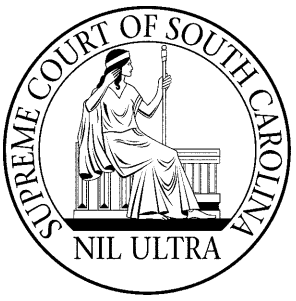

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

December 8, 2003

ADVANCE SHEET NO. 43

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PETITIONS - UNITED STATES SUPREME COURT

None

The Supreme Court of South Carolina

Janet B. Murphy and David M. Murphy, Respondents,

v.

Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, and as successor to Unarco Industries, Inc., ACandS, Inc., Rock Wool Manufacturing Co., Inc., The Anchor Packing Company, Rapid American Corporation, Garlock, Inc., Westinghouse Electric Corporation, Uniroyal, Inc., Metropolitan Life Insurance Co., Fibreboard Corporation, National Service Industries, Inc., A. P. Green Industries, Inc., Flexitallic Gasket Company, Inc., GAF Corporation, Armstrong World Industries, Inc., Asbestos Claims Management Co., United States Gypsum Company, T & N, PLC., C. E. Thurston & Sons, Inc., PPG Industries, Inc., Covil Corporation, and E.I. Dupont de Nemours and Company, Defendants,

Of which E.I. Dupont de Nemours and Company is Petitioner.

ORDER

Petitioner seeks rehearing, asking that we excise language from the opinion stating that mesothelioma is "caused exclusively by exposure to asbestos." Murphy v. Owens-Corning Fiberglas Corp., Op. No. 25740 (S.C. Sup. Ct. filed October 27, 2003)(Shearouse Adv. Sh. 39 at 26). We grant the petition, and remove the last six words from the first sentence of the third paragraph in the section denominated "FACTS." Accordingly, that sentence now reads "In July 1995, Janet was diagnosed with mesothelioma, a lung cancer."[2] A copy of the amended opinion shall be published in the Advance Sheets.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

December 8, 2003

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Janet B. Murphy and David M. Murphy, Respondents,

v.

Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, and as successor to Unarco Industries, Inc., ACandS, Inc., Rock Wool Manufacturing Co., Inc., The Anchor Packing Company, Rapid American Corporation, Garlock, Inc., Westinghouse Electric Corporation, Uniroyal, Inc., Metropolitan Life Insurance Co., Fibreboard Corporation, National Service Industries, Inc., A. P. Green Industries, Inc., Flexitallic Gasket Company, Inc., GAF Corporation, Armstrong World Industries, Inc., Asbestos Claims Management Co., United States Gypsum Company, T & N, PLC., C. E. Thurston & Sons, Inc., PPG Industries, Inc., Covil Corporation, and E.I. Dupont de Nemours and Company, Defendants,

Of which E.I. Dupont de Nemours and Company is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25740
Heard February 6, 2003 - Refiled December 8, 2003

AFFIRMED

David E. Dukes, C. Mitchell Brown, and Michael W. Hogue, all of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Petitioner.

L. Joel Chastain, of West Columbia, Terry E. Richardson, Jr., and Daniel S. Haltiwanger, both Richardson, Patrick, Westbrook and Brickman, L.L.C., of Barnwell, V. Brian Bevon, of Ness, Motley, of Mt. Pleasant, and William J. Cook, of Ness, Motley, of Barnwell, for Respondents.

R. Bruce Shaw and W. Thomas Causby, both of Nelson Mullins Riley & Scarborough, of Columbia, for Amicus Curiae Owens-Illinois, Inc.

JUSTICE PLEICONES: We granted certiorari to consider when a "cause of action shall have arisen…within this State" under the Door Closing Statute, S.C. Code Ann. § 15-5-150 (1976), where the cause of action is a tort suit premised on a latent disease claim. The circuit court held this suit barred by the statute, and a panel of the Court of Appeals affirmed. The

case was then reheard *en banc*, and by a vote of 7 to 2,[1] the Court of Appeals held the Door Closing Statute did not apply. Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001). We granted certiorari and now affirm.

FACTS

Petitioner E.I. du Pont de Nemours and Company (petitioner) employed respondent Janet Murphy's (Janet's) father (Father) as a chemical engineer from 1951 to 1984. Father was exposed to insulating asbestos dust and fibers in the course of his employment as he observed the reconfiguration of textile spinning equipment.

Father worked at petitioner's Virginia plant from 1951 to 1966. Janet was born in 1960. From 1966 until 1969 the family lived in South Carolina. They returned to Virginia until 1974, then spent four years overseas, and Father spent the last six years of his employment with petitioner in Virginia.

In July 1995, Janet was diagnosed with mesothelioma.[2] She brought this tort action in South Carolina, and her husband (David) brought his loss of consortium suit here. They allege Janet developed the disease as the result of her childhood exposure to asbestos fibers and dust in Father's clothing. Further, they contend that while Father was exposed to asbestos at all of petitioner's facilities, his exposure was greatest at the South Carolina plant.

Petitioner moved to dismiss Janet's and David's claims under Rule 12(b)(1), SCRCP, on the grounds South Carolina lacked subject matter jurisdiction over the suits in light of the Door Closing Statute. The circuit court dismissed the actions. See e.g. Nix v. Mercury Motors Express, Inc.,

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[1] In this case, the *en banc* panel consisted of four judges of the Court of Appeals and five acting Court of Appeals judges drawn from other state courts. The five acting judges sat by designation of Chief Justice Toal. See S.C. Const. art. V, § 4 ("The Chief Justice shall…have the power to assign any judge to sit in any court within the unified judicial system").

[2] Janet died of mesothelioma during the pendency of this matter.

270 S.C. 477, 242 S.E.2d 683 (1978). Janet and David appealed, and the *en banc* Court of Appeals reversed. Murphy v. Owens-Corning, *supra*. Following the circuit court's ruling and the decision of the Court of Appeals, we overruled our precedents including Nix which had held that the Door Closing Statute determines subject matter jurisdiction, and explained that the statute in fact governs a party's capacity to sue. Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003).

LAW

The Door Closing Statute provides:

> § 15-5-150. Foreign corporations as defendants.
>
> An action against a corporation created by or under the laws of any other state, government, or country may be brought in the circuit court:
>
> (1) By any resident of this State for any cause of action; or
>
> (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

In this case, subsection (2) of § 15-5-150 is the relevant provision since neither Janet nor David is a South Carolina resident. In Ophuls & Hill v. Carolina Ice & Fuel Co., 160 S.C. 441, 158 S.E. 824 (1931), the Court explicated the meaning of the statutory terms 'cause of action' and 'subject of the action.' 'Cause of action' was "described as being a legal wrong threatened or committed against the complaining party" while the 'subject of the action' was defined as "*the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is, ordinarily the property, or the contract and its subject matter*, or other thing involved in the dispute." Id. at

450, 158 S.E. at 827 (emphasis in original). In this tort case, the focus is on the term 'cause of action,' and not on the 'subject of the action.'

In order for Janet to bring her suit[3] in South Carolina, she must meet the Door Closing Statute's requirement that "the cause of action shall have arisen…within this State." § 15-5-150 (2). Janet's complaint unequivocally meets the 'cause of action' component of this requirement since she alleges that the legal wrong occurred in South Carolina when she was exposed to asbestos fibers and dust on Father's clothing. Ophuls & Hill v. Carolina Ice & Fuel Co., *supra*. As the Court of Appeals held, the critical inquiry here is whether the cause of action **arose** within the State. We thus examine, for the first time, when a latent disease cause of action 'arises.' Cf. Grillo v. Speedrite Prods., Inc., 340 S.C. 498, 532 S.E.2d 1 (Ct. App. 2000) *cert. denied* December 12, 2000 (discovery rule/statute of limitations in toxic exposure case). In doing so, we reexamine our precedents which equate the terms 'arise' and 'accrue.'

Our consideration of the novel issue raised by this case begins with an examination of the policies underlying the Door Closing Statute. Those policies have been articulated as follows:

> (1) It favors resident plaintiffs over nonresident plaintiffs;
>
> (2) It provides a forum for wrongs connected with the State while avoiding the resolution of wrongs in which the State has little interest; and
>
> (3) It encourages activity and investment within the State by foreign corporations without subjecting them to actions unrelated to their activity within the State.
>
> Farmer v. Monstanto Corp., *supra* citing

[3] We focus our discussion on Janet's suit since David's consortium claim is dependent on the viability of Janet's claim.

Rosenthal v. Unarco Industries, Inc., 278 S.C. 420, 297 S.E.2d 638 (1982).

The first policy, favoring resident plaintiffs, is reflected in subsection (1) of § 15-5-150 of the Door Closing Statute, which allows "any resident of this State" to maintain "any cause of action." This subsection, essentially "opening the Door" for resident plaintiffs, is irrelevant to determining whether Janet, a nonresident, has the capacity to maintain this suit. The second policy expressed in the statute restricts actions brought in state courts to those where the alleged wrong is connected to the State. Janet's suit does not offend this policy. The third policy consideration when a nonresident seeks to sue a foreign corporation in state court is whether the suit is predicated on the corporation's in-state activities. Id. Permitting Janet to maintain her action in our state courts does not contravene this policy. Having concluded that no fundamental policy would be offended by this suit, we turn to the arise/accrue distinction.

In traditional tort settings, we have held that a cause of action arises in this State for purposes of the Door Closing Statute when the plaintiff has the right to bring suit. See Cornelius v. Atlantic Greyhound Lines, 177 S.C. 93, 180 S.E. 791 (1935). In construing the statutory requirement that "the cause of action shall have arisen . . . within in this State," the Cornelius court cited with approval to an authority that "stated that 'a cause of action **accrues** when facts exist which authorize one party to maintain an action against another.'" Id. at 96, 180 S.E. at 792 (emphasis supplied). Cornelius is consistent with our later decision in Stephens v. Draffin, 327 S.C. 1, 488 S.E.2d 307 (1997), where we held "our cases use the verbs 'arise' and 'accrue' interchangeably when discussing the issue of the juncture at which the right to sue came into existence." Id. at footnote 4; see also Tilley v. Pacesetter Corp., Op. No. 25697 (S.C. Sup. Ct. filed August 11, 2003).

Were we to apply our traditional view of when a tort cause of action arises or accrues, we must conclude that Janet's cause of action did not arise "within the State" because no injury or damages occurred while she was in

South Carolina.[4] Until the exposure to asbestos resulted in injury or damage, Janet's tort cause of action did not accrue. See e.g., Gray v. Southern Facilities, 256 S.C. 558, 183 S.E.2d 438 (1971) ("It is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another"). Respondents urge us to reconsider whether to recognize a distinction between the terms 'arise' and 'accrue' in the context of latent disease tort actions within the ambit of the Door Closing Statute.

As explained above, the policies reflected in the Door Closing Statute would not be offended by allowing Janet's suit to proceed in state court. The only obstacle to Janet's maintenance of this action results from the nature of the latent disease process.

We find that it is not appropriate to apply a strict accrual test to latent disease tort actions brought by a nonresident against a foreign corporation. We hold that the proper inquiry is whether the foreign corporation's activities that allegedly exposed the victim to the injurious substance, and the exposure itself, occurred within the State. If so, then the legal wrong was committed here. See Ophuls & Hill v. Carolina Ice & Fuel Co., *supra*. The fact that the legal wrong did not result in injury and/or damages until the plaintiff had left the State does not foreclose a suit under the Door Closing Statute. Janet's latent disease claim 'arose' in South Carolina.

[4] Unlike the Court of Appeals, we do not rely upon a medical doctor's affidavit, submitted after the motion to dismiss was granted, to find injury at the time of exposure. It is questionable whether the affidavit was properly before the circuit court when it was deciding the Rule 59 motion. See Wright, Miller, & Kane *Fed. Proc. Practice: Civil 2d § 2810.1* (1995 and Supp. 2002). Whether to allow the affidavit upon remand is a question we leave to the trial court's discretion.

CONCLUSION

The circuit court erred in dismissing the suits under the Door Closing Statute.[5] The decision of the Court of Appeals, reversing that decision and remanding the case to the circuit court, is

AFFIRMED.

WALLER and BURNETT, JJ., concur. TOAL, C.J., concurring in result in a separate opinion in which MOORE, J., concurs.

[5] We do not perceive any meaningful distinction between our resolution of this issue and that of the concurring opinion. That opinion differs only in that it decides not just the question whether Janet's claim arose in South Carolina, but also determines the action accrued in 1995 upon Janet's diagnosis. Since this case comes before us in the context of a 12(b)(1) motion, we need not decide any factual or legal question other than whether the circuit court has subject matter jurisdiction.

CHIEF JUSTICE TOAL: Although I agree the Court of Appeals should be affirmed in this case, I respectfully disagree with the analysis employed by the majority, and, therefore, write separately to concur in result only. *See Murphy v. Owens-Corning Fiberglass Corp.,* 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001). The majority opinion purports to affirm the Court of Appeals, but it ignores the distinction between **"arise"** and **"accrue"** upon which the Court of Appeals based its decision. For the following reasons, I would affirm the Court of Appeals opinion as it was written.

> The South Carolina Door Closing Statute provides,
>
> An action against a corporation created by or under the laws of any other state, government, or country may be brought in circuit court:
>
> (1) By any resident of this State for any cause of action; or
>
> (2) By a plaintiff not a resident of this State when the cause of action shall have **arisen** or the subject of the action shall be situated within this State.

S.C. Code Ann. § 15-5-150 (1976) (emphasis added). Both the majority opinion of this Court and the Court of Appeals' opinion recognize that in order for Janet to bring her suit in South Carolina, she must meet the Door Closing Statute's requirement that her cause of action **arise** within this State. S.C. Code Ann. § 15-5-150; *see Murphy,* 346 S.C. at 46, 550 S.E.2d at 593.

After noting that **arise** and **accrue** have been used interchangeably in the "typical tort setting," the Court of Appeals' opinion concluded that there is a distinction between **arise** and **accrue** in latent disease cases such as this one. *Murphy,* 346 S.C. at 47-48, 550 S.E.2d at 594-95.

> The record establishes that the alleged wrongdoing, from which [Janet's] right to bring this action proceeds, originated in South Carolina. Their claims, therefore, arose in this state even though they did not accrue until the mesotheliomia was diagnosed.

> In applying the Door Closing Statute, the manifestation of injury through diagnosis, while relevant, is not dispositive in every case for the purpose of determining whether a cause of action shall have **arisen** in South Carolina. Such an approach is too simplistic and would lead to results contrary to existing case law and the legislative goals of the statute.

Id. at 48, 550 S.E.2d at 594-95 (emphasis added).

The majority opinion, on the other hand, declines to accept a distinction between **arise** and **accrue**, stating, "[a]pplying our traditional view of when a tort cause of action **arises** or **accrues**, we must conclude that Janet's cause of action did **not arise** 'within the State,' because no injury or damages occurred in South Carolina." (emphasis added). The majority averts the result this conclusion logically mandates on grounds that "it is not appropriate to apply a strict accrual test to latent disease tort actions brought by a nonresident against foreign corporations."

> We hold that the proper inquiry is whether the foreign corporation's activities that allegedly exposed the victim to the injurious substance, and the exposure itself, occurred within the State. If so, then the legal wrong was committed here. The fact that the legal wrong did not result in injury and/or damages until the plaintiff had left the State does not foreclose the Door Closing Statute. Janet's latent disease claims 'arose' in South Carolina.

(citations omitted).

Although the majority reaches the same result as the Court of Appeals, in my opinion, the only appropriate way to reach this result is to distinguish **arise** and **accrue** according to their technical, legal definitions. *See Murphy,* 346 S.C at 47, 550 S.E.2d at 594 (citations omitted) (stating that a cause of action **arises** when the act or omission that creates the right to bring the suit happens or begins and that a cause of action **accrues** when it becomes

complete so that the aggrieved party can prosecute the action). The majority's decision goes beyond mere interpretation of the language of the Door Closing Statute and, instead, appears to make a judicial exception to the Statute for latent disease cases.

In this case, Janet alleges that she came into contact with asbestos in South Carolina between 1966 and 1969, which finally manifested in a diagnosis of mesothelioma in July 1995. Janet's Father worked at Petitioner's South Carolina plant during these years, and Janet alleges she was exposed to asbestos fibers and dust that became caught in Father's clothing while working at the plant. Under these facts, I would find that Janet's cause of action against Petitioner **arose** in South Carolina, but did not **accrue** until her diagnosis of mesothelioma in Virginia. While **arise** and **accrue** may be used interchangeably appropriately in most circumstances (because most causes of action **arise** and **accrue** simultaneously), the two terms retain a technical distinction which comes into play in latent disease cases such as this one.

For the foregoing reasons, I write separately and concur in result only.

MOORE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Barry T. Wimberly, Respondent.

Opinion No. 25756
Heard November 6, 2003 - Filed December 1, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for Respondent.

PER CURIAM: This is an attorney disciplinary matter. The full panel adopted the subpanel's report, and recommended that respondent receive a nine-month suspension, and that he be required to pay costs.[1] Neither party filed exceptions to the report[2] or briefs. We suspend respondent for 12 months and order him to pay $295 in costs.

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[1] The costs total $295.

[2] Respondent did file objections to the subpanel's report, but did not renew them after that report was adopted by the full panel.

FACTS

The facts are not in dispute. Respondent, a mortgage broker, was seeking refinancing of a mortgage on behalf of a married couple. The appraiser questioned whether the marital property would qualify for the refinance loan. Respondent obtained a letter from the tax assessor's office concerning a separate property. Using the letter's letterhead and signature as a base, respondent created two purported assessor's letters placing the marital property and another parcel owned by the wife under a single tax map number. These forged documents were presented to the appraiser, who questioned their validity. The couple was able to obtain the refinancing without the use of the forged letters.

Respondent was charged with forgery as the result of creating these letters. The criminal charge was dismissed following respondent's successful completion of a pre-trial intervention program.

PANEL REPORT

The panel concluded that respondent acted deliberately to mislead respondent's employer, the lender, and the appraiser. It noted that not only did respondent conceive this scheme, but that he also engaged in a serious criminal act in furtherance of it. The panel found respondent violated the following Rules of Professional Conduct contained in Rule 407, SCACR: Rule 8.4(a) (violated the Rules of Professional Conduct); Rule 8.4(b) (committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer); Rule 8.4(c) (engaged in conduct involving moral turpitude); Rule 8.4(d) (engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (engaged in conduct prejudicial to the administration of justice). Respondent was also found to have violated the following Rules of Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violated the Rules of Professional Conduct); Rule 7(a)(5) (engaged in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule

7(a)(6) (violated the oath of office taken upon admission to practice law in this state).

SANCTION

The sole issue before the Court is the appropriate sanction for respondent's admitted misconduct. The panel has recommended a nine-month suspension and payment of $295 in costs. This Court is not bound by the panel's recommendation but "must administer the sanction it deems appropriate after a thorough review of the record." In re Oliver, Op. No. 25721 (S.C. Sup. Ct. filed September 29, 2003) (internal citation omitted).

Respondent offered evidence in mitigation and relies especially on the fact that he did not 'personally profit' from his wrongdoing, and on the fact that the refinancing was accomplished without reliance on the forged letters. We find the claim that respondent did not profit from his misconduct disingenuous. No doubt respondent's continued employment as a mortgage broker is contingent on his ability to successfully develop business opportunities, such as this refinancing, for his employer. Further, respondent admitted that he received some part of the $1,260 origination fee generated by this refinancing, thus demonstrating that he profited in a monetary sense from this transaction. Finally, although the refinancing was obtained without the use of the forged letters, this does not negate the fact that respondent gave them to the appraiser with the intent that they would be viewed as genuine. We find that the appropriate sanction for respondent's misconduct is a one-year suspension from the practice of law. As we recently explained, a harsher sanction is warranted where the attorney not only creates a forged document, but also presents it as authentic. In the Matter of Belding, Op. No. 25750 (S.C. Sup. Ct. filed November 10, 2003). In the present case, the forged letters were presented to the appraiser as authentic. We find that one year is an appropriate sanction.

Respondent shall, within fifteen days of the filing of this opinion, pay costs in the amount of $295. Further, within fifteen days of the filing of this opinion, respondent shall file an affidavit demonstrating that he

has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Charles M. Watson, Jr., County Attorney for Greenwood County, Petitioner.

In Re: The Unauthorized Practice of Law

ORIGINAL JURISDICTION

Opinion No. 25757
Submitted October 22, 2003 - Filed December 1, 2003

Charles M. Watson, Jr., of Greenwood, for Petitioner.

A.J. Tothacer, Jr., of Greenville, Alexander Cruikshanks, IV, of Clinton, Charles Heath Ruffner, of Cheraw, D'Anne Haydel, of Orangeburg, Hubbard W. McDonald, Jr., of Bennettsville, Kelly Jean Golden, of Beaufort, Robert M. Bell, of Langley, Thomas L. Martin, of Anderson, for Respondents.

PER CURIAM: Charles M. Watson, Jr., County Attorney for Greenwood County, ("Petitioner"), seeks a declaratory judgment as to whether nonlawyer title abstractors engage in the unauthorized practice of law when they conduct a title search and report the title status in connection with a tax foreclosure sale. We hold that such activities constitute the unauthorized practice of law and must either be conducted or supervised by an attorney.

FACTUAL/PROCEDURAL BACKGROUND

Before selling a property at a tax foreclosure sale, tax collectors must provide notice of the sale to the property owner and any lien holders. In order to determine who is entitled to notice, tax collectors often hire title abstractors—who generally are not licensed attorneys—to examine the public records and report the status of title.

Tax collectors and County Attorneys throughout this state disagree as to whether such title abstractors, when performing their duties without an attorney's supervision, are engaged in the unauthorized practice of law. Because of this disagreement, Petitioner sought a declaratory judgment pursuant to this Court's original jurisdiction under *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992). On April 11, 2003, this Court granted the petition and directed Petitioner to file a brief and serve it on every County Attorney in this state. Eight County Attorneys[1] ("Respondents") responded.

LAW/ANALYSIS

Petitioner contends that when a nonlawyer title abstractor examines public records and reports the status of a title, without the supervision of a licensed attorney, the title abstractor is engaged in the unauthorized practice of law. We agree.

This Court has addressed the unauthorized practice of law in the real estate context on at least three occasions. In the first case, this Court held that the preparation of title abstracts by title companies for buyers constituted the unauthorized practice of law. *State v. Buyers Serv. Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). The Court found that "[t]he examination of titles requires expert legal knowledge and

[1]The responding County Attorneys are from Aiken, Anderson, Beaufort, Chesterfield, Greenville, Laurens, Marlboro, and Orangeburg counties.

skill." *Id.* at 432, 357 S.E.2d at 19. As a result, the Court established a requirement that title examinations and abstract preparation be conducted "under the supervision of a licensed attorney." *Id.* at 432-33, 357 S.E.2d at 19.

Similarly, in another case, this Court considered whether a title search performed by a title company for a lender constituted the unauthorized practice of law. *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As in *Buyers*, this Court held that:

> Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling Doe must ensure the title search and preparation of loan documents are supervised by an attorney.

Id. at 313, 585 S.E.2d at 776.

In the third case, this Court disciplined an attorney for authorizing his paralegal to conduct a real estate closing in the attorney's absence. *Matter of Lester*, 353 S.C. 246, 247, 578 S.E.2d 7 (2003). The Court found, and the attorney later acknowledged, that an attorney should have been physically present at the closing. *Id.* at 247, 578 S.E.2d at 7. In addition to publicly reprimanding the attorney, the Court delivered a message to all attorneys, cautioning them against delegating functions that should be performed by attorneys to support staff. *Id.* at 248, 578 S.E.2d at 8.

Based on the foregoing precedent, we find that examining titles and preparing title abstracts constitute practicing law. Therefore, we require that licensed attorneys either conduct or supervise such activities. This requirement was established in *Buyers* and continues

today for the purpose of protecting the public. 292 S.C. at 432-33, 357 S.E.2d at 19.

In the present case, property owners, buyers, lien holders, and counties depend on the tax collector to notify all those statutorily entitled to notice. If the title abstractor's report contains errors, a tax sale may be invalidated, and the county may be subject to due process claims from those who did not receive notice.

Further, that the title abstractor is not, by the report, guaranteeing title or certifying that the title is marketable is of little consequence. Although the tax title is of a quitclaim-deed nature, it still has a legal effect: it signifies that title has been conveyed. Therefore, the title abstractor's report must either be generated or approved by a licensed attorney.

Finally, we recognize that expenses associated with the tax-sale process will increase if counties are required to involve attorneys in either the performance or oversight of title examination and abstract preparation. But we believe that mistakes, such as failing to notify the proper parties, may prove more costly. On balance, the consequences of relying on a defective report may expend more county resources than the costs associated with taking proper measures from the outset.

CONCLUSION

Based on the foregoing analysis, we hold that when nonlawyer title abstractors examine public records and then render an opinion as to the content of those records, they are engaged in the unauthorized practice of law. But if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Doris Stieglitz Ward,
individually and on behalf of all
others similarly situated, Appellants,

v.

State of South Carolina, Respondent.

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

Opinion No. 25758
Heard September 25, 2003 - Filed December 8, 2003

AFFIRMED

A. Camden Lewis, of Lewis, Babcock & Hawkins, LLP; John M.S. Hoefer and Paige Jones Gossett, of Willoughby & Hoefer, PA, all of Columbia, for appellants.

Vance J. Bettis and Shahin Vafai, of Gignilliat, Savitz & Bettis, L.L.P., of Columbia, for respondent.

JUSTICE BURNETT: Appellant Doris Stieglitz Ward brings this direct appeal on behalf of a class of federal retirees challenging the circuit court's decision upholding the constitutionality of Act 189, 1989 Acts 623 (Act 189). Federal retirees claim that South Carolina discriminates in taxation between state and federal retirees in violation of the federal constitutional and statutory intergovernmental tax immunity doctrine. For the following reasons, we affirm the judgment of the circuit court.

ISSUE

Did the circuit court err in holding that Act 189 does not violate the intergovernmental tax immunity doctrine now codified in 4 U.S.C. § 111 (1997)[1] and is therefore constitutional?

DISCUSSION

Statutes are to be construed in favor of constitutionality, and this Court will presume a legislative act is constitutional, unless its repugnance to the Constitution is clear and beyond a reasonable doubt. Main v. Thomason, 342 S.C. 79, 86, 535 S.E.2d 918, 921 (2000).

The South Carolina General Assembly enacted Act 189 to comply with the United States Supreme Court decision in Davis v. Michigan Dept't of Treasury, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). In Davis, the Supreme Court held that the Michigan Income Tax Act violated the doctrine of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees. The Michigan statute exempted retirement benefits paid by state and local governments from state income taxes without exempting retirement benefits paid by the federal government from state income taxes. The Supreme Court stated, "It

[1] That Section provides in relevant part, "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States…by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

is undisputed that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees." Id. at 814, 109 S.Ct. at 1507, 103 L.Ed.2d at 904.

To resolve the unconstitutional taxation provision, the Supreme Court declared that a mandate of "equal treatment" would remedy the constitutional infirmity in the Michigan statute. The Supreme Court stated:

> [A]ppellant's claim could be resolved either by extending the tax exemption to retired federal employees (or to all retired employees), or by eliminating the exemption for retired state and local government employees. *** [T]he Michigan courts are in the best position to determine how to comply with the mandate of equal treatment.

Id. at 818, 109 S.Ct. at 1509, 103 L.Ed.2d at 907.

Prior to Davis, South Carolina exempted all state retirement benefits from income taxation, but only exempted the first $3,000 of federal retirement benefits. Act 189, § 39 repealed the tax exemption for state retirement benefits, thereby rendering all federal and state retirement benefits in excess of $3,000 taxable. In addition to repealing the tax exemption, the General Assembly simultaneously increased retirement benefits for state and local retirees by 7%. Act 189, § 60. This increase in benefits is provided to all state retirees, regardless of their tax liability. The State does not dispute that the General Assembly increased retirement benefits to compensate state retirees, in part, for their increased income tax obligations resulting from the enactment of Act 189.

Federal retirees contend that Act 189 is unconstitutional because the State continues to discriminate against federal retirees by increasing the pension benefits paid to state and local retirees in an effort to offset the increased tax liability resulting from the exemption. In other words, federal retirees argue that the State has indirectly recast the pre-Davis discriminatory exemption through the 7% increase in benefits for state retirees. We disagree. For the following reasons, we conclude Act 189 is not, in effect, a "tax rebate" that implicates the intergovernmental tax immunity doctrine.

First, the doctrine of intergovernmental tax immunity does not deprive a state of its sovereignty to establish the level of its employees' compensation as long as the State does not discriminate in taxation based on the source of the income. The Tenth Amendment provides, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const. amend X. To determine if a statute violates the Tenth Amendment, we must first determine whether the regulation it embodies is within those enumerated in the Constitution. Second, we must determine whether the regulation employed impermissibly infringes upon state sovereignty. United States v. Johnson, 114 F.3d 476, 480 (4th Cir. 1997) referring to New York v. United States, 505 U.S. 144, 156, 112 S.Ct. 2408, 2418, 120 L.Ed.2d 120, 137 (1992). The power to compensate state retirees is clearly not delegated to the United States by the Constitution. As long as federal and state retirees are taxed equally, any restriction on this authority would violate the Tenth Amendment.

Second, in enacting Act 189, the General Assembly specifically followed the dictate of Davis by eliminating the tax exemption for both state and federal employees. In doing so, the General Assembly was guided by the remedies suggested by the Supreme Court. In direct response to Davis, the General Assembly amended South Carolina's tax statute to remove the tax exemption for state retirees. Act 189 conformed South Carolina to the requirements of the Davis decision.

Federal retirees argue the "indisputable linkage" between the increase in compensation and the tax exemption renders Act 189 unconstitutional under Davis. They argue that the Court must consider substance over form in evaluating the constitutionality of Act 189. See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201, 114 S.Ct. 2205, 2215, 129 L.Ed.2d 157, 171 (1994)(holding in a dormant Commerce Clause case, that it is not the form by which a state discriminates, but whether the means employed will result in discrimination). We do not believe Davis holds, or otherwise implies, that states may only raise retirement benefits for its state's retirees if the pension increase in no way serves to offset a prior tax

exemption. Even if the elimination of the tax exemption for state retirees and the simultaneous increase in benefits are read together, the doctrine of intergovernmental tax immunity is not violated. South Carolina has specifically followed the remedy prescribed by Davis. Therefore, federal retirees' argument is unavailing.

Third, neither Davis nor 4 U.S.C. § 111 prohibit the State from contracting with its retirees on the level of compensation paid to its retirees. The intergovernmental tax immunity doctrine serves to protect each sovereign's governmental operations from undue interference from the other. Davis, 489 U.S. at 814, 109 S.Ct. at 1507, 103 L.Ed.2d at 904. Davis does not hold, nor does it even suggest, that a state is prohibited from adjusting the compensation of its employees, even if the state's purpose is to compensate its employees for the loss of the income tax exemption. A state is entitled to raise the level of taxable compensation of its employees if it so chooses. Davis requires that the state *tax* federal and state retirees equally and does not concern itself with the manner in which a state chooses to *compensate* its retirees.

The Supreme Court implicitly recognized that a state's response to the Court's decision could be to increase compensation to state retirees to offset what those retirees lost in benefits as a result of being taxed. In his dissenting opinion, Justice Stevens stated:

> Even if it were appropriate to determine the discriminatory nature of a tax system by comparing the treatment of federal employees with the treatment of another discrete group of persons, it is peculiarly inappropriate to focus solely on the treatment of state governmental employees. *The state may always compensate in pay or salary for what it assesses in taxes.* Thus a special tax imposed only on federal and state employees nonetheless may reflect the type of disparate treatment that the intergovernmental tax immunity forbids because of the ability of the State to adjust any special tax burden on them…It trivializes the Supremacy Clause to interpret it as prohibiting the States from providing through this limited tax exemption *what the state has*

an unquestionable right to provide through increased retirement benefits.

489 U.S. at 824, 109 S.Ct. at 1512, 103 L.Ed.2d at 910-911. (emphasis added).

Although the majority disagreed with the first sentence in the above passage, they took no issue with a state's ability to lawfully increase the benefits paid to state retirees to offset the effect of the Court's holding. South Carolina's increase is the type of response to Davis specifically contemplated by the Supreme Court. The doctrine of intergovernmental tax immunity does not apply because there is no discrimination in taxation on account of the source of compensation.

Fourth, we find no direct correlation between state retirees' state tax obligations and the amount of increased retirement benefits. All eligible state retirees receive the 7% increase in retirement benefits. Act 189 resulted in an increase in compensation for state retirees, and was not a dollar for dollar offset. Moreover, the increased benefits are subject to both state and federal taxation. In Davis, the majority stated, "[t]axes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar." Davis, 489 U.S. at 815, 109 S.Ct. at 905, 103 L.Ed.2d at 1508. The General Assembly's increase in retirement actually increased the employment costs for South Carolina, while simultaneously bolstering the federal treasury.

Federal retirees rely on Sheehy v. Public Employees Retirement Div., 864 P.2d 762 (Mont. 1993) and Vogl v. Dep't of Revenue, 960 P.2d 373 (Or. 1998). In Sheehy, federal retirees challenged Montana's 1991 statute enacted in response to Davis. Before Davis, Montana, like South Carolina, taxed federal retirement benefits but exempted state retirement benefits. The Montana statute restructured the income tax on pension benefits by equalizing the taxation of all pension benefits. In the same act, the Montana legislature granted to state retirees who were Montana residents, and who were now to be taxed in response to Davis, an annual retirement

adjustment payment. Sheehy, 864 P.2d at 764. The Montana Supreme Court held that the Montana statute violated the intergovernmental tax immunity provision of 4 U.S.C. § 111. The court stated,

> It is clear that the adjustment is not an actual and legitimate pension or retirement benefit. If it were a pension benefit, the State would have provided it to all of its retirees in recognition of their years of public service rather than just those living in Montana. There was no need to do so because the sole purpose of the adjustment was to partially recompense state retirees living in Montana for the tax they must pay under the equalizing provisions of [the Montana law].

864 P.2d at 768.

Federal retirees argue that South Carolina's Act 189, like the Montana statute, constitutes discriminatory taxation in violation of intergovernmental tax immunity principles. We disagree. In reaching their decision, the Montana Supreme Court relied heavily on the fact the adjustment was provided only to state retirees who are Montana residents. South Carolina's statute is distinguishable. Act 189 provides the increase to all state retirees, regardless of their domicile.

The Oregon statute considered by the Oregon Supreme Court in Vogl is also distinguishable from Act 189. The 1995 Oregon statute explicitly stated that its purpose was to compensate for damages. Furthermore, the benefit increases under the 1995 statute were mathematically correlated to replace the lost state retirement income. South Carolina's General Assembly did not tie the pension benefit increase, dollar for dollar, to the lost tax exemption, nor did it declare that Act 189 was designed to compensate state retirees for damages. South Carolina's Act 189 is analogous to the 1991 statute considered by the Oregon Supreme Court in Ragsdale v. Dep't of Revenue, 895 P.2d 1348 (Or. 1995). In 1991, the Oregon legislature repealed the tax exemption for state retirees and

simultaneously increased the benefits for state retirees.[2] Like Act 189, Oregon's 1991 act provided no direct correlation between the increase in benefits for state retirees and their tax obligations. Id. at 1350.

Federal retirees have failed to show beyond a reasonable doubt that Act 189 is clearly repugnant to the Constitution. Accordingly, we affirm.

AFFIRMED.

WALLER, A.C.J., and Acting Justices H. Samuel Stilwell, William L. Howard and J. Mark Hayes, concur.

[2] A Virginia statute, recently considered by a Virginia circuit court, is also similar to Act 189. In Almeter v. Virginia Department of Taxation, 2000 WL 1687589 (Va. Cir. Ct. Nov. 6, 2000), petition denied, (Va. 2001), cert. denied, 2001 WL 872690 (U.S. Oct. 1, 2001), federal retirees brought a class action seeking a refund of state income taxes that they alleged were illegally collected from them following that state's 3% increase in retirement benefits for its state's retirees. Like the present case, federal retirees alleged that the 3% increase was designed to offset the new tax liability incurred by state retirees and therefore violated the intergovernmental tax immunity doctrine. The Virginia circuit court dismissed the federal retirees' claims in holding that the increase in benefits was a remedy specifically envisioned by the Supreme Court in Davis.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Southern Atlantic Financial Services, Inc., Petitioner,

v.

Donna F. Middleton, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dorchester County
Patrick R. Watts, Circuit Court Judge

Opinion No. 25759
Heard November 6, 2003 - Filed December 8, 2003

AFFIRMED AS MODIFIED

Donald E. Rothwell and Scott L. Hood, both of Rothwell Law Firm, of Irmo, for Petitioner.

David Popowski, of Charleston, for Respondents.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Southern Atlantic Financial Services, Inc. v. Middleton, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002). We affirm as modified.

FACTS

On June 25, 1996, Donna Middleton entered into a note and mortgage with Petitioner, Southern Atlantic Financial Services, to borrow $186,000 to refinance her home. Four months later, in October 1996, Middleton brought suit against Southern, and the broker which obtained the loan, seeking a reduction in the stated interest rate from 11.99% to 8%. Middleton claimed the broker, Carolina Federal Mortgage Company, had orally agreed to an 8% interest rate. Summary judgment was granted to Southern on the basis that the broker was not its agent and could not reduce the interest amount.

Subsequently, Southern brought suit to foreclose on the mortgage and determine the amount due under the note.[1] Middleton argued Southern failed to send her a notice of default and right to cure, as required by the note. The master ruled the note did not require Southern to provide Middleton notice prior to accelerating the balance. Based on the testimony of Southern's executive vice-president, the master awarded Southern judgment of $311,457.63.[2] The Court of Appeals reversed; it found the default provision of the note created an ambiguity as to whether notice was required prior to accelerating the balance due; the Court of Appeals therefore remanded to the master for a new trial to determine the parties' respective intent and determine whether Middleton had a right to notice of default and a right to cure.

ISSUE

Is the default provision of the note ambiguous?

---

[1] The foreclosure suit was instituted in Dec. 1996, but was held in abeyance pending resolution of Middleton's suit. At the hearing before the master in May 2000, it was revealed that Middleton had deeded the property which was the subject of the foreclosure action to a third party. In light of this fact, the master found he could not go forward with the foreclosure hearing, but he did go forward with the hearing on Middleton's liability under the note.

[2] This figure included interest, insurance, and taxes Southern had paid on the property. Middleton never made any payments.

DISCUSSION

The Note signed by Middleton provides, in pertinent part, as follows:

> 6. BORROWER'S FAILURE TO PAY AS REQUIRED
>
> (B) Default
> If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.
> (C) **Notice of Default**
> If I am in default, the Note Holder **may** send me a written notice telling that if I do not pay the overdue amount by a certain date, the Note Holder **may** require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date **must** be at least 30 days after the date of which the notice is delivered or mailed to me.
> (D) No Waiver By Note Holder
> Even if, at a time when I am in default, **the Note Holder does not require me to pay immediately in full as described above**, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note . . .

(Emphasis added).

Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994). Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party. Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), *vacated on other grounds*, 123 S.Ct. 2403 (2003). A contract is read as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity." Schulmeyer v.

State Farm Ins. Co., 353 S.C. 491, 579 S.E.2d 132 (2003), *citing* Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976).

The Court of Appeals cited caselaw that the term "may" generally signifies "optional." See Kennedy v. South Carolina Retirement Systems, 345 S.C. 339, 549 S.E.2d 243 (2001); Rice v. Multimedia, Inc. 318 S.C. 95, 456 S.E.2d 381 (1995). However, the Court of Appeals failed to acknowledge that these cases also stand for the proposition that the action spoken of is optional or discretionary "**unless it appears to require that it be given any other meaning**." (Emphasis supplied). Kennedy, supra, 345 S.C. at 353, 549 S.E.2d at 250; see also State v. Wilson, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980).

The Court of Appeals nonetheless went on to hold, citing an Eighth Circuit case, that "[a]cceleration of an installment note, however, is a harsh remedy." 349 S.C. at 83, 562 S.E.2d at 486, *citing* First Bank Investors' Trust v. Tarkio College, 129 F.3d 471 (8th Cir.1997). Accordingly, it held that "[b]ecause of the severity of the circumstances, a payee's right to accelerate should therefore be clearly and unequivocally articulated within the agreement." Id. (Emphasis in original). The Court of Appeals held that the note here "was a contract of adhesion filled with boilerplate language made between a sophisticated lender and an unsophisticated maker," and cited a California case establishing judicial limitations on the enforcement of adhesion contracts when the contract "does not fall within the **reasonable expectations** of the weaker or "adhering" party." Id. *citing* Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165 (1981) (emphasis supplied).

Although we agree with the Court of Appeals' ultimate holding, we find its creation of a "reasonable expectations" test is an unwarranted and unnecessary extension of South Carolina law as this case may be decided utilizing basic principles of contract ambiguity. [3]

[3] For the same reasons, we do not address whether the present contract is one of adhesion; the Court of Appeals' opinion is modified to the extent it so held.

We find the provisions of the note here are patently ambiguous. While it is possible to construe the note as simply giving rise to an **option** on the part of Southern to give **notice** of default, the fact that it sets forth a mandatory notice provision renders it susceptible of another construction. As noted previously, the provisions states:

> If I am in default, the Note Holder may send me a written notice telling that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. **That date must be at least 30 days after the date of which the notice is delivered or mailed to me.**

(Emphasis supplied). We find this provision is susceptible of a construction that the note sets forth that the Note Holder **may** accelerate, but that if it decides to do so, it must give at least 30 days notice prior to accelerating. See Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002)(use of words such as "shall" or "must" indicates a mandatory requirement). Such a construction is consistent with caselaw that ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. Myrtle Beach Lumber Co., Inc. v. Willoughby, supra.

The Court of Appeals' opinion is affirmed as modified.[4]

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

[4] We are in accord with the Court of Appeals that the two South Carolina cases dealing with acceleration clauses are not controlling here. In Allendale Furniture Co. v. Carolina Commercial Bank, 284 S.C. 76, 77, 325 S.E.2d 530, 530-531 (1985), the note specifically stated that upon default, the balance would become "at once due and payable at the option of the holder without further notice." In Hendrix v. Franklin, 292 S.C. 138, 355 S.E.2d 273 (Ct. App. 1986), the note provided that upon default, the whole amount due became immediately due and payable at the Holder's option and that the Holder had the right to institute legal proceedings thereon. Unlike the present case, however, the notes in Allendale or Hendrix, had **no** provision which appeared to require notice.

STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Curly Keenon, Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

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

Opinion No. 25760
Submitted November 21, 2003 - Filed December 8, 2003

AFFIRMED AS MODIFIED

Assistant Appellate Defender Robert M. Pachak, of the South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

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

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

PER CURIAM: We grant certiorari in this matter to review the Court of Appeals' decision in State v. Keenon, Op. No. 2002-UP-749 (S.C. Ct. App. filed November 27, 2002). We dispense with further briefing and affirm as modified.

Petitioner was convicted of first degree burglary, petit larceny, and possession of a stolen vehicle. Petitioner was charged with first degree burglary under S.C. Code Ann. § 16-11-311(A)(2)(2003), which provides that a person is guilty of first degree burglary if he enters a dwelling without consent and with intent to commit a crime therein and the person has a prior record of two or more convictions for burglary or housebreaking or both. At trial, the State sought to introduce evidence of petitioner's five prior convictions for burglary and one prior conviction for housebreaking. The State, in arguing against petitioner's motion to limit introduction of evidence of the prior convictions, relied on the Court of Appeals' opinion in State v. James, 346 S.C. 303, 551 S.E.2d 591 (Ct. App. 2001), wherein the Court of Appeals held that the introduction of the defendant's seven prior convictions for burglary were relevant and were not unduly prejudicial. The trial judge denied petitioner's motion and allowed introduction of evidence of petitioner's six prior convictions.

On appeal, the Court of Appeals, also relying on State v. James, supra, found the trial judge did not abuse his discretion in admitting evidence of petitioner's six prior convictions. At that time, this Court had granted certiorari to review the Court of Appeals' decision in State v. James.

Thereafter, this Court issued an opinion reversing the Court of Appeals' decision in State v. James. State v. James, 355 S.C. 25, 583 S.E.2d

745 (2003). Therein, we determined that the probative value of multiple prior convictions must be weighed against their prejudicial effect under Rule 403, SCRE. We found further that "[a]lthough there may be rare occasions where the admission of more than two prior burglary convictions is more probative than prejudicial and therefore proper, the potential for undue prejudice - for the impermissible interpretation of such evidence as propensity or character evidence - warrants great caution."

In the case at hand, it was clearly error, in light of this Court's opinion in State v. James, for the trial judge to allow the State to present evidence of all six of petitioner's prior convictions without first weighing the prejudicial effect against the probative value. However, because of the overwhelming evidence of petitioner's guilt, we find the admission of more than two prior convictions was harmless error. See State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000)(even where probative value of prior bad act evidence is substantially outweighed by its prejudicial effect, admission of evidence may be deemed harmless). The Court of Appeals' opinion is therefore

AFFIRMED AS MODIFIED.

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

The Supreme Court of South Carolina

In the Matter of Dirk Jeffrey Kitchel, Respondent.

ORDER

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

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

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

office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina
November 21, 2003

The Supreme Court of South Carolina

In the Matter of Randolph Frails, Respondent.

ORDER

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

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

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

account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina
November 25, 2003

The Supreme Court of South Carolina

In the Matter of Ray D. Lathan, Respondent.

ORDER

Respondent pled guilty to violating 18 U.S.C. § 1010(2) by knowingly providing false statements to the United States Department of Housing and Urban Development with the intent to influence the Department to provide insurance on loans. Specifically, respondent pled guilty to providing the Department with false certifications that he had received cash at settlement from certain borrowers in amounts reported on HUD-1 settlement statements prepared by respondent and submitted to the Department when, in fact, respondent had not received the stated amount of cash from the borrowers.

Because respondent has pled guilty to a serious crime, the Office of Disciplinary Counsel asks this Court to place respondent on interim

suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension.

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

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

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making

withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that W. Lindsay Smith, Esquire, has been duly appointed by this Court.

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

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

s/Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

December 4, 2003

The Supreme Court of South Carolina

In the Matter of Ronald F. Barbare, Respondent.

ORDER

Respondent pled guilty to violating 18 U.S.C. § 1010(2) by knowingly providing false statements to the United States Department of Housing and Urban Development with the intent to influence the Department to provide insurance on loans. Specifically, respondent pled guilty to providing the Department with false certifications that he had received cash at settlement from certain borrowers in amounts reported on HUD-1 settlement statements prepared by respondent and submitted to the Department when, in fact, respondent had not received the stated amount of cash from the borrowers.

Because respondent has pled guilty to a serious crime, the Office of Disciplinary Counsel asks this Court to place respondent on interim

suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension.

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

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

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making

withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that W. Lindsay Smith, Esquire, has been duly appointed by this Court.

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

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

s/Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

December 4, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alice C. Sims, Jr., Individually
And In Her Capacity as Personal
Representative of the Estates of
Alice C. Sims, Sr., and Georgia
Sheridan Sims, Respondent,

v.

Ronald R. Hall, Appellant.

Appeal From Orangeburg County
Olin D. Burgdorf, Master In Equity

Opinion No. 3703
Submitted November 3, 2003 – Filed December 8, 2003

AFFIRMED

Ronald R. Hall, of West Columbia, Pro Se.

John G. Felder, Jr., of Columbia, for Respondent.

ANDERSON, J.: Alice Sims, Jr., initiated this legal malpractice action against Ronald R. Hall alleging he was negligent in failing to provide competent advice regarding the administration of her deceased mother's estate. The trial court found Hall was negligent and awarded Sims $191,543 in actual damages. We affirm.[1]

FACTS/PROCEDURAL BACKGROUND

Alice Sims, Jr.'s sister, Georgia Sims, died intestate on January 14, 1997. Their mother, Alice Sims, Sr., died later that year on September 1, 1997. As personal representative of both estates, Alice Sims, Jr., retained Hall to advise her as she concluded her mother's and sister's affairs.

Georgia Sims died without a valid will. Her estate passed to Alice Sims, Sr., under South Carolina's intestate succession statute. See S.C. Code Ann. § 62-2-103(2) (Supp. 2002) (providing if there is no surviving spouse or surviving issue, the entire estate passes to the intestate's parents). As a result, when Alice Sims, Sr.'s estate was settled in 1998, it was subject to substantially higher tax liability because Georgia Sims' property had become part of Alice Sims, Sr.'s estate.

The taxing of Georgia Sims' property as part of her mother's estate could have been avoided if Alice Sims, Sr. (during the last few months of her life) or Alice Sims, Jr. (as personal representative of Alice Sims, Sr.'s estate after her death) had executed a "qualified disclaimer" under section 2518 of the Internal Revenue Code. See 26 U.S.C.A. § 2518 (2003). South Carolina adopted the Internal Revenue Code's disclaimer requirements for its estate tax laws. Section 12-16-1910 (1976) of the South Carolina Code provides that "if a person as defined in Section 62-2-801 makes a disclaimer as provided in Internal Revenue Code Section 2518 with respect to any interest in property,

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

this chapter applies as if the interest had never been transferred to the person."

By exercising the right of disclaimer, a person relinquishes all rights to, or "disclaims," property received by gift, will, or intestate succession. This is done almost exclusively to garner favorable tax consequences. In this case, if a valid disclaimer of Georgia Sims' property had been made by Alice Sims, Sr., or on behalf of her estate by Alice Sims, Jr., the property of Georgia Sims would have been treated for tax purposes as though it had never passed to Alice Sims, Sr.

The right of disclaimer cannot, however, be exercised at any time. A party wishing to disclaim her interest in property received must do so within the statutorily prescribed time limit. The time period is enunciated in section 2518, which provides, in pertinent part, that the written disclaimer must be "received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after . . . the day on which the transfer creating the interest in such person is made." 26 U.S.C.A. § 2518(b)(2)(A). For the purposes of the present appeal, the unappealed rulings of the trial court establish as the law of this case that the date of "transfer" under section 2518 was the date of Georgia Sims' death.[2]

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[2] Prior to trial, there was a dispute among the parties concerning the date on which a "transfer" occurs under section 2518. Hall contended the "transfer" of Georgia Sims' property to Alice Sims, Sr., did not occur until the date the deed of distribution transferred title. Alice Sims, Jr., claimed the transfer occurred on the date Georgia Sims died. In ruling on Hall's motion for summary judgment, the circuit court found that the date of transfer, for the purposes of transfer by intestacy, was the date of Georgia Sims' death.

Hall did not appeal the court's summary judgment order and later conceded at trial that, to be effective, disclaimer of Georgia Sims' property must have occurred within nine months after her death. Unappealed rulings become the law of the case and should not be reconsidered by this court. ML-Lee Acquisition Fund, L.P. v. Deloitte

Alice Sims, Jr., served as the personal representative of Georgia Sims' estate and Alice Sims, Sr.'s estate during this nine-month time period for disclaimer following Georgia Sims' death. It is undisputed that Hall, as Alice Sims, Jr.'s attorney during this time, never advised her of the benefits of disclaiming Alice Sims, Sr.'s interest in Georgia Sims' estate.

Alice Sims, Jr., instituted this action against Hall, claiming he was professionally negligent in failing to advise her of the right to disclaim Georgia Sims' estate. The case was tried without a jury before the Master-in-Equity of Orangeburg County. The trial court found Hall's failure to discuss the option of executing a disclaimer fell below the standard of care owed to Sims. The court ruled that Alice Sims, Jr., was legally entitled to exercise the right of disclaimer on behalf of her mother's estate and she would have disclaimed had she been informed of the option by Hall. As to damages, the court found that the failure to execute a disclaimer resulted in additional tax liability of $191,543.

STANDARD OF REVIEW

In an action at law tried without a jury, an appellate court's scope of review extends only to the correction of errors of law. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998) (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)); Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 280, 580 S.E.2d 163, 165-66 (Ct. App. 2003). Thus, the factual findings of the trial judge will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings. Harkins v. Greenville

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& Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997); Toyota of Florence, Inc., v. Lynch, 314 S.C. 257, 266, 442 S.E.2d 611, 616 (1994). Accordingly, this Court will not rule on the legal question as to the date on which the transfer occurred under section 2518. In the present appeal, the date of transfer will be the date of Georgia Sims' death.

County, 340 S.C. 606, 621, 533 S.E.2d 886, 893 (2000); Townes, 266 S.C. at 86, 221 S.E.2d at 775; Scott v. Greenville Hous. Auth., 353 S.C. 639, 645, 579 S.E.2d 151, 154 (Ct. App. 2003).

LAW/ANALYSIS

Hall appeals the trial court's judgment, arguing: (A) Respondent did not properly establish that he owed a duty to inform her of the disclaimer rights or that he breached this duty, and (B) Respondent failed to present sufficient evidence supporting the trial court's finding he proximately caused the damages.[3] In an action for legal malpractice, the claimant must prove four elements: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996); McNair v. Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998).

[3] In the Appellant's "Statement of Issues on Appeal," he lists as an issue whether "the trial court err[ed] in finding the Respondent had proven damages in the amount of $191,453.00." In the body of the brief, however, this issue is not discussed. Our state's appellate courts have consistently held that issues raised on appeal but not argued in the brief will not be considered by the court. See, e.g, Jinks v. Richland County, 355 S.C. 341, ___, 585 S.E.2d 281, 283 (2003) (holding the court will not consider issues raised on appeal but not argued in the body of the brief); Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (finding that "[a]lthough the [appellants] raise this alternative holding in their statement of the issues on appeal, they fail to argue it in their brief. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.").

A. Standard of Care and Breach

Hall contends the trial court committed reversible error in finding he breached his duty of care owed to Alice Sims, Jr., because, at trial, Sims failed to establish by expert testimony the standard of care he owed to her. We disagree.

Generally, a plaintiff in a legal malpractice case must establish the standard of care by expert testimony, unless the subject matter is of common knowledge to laypersons. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002); Henkel v. Winn, 346 S.C. 14, 18, 550 S.E.2d 577, 579 (Ct. App. 2001). However, this court held in Mali v. Odom that expert testimony is not required where the defendant admits the standard of care that was owed to the plaintiff. 295 S.C. 78, 81, 367 S.E.2d 166, 168 (Ct. App. 1988). The same result is warranted in the present case.

In Mali, the plaintiffs brought a legal malpractice action against their attorney alleging negligent misrepresentation at a real estate closing. Id. at 79, 367 S.E.2d at 168. The court found the plaintiffs were not required to establish by expert testimony the applicable standard of care because the defendant attorney conceded in written responses to the plaintiffs' interrogatories that he had a duty to disclose restrictions on the subject property and explain the legal impact of those restrictions to his clients. Id. at 81, 367 S.E.2d at 168.

In the present case, Hall admitted in his Memorandum in Support of Summary Judgment filed with the circuit court that, during the nine-month time period of the disclaimer right, Alice Sims, Jr.'s "counsel of record" had a duty to advise her regarding the option to execute a disclaimer. In his motion for summary judgment and supporting memorandum, however, the lynchpin of Hall's argument was that he was not the "counsel of record" during the nine-month disclaimer

period.[4] Therefore, in addressing the duty to advise Sims of her right to disclaim, Hall states in the memorandum:

> As Defendant was not Plaintiff's attorney at the time of the transfer, nor had any knowledge or dealings with either Estate, the Defendant could not have advised Plaintiff regarding her option to file a Disclaimer. It follows then that the Defendant owed no duty to Plaintiff to advise her regarding her option to file a Disclaimer. That duty lay with her then counsel of record.

At trial, Hall abandoned the argument that he was not Sims' attorney after his motion for summary judgment was denied. He now concedes that he was Sims' attorney during the disclaimer period.

Hall argues that his statement in his summary judgment memorandum does not constitute an admission of the standard of care because he made the statement while arguing that someone else was Sims' counsel of record during the disclaimer period. We disagree.

The admission of the standard of care need not be an admission of wrongdoing by the defendant. To the contrary, the purpose of establishing the appropriate standard of care is simply to arm the finder of fact with the appropriate criteria by which to judge the defendant's conduct. Cianbro Corp. v. Jeffcoat & Martin, 804 F. Supp. 784, 791 (D.S.C. 1992). In Mali, the defendant admitted his duty to disclose the restrictions on the subject property, but he did not admit he breached that duty. See also Stallings v. Ratliff, 292 S.C. 349, 356 S.E.2d 414 (Ct. App. 1987) (finding testimony of defendant physician's own expert and defendant himself established the applicable standard of care, even though defendant denied he breached that standard). Thus, Hall's argument that his statement in his summary judgment memorandum does not constitute an admission establishing the standard of care

[4] See supra fn. 2 (explaining Hall's earlier motion for summary judgment and the trial court's disposition).

because it was not made in connection with an admission of wrongdoing is in error.

We hold Hall established the appropriate standard of care by his own admission and expert testimony was not required in this case.

Despite his admission, Hall contends he did not breach his duty to advise Alice Sims, Jr., of her rights to execute a disclaimer because he did not have knowledge of the size of Alice Sims, Sr.'s estate during the time he was the attorney for the estate. Because he did not know the amount of the estate, Hall claims he had no way to determine if there would be possible tax consequences.

This argument is meritless. Hall acknowledged that he was familiar with the concept of disclaimer. Moreover, he has admitted that he had a duty to inform Sims of the right of disclaimer. As an attorney familiar with the concept, Hall's duty to advise his client whether disclaimer would be to her advantage cannot be abrogated by mere ignorance of his client's affairs. Hall's duty to inform Sims of the right of disclaimer compelled him to ascertain if executing a disclaimer was in his client's interest or, at a minimum, advise her of the existence or significance of a disclaimer.

B. Proximate Cause

Hall next asserts that he did not proximately cause Alice Sims, Sr.'s estate to be subject to additional tax liability because Alice Sims, Sr. (1) took possession and, therefore, "accepted" Georgia Sims' property, and (2) "directed" its disposition to Alice Sims, Jr.—actions Hall claims contravene the right of disclaimer under section 2518. We address these claims seriatim.

Proximate cause requires proof of causation in fact and legal cause. Oliver v. South Carolina Dep't of Highways & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992); Hurd v. Williamsburg County, 353 S.C. 596, 611, 579 S.E.2d 136, 144 (Ct. App. 2003); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 135, 558

S.E.2d 271, 276 (Ct. App. 2001). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Oliver, 309 S.C. at 316, 422 S.E.2d at 130; Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1997); Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996). Legal cause is proved by establishing foreseeability. Bray v. Marathon Corp., Op. No. 25733 (S.C. Sup.Ct. filed October 13, 2003) (Shearouse Adv. Sh. No. 37 at 36). For an act to be a proximate cause of the injury, the injury must be a foreseeable consequence of the act. Young v. Tide Craft, Inc., 270 S.C. 453, 475, 242 S.E.2d 671, 681 (1978); Small, 329 S.C. at 463, 494 S.E.2d at 842-43. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the particular event which occurred. Whitlaw v. Kroger Co., 306 S.C. 51, 54, 410 S.E.2d 251, 253 (1991); Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 74, 393 S.E.2d 914, 916 (1990).

The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 245, 391 S.E.2d 546, 548 (1990); Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966). Proximate cause does not mean the sole cause. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998); Hurd, 353 S.C. at 613, 579 S.E.2d at 145. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977); Small, 329 S.C. at 464, 494 S.E.2d at 843.

1. Alice Sims, Sr., did not "accept" Georgia Sims' estate.

Under section 2518, a person may validly execute a disclaimer only if "such person has not accepted the interest or any of its benefits." Hall claims Alice Sims, Sr., took constructive possession of Georgia Sims' property and thereby "accepted" it. We disagree.

Initially, we note this issue is not preserved for appellate review. Though Hall pled this defense in his answer to plaintiff's complaint, the trial court did not rule upon the question of whether Alice Sims, Sr., accepted Georgia Sims' property, and Hall did not raise the issue in his post-trial Motion to Modify or Amend Judgment and Motion for a New Trial. Post-trial motions to amend or modify judgment are necessary to preserve issues that have been raised to the trial court but not ruled upon. Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001); see also Creech v. South Carolina Marine Wildlife Res. Dep't, 328 S.C. 24, 34, 491 S.E.2d 571, 576 (1997) (holding that appellate court cannot address an issue unless the issue was raised to and ruled upon by the trial court). Accordingly, the issue is not properly before this court. Even if we were to reach the merits of Hall's argument, however, we would still affirm the trial court's judgment.

We find no evidence in the record before us sufficient to warrant finding Alice Sims, Sr., accepted Georgia Sims' property. In defining the parameters of "acceptance" under section 2518, the applicable treasury regulation provides:

> A qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in property; accepting dividends, interest, or rents from the property; and directing others to act with respect to the property or interest in property. However, merely taking delivery of an instrument of title, without more, does not constitute acceptance.

26 C.F.R. § 25.2518-2(d)(1) (2003). When determining whether a disclaimant has accepted the property, we do not look to a single act or declaration, but rather the court must examine the disclaimant's conduct in toto. See 80 Am. Jur. 2d Wills § 1364 (2002) (noting

"acceptance of a devise or bequest need not be express but may be shown by the acts or conduct of the beneficiary" and "acceptance . . . occurs if the party with the expectancy interest exercises dominion and control over the property in the capacity of a beneficiary"). A beneficiary of property in an estate will not be deemed to have accepted the property as long she "leaves the disputed property in the possession of the estate and does not unreasonably disrupt the orderly and timely distribution of the estate assets." In re Estate of Watkins, 572 So. 2d 1014, 1015 (Fla. App. 1991); see also Jordan v. Trower, 208 Ga. App. 552, 553, 431 S.E.2d 160, 162 (1993) (finding that a will beneficiary's acceptance of approximately $460 from an estate prior to filing of a will for probate, for beneficiary's use in purchasing clothing for funeral and other expenses, did not constitute type of acceptance or possession of property of estate that would preclude her from timely renouncing her interest; beneficiary did not obtain, nor even seek, possession of property of estate as a whole and undertook no actions that would indicate an intention to assert an ownership interest in the property of the estate); Niklason v. Ramsey, 233 Va. 161, 164, 353 S.E.2d 783, 784 (1987) (holding that a beneficiary's contract to divide his mother's estate prior to execution of disclaimer operated as dominion and control over the estate, thereby precluding disclaimer).

In this case, Hall points to his testimony that Alice Sims, Sr., had "taken possession" of Georgia Sims' house after her death because she "had the house cleaned up" and she "sold the furniture out of the house." Without more, this conduct does not evidence such dominion and control as to have precluded Alice Sims, Sr., or the personal representative of her estate from making a valid disclaimer.

Important to this determination is the fact that both Alice Sims, Sr., prior to her death, and Alice Sims, Jr., served as personal representatives of Georgia Sims' estate, qualifying them as fiduciaries of the estate. See S.C. Code Ann. § 62-3-703(a) (1987). As fiduciaries, the Treasury Regulation defining acceptance under section 2518 provides that their actions "to preserve or maintain the disclaimed property shall not be treated as an acceptance of such property or any of its benefits. Under this rule, for example, an executor who is also a

beneficiary may direct the harvesting of a crop or the general maintenance of a home." 26 C.F.R. § 25.2518-2(d)(2) (emphasis added). Alice Sims, Sr., therefore, did not prejudice her right to execute a qualified disclaimer by acting to preserve her late daughter's estate.

2. Alice Sims, Sr., did not direct the disposition of Georgia Sims' estate.

Under 26 U.S.C.A. § 2518(b)(4), a disclaimer is valid only if the interest being refused "passes without any direction on the part of the person making the disclaimer." Hall claims that prior to her death, Alice Sims, Sr. "planned and directed" Georgia Sims' estate go directly to Alice Sims, Jr., thereby precluding her from effecting a valid disclaimer. We disagree.

As a threshold matter, this question is not preserved for appellate review because the trial court did not rule upon this issue and Hall did not raise the issue in his post-trial Motion to Modify or Amend Order. For the same reasons cited regarding preservation of the prior issue, this question is not properly before this court. Again, however, even if we reach the merits, we would affirm the trial court's judgment.

The applicable Treasury Regulation has interpreted the requirement that the interest pass without direction by the disclaimant as meaning: "If there is an express or implied agreement that the disclaimed interest in property is to be given or bequeathed to a person specified by the disclaimant, the disclaimant shall be treated as directing the transfer of the property interest." 26 C.F.R. § 25.2518-2(e)(1).

As evidence that Alice Sims, Sr., had such an agreement prior to disclaimer to dispose of Georgia Sims' estate, Hall cites the trial testimony of Alice Sims, Jr.:

> [W]e [Alice Sims, Sr., and Alice Sims, Jr.] both felt that Georgia's estate should come directly to me. At the time I

> had been told by Mr. Hall that I was co-heir with my . . . mother. And I said, well, then I want, we want mama's portion, mama's half to come directly to me.

This statement does not evidence an agreement between Alice Sims Jr., and her mother to "direct" the transfer of Georgia Sims' property as contemplated under section 2518. To the contrary, this testimony reveals nothing more than Alice Sims, Jr., and Alice Sims, Sr., simply inquiring with their attorney about the possibility of disclaimer. Hall asks this court to find that Alice Sims, Sr.—by saying that she wanted to disclaim her interest—is barred from making such a disclaimer because she directed the transfer of the property. This argument strains credulity. If this procedure was followed, lawyers advising clients on matters of estate administration would be unable to engage their clients in meaningful conversations about their wishes for the distribution of property for fear of foregoing disclaimer and other similar options. We decline to adopt this approach.

CONCLUSION

The trial court did not err in ruling Respondent had established the proper standard of care in this case and Hall breached that duty, proximately resulting in substantial, additional taxable assets accruing to Alice Sims, Sr.'s estate. Concomitantly, the judgment of the Master is

AFFIRMED.

BEATTY, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of Greenville County, and on behalf of all others similarly situated, Appellant/Respondent,

v.

Greenville County, a Political Subdivision of the State of South Carolina, Dozier Brooks, Scott Case, C. Wade Cleveland, Bob Cook, Joseph Dill, Lottie Gibson, Allen "Bunk" Johnson, Mark C. Kingsbury, Xanthene Norris, Stephen Selby, and Dana Sullivan, Paul B. Wickensimer in their official capacity as Greenville County Council Members, Respondents/Appellants.

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

Opinion No. 3704
Heard November 5, 2003 – Filed December 8, 2003

AFFIRMED

Jennifer J. Miller and James G. Carpenter, of Greenville, for Appellant-Respondent.

Boyd B. Nicholson, Jr. and Thomas H. Coker, Jr., of Greenville, for Respondents-Appellants.

ANDERSON, J.: Edward D. Sloan, Jr., individually, and as a citizen, resident, taxpayer and registered elector of Greenville County, and on behalf of all others similarly situated, brought this action against Greenville County alleging it failed to comply with county ordinances governing the procurement of construction services when it awarded contracts for the completion of three public works projects. The trial court ruled the procurement processes met the statutory standard with respect to two of these projects, while the third project did not. Both Sloan and the County appeal. We affirm.

FACTS/PROCEDURAL BACKGROUND

The Greenville County Code ("G.C.C." or "the Code") prescribes the methods the County may use to award contracts for construction services. As a general rule, the code requires that all contracts must be awarded by the "competitive sealed bidding" method. G.C.C. § 7-212. This method of source selection proceeds in multiple stages. The County must first hire an architect or other design professional to prepare the initial plans and specifications for the new construction project. After the County has approved these initial plans, the design professional will typically draft a detailed set of construction drawings and specifications that will become part of a "bid package." The County will then use the bid package to publicly solicit bids from contractors to perform the work. The lowest responsible, responsive bidder is awarded the project.

Under the Code, the County must use the competitive sealed bidding method to procure construction services over $15,000 unless one of several specific exceptions applies. See G.C.C. §§ 7-212 – 7-242.5. One of these

exceptions—the focal point of this case—is known as the "design-build" procurement method.[1] See § 7-242.5.

The design-build method differs from traditional competitive sealed bidding in two important ways. First, under the design-build method, the County enters into a single contract for design and construction of the project. This arrangement condenses the two-step process of competitive sealed bidding in which the County procures design services and then contracts separately for the actual construction. Design-build's single source procurement also enables design and construction to proceed concurrently, thereby shortening project duration. Once a design "footprint" for a structure has been prepared, a contractor may begin work such as grading and excavating a site, while a designer continues to design the structure.

Second, the design-build method allows comparative subjective evaluations to be made when determining acceptable proposals for negotiation and award of the contract. Price need not be the sole or primary criterion for evaluating competing proposals—it may be only one of several factors considered. The County may select the design-build team based on other factors such as experience, project team members, and expertise.

It is design-build's lack of objective, bright-line criteria that raises concerns about its use. Critics espouse that design-build vests too much discretion with the governing body regarding when and to whom public contracts are awarded. Because price is not a controlling factor in design-build source selection, the public entity may not always receive the lowest, most competitive price possible. See e.g., Sloan v. Sch. Dist. of Greenville County, 342 S.C. 515, 521, 537 S.E.2d 299, 302 (Ct. App. 2000) (opining that "[t]his court has long maintained that '[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the

[1] Professionals in the field of public procurement variously refer to this method of source selection as "design-build," "competitive sealed proposal," or "request for proposal." Though these terms are generally interchangeable, for ease of reference, we will refer exclusively to "design-build" when discussing this alternative to traditional competitive sealed bidding procurement.

award of contracts, to secure the best product at the lowest price'"). Without proper guidelines and oversight, design-build may foster the impression that the government is somehow less accountable for its decisions as to how it spends taxpayer money.

For these reasons, the use of design-build is limited under the Code to those situations in which it is properly justified. Greenville County's design-build ordinance sets out when it may be used:

> The county administrator or his designee shall have the discretion to use construction management services, design-build services, or turnkey management services as alternatives for construction contracting administration. In exercising such discretion, the county administrator or his designee shall consider the method which is the most advantageous to the county and will result in the most timely, economical, and successful completion of the construction project. The determination for the method of source selection utilized shall be stated in writing and included as part of the contract file.

G.C.C. § 7-242.5(a). The County's discretion to use design-build instead of competitive sealed bidding source selection is therefore limited to those occasions when it is in the best interests of the County—a determination that must be in writing and available for public consumption in the contract file.

At issue before us is whether Greenville County properly justified its decision to use the design-build method to award three multi-million dollar construction contracts. Specifically, we must decide whether the written determinations were sufficient under section 7-242.5 of the Code.

The Construction Projects

The contracts for the three construction projects were awarded in 1999 and 2000. Construction services for all three were obtained using the design-build method.

Two of these contracts were for road-building projects that were part of a special infrastructure improvement program called the "Prescription for Progress" plan. This plan, approved by Greenville County Council in 1997, called for the expenditure of eighteen million dollars for the repair and resurfacing of approximately 148 lane miles on more than 400 county roads through the year 2010. The two projects at issue are Prescription for Progress road improvement programs for years 2000 and 2001 (hereinafter referred to as the "Roads 2000" and "Roads 2001" projects). For the Roads 2000 project, the County procured $6,759,100 of road construction services. In the Roads 2001 project, the County obtained $12 million in road construction services.

The third construction contract was for the renovation of the criminal forensics lab at the County's law enforcement center in 1999. The County procured $290,000 in construction services to complete this project.

This Action

After each of these contracts was awarded, Sloan brought suit seeking declaratory and injunctive relief, contending the procurements violated the Code. The primary issue—common to all three cases—was the validity of the County's determination to use design-build source selection rather than competitive sealed bidding in awarding the contracts. As additional causes of action, Sloan asserted the County did not obtain sufficient performance and payment bonds for the Roads 2000 project, and he claimed the Forensics Lab contract did not properly define the responsibilities and rights of the parties, both in violation of the Greenville County Code. In answering Sloan's charges, the County asserted the cases were not justiciable because Sloan did not have standing to challenge the County's actions and the questions presented were moot, preventing the court from awarding any effective relief.

The trial court consolidated the three cases for trial. The court decided these actions were properly justiciable—ruling that Sloan had standing to bring suit and the case was not subject to dismissal for mootness. With respect to the validity of the written determinations to use design-build source selection, the court deemed the determinations for the Roads 2000 and Roads 2001 projects were sufficient under the Code. It pronounced, however, the written

determination for the Forensics Lab project did not satisfy the Code's requirements. As to the other claims asserted: The court adjudged the County had failed to obtain sufficient bonds for the Roads 2000 project. It found the Forensics Lab contract sufficiently defined the rights and duties of the parties.

STANDARD OF REVIEW

The County contends this court should apply an "any evidence" standard of review rather than a "preponderance of the evidence" standard. We disagree.

In actions at law, on appeal of a case tried without a jury, the lower court must be affirmed where there is any evidence which reasonably supports the judge's findings. Strickland v. Prudential Ins. Co. of Am., 278 S.C. 82, 85, 292 S.E.2d 301, 303 (1982); Townes Assocs., LTD. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 280, 580 S.E.2d 163, 165 (Ct. App. 2003). In an action in equity, however, the appellate court may "find facts in accordance with its views of the preponderance of the evidence." Townes Assocs., 266 S.C. at 86, 221 S.E.2d at 775; Kiriakides v. Atlas Food Sys. & Serv., 338 S.C. 572, 581, 527 S.E.2d 371, 376 (Ct. App. 2000).

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001); Felts v. Richland County, 303 S.C. 354, 355, 400 S.E.2d 781, 781 (1991); Travelers Indem. Co. v. Auto World of Orangeburg, 334 S.C. 137, 140, 511 S.E.2d 692, 694 (Ct. App. 1999). The fact that Sloan seeks equitable relief does not, however, require the case be treated as an equitable action in toto. Rather, we must look to the "main purpose" of the suit to determine its characterization. William v. Wilson, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002); Ins. Fin. Servs., Inc. v. South Carolina Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978); see also Floyd v. Floyd, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991) ("As we interpret the 'main purpose' rule, its primary function is to administratively categorize an action in which parties seek both equitable relief and legal redress."); Alford v. Martin, 176 S.C. 207, 212, 180 S.E. 13, 15 (1935) ("The character of an action is determined by the complaint in its main

purpose and broad outlines and not merely by allegations that are merely incidental."). The main purpose of the action is generally discerned from the body of the complaint. Ins. Fin. Servs., at 293, 247 S.E.2d at 318; see also Nat'l Bank of South Carolina v. Daniels, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984) (noting that whether an action is legal or equitable "must be determined from the character of the action as framed in the complaint"). "However, if necessary, resort may be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." Id.; see also Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001) (finding the main purpose of an action was equitable in nature where both injunctive relief and money damages were sought, but plaintiff offered no proof of damages at trial and no damages were awarded by the court); Bramlett v. Young, 229 S.C. 519, 534-35, 93 S.E.2d 873, 881 (1956) (examining the substance of the pleadings throughout the case and the evidence introduced at trial in its determination whether the action sounded in law or equity).

Although the County asserts the main purpose of this action is to construe a written contract, it seems clear that Sloan's main concern is to enjoin the County from awarding contracts in a manner he claims is ultra vires under the County's procurement code. Sloan brought this action as a citizen and taxpayer of Greenville County, not as a private individual seeking redress under the terms of a particular contract. In his complaint, Sloan only requested a declaration that the contracts were illegal and should be set aside. At trial, the testimony introduced concerned only the sufficiency of the County's determination that design-build was the proper method of source selection for the construction projects. Sloan did not pray for damages in his pleadings, and the court awarded none. Indeed, by the time the case reached trial, the projects at issue had already been completed. The gravamen of the action, therefore, is merely to prevent the County from awarding future public works contracts in the manner employed in the present case.

A case with legal and equitable issues presents a divided scope of review. Perry v. Heirs at Law & Distributees of Gadsden, 313 S.C. 296, 437 S.E.2d 174 (Ct. App. 1993), aff'd as modified, 316 S.C. 224, 449 S.E.2d 250 (1994). When legal and equitable actions are maintained in one suit, each retains its own

identity as legal or equitable for purposes of the applicable standard of review on appeal. Corley v. Ott, 326 S.C. 89, 485 S.E.2d 97 (1997); Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000), cert. granted July 3, 2001. A legal question in an equity case receives review as in law. Gunter v. Fallaw, 78 S.C. 457, 59 S.E. 70 (1907); Garvin v. Garvin, 55 S.C. 360, 33 S.E. 458 (1899). Even if a case is tried in equity if it is actually a law case, the appellate court will apply the scope of review in law cases. Brooks v. Cent. Baptist Church, 185 S.C. 200, 193 S.E. 326 (1937).

This action is appropriately characterized as equitable and should be reviewed under the "preponderance of the evidence" standard. Our broad scope of review, however, does not require this court to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. See Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001); Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000); Greer v. Spartanburg Technical Coll., 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999).

LAW/ANALYSIS

I. JUSTICIABILITY OF SLOAN'S CLAIMS

We first examine whether Sloan's causes of action were properly justiciable. The County challenges Sloan's standing to bring suit and asserts the issues raised present no actual controversy and are therefore moot. We address each seriatim.

Before any action can be maintained, a justiciable controversy must be present. Byrd v. Irmo High School, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character. Waters v. South Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996); S. Bank & Trust Co. v. Harrison Sales Co., Inc., 285 S.C. 50, 51, 328 S.E.2d 66, 67 (1985); Charleston County Sch. Dist. v. Thomas, 277 S.C. 145, 146, 283 S.E.2d 441, 442 (1981); see also Graham v. State Farm Mut. Auto Ins. Co., 319

S.C. 69, 71, 459 S.E.2d 844, 845 (1995) ("A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party."). The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002).

A. Standing

The County argues the trial court erred in holding Sloan had standing to challenge the County's award of the contracts. We disagree.

A plaintiff must have standing to institute an action. Joytime Distribs. & Amusement Co., Inc. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). "To have standing, one must have a personal stake in the subject matter of the lawsuit." Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. South Carolina Dep't of Natural Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001); Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000); Newman v. Richland County Historic Pres. Comm'n, 325 S.C. 79, ___, 480 S.E.2d 72, 74 (1997). "To have standing . . . one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) (quoting Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)); see also Henry v. Horry County, 334 S.C. 461, 463 n.1, 514 S.E.2d 122, 123 n.1 (1999) ("To have standing, one must be a real party in interest."); Baird v. Charleston County, 333 S.C. 519, 530, 229 S.E.2d 718, 718 (1999). Our supreme court has consistently held:

> A private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained.

Joytime Distribs., 338 S.C. at 639, 528 S.E.2d at 649-50; see also Evins, 341 S.C. at 21, 532 S.E.2d at 879; Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992); Blandon v. Coleman, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (1985); Florence Morning News v. Bldg. Comm'n, 265 S.C. 389, 398, 218 S.E.2d 881, 884-85 (1975); Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 486, 523 S.E.2d 795, 800 (Ct. App. 1999). "Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public." Joytime Distribs., 338 S.C. at 639-40, 528 S.E.2d at 650; see also Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000); Baird, 333 S.C. at 530, 511 S.E.2d at 75.

"[T]he rule [of standing] is not an inflexible one." Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). Standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." Baird, 333 S.C. at 531, 511 S.E.2d at 75; Carolina Alliance, 337 S.C. at 488, 523 S.E.2d at 801; see also Charleston County Parents for Pub. Sch., Inc. v. Moseley, 343 S.C. 509, 513, 541 S.E.2d 533, 535 (2001) (noting that an action to determine whether a school district could impose a tax levy was an issue of public importance sufficient to confer standing); Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976) (holding the plaintiffs had standing because the questions involved were of such wide concern, both to law enforcement personnel and to the public); Berry v. Zahler, 220 S.C. 86, 89, 66 S.E.2d 459, 461 (1951) (holding the question of public interest originally encompassed in an action should be decided for future guidance).

> The general rule is that a taxpayer may not maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer. This doctrine is founded upon the salutary public policy of limiting the judicial process to real controversies between the parties to the proceeding. The mere fact that the issue is one of

> public importance does not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue.

Crews v. Beattie, 197 S.C. 32, 49, 14 S.E.2d 351, 357-58 (1941). For a plaintiff to have taxpayer standing, the party must "demonstrate some overriding public purpose or concern to confer standing to sue on behalf of her fellow taxpayers." Beaufort County v. Trask, 349 S.C. 522, 529, 563 S.E.2d 660, 664 (Ct. App. 2002).

A party seeking to establish standing must prove the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. Sea Pines Ass'n, 345 S.C. at 601, 550 S.E.2d at 291 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); see also Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001) ("The United States Supreme Court has established the following requirements to show standing: (1) the plaintiff must suffer an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

The present case is analogous to this court's decision in Sloan v. School District of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), in which the court examined taxpayer standing on largely similar facts. In Sloan, the plaintiff brought an action against the school district seeking a declaratory judgment that the district violated its procurement regulations by entering into construction contracts without following the prescribed competitive sealed bidding procedure. Id. at 517-18, 537 S.E.2d at 300. The contracts at issue had been awarded under an exception which allowed the district to award contracts without competitive sealed bidding when there was an emergency need for the procurement of construction and other services. Id. at 517, 537 S.E.2d at 300. The plaintiff challenged the district's determination that the procurement without competitive sealed bidding was justified under this exception. Id. at

518, 537 S.E.2d at 300. As in the case sub judice, the plaintiff had no private interest in the contracts and had not submitted a bid for the construction work. Id.

The court first held the plaintiff had standing to sue as an individual taxpayer, finding the plaintiff, as a taxpaying citizen of Greenville County, had "a direct interest in the proper use and allocation of tax receipts by the District." Id. at 522, 537 S.E.2d at 303. The court grounded its reasoning on the rationale articulated by our supreme court in Mauldin v. City Council of Greenville, 33 S.C. 1, 11 S.E. 434 (1890), a case challenging the government's expenditure of public funds. There, the court held:

> The injury charged as the result of the acts complained of is a private injury, in which the tax-payers of the county . . . are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county, except the tax-payers, bear any part of it. It is therefore an injury peculiar to one class of persons, namely the tax-payers of the county.

Id. at 20, 11 S.E. at 436 (quoted in Sloan, 342 S.C. at 519, 537 S.E.2d at 301).

The court decreed the plaintiff had standing because the question presented was of such substantial public importance as to warrant a resolution for future guidance. Sloan, 342 S.C. at 522-24, 537 S.E.2d at 303-304. The court noted, "the public interest involved is the prevention of the unlawful expenditure of money raised by taxation." Id. at 523, 537 S.E.2d at 303. With specific regard to procurement of services for public works projects, the court opined:

> The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to maintain the public's trust and confidence in governmental management of public funds. The integrity of the

> competitive sealed bidding process is so important that in some states "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed . . . without showing that the municipality suffered any alleged injury."

Id. at 524, 537 S.E.2d at 303 (alteration in original) (quoting 18 Eugene McQuillin, The Law of Municipal Corporations § 52.26 (3d ed. 1993)).

We find the court's reasoning in Sloan compels the same result in the case at bar. Here, Sloan's interest as a taxpayer in how public funds were spent is virtually identical. The projects were large and altogether required the expenditure of millions of taxpayer dollars. This burden was borne exclusively by the taxpaying citizens of Greenville County. Sloan, therefore, had a real, material, and substantial interest in whether the County followed the procurement procedures set out in the county code—procedures specifically designed to ensure wise management of the public fisc.

The issue in the present case is also of sufficient public importance to confer standing. Because the fundamental issue is the same as in the School District case—whether a competitive bidding procurement scheme was properly followed—the reasons underlying the court's finding of public importance apply with equal force in the instant case. Resolution of this issue will likely have an impact on government practices beyond the confines of the case itself. Greenville County and other public entities must be accountable under the laws and regulations which govern how they spend public money. Allowing interested citizens a right of action in our judicial system when issues are of significant public importance ensures this accountability and the concomitant integrity of government action.

For these reasons, we find the trial court correctly ruled Sloan had standing to pursue this declaratory judgment action.

B. Mootness

The County argues this case is not justiciable because the issues presented are moot. We disagree.

In general, this court may only consider cases where a justiciable controversy exists. See Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). "Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Byrd, 321 S.C. at 431, 468 S.E.2d at 864 (citing Jones v. Dillon-Marion Human Res. Dev. Comm'n, 277 S.C. 533, 291 S.E.2d 195 (1982)); see also Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 180, 519 S.E.2d 567, 570-71 (1999) (quoting Byrd). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Curtis, 345 S.C. at 567, 549 S.E.2d at 596 (quoting Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). "The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review." Wallace v. City of York, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981).

> In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a

> decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Curtis, 345 S.C. at 568, 549 S.E.2d at 596 (citations omitted).

Despite an issue's mootness, "an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis v. State, 345 S.C. at 568, 549 S.E.2d at 596. The seminal case in our state defining this exception to the mootness doctrine is Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947). In Ashmore, the plaintiff sought to enjoin a government body from issuing bonds to fund the construction and maintenance of a new auditorium. Id. at 85, 44 S.E.2d at 91. The trial court denied the request for injunction. Id. An election was held in which the voters approved the sale of bonds, thereby rendering the issue moot. Id. The court nevertheless decided the case was justiciable because the issues raised were of substantial public importance, opining:

> If this were an ordinary case, our opinion might well stop here. . . . But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are earnestly argued public questions of importance. The last stated factor brings into play the principle, now generally established, that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest.

Id. at 96, 44 S.E.2d at 96-97; see also Berry v. Zahler, 220 S.C. 86, 89, 66 S.E.2d 459, 461 (1951) (reaffirming the "exception to the rule of rejection without decision of academic questions" articulated in Ashmore); People ex rel. Wallace v. Labrenz, 411 Ill. 618, 622, 104 N.E.2d 769, 772 (1952) ("Among the criteria considered in determining the existence of the requisite degree of public

interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question."); 20 Am. Jur. 2d Courts § 47 (2003) ("[C]ourts may decide moot issues or cases where such a decision would be in the public interest").

In our discussion of Sloan's standing to bring this action, this court has already found in an analogous case that the "expenditure of public funds pursuant to a competitive bidding statute is of immense public importance." Sloan, 342 S.C. at 524, 537 S.E.2d at 303. The same rationale applies with respect to mootness. There is a keen public interest in the stewardship of public funds and a strong need to provide guidance for future procurement decisions. Our inability to provide any effective relief in this case should not be a barrier to the court's consideration of this question of exceptional public interest.

This court may take jurisdiction of a case, "despite mootness, if the issue raised is capable of repetition, but evading review." Curtis, 345 S.C. at 568, 549 S.E.2d at 59; see also Byrd, 321 S.C. at 431-32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review); Treasured Arts, Inc. v. Watson, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995) (Under the mootness doctrine of capable of repetition yet evading review, a case is not rendered moot when a challenged action was in its duration too short to be fully litigated prior to its completion and there was a reasonable expectation that the same complaining party would be subjected to the same action again.); South Carolina Dep't of Mental Health v. State, 301 S.C. 75, 76, 390 S.E.2d 185, 185 (1990) ([A]lthough the issue presented was moot, "appeal was allowed because it raises a question that is capable of repetition, but which usually becomes moot before it can be reviewed"); Evans v. South Carolina Dep't of Soc. Servs., 303 S.C. 108, 110, 399 S.E.2d 156, 157 (1990) (addressing a moot question because the controversy presents a "recurring dilemma" which needed clarification for future guidance); 1 Am. Jur. 2d Actions § 50 (2003) (noting the general rule that "courts will not decide moot questions is subject to an exception where the question, though moot, is . . . likely to recur and evade judicial resolution in the future"). The party bringing the action need only show the issue raised is capable of repetition and is not required to prove there is a

"reasonable expectation" the issue will arise again. Byrd, 321 S.C. at 431-32, 463 S.E.2d at 864 (finding South Carolina has adopted the "lenient" approach to evading review analysis).

We find the present case presents an issue that is likely to recur but evade review. By design, the procurement code's exception allowing use of design-build source selection accelerates the process of awarding public works contracts and the ultimate completion of the projects themselves. Sloan initiated the actions in the present case within one week after the contracts were executed or the County's written determination was filed. Nevertheless, construction on all three projects was complete prior to the beginning of trial in this case. Because the fundamental inquiry in this case concerns the validity of using an expedited procurement process, it is improbable similar challenges can navigate the litigation process before the question becomes a purely academic one.

For these reasons, we find a justiciable controversy exists in the present case despite the mootness of the questions presented.

II. SUFFICIENCY OF THE WRITTEN DETERMINATIONS

Having found Sloan's claims to be properly reviewable by this court, we review whether the written determinations published by the County are sufficient under the Greenville County Code. The County's decision to use design-build source selection rather than the traditional competitive sealed bidding method is discretionary. G.C.C. § 7-242.5(a). The Code provides little guidance, however, as to what the County should consider when making its decision—couching its directives in the most general terms: "In exercising such discretion, the county administrator or his designee shall consider the method which is the most advantageous to the county and will result in the most timely, economical, and successful completion of the construction project." Id.

In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions "should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power." Smith v. Georgetown County Council, 292 S.C. 235, 238-39, 355

S.E.2d 864, 866 (Ct. App. 1987) (citing Bob Jones Univ. v. City of Greenville, 243 S.C. 351, 133 S.E.2d 843 (1963)); see also 62 C.J.S. Municipal Corporations § 196(b) (1999) (commenting that "discretionary action on the part of a municipality is subject to judicial review where the action is manifestly arbitrary or discretion is clearly abused").

Our review must be guided by the express legislative intent underlying Greenville County's procurement code:

> It is the intent of the county council that the primary concern of county government be the effective provision of services to the citizens of the county in the most efficient and economical way possible, and that all purchases of goods and services needed to provide these services be conducted with primary concern for the efficient and economical use of revenues provided by those citizens.

G.C.C. § 7-192. Included among the "underlying purposes and policies" of the procurement ordinances, is the direction to "promote increased public confidence in the procurement regulations, procedures, and practices used by this county," "maximize the purchasing value of public funds," and "provide safeguards for maintaining a procurement system of quality and integrity." § 7-192(b)(2), (3) & (6).

In light of the Code's express mandate and guiding policy, it is apparent the written determination required under section 7-242.5 must serve a dual function: The determination must first effectively inform county council of the reasons why design-build source selection works to the County's best advantage for the project at issue. Equally important, the determination must provide the citizens of Greenville County a window into the County's decision-making process—safeguarding the quality and integrity of the contract awards through public accountability. If the written determination provides sufficient factual grounds and reasoning for the County Council and the public to make an informed, objective review of these decisions, then it has accomplished its purpose.

Bearing these twin aims in mind, we examine each of the written determinations for the Roads 2000, Roads 2001, and Forensics Lab projects.

A. Roads 2000 Determination

The written determination to use design-build source selection for the Roads 2000 project was prepared by Gerald Seals, the Greenville County Administrator from 1993 to 2000. Seal's determination addresses the County Council's time, budget, and quality requirements and sets forth the project-specific reasons why design-build rather than traditional competitive sealed bidding procurement serves to better meet the County's goals.

The determination first addressed the Roads 2000 project's particular time and budget requirements. Seals described how the special, expedited road paving needs outlined by the Prescription for Progress plan significantly exceeded the County's timeline and budget capacity for road improvements. He also noted that, less than four months before the date of this determination, the County Council reaffirmed its commitment to the Prescription for Progress program and "its goal and commitment to improve County roads by 2010."

Given these requirements, Seals concluded the design-build method of source selection would best address the County Council's mandate under the Prescription for Progress program that extensive road improvements be completed rapidly while not affecting any other County services. Seals cited his particular experience using the design-build method in past projects: "These projects were fast-tracked and let using the [design-build] procurement method to satisfy tight time schedules, quality and budget requirements." Seals then offered several reasons why traditional low-bid, competitive sealed bidding procurement would hinder the County's ability to achieve its project objectives. He noted:

> Low bid is a slower process that [will] require[] the County [to] subdivide the varied aspects of the 1999-2000 Road Improvement Program into specific and disparate sections and individually solicit a low bid for each service component and each individual road. It should be noted that the 1999-2000 Road Improvement Program

> encompasses more than one-hundred (100) roads. Broad service components include: general engineering, specific individual engineering of each of the one-hundred roads included in the program, quality control, drainage inspection and engineering, inspections, and paving. Individualized low bid solicitation for each road and/or service components means that completing the 1999-2000 Road Improvement Program would likely take more than one (1) year, not the twelve (12) months mandated by County Council.

Additionally, Seals found that "[s]trict low bid procurement solicitation does not eliminate bid rigging or fraud" and can result in "low ball bidding" in which the vendor who submitted the lowest bid "knowingly or as a result of inexperience, increases the actual contract using change orders or refusing to proceed until the government corrects its program by increasing the contract." He stated: "The factors for analysis under low bid procurement [are] limited—specifically, the ability to analyze a vendor's history of change orders due to the submission of unrealistically low bids, or vendor's actual history of performance track record, is restricted" and that "[l]ow bid procurement will require excessive staff time and thus adversely affect other services, such as pothole and drainage repair."

We find this determination provided ample grounds to support the County Council's decision to approve use of the design-build method. It addressed the specific needs of the project and weighed the alternative methods for procuring construction services, providing the County Council and interested members of the public clear insight into the rationale underlying its decision to use design-build. Accordingly, the trial court properly ruled this determination was sufficient under section 7-242.5.

B. Roads 2001 Determination

The written determination for the Roads 2001 project was prepared by John Hansley, who was serving at the time as acting county administrator. Hansley sets forth a detailed basis for the decision to use design-build.

As with the Roads 2000 determination, this determination addressed the special challenges presented by the extensive, expedited roads improvement

program called for under the Prescription for Progress plan. Hansley affirmed: "The department is faced with budget limitations, increased workloads, three major construction projects and seven designs of projects, as well as a one-year timeframe for the program coupled with overlapping roadwork and special projects from the previous fiscal year."

To meet the goals of the road improvement program for 2001, Hansley made project-specific findings that additional staff would need to be hired to ensure proper engineering, quality control, and inspection for the various components of the project if the County used the traditional procurement methods. The determination contains specific projections of these additional costs which Hansley estimated would total over a million dollars.

Hansley discussed the County's past success using design-build source selection for large, complex and expedited construction projects. The determination provided specific details about past projects in the form of comprehensive empirical evidence showing six design-build construction contracts where the project was completed on time and on budget. Hansley concluded:

> Additionally, the County has utilized this process [design-build] since the inception of the Prescription for Progress Road Program in 1997. In my opinion, it can be firmly stated that the competitive proposal method has proven to be valuable to the County.
>
> . . . Thus, the public/private partnership will afford the County an opportunity to continue its commitment to providing optimal public services. At the same time, the aggressive road improvement program will continue to meet Council's expectations.

The determination addressed the project-specific needs of the County, the County's previous experience with design-build, and a comparison of the alternative methods. An ample factual basis therefore exists, supporting the conclusion that design-build source selection "should benefit the County by

allowing it to accomplish its goals and deadlines in a timely manner, while providing day-to-day services to citizens." The County Council and the public were well served by Hansley's written determination, and the trial court correctly ruled it satisfied the requirements of section 7-242.5.

C. Forensics Lab Determination

The written determination for the Forensics Lab project was prepared by Rick Brookey, the facilities project manager for Greenville County. The entire determination is limited to a single paragraph, and reads:

> Due to the nature of this project (no detailed defined scope of work), it is the opinion of Public Services that this project will best be served using the turn key/design build methodology. Also, due to the budget (already established & approved) and having both, contractor and architect as a team, this approach will give the project the best opportunity to get the most value for the needed renovation for our budget. Having a team consisting of a contractor, architect and user groups, will be the most feasible way to get a defined scope of work and succeed in accomplishing the user's needs within the budget and time frame for this project.

The County argues this determination is sufficient because it addressed the critical "issues related to time, money and quality." We disagree.

Brookey's written determination stands in stark contrast to the determinations prepared by Seals and Hansley for the Roads 2000 and 2001 projects. The Forensics Lab determination merely sets forth three conclusory statements that are unsupported by any factual grounds related to the renovation project. The determination does not discuss the disadvantages of using the traditional competitive sealed bidding method for this project, nor does it discuss the advantages of the design-build with any degree of specificity.

We conclude that the Forensics Lab determination fails to provide any reasoned basis for the decision to use design-build source selection. It does not provide sufficient detail to allow the County Council and the public to make an

intelligent review of the decision. The trial court was therefore correct in finding this determination inadequate under section 7-242.5.

III. ADMISSIBILITY OF EVIDENCE REGARDING THE WRITTEN DETERMINATIONS

Sloan argues the trial court erred by allowing the County to present evidence regarding the written determinations for the use of the design-build method of source selection. We disagree.

At trial, the court heard testimony from Gerald Seals and John Hansley, both of whom served as county administrators during the time the construction contracts were awarded and were responsible for preparing the written determinations required by section 7-236. The focus of their testimony moved from matters specific to the projects at issue in this case to areas of general background information, drawing on the sum of their experience working with government procurement. Seals and Hansley described the factors they considered in making the determinations that design-build should be used for the construction projects. Their testimony extended beyond the confines of the text of the written determinations they submitted to the County Council: Seals and Hansley also described their decision-making process—how they arrived at these determinations—at times walking the court through the steps they followed in deciding that design-build was the best fit for these projects. They discussed some of the problems encountered when using the competitive sealed bidding process in earlier projects and some of their past successes using the design-build method.

Sloan argues, by allowing testimony beyond a narrow inquiry related to the specific content of the written determinations, the trial court permitted the County to supplement and bolster those determinations. As proof that this evidence was improperly admitted and should not have been considered, Sloan points to portions of the trial court's order where the court apparently relies on this testimony in reaching its conclusion that the Roads projects were properly justified by the written determinations. Sloan cites several examples in the trial court's Roads 2001 and Roads 2000 orders: In the "Facts" section of the Roads 2001 order, the trial court specifically discussed Seals' and Hansley's testimony

regarding the County's "great success" in using the design-build method in earlier construction projects. The court stated that Hansley "conduct[ed] a thorough review of the project" in making his determination to use the design-build method. In the Roads 2000 order, the trial court reviewed in its "Facts" section Seals' testimony recounting his positive past experience using the design-build method.

In support of his argument that the testimony was improperly admitted, Sloan relies exclusively on two cases: Piedmont Natural Gas Co., Inc. v. Hamm, 301 S.C. 50, 389 S.E.2d 655 (1990) and Parker v. South Carolina Public Service Commission, 288 S.C. 304, 342 S.E.2d 403 (1986). We find this authority inapposite.

Both Piedmont Natural Gas and Parker stand for the rule that after a case has been remanded by an appellate court, a party cannot submit additional evidence unless the appellate court has given leave to do so. See Piedmont Natural Gas, 301 S.C. at 54, 389 S.E.2d at 657 (holding the supreme court's remand to the Public Service Commission to "substantiate the record" was a direction to the Commission merely to review the evidence which was already contained in the record, not to hold a new hearing for the admission of additional evidence); Parker, 288 S.C. at 307, 342 S.E.2d at 405 (finding the supreme court's remand of an issue to the Public Service Commission for "further consideration" did not permit the Commission to entertain additional evidence not already contained in the record). The rationale for this rule is straightforward: "no party may afford itself two bites at the apple." Parker, 288 S.C. at 307, 342 S.E.2d at 405.

The present case does not concern the admission of additional evidence upon remand from an appeal. Quite the contrary, the question before us is whether the trial court overstepped its authority by entertaining evidence at trial—the parties' "first bite" at the apple.

We find the evidence admitted was material and probative to the trial court's inquiry into the sufficiency of the County's written determination. Part of the function of presenting evidence at trial is to educate the finder of fact as to the surrounding circumstances giving rise to the narrow issues raised. There is

no question that there was much that was outside the expectable realm of knowledge of the trial court judge. Government procurement and its guiding policies are unfamiliar territory to all but a few. Collateral or background information presented by way of testimonial, documentary, and demonstrative evidence would be necessary to fill in the gaps of understanding. This type of information is an important part of the trial court's process of educating itself: "In addition to evidence that bears directly on the issues, leeway is allowed even on direct examination for proof of facts that merely fill in the background of the narrative and give it interest, color, and lifelikeness." 1 McCormick on Evidence § 185 (5th ed. 1999).

We conclude the trial court did not err in admitting the complete testimony of Seals and Hansley.

IV. ROADS 2000 BONDING

The County argues the trial court erred in ruling the County failed to obtain the appropriate payment and performance bonds for the Roads 2000 project. We disagree.

Section 7-238 of the County Code provides "[w]hen a construction contract is awarded in excess of twenty-five thousand dollars ($25,000.00)" a "performance bond" and a "payment bond" "shall be delivered to the county and shall become binding on the parties upon the execution of the contract." Each of these bonds "shall be in an amount equal to one hundred (100) percent of the price specified in the contract." G.C.C. § 7-238.

The total amount of compensation agreed upon under the contract for the Roads 2000 project was $6,759,100. The County, however, obtained a bond for only $4,666,000, the amount listed as the "total construction budget" in an exhibit attached to the contract. The additional $2,093,100 covered the costs for engineering ($816,900), "quality assurance" ($201,200), and "program management" ($1,075,000).

The County asserts the "price specified in the contract" under section 7-238 need not include items in the contract other than the actual, direct costs of construction. We find this argument is in error.

We look first to the language of the Code provision. The words of a statute or regulation "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); accord Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Sys., 309 S.C. at 178, 420 S.E.2d at 846 (citations omitted). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Georgia-Carolina Bail Bonds, 354 S.C. at 24, 579 S.E.2d at 337.

By its plain meaning, section 7-238 affords the County no discretion to deliver payment and performance bonds for any amount less than the amount specified in the contract. There is no limiting language which would indicate the provision was intended to apply only to the portion of the contract price specifically related to the cost of construction.

The County's procurement code is remedial in nature, and its provisions should be construed liberally to carry out its purposes. See South Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) ("A remedial statute should be liberally construed in order to effectuate its purpose."); Spencer v. Barnwell County Hosp., 314 S.C. 405, 408, 444 S.E.2d 538, 540 (Ct. App. 1994) ("In considering a remedial act designed to

protect a class of persons or the public at large, the courts liberally construe the act to carry out its purposes."). Because the express purpose of the procurement code is to ensure the "efficient and economical use of revenues" provided by the taxpayers (§ 7-192), the bonding requirements of section 7-238 should be read to afford the greatest protection to the citizens of Greenville County.

We are bolstered in our reading of section 7-238 by evidence presented at trial regarding the general industry practice concerning the delivery of performance and payment bonds. Included in the record before the court is an industry publication, Design-Build RFQ/RFP Guide for Public Sector Projects. Under the heading "Contract Bond Must Include Design," this guide instructs the government procurer to:

> Indicate to the proposers that the contract bond (performance and payment bond) must cover the entire contract between the owner and the design-builder, including any and all necessary professional architectural and engineering services. The bond must not be limited to construction value and associated risks.

Expert testimony was also presented which confirms that the general practice in the field of public procurement is to obtain bonds for the full amount of the contract price, inclusive of design and other non-construction cost items.

We conclude the language of section 7-238, supported by evidence regarding industry practice, clearly requires the delivery of performance and payment bonds for the full amount of the contract price, not simply the contract costs for construction alone. The trial court, therefore, correctly ruled the Roads 2000 project was not properly bonded.

V. SUFFICIENCY OF FORENSICS LAB CONTRACT

Sloan argues the Forensics Lab contract fails to comply with section 7-240(a) of the County Code because the County failed to append the contract with a project scope, payment schedule, or project schedule. We disagree.

Section 7-240 provides: "All contracts for . . . construction shall include provisions necessary to define the responsibilities and rights of the parties to the contract." Based on our review of the contract, we find this standard was met. Although no additional documents were attached to the original contract further defining the project scope, payment schedule, or project schedule, the contract was sufficiently definite to "define the responsibilities and rights of the parties to the contract."

With respect to the project scope, construction drawings were developed for the project, reflecting in substantial detail the project scope contemplated by the design-build team. The contract also incorporated by reference the Request for Proposal criteria used to solicit design-build team proposals, providing a further indication of the planned project scope.

The contract also contains sufficient details regarding compensation and terms of payment. Article 3.1 provides that the price of the contract shall not exceed $290,000. Additionally, Article 4.1 addresses the terms of payment—outlining in substantial detail when the contractor is required to submit payments each month and the timeframe in which the County must make payments.

Finally, while the contract does not provide a comprehensive project schedule, it does contain a 120-day completion schedule. We conclude, therefore, that the contract is sufficiently definite to "define the responsibilities and rights of the parties."

CONCLUSION

We find the trial court ruled correctly with respect to all of the issues presented: The case was properly justiciable. The written determinations to use design-build source selection for the Roads 2000 and Roads 2001 projects were sufficient under the Code, while the determination prepared for the Forensics Lab project was not. The trial court did not err by admitting witness testimony regarding the written determinations. The County did not obtain sufficient performance and payment bonds for the Roads 2000 project. Finally, the trial

court correctly found the Forensics Lab contract was sufficient under the Code. Accordingly, the rulings of the trial court are

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.