trial court did not abuse its discretion in denying SCDOT's motion.

Finally, we find no error on the part of the trial judge in denying SCDOT's motions for a directed verdict and JNOV based on the absence of negligence on the part of SCDOT. When reviewing the denial of a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Strange v. South Carolina Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d

439 (1994). The appellate court will reverse the trial court only where there is no evidence to support the ruling below. Id.

Viewing the evidence in the light most favorable to Elam, it is reasonably inferable the jury could find SCDOT's negligence caused the accident. The jury heard the testimony of several witnesses, including SCDOT's former resident maintenance engineer for Allendale County, who testified SCDOT had actual notice the site of Elam's accident was a flood hazard. Sergeant G.F. King, a trooper with the South Carolina Highway Patrol, testified there had been numerous accidents during the past eight years at the same location. Sergeant King testified he had reported the condition to SCDOT on numerous occasions. Given the testimony of these witnesses and others, the jury could reasonably have found SCDOT negligent in failing to properly maintain the highway.

SCDOT argues the trial court erred in denying its motions for a directed verdict and JNOV based on the absence of notice of the defect after the department's remedial work actions and prior to Elam's accident. We affirm the trial court's ruling the evidence presented a jury question on whether SCDOT took any remedial actions. See Strange, supra.

CONCLUSION

We reaffirm the principles set forth in Coward Hund, 336 S.C. 1, 518 S.E.2d 56; Quality Trailer, 349 S.C. 216, 562 S.E.2d 615; and Collins Music, 353 S.C. 559, 579 S.E.2d 524. We reverse the Court of Appeals' order in the present case and overrule the Court of Appeals' opinion in Matthews, 357 S.C. 594, 594 S.E.2d 177. We conclude SCDOT timely served its notice of appeal after receipt of written notice of entry of the order denying its Rule 59(e) motion.

On the merits of SCDOT's appeal, the trial court did not err in denying SCDOT's motion to amend its answer or its motions for a directed verdict, JNOV, and new trial. Accordingly, we reinstate the jury's verdict in favor of Elam and remand this case to circuit court for entry of judgment on the verdict.

REVERSED.

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

JUSTICE WALLER: I respectfully dissent. In my opinion, SCDOT's Rule 59(e) motion, raising the same issues orally raised to and ruled upon in its motions for directed verdict, JNOV, and a new trial, did not stay the time for filing a notice of appeal. I would affirm the Court of Appeals' holding that SCDOT's appeal was untimely.

Post-trial motions are required in two primary circumstances: to preserve issues that have been raised to the trial court but not yet ruled upon or when the trial court grants relief not requested or rules on an issue never raised at trial. Jean Hoefer Toal, et al, Appellate Practice in South Carolina 59-60 (2d ed. 2002). Issues are preserved for appeal even where a JNOV motion is denied in a form order, if the issues have been adequately raised and argued to the court and the record on appeal contains transcripts of the court proceedings. Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001).

Here, SCDOT repeatedly argued its position to the trial court: in its directed verdict motion, in renewing its directed verdict motion, in its motion for JNOV, and in its motion for a new trial. Each time the trial judge denied SCDOT's motions. Two years ago, in Quality Trailer Products v. CSL Equipment Co. Inc., 349 S.C. 216, 565 S.E.2d 615 (2002), we held the filing of a successive motion, raising issues already raised to and ruled upon by the trial judge, does not stay the time to appeal. Nothing in Quality Trailer limited our holding to the filing of **written** post-trial motions. In my opinion, once a litigant has fully argued, either orally or in writing, its post-trial motions to a judge, and obtained a ruling thereon, there is simply no need to permit the same exact arguments to be re-raised in a subsequent Rule 59(e) motion.

I would hold SCDOT had its one full bite at the apple such that the filing of its written Rule 59(e) motion did not stay the time for filing an appeal in this case. I would affirm the Court of Appeals' opinion.[6]

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[6] I would also affirm the opinion in Matthews v. Richland County School Dist. One, 357 S.C. 594, 594 S.E.2d 177 (Ct. App. 2004).

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jason Roberts, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Laurens County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 25870
Submitted May 13, 2004 - Filed September 13, 2004

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Respondent.

JUSTICE WALLER: Respondent was convicted of murder and sentenced to life imprisonment. Respondent filed an application for post-

conviction relief (PCR), which was granted on a number of grounds. This Court granted the State's petition for a writ of certiorari. We hold there is probative evidence to support the PCR judge's decision.

FACTS

On January 10, 1992, Bobby Marler was found robbed and beaten to death in his pawnshop in Laurens. In early 1993, Thomas E. Whitehead, Jr. gave police a statement about the murder, implicating respondent. From February 1993 to February 1994, Whitehead gave four vastly different statements to police, and was eventually promised by the Sheriff's Department that he would not be charged with murder in return for his testimony.[1]

In Whitehead's first statement, which he made on February 26, 1993, Whitehead told police that Jaime McAlister and respondent committed the crime. Whitehead told police that he was not involved. Whitehead claimed respondent told him he and McAlister originally went to Marler's pawnshop to buy marijuana, but that the two ended up robbing and killing Marler. However, McAlister was in jail on the night of the murder, and could not have been involved. Further, Whitehead admitted at trial that police suggested to him that McAlister was involved.

In the second statement, made on November 22, 1993, Whitehead again claimed McAlister and respondent committed the crime. Whitehead told police respondent and McAlister used a baseball bat to beat Marler, and that he saw a silver baseball bat in the hatchback of Matt Cagle's[2] car. Whitehead also claimed respondent used the money from the robbery to buy cocaine. Whitehead admitted at trial that the statement was false.

Whitehead made a third statement on February 8, 1994. In that

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[1] None of these statements are included in the record, though it appears some were written and others were recorded, and some were admitted as evidence.

[2] Cagle was another friend of both Whitehead and respondent. Cagle was later charged in connection with the murder.

statement, Whitehead again implicated respondent and McAlister. It appears that shortly after the third statement, police finally discovered McAlister was incarcerated the night of the murder and could not have been involved.

The sheriff's office promised Whitehead that he would not be charged with murder before Whitehead provided the fourth statement in late February 1994.[3] In the fourth statement, Whitehead admitted he was involved, and told police substantially the same story that he told at trial.

Whitehead testified at trial that he, respondent, and Matt Cagle drank beer and liquor at respondent's house and in Cagle's car on the day of the murder. When they needed money to buy more alcohol, the three decided to pawn respondent's .22 rifle. Whitehead testified that while Cagle stayed in the car, he and respondent went into Marler's pawnshop. When Marler opened his wallet to pay for the rifle, he and respondent noticed that Marler had a substantial amount of money. Whitehead testified that respondent pushed Marler to the floor and beat him in the head and chest with the rifle butt. The two grabbed Marler's wallet and fled. The next day, after spending the night at respondent's house, Whitehead, Cagle, and respondent went to Cagle's house and put the gun in Cagle's father's furnace to melt it down.[4]

During the presentation of respondent's case, respondent's mother testified that he was in night school at the time of the murder, and that she picked him up after school that evening. However, the school did not have any attendance records because respondent was auditing his classes. Respondent's mother also testified that Whitehead and Cagle did not spend the night at her house as Whitehead had claimed in his testimony.

Cagle testified he was not involved in the murder. Cagle testified he

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[3] Whitehead testified against respondent in exchange for a five-year sentence. He served three.

[4] The furnace was used to melt aluminum, though it would not melt steel. There was testimony that the wood component of the rifle burned, but the barrel and other steel components of the rifle would not melt. It is unclear what happened to the steel components of the rifle, though there was testimony they were simply "raked out" and left on the ground.

went to a birthday party in Greenville on the night of January 9, 1992, and spent the night there because he was too drunk to drive home. Several other witnesses corroborated Cagle's testimony, including Christopher Thornhill, who testified he remembered the date because it was his birthday.

Angela McAlister testified at trial that sometime after the murder, Whitehead visited her son,[5] who was ill. She testified that she stood in the hall and overheard Whitehead tell her son that he should have killed a man named Bob Holmes and that he "[c]ould've gotten away with it because him and his daddy did because of the old fart they murdered . . . out in front of the Wal-Mart."[6]

Respondent also presented the testimony of William Anthony Patterson, who stated that he operated the furnace Whitehead claimed was used to melt the gun. Patterson testified that the furnace was not installed until March 1992. Cagle's father corroborated Patterson's testimony, and also added that the furnace did not have a propane tank attached until April 1992. An employee with PNG Propane testified that he installed a propane tank for an aluminum smelter for Cagle's father on March 17, 1992, and that there were no other gas lines in place on that date.

The State also presented testimony from Gary Gleen. Gleen testified at trial that respondent confessed to him while the two were incarcerated at the Broad River Correctional Facility. Gleen described himself as a "paralegal," and testified that he and respondent first discussed the charges in the Monticello Dormitory in Broad River. Gleen testified that respondent initially denied he was involved in the murder.

However, Gleen testified that after the two were transferred to the Saluda Dormitory, respondent discussed the case with him again and admitted he murdered Marler. Gleen testified that he was in cell 106, and that respondent was in another cell, which was *ten feet* away, when the conversations took place. Gleen testified that respondent told him, "Yeah,

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[5] Angela McAlister is the mother of Jaime McAlister.

[6] Marler's pawnshop was located across from the Wal-Mart Distribution Center in Laurens.

well, I killed a man but they ain't got nothing on me." Gleen admitted others could overhear the conversations, but claimed he and respondent "would pull ourselves closer so that the voice would only carry towards each other," and that he and respondent simply stopped talking when guards or inmates would pass.

Using notes, Gleen testified that respondent knew Whitehead had given police a statement, but that respondent thought he could "beat the crime" because witnesses would testify he was at school when the murder occurred. Gleen testified that respondent told him he did not have any intention of killing Marler, but that Marler "got smart and acted like he wouldn't take the gun." Gleen testified that respondent showed him how he beat Marler and told him how he melted down the gun after the murder. Gleen further testified that respondent had a "gleam in his eye" when he talked about he murder.

ISSUE

> Did the PCR judge err in finding that counsel was ineffective for failing to present evidence regarding the distance between Gleen and respondent's cells?

The State contends the PCR judge erred in finding that counsel was ineffective for failing to present evidence that respondent's conversations with Gleen were impossible. We disagree.

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). In order to establish a claim of ineffective assistance of trial counsel, a PCR applicant must prove that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show that counsel was deficient, the applicant must establish that counsel failed to render reasonably effective assistance under prevailing professional norms. Strickland, 466 U.S. at 688. To show prejudice, the applicant must show that, but for

counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id. at 186, 480 S.E.2d at 735.

This Court gives great deference to the PCR judge's findings when matters of credibility are involved. Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993). The existence in the record of any evidence of probative value is sufficient to uphold the PCR judge's ruling. Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000).

At the PCR hearing, respondent testified that he and Gleen were both inmates in Saluda Dormitory at the Broad River Correctional Facility. Respondent admitted that he talked to Gleen about the case. However, respondent maintained that he told Gleen he did not commit the crime. Respondent testified that it was impossible for the conversation to have taken place as Gleen maintained, and that the distance between the cells was approximately thirty-five feet, not ten feet. Respondent further testified that there were seventy inmates in Saluda Dormitory when he was incarcerated there. Respondent then presented a videotape of the prison dormitory to show the noise level in the dormitory and the distance between the cells.[7]

Ricky Higgs testified at the PCR hearing that he and respondent were next door to each other in segregated lockup in Saluda Dormitory. Higgs stated that respondent's cell was approximately thirty-five feet from Gleen's cell, and that the noise in Saluda was "deafening" at times. Higgs testified that, while it was possible to have a conversation with someone in the next cell because of shared ventilation systems, one would have to yell to be heard by someone in another cell. Higgs testified that he heard respondent and Gleen yelling across the breezeway about respondent's case. However, Higgs stated that respondent never confessed to Gleen.

Trial counsel testified that Gleen was not listed as a witness in the

[7] Unfortunately, the videotape is defective and the Court has been unable to view it.

initial discovery response and that he was not aware Gleen would testify until a short time before the trial. Trial counsel remembered discussing with respondent that it was physically impossible to have the discussion Gleen described because of the layout of Saluda Dormitory. However, counsel did not cross-examine Gleen about the configuration of the cells, and he failed to present any evidence about the setup of Saluda Dormitory.

The PCR judge found that the videotape showed respondent's cell was one hundred feet away from Gleen's, and it was therefore impossible for the conversation to have taken place as Gleen alleged. The PCR judge found that if this evidence had been presented at trial, it would have had a significant impact on the credibility of Gleen, who was a key witness for the State. The PCR judge also ruled that the evidence would have been available at trial if trial counsel had made diligent efforts to obtain it. Finally, the PCR judge found there was a reasonable probability the result at trial would have been different had trial counsel presented the evidence to the jury.

Even conceding that respondent engaged in some conversations with Gleen, it is highly unlikely that respondent confessed to murder across a cellblock from a distance of thirty-five to one hundred feet. There was evidence at the PCR hearing that numerous other inmates and guards would have overheard respondent, as it would have been necessary to shout over the television and other noise. Additionally, counsel admitted that he was somewhat unprepared for Gleen's testimony, and counsel failed to refute Gleen's assertion that the cells were no more than ten feet apart at trial. See Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (evidence supported PCR judge's ruling that counsel was deficient, in part because counsel admitted he was unprepared for trial).

While we acknowledge that this is a close case, there is at least some probative evidence to support the PCR judge's ruling. We agree with the PCR judge's finding that, had counsel presented evidence that the jail cells were more than a mere ten feet apart, there is a reasonable probability the result at trial would have been different. This evidence was particularly important in light of the fact that the case against respondent was far from overwhelming, and consisted almost entirely of the testimony of Whitehead,

a codefendant who implicated an innocent man in three false statements, and Gleen, a jailhouse snitch. Additionally, we note that there was evidence presented at trial and at PCR that Whitehead told several people that he and his father committed the crime and that respondent was not involved. Further, the jury returned during deliberations and actually asked the trial judge "who was on trial" in the case.[8] The trial judge simply told the jury that respondent was on trial.[9]

Accordingly, we hold there is probative evidence to support the PCR judge's finding that counsel was deficient for failing to present evidence of the cell configuration. See Caprood, id. at 109-10, 525 S.E.2d at 517; Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984).

CONCLUSION

We affirm the PCR judge's ruling that counsel was ineffective for failing to present evidence regarding the configuration of the cells. Accordingly, we need not address the State's remaining questions. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that an appellate court need not address all remaining issues when disposition of prior issue is dispositive).

AFFIRMED.

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

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[8] The jury actually asked two questions, neither of which is included in the record. The parties have been unable to locate the exhibits.

[9] We also note that the PCR judge found trial counsel was ineffective for failing to move for a mistrial when the jury returned with this question. The State seeks reversal on this issue; however, because we hold that the PCR judge correctly granted relief on the question of Gleen's testimony, we need not address whether the PCR judge erred in ruling counsel was ineffective for failing to move for a mistrial following the jury question.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Beaufort Municipal Court
Judge George H. O'Kelley, Jr., Respondent.

Opinion No. 25871
Submitted August 3, 2004 - Filed September 13, 2004

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for Office of Disciplinary Counsel.

George H. O'Kelley, Jr., of Beaufort, pro se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of either an admonition or a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and impose a public reprimand, the most severe sanction we are able to impose under the circumstances. The facts as set forth in the agreement are as follows.

FACTS

Respondent was an associate municipal judge for the City of Beaufort from approximately 1996 until his resignation in October 2003. Among other things, his duties as associate judge required him to adjudicate parking tickets.

In Beaufort, the recipient of a parking ticket may either pay the fine or appear in court to contest the ticket. If the violator chooses to pay the fine, he or she may remit payment by mail, take it to City Hall, or place the ticket and payment in courtesy boxes located on certain parking meters. Police Officer John O'Neill, who is assigned parking enforcement duties in the downtown district, collects the tickets and payments from the courtesy boxes and delivers them to City Hall.

ODC is informed that violators who appear in court to contest a parking ticket are heard last and, unless they are repeat offenders, usually have the charge dismissed (i.e., reduced to a warning). This disposition is indicated by the presiding judge writing "warning" across the ticket along with his or her signature.

Police officers have no further contact with a parking ticket after it is issued. Police officers do not appear in court against violators who wish to contest parking tickets and do not know whether tickets are contested, paid, or dismissed, except that Officer O'Neill has some knowledge which tickets are paid when he retrieves tickets from the courtesy boxes.

In October 2003, while retrieving tickets from the courtesy boxes, Officer O'Neill noticed particular tickets signed by respondent had been marked "warning" and placed in a courtesy box. Officer O'Neill recognized the tickets as those he had issued two days in a row to a Volvo bearing South Carolina license 120KMP and which he knew was usually driven by respondent's wife. Officer O'Neill brought this to the attention of the City Manager, who brought it to the attention of the Chief Municipal Judge and City Attorney. An inquiry was made as

to other parking tickets issued to this tag number. It was determined that fourteen additional tickets had been issued to the above-referenced vehicle. Thirteen of those fourteen tickets also had been dismissed by respondent. The fourteenth ticket had been unpaid for over three years.

An emergency session of the Beaufort City Council was convened to consider this matter. Respondent acknowledged having dismissed the above-referenced tickets. By a 3-2 vote, the City Council asked respondent to submit his resignation. Respondent resigned.

Respondent self-reported this matter to ODC. ODC made an examination of 1) parking tickets issued to other vehicles owned by respondent and 2) all parking tickets dismissed by respondent during the period of January 2001 until his resignation in October 2003. The investigation revealed:

1. Five tickets were issued to respondent's other vehicles. Four of these tickets were dismissed by respondent and one was marked "void" by the issuing officer. The voided ticket had been issued when respondent blocked-in a vehicle which had parked unlawfully in the space respondent reserves from the City. Two of the dismissed tickets were tickets issued to respondent while he was parked in his reserved space, but in a vehicle which did not have the reserved parking placard affixed to the rear view mirror. The remaining two tickets dismissed by respondent were for meter violations in the vicinity of his law office.

2. During the period from January 2001 through October 2003, fifty-five additional parking tickets were marked "warning" by respondent. Because tickets dismissed in court are marked in the same manner, it is impossible to distinguish which of these tickets were marked "warning" prior to a court appearance by the violator and which were marked "warning" as a result of a court appearance.

On May 6, 2004, respondent was interviewed about the fifty-five additional tickets and he stated the following:

1. Some of the violators were not known to respondent. Respondent assumes these are tickets where the violator appeared in court and the tickets were reduced to a warning in accordance with the customary practice apparently acceptable to the City Police.

2. Some violators were known to respondent, but he had no recollection of having dismissed the tickets outside court and, therefore, assumes these violators appeared in court to contest the tickets.

3. Ten violators were known to respondent and respondent acknowledges he probably marked fifteen tickets issued to these violators as "warnings" outside of court. These tickets were issued to respondent's relatives, employees, and his acquaintances.

Of the seventy-six parking tickets examined by ODC, thirty-four were dismissed by respondent outside of court.

LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); and Canon 3(B)(7) (judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence

of the parties concerning a pending proceeding). By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand.[1] Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

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[1] As previously noted, a public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nellie Durham, Respondent-Appellant,

v.

David Vinson, Jr., M.D. and
Upstate General Surgery, P.A., Appellants-Respondents.

On Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25872
Heard September 24, 2003 - Filed September 13, 2004

AFFIRMED IN PART; REVERSED IN PART

Alexander M. Sanders, Jr., of Charleston; O. Doyle Martin, Jack H. Tedards, Jr., Russell D. Ghent, and Seann A. Gray, all of Leatherwood Walker Todd & Mann, P.C., of Greenville, for Appellants-Respondents.

Chad Alan McGowan, of McGowan & Hood, of Rock Hill; F. Patrick Hubbard, of Columbia; and Joseph G. Wright, III, of Wright Law Offices, of Anderson, for Respondent-Appellant.

CHIEF JUSTICE TOAL: We are asked to rule on several issues regarding alleged errors made during a medical malpractice trial. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Respondent-Appellant, Nellie Durham (Durham), was referred to Appellant-Respondent, Dr. David Vinson (Dr. Vinson), for a surgical evaluation after being diagnosed with acid reflux and a hiatal hernia. On October 26, 1996, Dr. Vinson attempted to repair the hernia by performing a laparoscopic Nissen fundoplication (LNF)—an advanced form of laparoscopic surgery. During the LNF, Dr. Vinson did not "take down" the short gastric vessels, which would have prevented the repair from being too tight.

Initially, Durham appeared to respond well to the surgery, but then she began to have trouble swallowing and began to vomit. An esophagram, performed on October 28, revealed that food particles were dispersed throughout the esophagus and that the esophagus was not completely clearing the barium used in the esophagram. As a result, Dr. Vinson performed an esophageal gastroduodenoscopy (EGD) on Durham the next day. During the EGD, Durham's gag reflex was suppressed. Whether Durham aspirated[1] during this procedure or during the repair surgery conducted the next day became an issue at trial. It was clear, however, that Durham aspirated while under the care of Dr. Vinson, and that, most likely, this aspiration occurred during the EGD.

On October 30, Dr. Vinson performed a repair LNF on Durham. During this surgery, Dr. Vinson took down the short gastric vessels. Dr. Vinson also instructed Diane Hardy, a Certified Registered Nurse Anesthetist, to advance a dilator down Durham's esophagus during the surgery, even though Hardy protested three times that it was too tight. Hardy followed Dr. Vinson's orders and, as a result, Durham's esophagus was

[1] An aspiration refers to the accidental sucking in of food particles or fluids into the lungs.

perforated. When the perforation occurred, Dr. Vinson switched from performing the procedure laparoscopically to performing an open procedure in order to repair the perforation.

After the repair LNF surgery, Durham could not breathe without mechanical assistance and was transferred to the Critical Care Unit (CCU) at Oconee Hospital. Durham's family did not learn Durham had aspirated and her esophagus had been perforated until Durham was later moved to Greenville Memorial Hospital. Dr. Vinson informed the family that everything had gone well and that she was only in CCU as a precaution.

While Durham was in CCU, her family requested that Dr. Vinson consult a pulmonologist. However, he did not do so. Durham's family also requested that she be moved to Greenville Memorial Hospital, a better-equipped facility, but Dr. Vinson advised against the transfer because he believed that she could be properly cared for at Oconee Hospital. Finally, after two days, the family obtained the transfer order from a nurse. Durham entered Greenville Memorial Hospital and remained there for over two months, with her first month being spent in the CCU.

As a result of Dr. Vinson's treatment, Durham developed adult respiratory distress syndrome and later, due to the complications stemming from her aspiration, developed pulmonary fibrosis. At present, Durham can only walk for very short distances and requires supplemental oxygen twenty-four hours a day.

Durham brought a medical malpractice action against Dr. Vinson. After the liability phase of the bifurcated trial,[2] the jury found Dr. Vinson was

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[2] Trial judges have discretion as to whether to bifurcate a trial. Rule 42(b), SCRCP; *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000). Although some states require bifurcation in every case in which the plaintiff seeks punitive damages, we are unwilling to impose such a requirement. We encourage judges, however, to bifurcate trials in complex medical malpractice cases such as this one, particularly when bifurcation helps to clarify and simplify the issues. Nonetheless, in exercising their

liable to Durham for $2,250,000 in actual damages, and the jury found his conduct to be willful, wanton, or in reckless disregard of Durham's rights. The trial then proceeded to the punitive damages phase. The jury awarded Durham $15,000,000 in punitive damages.

Following post-trial motions, the trial court found the award did not violate Dr. Vinson's due process rights, but remitted the award to $8,000,000 on the basis the award was merely liberal.

Dr. Vinson appeals the trial court decision, raising the following issues:

I. Did the trial court err by allowing testimony during the liability phase regarding Dr. Vinson's hospital privileging file?

II. Did the trial court err by giving the jury a charge during the liability phase that contained an incorrect discussion of the standard of care in a medical malpractice action?

III. Did the trial court err by allowing, in the punitive damages phase, the admission of evidence that Dr. Vinson prescribed valium to Durham's daughter?

LAW/ANALYSIS

I. HOSPITAL PRIVILEGING FILE

Dr. Vinson argues Durham's counsel should not have been allowed to question him about his failure to produce only a portion of his hospital privileging file and then further prejudice him by mentioning this failure in closing argument. We agree but find the error harmless.

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discretion, trial judges must continue to heed the "separate issue" mandate of Rule 42(b); *see also Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331, 333 (2000) (trial judges are responsible for determining whether trial issues are distinct enough to warrant severability).

The hospital privileging file contains information related to a doctor's attempt to acquire certain privileges at the hospital, such as the privilege to perform an LNF.

S.C. Code Ann. § 40-71-20 (2001) provides, in part, as follows:

> All proceedings of and all data and information acquired by the committee referred to in Section 40-71-10[3] in the exercise of its duties are confidential . . . These proceedings and documents are not subject to discovery, subpoena, or introduction into evidence in any civil action . . . Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented during the committee proceedings nor shall any complainant or witness before the committee be prevented from testifying in a civil action as to matters of which he has knowledge apart from the committee proceedings . . . .

The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. *McGee v. Bruce Hosp. Sys.*, 312 S.C. 58, 61, 439 S.E.2d 257, 259 (1993). The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process. *Id.* In *McGee*, we further noted:

> The policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the committee . . . during the peer

[3] S.C. Code Ann. § 40-71-10 (2001) (members of certain professional committees exempt from tort liability).

> review or credentialing process are protected. Committee members and those providing information to the committee must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee. Physicians who fear that information provided in an application might someday be used against them by a third party will be reluctant to fully detail matters that the committee should consider.

Id. at 61-62, 439 S.E.2d at 259-260 (quoting *Cruger v. Love*, 599 So.2d 111 (Fla. 1992)).

We concluded, however, that the outcome of the decision-making process is not protected from discovery. Therefore, a plaintiff is entitled to know the clinical privileges either granted or denied by the hospital. *Id.* at 63, 439 S.E.2d at 260-261.

During Durham's direct examination of Dr. Vinson, Dr. Vinson was asked about Durham's medical records and the fact that they are confidential. He was also asked about the fact that Durham complied with his request that she disclose her medical records. Dr. Vinson was then asked: "Correspondingly we requested that you provide us with the application and supporting documents." Dr. Vinson's counsel objected and a discussion ensued outside the hearing of the jury.

Dr. Vinson argued that the privileging file was confidential under *McGee* and section 40-71-20 and that Durham was trying to create the impression that he had something to hide.

The trial court found Dr. Vinson could be asked about the privileging file but that the questions should be limited to whether Dr. Vinson authorized his attorneys to disclose the results of the privileging file.[4]

The testimony then continued with Durham's counsel asking Dr. Vinson whether he was aware that his privileging file was confidential and could not be disclosed without his consent. Dr. Vinson responded yes to the questions. Then, the following exchange occurred:

> Q: And we on behalf of Mrs. Durham requested that you fully disclose the results of your [privileging] file . . . however you only allowed the disclosure of part of that file, is that correct?
>
> Mr. Gray: Your Honor –
>
> The Court: Yes sir.

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[4] Durham argues and the trial court found that Dr. Vinson opened the door to asking questions about the privileging file during his opening argument. In opening, counsel stated:

> Dr. Vinson was a fully licensed physician, authorized by South Carolina law to practice medicine and to practice surgery. Board certification was not required for Dr. Vinson to get his privileges to practice surgery including doing the [LNF]. Dr. Vinson presented his information to the credentials accrediting authorities at Oconee Memorial Hospital and was given the authority to do the procedures he did on Ms. Durham. He was not required to be Board certified.

This did not, however, open the door to the evidence. Because Durham's counsel emphasized in opening argument that Dr. Vinson was not board certified in surgery, Dr. Vinson simply desired to point out in his opening that, although he was not board certified, he was in fact privileged by Oconee Hospital to perform surgery. Further, the information Dr. Vinson relayed to the jury only concerned the results of the privileging process.

Mr. Gray: Again I think that's not a correct statement.

The Court: . . . I'm going to overrule your objection . . .

. . .

Q: On behalf of . . . Durham we requested your entire—that you fully disclose the results of your . . . [privileging] file but you only authorized a portion of that file to be produced, is that correct?

A: Correct.

On cross-examination by his counsel, Dr. Vinson stated there were no results of the privileging process that were adverse to him.

During closing argument, Durham's counsel stated:

> Let me mention about privileges. It is true that Dr. Vinson was privileged by Oconee Memorial Hospital to perform this surgery. It is also true that Dr. Vinson was privileged to perform surgical critical care. Dr. Vinson submitted certain information to Oconee Memorial Hospital. One of the things he submitted was a resume or what is referred to as a Curriculum Vitae. This was submitted. He had a fellowship, surgical critical care. Is there anywhere on that sheet that says that critical care fellowship was unaccredited? No. Had it been, would that have made a difference? I don't know. *We haven't seen the file but I think that's an important deception.* The second thing I'd like to point out is I don't know what Dr. Vinson told them about his training in residency. If he told them what was in the sworn statement to you ladies and gentlemen of the jury, he did not have proctoring and under the regulations he would have to have it or did he tell what he told his expert when he put him on the stand—I've been trained. I don't know. *If he told them something that wasn't true they would have given privileges.*

(emphases added). Durham's counsel also stated, "He has tried to deceive everyone throughout this litigation and now he's trying to commit the ultimate sin and that's to deceive you ladies and gentlemen of the jury."

The trial court erred by allowing Durham's counsel to ask Dr. Vinson about his failure to fully disclose his privileging file, a file that he was under no obligation to disclose pursuant to section 40-71-20. If physicians can be questioned before the jury about the refusal to produce this privileged information, the effect is to pressure them toward disclosure of the privileging file. As occurred here, the exercise of the statutory right not to disclose the information would be used against the physician as evidence the physician is hiding something. Allowing this to occur does not serve the policy goals of promoting candor and open discussion among participants in the peer review process. *See McGee*, 312 S.C. at 62, 439 S.E.2d at 259 (participants in the peer review process must be able to operate without fear of reprisal).

This error was exacerbated when counsel effectively argued that Dr. Vinson had deceived everyone by failing to disclose the file. The fact that Dr. Vinson was able to tell the jury that he had no adverse results during the privileging process did not cure the error. The jury was not informed that Dr. Vinson was not obligated to produce his privileging file by statute. Instead, the jury was allowed to believe Dr. Vinson was not forthcoming for some unstated reason and, as a result, the jury may have believed Dr. Vinson was attempting to conceal something in the file.

However, we find the error harmless. First, there was other properly admitted evidence that indicated Dr. Vinson was being deceitful, such as (1) failing to indicate his fellowship program was unaccredited on his curriculum vitae, (2) telling Durham's family that Durham was fine and had only been placed in the CCU as a precaution, (3) failing to call a specialist upon the family's request, (4) misinforming his own expert about the training he had in performing a LNF, and (5) attempting to shift the blame for Durham's aspiration on another doctor.

Second, the evidence of Dr. Vinson's liability is overwhelming. The breach of his duty of care to Durham is uncontradicted, especially in light of the fact that his own expert believed Dr. Vinson's treatment of Durham had deviated from the standard of care.

II. JURY CHARGE ON STANDARD OF CARE

As to the standard of care, the court charged the jury as follows:

> A physician or surgeon who undertakes to render professional services must meet these requirements. The physician must *possess the degree of professional learning*, skill and ability which others similarly situat[ed] ordinarily possess at the time. The physician must exercise reasonable care and diligence in the application of this knowledge and skill to the patient's care and the physician must use his best judgment in the treatment and care of his patient. … If the physician fails in any of those particulars and such failure is the proximate cause of injury and damage the physician is liable.

(emphasis added). The court again charged that a physician "shall possess and exercise that degree of knowledge, care and skill ordinarily possessed by members of his profession in good standing under the same or similar circumstances."

Dr. Vinson argues the knowledge component should not have been included in the charge. He contends that Durham's repeated emphasis on his education and training, combined with the trial judge's charge, created the impression the jury could find Dr. Vinson liable for malpractice solely on the basis of a lack of education or background, that is, if they found he did not "possess the degree of professional learning" that he should have, regardless of his conduct in treating Durham. We disagree.

To the extent that the trial court's charge suggests that a lack of professional learning, by itself, constitutes a breach of the standard of care, the charge was erroneous. The standard of care in a medical malpractice action concerns *both* the physician's skill and the physician's professional learning. Accordingly, the appropriate standard of care charge is the following: A physician is only bound to possess and exercise that degree of skill *and* learning that is ordinarily possessed and exercised by members of his profession in good standing acting in the same or similar circumstances. *King v. Williams*, 276 S.C. 478, 482, 279 S.E.2d 618, 620 (1981) (degree of care which must be observed is that of an average, competent practitioner acting in same or similar circumstances); *Bessinger v. DeLoach*, 230 S.C. 1, 7, 94 S.E.2d 3, 6 (1956) (physician has been held to degree of skill and learning which is ordinarily possessed and exercised by members of his profession in good standing in the same general neighborhood or in similar localities).[5]

Professional learning is pertinent to a physician's background and training, particularly when the procedure in question—such as the one performed in the present case—requires a special kind of learning. Therefore, the knowledge component was properly included in the jury charge. But the lack of or inadequacy of such knowledge is not, by itself, dispositive as to whether a physician is liable for medical malpractice. Therefore, the portion of the charge instructing the jury to find the physician liable if he "fails in *any* of those particulars and such failure is the proximate cause of injury and damage," was erroneous. We note that this is a minor judicial error in an otherwise appropriate charge.

Nonetheless, we find the error harmless given that Dr. Vinson's liability to Durham is so clear. As noted previously, it is uncontradicted that

[5] This Court eventually eliminated the phrase, known as the locality rule, "in the same general neighborhood or in similar localities" and replaced it with the phrase, "acting in same or similar circumstances." *King*, 276 S.C. at 482, 279 S.E.2d at 620.

Dr. Vinson committed a gross breach of the standard of care in more than one instance while treating Durham.

III. VALIUM PRESCRIPTION EVIDENCE

Dr. Vinson argues he is entitled to a new trial due to the admission of evidence, during the punitive damages phase of the bifurcated trial, that he prescribed valium to Durham's daughter and that he instructed her to give the valium to other family members. We agree.

Durham's daughter testified Dr. Vinson told her that she and her sisters were upsetting Durham while she was in the CCU. She stated that he wrote her a prescription for sixty valiums, and told her to take them and pass them around to the other sisters to calm them down. The daughter stated that she was never a patient of Dr. Vinson's. Another daughter corroborated this testimony.

In addition, a portion of the deposition of Dr. Vincent Russo, an expert for Durham, was admitted during the punitive damages phase. Dr. Russo testified regarding the valium prescription incident. The court overruled defense counsel's objection on the basis the evidence was relevant to the *Gamble*[6] factor concerning Dr. Vinson's awareness or concealment. The court further stated the evidence did not violate Rule 403, SCRE.[7]

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[6] *Gamble v. Stevenson*, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991), set out the factors to be used when conducting a review of a punitive damage award. The factors are: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) other factors deemed appropriate.

[7] Rule 403, SCRE, states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

Dr. Russo testified Dr. Vinson attempted to alleviate the family's anxiety about Durham by prescribing valium to Durham's daughter and telling her to distribute the valium to the other relatives. Dr. Russo opined that a reasonable surgeon does not engage in such conduct and that his actions were incompetent and could be criminal and unethical.

We find that the trial court erroneously allowed the valium prescription evidence. The evidence was inappropriate because it concerned Dr. Vinson's misconduct towards a third party, rather than his misconduct towards Durham. We disagree with the trial court's finding that the evidence was relevant to the *Gamble* factor of concealment. The finding that the evidence is relevant to whether Dr. Vinson attempted to conceal his misconduct towards Durham is attenuated. Further, the evidence is inflammatory, especially in light of the fact that the valium prescription evidence was the only evidence admitted during the punitive damages phase. We find the evidence violates Rule 403, SCRE, because the prejudicial effect of the evidence outweighs any probative value it may have had. By allowing the evidence, the trial court allowed the jury to punish Dr. Vinson for a bad act unrelated to his actions towards Durham. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409, 123 S. Ct. 1513, 1515 (2003) (defendant's dissimilar acts, independent from acts upon which liability was premised, may not serve as basis for punitive damages; defendant should be punished for conduct that harmed plaintiff, not for being an unsavory individual).

Accordingly, we reverse the trial court on this ground and remand the case for a new punitive damages phase.

CONCLUSION

We find the trial court committed two errors during the liability phase of trial. The trial court erred by allowing Durham's counsel to ask Dr. Vinson about his failure to fully disclose his privileging file and by giving an inappropriate standard of care charge to the jury. But we find the errors

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considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

harmless given that Dr. Vinson's liability to Durham is so clear based on the uncontradicted evidence that Dr. Vinson committed a gross breach of the standard of care in more than one instance while treating Durham.

We further find the admission of the valium prescription evidence during the punitive damages phase violates Rule 403, SCRE. Because this error was not harmless, we reverse the trial court and remand the case for a new punitive damages phase.

The following issues raised by Appellants-Respondents are not preserved for review: Issues I, V, VII, XI, and XIII. *See Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (due process claim raised for first time on appeal is not preserved); *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (2002) (to preserve issue for appellate review, issue must have been raised to and ruled upon by trial court); *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996) (party may not argue one ground for objection at trial and another ground on appeal); *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986) (proper course is to object immediately to improper argument).

Appellants-Respondents' remaining issues are without merit and we affirm pursuant to Rule 220(b), SCACR, and the following authorities: Issue II: *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); Issue VI: Rule 803(4) and 803(6), SCRE; Issues VIII and IX: *Elledge v. Richland/Lexington Sch. Dist. Five*, 352 S.C. 179, 573 S.E.2d 789 (2002) (admission of testimony largely within trial court's sound discretion, exercise of which will not be disturbed on appeal absent abuse of discretion). Respondent-Appellant's issue is also without merit and we affirm pursuant to Rule 220(b), SCACR, and the following authority: *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (grant of motion is within trial court's discretion, and absent abuse of discretion, it will not be reversed on appeal).

AFFIRMED IN PART; REVERSED IN PART.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice G. Thomas Cooper, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

McCormick County Council, Petitioner,

v.

Kathryne P. Butler, in her capacity as McCormick County Clerk of Court, Respondent.

IN THE ORIGINAL JURISDICTION

Opinion No. 25873
Submitted August 18, 2004 - Filed September 13, 2004

George P. Callison, Jr., Callison Dorn Thomason & Knott, PA, of Greenwood, for Petitioner.

Kathryne P. Butler, pro se, of McCormick, for Respondent.

PER CURIAM: Petitioner (County Council) seeks a declaratory judgment in this Court's original jurisdiction to have the Court determine who has the right to assign office space and possess the keys to the offices in the McCormick County Courthouse. Because this is a matter of significant public interest, we grant the petition to hear this matter in our original jurisdiction, dispense with further briefing, and hold that respondent (the Clerk of Court) has the authority to assign offices and possess the keys thereto in the county courthouse.

In an administrative order dated June 23, 2004, Chief Justice Toal ordered that, pursuant to S.C. Code Ann. § 14-17-210 (1976), the Clerk of Court has charge of the courthouse and has the authority to exercise control over the assignment of rooms and possess all office keys. County Council asks that this administrative order be stayed pending resolution of this matter. The request to stay the June 23rd administrative order is denied.

South Carolina Code Ann. § 4-1-80 (1986) requires the governing body of each county to furnish the probate judge, auditor, superintendent of education, clerk of court, sheriff, treasurer and master in equity office room, furniture, and stationery, as well as fuel, lights, postage and other incidentals necessary to transact business. In addition, the county governing body is required to make any alterations and additions advisable or necessary to any courthouse. S.C. Code Ann. § 4-17-60 (1986).

The office of clerk of court is an elected one, created by Article V, § 24 of the South Carolina Constitution. This section states that the General Assembly shall provide for the clerk of court's duties. In S.C. Code Ann. § 14-17-210 (1976), the General Assembly has provided that the county clerk of court has charge of the courthouse and must open the courthouse when required for public use and close it at all other times.

South Carolina Code Ann. § 4-9-650 (1986) provides that the county administrator has no authority over elected officials of the county whose offices are created by the Constitution or general law of the State.

Although the statutes do not specifically provide who has the authority to assign offices and possess the keys thereto in the county courthouse, the provision of § 14-17-210 giving the clerk of court charge of the courthouse must include the assignment of offices and possession of keys. Further, since § 4-9-650 specifically states that the county administrator does not have authority over elected officials whose offices are created by the Constitution, the county has no authority to control the Clerk of Court.

Essentially, County Council is challenging the Chief Justice's June 23rd administrative order in this matter. As the administrative head of

the unified judicial system,[1] the Chief Justice has the authority to issue administrative orders controlling the courts in the State. Because authority to control the courthouse is given to the Clerk of Court, we hold that the Clerk of Court has the authority to assign offices in and possess the keys to the offices in the courthouse.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur. MOORE, J., not participating.

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[1] S.C. Const. art. V, § 4.

The Supreme Court of South Carolina

RE: Amendment to Rule 28 of Rule 413, SCACR

ORDER

Effective September 1, 2003, this Court made extensive amendments to Rule 402, SCACR, relating to admission to practice law. The amendments resulted in the renumbering of various provisions of Rule 402. Rule 28 of Rule 413, SCACR, was not amended to reflect the changes made to Rule 402.

Accordingly, pursuant to Article V, § 4, of the South Carolina Constitution, Rule 28(f)(5) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, is amended to read:

> **(5) Learning in Law; Examinations and Training.** The Supreme Court may also direct that the lawyer establish proof of competency and learning in the law, which may include a requirement to successfully complete the

examinations and training required by Rule 402(c)(5), (6), and (8), SCACR.

This amendment is retroactive to September 1, 2003.

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

September 8, 2004