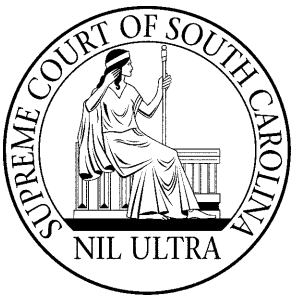

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
February 5, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of William Thomas Moody, Respondent.

Appellate Case No. 2014-000158
Appellate Case No. 2014-000159

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of a Special Receiver pursuant to Rule 31, RLDE. 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.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

The Court appoints Robert W. Maring, Esquire, to serve as a Special Receiver to exercise all duties as specified under Rule 31, RLDE. Mr. Maring shall 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. Maring shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Maring 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. Respondent shall promptly respond to Mr. Maring's requests for information and/or documentation and shall fully cooperate with Mr. Maring in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Robert W. Maring, Esquire, has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Robert W. Maring, 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. Maring's office.

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

Respondent shall fully comply with all obligations imposed by Rule 30, RLDE, Rule 413, SCACR.

s/ Jean H. Toal C.J.

Columbia, South Carolina

January 27, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Myrtle Beach, Respondent,

v.

Tourism Expenditure Review Committee, Appellant.

Appellate Case No. 2011-194346

Appeal from the Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 27356
Heard January 8, 2013 – Filed February 5, 2014

REVERSED

John M.S. Hoefer and Chad N. Johnston, both of Willoughby & Hoefer, PA, of Columbia, for Appellant.

Michael W. Battle, of Battle & Vaught, PA, of Conway, for Respondent.

JUSTICE KITTREDGE: In South Carolina, a sales tax of seven percent is imposed on all gross proceeds derived from the rental of sleeping accommodations to overnight guests. S.C. Code Ann. § 12-36-920(A). That seven percent tax is comprised of several components.[1] At issue in this case is the two percent local

[1] The two components not at issue in this case are as follows: four percent is

accommodations tax (A-Tax), the proceeds of which are remitted to the counties and municipalities where it was collected. S.C. Code Ann. § 12-36-2630(3). Counties and municipalities receiving A-Tax revenues must expend those funds in accordance with the provisions of the South Carolina Accommodations Tax Act (the Act). S.C. Code Ann. §§ 6-4-5 to -35. The Legislature created a statewide oversight body—the Tourism Expenditure Review Committee (TERC)—to ensure counties and municipalities comply with the basic requirements and restrictions set forth in the Act. S.C. Code Ann. § 6-4-35.

When the Respondent City of Myrtle Beach (the City) transferred $302,545 of A-Tax funds into the City's general fund and bypassed the Act's provisions, Appellant TERC invoked its authority under section 6-4-35(B) and certified those expenditures as "noncomplian[t] to the State Treasurer." The Administrative Law Court (ALC) reversed TERC's noncompliance certification. The ALC's acceptance of the City's characterization of the funds as "general funds" was error, for the City's internal documents unmistakably reveal that it "decided to sweep accommodations tax funds to the General Fund to cover tourism related public services." We reverse the ALC.

I.

Under the Act, some A-Tax funds are allocated as "general funds" and some are not. The Act allocates the first $25,000 of A-Tax funds collected by a county or municipality to the local government's unrestricted general fund, and the local government may spend these funds however it sees fit. S.C. Code Ann. § 6-4-10(1). Five percent of the remaining balance is likewise allocated to the general fund, and thirty percent is allocated to a restricted special fund to be used only for the advertising and promotion of tourism. S.C. Code Ann. § 6-4-10(2)–(3). The remaining sixty-five percent (65% Funds) is allocated to a separate fund to be used for the special purpose of promoting and accommodating tourism. S.C. Code Ann. § 6-4-10(4)(a)–(b). The A-Tax funds at issue here are part of the 65% Funds, and as a result, are subject to the guidelines and TERC oversight as set forth in the

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credited to the state public school building fund and the remaining one percent is credited to the South Carolina Education Improvement Act of 1984 Fund. S.C. Code Ann. § 59-21-1010(A)–(B).

Act.[2]

Counties and municipalities receiving A-Tax funds must adopt guidelines governing applications for the 65% Funds and appoint a local advisory committee to make recommendations on the expenditure of A-Tax revenues.[3] S.C. Code Ann. § 6-4-25(A). The local advisory committee must review all grant applications for tourism-related expenditures and submit a recommendation as to each application to the governing body of the county or municipality. S.C. Code Ann. § 6-4-25(B). Those recommendations are considered by, but are not binding upon, the local governing body in determining how 65% Funds will be spent. S.C. Code Ann. § 6-4-25(C).

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[2] Specifically, the Act's restrictions allow expenditure of 65% Funds only for "tourism-related expenditures," which include:

1. advertising and promotion of tourism so as to develop and increase tourist attendance through the generation of publicity;
2. promotion of the arts and cultural events;
3. construction, maintenance, and operation of facilities for civic and cultural activities including construction and maintenance of access and other nearby roads and utilities for the facilities;
4. the criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities. This is based on the estimated percentage of costs directly attributed to tourists;
5. public facilities such as restrooms, dressing rooms, parks, and parking lots;
6. tourist shuttle transportation;
7. control and repair of waterfront erosion;
8. operating visitor information centers.

S.C. Code Ann. § 6-4-10(4)(b). Further, municipalities with "a high concentration of tourism activity" may also use 65% Funds "to provide additional county and municipal services, including, but not limited to, law enforcement, traffic control, public facilities." *Id.*

[3] Counties and municipalities receiving $50,000 or less in A-Tax revenues are exempt from local advisory committee requirements. S.C. Code Ann. § 6-4-25(A).

Counties and municipalities receiving A-Tax funds must submit annual reports, which TERC reviews to ensure all expenditures comply with the Act's restrictions. S.C. Code Ann. §§ 6-4-25(D), -35(B)(1)(a). In its annual report, the county or municipality must submit a list of all tourism-related funding requests; the local advisory committee's recommendations; the municipality's action following the recommendations; and an account of "how funds from the accommodations tax are spent." S.C. Code Ann. § 6-4-25(D)(3). The only A-Tax funds outside the scope of TERC's regulatory oversight are the first $25,000 and five percent of the balance statutorily allocated to the general fund. S.C. Code Ann. §§ 6-4-10(2), 6-4-25(D)(3).

If TERC questions a particular expenditure, it must notify the county or municipality and may consider any "further supporting information" the county or municipality wishes TERC to consider in its compliance determination. S.C. Code Ann. § 6-4-35(B)(1)(a). Section 6-4-35(B) further provides that "[i]f [TERC] finds an expenditure to be in noncompliance, it shall certify the noncompliance to the State Treasurer, who shall withhold the amount of the expenditure found in noncompliance from subsequent distributions in accommodations tax revenue otherwise due the municipality or county."

II.

For fiscal year 2008-2009, the City received A-Tax funds in excess of $6 million, most of which constituted 65% Funds subject to the restrictions and guidelines in the Act. Twenty-five organizations submitted grant applications seeking $2,253,586 for tourism-related expenditures from the 65% Funds. The City, however, submitted only twenty-one of those applications to the local advisory committee. Four requests from outside organizations totaling $302,545 were not forwarded to the local advisory committee for review and recommendation and were not reported to TERC in the City's annual report.[4] This case concerns the

[4] TERC requested that the City provide it with additional information regarding the City's award of the questioned tourism-related grants. When the City refused to provide additional information, TERC obtained the information by filing a request pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 to -165. Based on the City's brazen refusal to cooperate with TERC's request, we reject the dissent's suggestion that the City should receive another opportunity to submit additional evidence relating to the questioned grants. *See*

four tourism-related grants to outside entities in the amount of $302,545, which TERC ultimately certified as noncompliant with the Act.

Thereafter, the City appealed TERC's noncompliance certification by requesting a contested case hearing with the ALC. The City claimed it was not required to submit those applications to the local committee or report them or the funding grants to TERC because the source of those particular funds was the City's general fund. The City asserted that A-Tax funds were not involved in the four questioned tourism-related expenditures. Contrary to the City's attempt to assign a position to TERC it never advanced (but was embraced by the ALC), TERC has never challenged the ability of the City to spend general funds. TERC concedes the obvious—a municipality or county may spend general funds as it sees fit, free from outside interference.

In response, TERC argued the funds at issue were A-Tax funds, and therefore the four grant applications were required to be forwarded to the local advisory committee for review and included on the City's annual report pursuant to the Act. *See* S.C. Code Ann. § 6-4-25(B), (D)(3). TERC claimed the City cannot rely on its decision to "sweep" (or transfer) A-Tax funds into its general fund and then subsequently fund grant applications for tourism-related expenditures, thereby circumventing the Act. The expenditure of A-Tax funds, according to TERC, must be accomplished pursuant to the Act. Accordingly, a local government cannot evade the Act's requirements by a mere bookkeeping transfer or "sweep" from the A-Tax fund to the general fund. We agree with TERC.

The ALC found that the four questioned grants totaling $302,545 were disbursed from the City's general funds, a finding with no support in the record. The City's internal documents reveal that the City sought to "sweep" the A-Tax Funds into the general fund. The City's March 14, 2008 memorandum admits that "Council decided to sweep accommodations tax funds to the General Fund to cover tourism-related public services. Subsequent to the decision to utilize accommodations tax funds in the General Fund, council awarded outside grants to several agencies originally requesting accommodations funding." The inescapable conclusion from the March 14, 2008 memorandum is that the City simply decided to transfer

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S.C. Code Ann. § 1-23-610(B) ("The review of the administrative law judge's order must be confined to the record.").

("sweep") A-Tax funds to the general fund.[5] It was these very funds that the City used to fund the tourism-related grants that are in dispute.

We fully recognize that the four challenged grants reek of tourism-related expenditures. TERC has never suggested it would not have approved the expenditures; TERC's complaint is process-driven in that the City did not follow the Act. Technically, TERC's position is legally correct in this case. We emphasize the narrow reach of our holding today to the funding of outside entities with 65% Funds. We must also acknowledge that the Act grants local governments latitude in the expenditure of 65% Funds. For example, section 6-4-

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[5] The dissent agrees with our premise "that a municipality may not transfer the 65% Funds to its general fund and then grant those same funds to outside entities. To permit a municipality to do so would allow it to circumvent the TERC and local advisory committee oversight mandated by the Act." Based on the record before us, which is limited only by the City's own actions in refusing to provide additional substantiating information, that is precisely what the City has done in this case. The dissent seeks to recast the dispute as an unresolved question of fact as to whether the funds at issue were general funds or A-Tax funds. In this regard, the dissent would remand for the City to have a second bite at the apple by "remand[ing] for a new hearing and the presentation of additional evidence in accordance with what I believe is the correct standard." The dissent's "correct standard" is one never raised by the City. Indeed, the ALC based its erroneous decision on the very theory advanced by the City. We see no reason to afford the City a reprieve from a situation its own conduct induced. *See Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (holding that a party may not complain of an error his own conduct has induced); *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 32, 507 S.E.2d 328, 338 (1998) (noting that an "administrative agency may not consider additional evidence upon remand unless [this] Court allows it because that affords a party two bites at the apple" (citing *Parker v. S.C. Pub. Serv. Comm'n*, 288 S.C. 304, 342 S.E.2d 403 (1986))). We view in a similar light the dissent's extensive quoting from the record as advancing arguments on behalf of the City, arguments the City has never argued on appeal and are nowhere to be found in the City's brief. *See Wierszewski v. Tokarick*, 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct. App. 1992) (finding that where a party fails to raise an issue or file a brief indicating how and why an appellate court should reach it, the appellate court need not address the issue).

10(4)(b) authorizes a local government with "a high concentration of tourism activity" to utilize 65% Funds to provide additional fire protection and law enforcement. It is undisputed that the City has "a high concentration of tourism activity."[6] Yet, we must also recognize that the challenged $302,545 A-Tax funds were granted to outside agencies, just as the March 14, 2008 memorandum admits. Because these expenditures were not forwarded to the local advisory committee for review and recommendation or reported to TERC in the City's annual report, we are constrained to conclude the City failed to comply with the Act.

Moreover, the City submits a broader argument, one we do not lightly reject. The City contends that the budgeting process for the City is complex on many levels and beyond judicial ken. While this argument may have merit, it cannot serve as a basis to avoid a justiciable controversy. Here the Legislature has created a complex statutory scheme for the expenditure of accommodation tax revenues, and we must do our best to construe and apply the Act as intended by the Legislature. The wisdom or folly of the Act is not for us to judge; we must enforce the Act as written.

In recasting the case, the dissent posits that "[t]he City argued the determinative issue was what the A-Tax monies were spent on, not where the monies were held before being spent." Yet the thrust of the City's case before the ALC was focused on the City's ability to spend its general fund, free from the requirements of the Act. The fact remains that the City granted admitted A-Tax funds to outside agencies as tourism-related expenditures, and the Act requires a specific process to be followed when doing so. We find there is nothing in the Act sanctioning the procedure employed by the City here. "Where a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose, or transferred from such authorized fund to any other fund." 81A C.J.S. *States* § 387.

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[6] The City makes this very point in its brief: "the [A]ct expressly gives local governments like the City with high concentrations of tourism the authority to use accommodation tax revenues for law enforcement, traffic control, public facilities, and highway and street maintenance expenditures provided the expenditures are related to the additional costs associated with providing for tourism activity." We do not disagree with the City's construction of the Act, other than to note the A-Tax funds at issue here were spent on tourism-related grants to outside agencies.

Moreover, in its brief, the City invites the reader to study the testimony of its Budget Director, Mike Shelton, who purportedly explained the City's bookkeeping and accounting practices in detail. This detail, we are told, includes the City's scrupulous compliance with the law, presumably including the Act. We have read Mr. Shelton's testimony, and we cannot find the supporting testimony that is referenced in the City's brief. We are left with a claim that this case involves only general funds, a claim that we find is unsupported by any evidence in the record, which is the result of the City's own failure to submit additional substantiating information to TERC and the City's failure to present adequate testimony at the hearing to substantiate its claim. Based on the record before us, the truth is no more complicated than the March 14, 2008 memorandum. That admission in the City's internal documents leads this Court to conclude that the $302,545 in questioned expenditures are unmistakably traceable and attributable to A-Tax funds, not general funds. Thus, the relevant legal issue is whether these A-Tax expenditures complied with the Act—not whether the City may spend its general funds free from the strictures of the Act. In accepting the City's argument, the ALC committed an error of law by myopically framing the question presented as encompassing only the latter.

In sum, we are presented with the use of A-Tax funds (specifically 65% Funds) for tourism-related expenses, accomplished in contravention of the Act. Accordingly, we reverse the ALC and reinstate TERC's certification of noncompliance concerning the questioned tourism-related grants totaling $302,545.

REVERSED.

PLEICONES, J., and Acting Justice James E. Moore, concur. HEARN, J., dissenting in a separate opinion in which BEATTY, J., concurs.

JUSTICE HEARN: Respectfully, I dissent. While I agree with much of the majority's analysis, particularly its conclusions that the ALC erred and that a municipality may not circumvent the Act, I disagree with its penultimate decision that the City circumvented the Act. Because I believe the majority employs the wrong standard in making that determination, I would reverse and remand for additional evidence and a new determination by the ALC under what I believe to be the correct standard.

First, I concur with the majority's implied holding that the ALC erred in concluding the Act, specifically section 6-4-10(1), explicitly exempts a municipality's general funds from the Act's requirements. The Act does clearly exempt the first $25,000 of A-Tax revenue and 5% of the balance of the revenue from the Act's requirements and TERC's oversight. *See* S.C. Code Ann. §§ 6-4-10(1) & (2) (2004). However, the Act contains no such exemption for the 65% Funds at issue here. Rather, the Act sets forth a detailed procedure that must be followed for the disbursement of the 65% Funds. *See* S.C. Code Ann. § 6-4-10(4) (2004).

I also agree with the majority's implied holding that a municipality may not do indirectly what it cannot do directly. *See City of Rock Hill v. Pub. Serv. Comm'n of S.C.*, 308 S.C. 175, 178, 417 S.E.2d 562, 564 (1992) (rejecting a municipality's position because it "would be tantamount to allowing the [municipality] to do indirectly what it could not do directly"). In other words, I agree that a municipality may not transfer the 65% Funds to its general fund and then grant those same funds to outside entities. To permit a municipality to do so would allow it to circumvent the TERC and local advisory committee oversight mandated by the Act.

Finally, I agree with the majority that it is undisputed a municipality or county may spend its general funds as it wishes, free from TERC or local advisory committee oversight. The ALC erroneously concluded the case could be decided on that principle alone. However, as the majority makes clear, the real dispute here is whether the City's challenged grants were made using the City's general fund or using the 65% Funds. Thus, the issue is whether the City circumvented the Act by transferring the 65% Funds to its general fund and then "re-granting" those funds.

Where I part company with the majority is in its conclusion that "the $302,545 in questioned expenditures are unmistakably traceable and attributable to A-Tax funds, not general funds." The majority asserts this is an "inescapable conclusion" of the City's March 14, 2008 memorandum which states that "Council decided to sweep accommodations tax funds to the General Fund to cover tourism-related public services. Subsequent to the decision to utilize accommodations tax funds in the General Fund, council awarded outside grants to several agencies originally requesting accommodations funding." More precisely, it appears the majority's holding turns on the use of the word "sweep." Contrary to the majority, I do not believe there is necessarily anything improper about the City "sweeping" the 65% Funds into its general fund.

The Act provides that the 65% Funds may be spent by a county or municipality with a high concentration of tourism to "provide additional county and municipal services, including, but not limited to, law enforcement, traffic control, public facilities, and highway and street maintenance . . . ." S.C. Code Ann. § 6-4-10(4)(b). However, the Act limits such expenditures of the 65% Funds to those that "promote tourism and enlarge its economic benefits through . . . providing those facilities and services which enhance the ability of the county or municipality to attract and provide for tourists." *Id.* In other words, rather than granting the 65% Funds to outside entities, a municipality may retain the funds and use them to provide municipal services for tourists or tourism.

Here, the City properly decided to use the 65% Funds for the provision of "tourism-related public services."[7] In order to accomplish that, the City presumably must—but certainly may—transfer the 65% Funds into its general fund. The funds belong to the City, and so long as the City expends them in accordance with the Act, their location prior to expenditure is irrelevant in my view. The Act does not set forth any requirement that the 65% Funds used by a municipality for the provision of tourism-related public services be maintained in a separate account. Accordingly, there is nothing improper about the City

[7] While the propriety of the City's usage of the 65% Funds for the provision of municipal services was the subject of separate litigation, that case did not resolve the issue, *see Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (2013), and that issue was not raised in this case. Rather, in this case, the parties agreed that the ALC must presume that the City's use of the 65% Funds for additional municipal services was proper under the Act.

transferring—or "sweeping"—the 65% Funds into its general fund, and whether the City circumvented the Act cannot be resolved simply by the fact that this transfer took place.

The majority discusses the possibility of reviewing evidence of the City's bookkeeping and accounting practices, presumably to trace whether the 65% Funds were used for additional municipal services or for the challenged grants, but finds the City failed to present any such evidence. However, I believe the Act does not require us to trace funds in order to determine whether a municipality has circumvented the Act. Quite simply, a dollar is a dollar; money is fungible. For purposes of the Act, it makes no difference whether a dollar with a particular serial number was expended for one purpose as opposed to another. If a municipality transfers the 65% Funds to its general fund for the provision of municipal services, so long as the municipality expends that amount of money for that purpose from its general fund, the Act is satisfied and no circumvention occurred.

Accordingly, I believe the standard for determining whether a municipality circumvented the Act through "re-granting" is whether the municipality actually spent an amount equal to the 65% Funds it transferred to its general fund for the statutorily permissible purpose. For example, here the City would need to establish that it spent the $4,664,951 in 65% Funds it transferred to its general fund as it asserts it did—on the provision of tourism-related municipal services. If the City failed to spend the full amount of the 65% Funds it allocated to itself for this purpose, the City has granted the 65% Funds without the review of the local advisory committee and thus, has circumvented the Act.

The Act supports this interpretation and provides a ready source of evidence for this determination through its requirement of annual reports by municipalities and counties receiving A-Tax funds. Specifically, Section 6-4-25(D)(3) of the South Carolina Code (2004) requires that municipalities and counties receiving A-Tax funds annually submit a report listing how A-Tax funds "are spent." The Act provides that TERC is to receive a copy of those reports. S.C. Code Ann. § 6-4-35(B)(1)(a) (2004). Furthermore, TERC may request additional information from a municipality or county, and if not satisfied that the municipality or county complied with the Act, it may certify an expenditure as noncompliant. *Id.*

The ALC correctly held that a municipality may spend its general funds as it sees fit and is not subject to TERC's oversight in doing so. However, the ALC erroneously presumed that principle resolved the case. Instead, the ALC should

have taken the next step and determined whether the City impermissibly circumvented the Act by depositing its 65% Funds in its general fund and then "re-granting" those same funds. Absent this analysis, which I believe to be critical, I cannot agree with the majority's final conclusion that the record before us clearly reveals that the City circumvented the Act. Because the ALC stopped short of reaching the issue, I would reverse and remand for a new hearing and the presentation of additional evidence in accordance with what I believe is the correct standard.

The majority insists that a remand for a new hearing and the presentation of additional evidence would be inappropriate because it would "afford the City a reprieve from a situation its own conduct induced." In support, the majority characterizes the record in this case as "limited *only* by the City's own actions in refusing to provide additional substantiating information" and asserts the standard advanced by this dissent was "never raised by the City." (emphasis added) I believe the record undermines the majority's assertions and establishes that remand is appropriate here.

At the hearing before the ALC, the City advanced the theory that the four grants at issue here were made using general fund monies, whereas the A-Tax monies transferred to the general fund were expended on municipal services. The City also attempted to present evidence in support of this theory. Specifically, counsel for the City argued before the ALC:

> The State money was spent on the police department. . . . We took that money and we, under the statute, justifiably paid all of it for additional municipal services. . . . But our point is, is that all the money that was earmarked for the two percent allocation, all of that money was sent and was reviewed—the applications for that money, all the applications for that money were reviewed by the advisory committee. . . . They then made those recommendations to the City Council. City Council duly considered those decisions and then made its own decision as to what to do with the money. There's no dispute that the City has the right to do that. Then the money was allocated under the ordinance to additional services. . . . Now that's how that money was spent. We have some additional money that was spent for four outside grants in the amount of $300,000. . . . And we're talking

> about now a 4.6-million-dollar allocation. We're talking about this $300,000 does not come from that $4.6 million. It comes from other funds within the general fund. . . . We're allowed to do our own planning with the allocations from the revenue fund and it it's—and if we can justifiably say it goes to additional municipal services, then TERC cannot say, "Well, you can't use anything else in your fund. If you're going to give away all that money to your additional municipal services, you can't use anything else in your fund for tourism-related expenditures without having to meet the requirements of the Act."

Additionally, counsel for the City attempted to elicit information relevant to the standard proposed by this dissent from Mike Shelton, budget director for the City. Counsel began to question Shelton about municipal services provided by the City and the amounts expended for those services. TERC objected on the grounds of relevancy. Counsel for the City argued that his line of questioning was relevant in part to show the court "that all of the money—that the two percent was spent on additional municipal services." The court sustained the objection. Counsel for the City then asked Shelton "[I]s there any question in your mind the general funds were spent on these four grants?" Again, TERC objected on grounds of relevancy, and the court sustained the objection.

The City also advanced this argument on appeal. In addition to arguing a stronger position that the evidence before the ALC clearly established that the A-Tax funds were spent on municipal services, the City also argued more broadly that simply placing the A-Tax monies in the City's general fund did not establish a violation of the Act. The City argued the determinative issue was what the A-Tax monies were spent on, not where the monies were held before being spent. Specifically, the City argued in its brief before this Court:

> Instead of refuting the testimony of Mike Shelton, TERC focused on a single line lifted out of context from an e-mail by a City employee from Mr. Shelton's office. The line upon which TERC's [sic] hangs its claim is: "Council decided to sweep accommodations tax funds to the General Fund to cover tourism related public services." . . . TERC's interpretation of "General Fund" as used by the employee in the e-mail is mistaken. *Sweeping accommodations tax funds into the City's General Fund does not mean that the A-Tax special fund lost its identity in the City's accounting procedures. As stated, those funds*

> *were properly used and accounted for to cover tourism related public services as indicated by the e-mail.*

(emphasis added). Accordingly, I believe on appeal the City continued to assert, and thus preserved, the arguments it made before the ALC.

Therefore, the City both advanced the theory I propose herein and attempted to present evidence in support of that theory. The ALC erroneously rejected the City's attempts and as the prevailing party, the City had no obligation to seek reconsideration of the ALC's erroneous ruling. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Accordingly, I believe the majority is incorrect in suggesting that the City is responsible for the insufficiency of the record and that a remand and the taking of additional evidence is an inappropriate result.

In conclusion, I believe the ALC erred in several respects and a remand is required. As the majority holds, the ALC erred in finding the City did not violate the Act because it made the grants from its general funds. I believe the ALC further erred in not permitting the admission of evidence to show that the A-Tax funds were properly expended on municipal services and therefore, the City complied with the Act. Accordingly, I would reverse and remand for a new hearing and the presentation of additional evidence.

BEATTY, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Israel Wilds, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2008-092411

ON WRIT OF CERTIORARI

Appeal From Richland County
Marc H. Westbrook, Trial Judge
J. Michelle Childs, Post-Conviction Relief Judge

Opinion No. 5193
Heard November 5, 2013 – Filed February 5, 2014

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Jennifer Ellis Roberts, all of Columbia, for Petitioner/Respondent.

Tara Dawn Shurling, of Columbia, for Respondent/ Petitioner.

SHORT, J.: In this cross-appeal involving an action for post-conviction relief (PCR), the State argues the PCR court erred in finding Israel Wilds' appellate counsel was ineffective for failing to raise the issues of accomplice liability and mere presence on appeal. In his cross-appeal, Wilds argues the PCR court erred in finding his trial counsel was not ineffective for failing to assert at trial that the trial court's ruling prohibiting him from cross-examining his co-defendants about their potential sentences violated his Confrontation Clause rights. We affirm.

FACTS

On March 29, 1999, at approximately 9:30 p.m., Anthony Rumph was robbed and shot while walking down Rhett Street in Columbia, South Carolina. Wilds was charged with armed robbery and murder following Rumph's death on July 8, 1999.[1] A trial was held on March 26-29, 2001.

During the trial, two of Wilds' co-defendants, Isom Simmons and Joseph Dante Dungee, testified that on the afternoon of March 29, 1999, they and Wilds were walking down Rhett Street when they saw Rumph walking toward them. In his original statement given to police after his arrest, Simmons stated that as they approached Rumph, Wilds said, "I bet this dude has some money." In addition, Dungee testified Wilds told them before they saw Rumph, "I'm going to stick somebody or jack somebody – something like that," and Dungee could see he had a pistol. When they met Rumph, Wilds stopped to talk to him, and Simmons and Dungee continued walking. Simmons and Dungee both testified that after talking to Rumph for a few minutes, Wilds suddenly pulled out a gun and pointed it at Rumph's chest. Rumph pulled his wallet out of his back pocket, and Wilds ordered Simmons and Dungee to hit Rumph. Simmons and Dungee proceeded to hit Rumph in the back of the head and his face, and Simmons pulled a pack of cigarettes out of Rumph's back pocket. Dungee retrieved a lighter and some change from Rumph's pocket. When Rumph refused to let go of his wallet, Simmons testified Wilds said, "My man, you going to make me shoot you,"[2] and shot Rumph in the chest.

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[1] Rumph died from complications secondary to a gunshot wound of the abdomen.
[2] Dungee testified Wilds said, "If you don't give me the wallet, I'm going to blast you."

After Wilds shot Rumph, Wilds, Simmons, and Dungee ran, but stopped across the street from the scene of the shooting. Wilds went through Rumph's wallet, handed Simmons and Dungee some money from the wallet, and told them not to say anything.[3] Simmons told Wilds he should get rid of the gun. Simmons and Dungee then went to Timothy Myers' home, and Simmons told him that his "cousin had just shot somebody." Simmons testified that he called Wilds "cousin" because Wilds' aunt was a longtime friend of his family.

In addition to the above testimony from Wilds' two co-defendants, Investigator Mark Vinson of the Columbia Police Department removed Wilds' shoes during his interrogation because they matched a description of the shoes worn by him during the shooting. A swab of material on one of the shoes tested positive for human blood, and mitochondrial DNA testing matched Rumph's DNA. Detective Gertrude Burns, of the Columbia Police Department, testified Wilds initially denied having a gun, but then bragged about having a shotgun, a .38, and a nine millimeter.

In his defense, several of Wilds' relatives testified he was at home watching television the night of the shooting. The murder weapon was never found, and an unfired .22 caliber bullet collected at the scene was not subjected to any test for identification. Additionally, none of the other items found around the crime scene that were processed revealed any fingerprints suitable for identification.

During jury deliberations, the jury sent a note to the trial court asking, "[I]f we say [Wilds is] guilty of murder, are we saying he of the three [alone] actually pulled the trigger?" In response to this question, and over Wilds' objection, the trial court instructed the jury on accomplice liability, noting, "[I]t appears the only appropriate thing I can do at this point is to give a charge on hand of [one], hand of all. I don't know any other way around it." After instructing the jury on accomplice liability, Wilds requested a charge on mere presence; however, the trial court declined to give an additional instruction regarding mere presence.

The jury found Wilds guilty of armed robbery and murder. The trial court sentenced Wilds to thirty years' imprisonment on the armed robbery conviction and life imprisonment for the murder conviction. Wilds filed a direct appeal, and this

[3] Simmons testified he received $10.

court affirmed his conviction and sentence. *See State v. Wilds*, Op. No. 2003-UP-152 (S.C. Ct. App. filed Feb. 20, 2003). Wilds filed an application for PCR, which the PCR court granted in part and denied in part. Specifically, the PCR court found Wilds' appellate counsel was ineffective for failing to appeal the trial court's accomplice liability jury charge. Accordingly, the PCR court granted Wilds' PCR application on that ground, vacated his conviction and sentence, and remanded his case for a new trial. However, the PCR court found Wilds' trial counsel was not ineffective. Wilds and the State filed petitions for certiorari with this court. On May 7, 2012, this court granted the petitions for certiorari and ordered the parties to file their briefs.

STANDARD OF REVIEW

This court gives great deference to the PCR court's findings of fact and conclusions of law. *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). When matters of credibility are involved, this court gives deference to the PCR judge's findings because this court lacks the opportunity to directly observe the witnesses. *Lee v. State*, 396 S.C. 314, 319, 721 S.E.2d 442, 445 (Ct. App. 2011). "The existence in the record of 'any evidence' of probative value is sufficient to uphold the PCR judge's ruling." *Caprood v. State*, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000).

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." *Caprood*, 338 S.C. at 109, 525 S.E.2d at 517. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

LAW/ANALYSIS

I. The State's Appeal

The State argues the PCR court erred in finding Wilds' appellate counsel was ineffective for failing to raise the issues of accomplice liability and mere presence on appeal.

At the PCR hearing, Wilds testified he believed the trial court's accomplice liability charge was in error because no evidence supported such a charge and his appellate counsel was ineffective for failing to raise this issue on appeal. In addition, Wilds testified that, even if the trial court did not err in instructing the jury on accomplice liability, the court erred in failing to give a "mere presence" charge as part of that instruction, and his appellate counsel was ineffective for failing to raise this issue on appeal as well.

The PCR court found appellate counsel was ineffective for failing to challenge the trial court's accomplice liability charge on appeal, particularly when the issue raised on appeal was unpreserved. In addition, the PCR court found Wilds' appellate counsel was ineffective for failing to raise on appeal that the trial court improperly denied his request for a charge on mere presence.

Our supreme court has noted that "[l]ike a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In *Barber*, as in the instant case, four men committed an armed robbery, and, during the robbery, one of the men shot two of the victims. *Id.* at 234-35, 712 S.E.2d at 437-38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the two victims during the robbery. *Id.* at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. *Id.* at 438. Our supreme court noted "[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." *Id.* at 237, 712 S.E.2d at 439. Under this test, the court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the

shooter." *Id.* at 236, 712 S.E.2d at 439. In making this finding, the supreme court relied upon evidence presented at trial indicating three of the robbers were armed, two with .380 handguns, which was the type of weapon forensic experts testified fired all the shots during the robbery. *Id.* at 237, 712 S.E.2d at 439.

In contrast, no evidence in the instant case indicated anyone other than Wilds was the shooter. The only evidence presented was that Wilds was the shooter, and Simmons and Dungee joined in the robbery after Wilds pulled the gun on Rumph. Although the jury may have had doubts about Simmons' and Dungee's testimony, an alternate theory of liability, such as accomplice liability, "may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." *Id.* at 236, 712 S.E.2d at 438. In addition, Wilds was prejudiced by the trial court's instruction on accomplice liability and, consequently, by the failure of his appellate counsel to raise the issue on appeal. Because the instruction was given in response to the jury's question regarding whether a conviction meant it found Wilds actually pulled the trigger, and because the jury returned guilty verdicts after receiving the instruction, the circumstances indicate the instruction enabled it to unanimously render verdicts of guilty.

Accordingly, because no evidence in the instant case indicated anyone other than Wilds was the shooter, we find the PCR court correctly determined the trial court erred in charging the jury on accomplice liability. Furthermore, although appellate counsel is not required to raise every nonfrivolous issue presented in the record, the only issue Wilds' appellate counsel raised on appeal was unpreserved and the State presented no testimony indicating counsel made a tactical decision not to appeal this issue. *See Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (holding appellate counsel is not required to raise every nonfrivolous issue presented in the record, and appellate counsel testified at the PCR hearing she did not raise an exception to the trial judge's failure to charge the jury as requested because she thought the instruction given substantially complied with the law). Therefore, we find the PCR court properly found Wilds' appellate counsel was ineffective for failing to raise the issue of accomplice liability on appeal.[4]

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[4] We decline to reach the issue of mere presence because this issue is dispositive of the appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

II. Wilds' Appeal

Wilds argues the PCR court erred in finding his trial counsel was not ineffective for failing to assert at trial that the trial court's ruling prohibiting him from cross-examining his co-defendants about their potential sentences violated his Confrontation Clause rights.

"Generally, a judge may prevent the introduction of evidence which informs the jury of the possible sentence defendants may receive if convicted because it is either irrelevant or substantially prejudicial." *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002). "However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence." *Id.* at 331-32, 563 S.E.2d at 318. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotation marks and alterations omitted). Furthermore, "[t]he lack of a negotiated plea . . . creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency." *Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318.

"'A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error' if the 'error was harmless beyond a reasonable doubt.'" *Id*. (quoting *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)). Whether an error is harmless depends on the particular facts of each case, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-

> examination otherwise permitted, and of course the overall strength of the prosecution's case.

Id. at 333, 563 S.E.2d at 318-19 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

At the time of Wilds' trial, Simmons and Dungee were charged with murder and armed robbery, and both testified for the prosecution that Wilds shot Rumph. The prosecution did not offer Simmons or Dungee a deal in exchange for testifying against Wilds, but both acknowledged they hoped for something in return. During Wilds' trial, the following exchange took place between Wilds' trial counsel and the trial court just prior to the testimony of Simmons:

> **The Court**: The Co-defendant – As to what they may have gotten, and, as I indicated, certainly you can go into that then and ask, but you can't get into any details about the potential sentences and that sort of thing.
>
> **Mr. Strickler**: Yes, sir.
>
> **The Court**: Anything else on that?
>
> **Mr. Strickler**: With regard to the pending charges as against Mr. Simmons and Mr. Dungee, they are currently, according to the Solicitor, both charged with murder and armed robbery. We would submit to the Court that I should be able to question them not merely about the existence of the charges but what they hope to get as a result of their testimony. Their understanding of the penalties they're facing now and specifics of the fact that they are looking at life in prison on the murder charge, and their hopes in regard to a reduction in sentencing. I understand Your Honor's ruling that I cannot go into that.
>
> **The Court**: Yes, sir. It's appropriate to ask if they think they're going to get their sentence reduced or if they think

> they're going to get the charges reduced, but I think you can do that without going into details.

On direct appeal, Wilds asserted the trial judge's ruling was an erroneous application of Rule 608, SCRE, and a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. This court affirmed, finding the argument unpreserved. At the PCR hearing, Wilds argued his trial counsel was ineffective for failing to object that the limitation on cross-examination of the co-defendants violated his Sixth Amendment right to confront adverse witnesses. During the hearing, when asked if in retrospect he should have "federalize[d] that issue, if you will, and . . . argue[d] it as an express violation of the [C]onfrontation [C]lause to limit your cross-examination," Wilds' trial counsel responded, "Sure." Ultimately, the PCR court found Wilds' trial counsel was not ineffective for failing to object to the trial court's limitation of his cross-examination of Wilds' co-defendants because there was no deal or promise of a lesser offense or lesser sentence, and the trial court allowed full impeachment of the co-defendants regarding their pending charges. Further, the court found that even if trial counsel should have objected, the error was harmless.

Although our supreme court in *Mizzell* found the lack of a negotiated plea creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency, *Mizzell* had not been decided at the time of Wilds' trial, and his trial counsel did not have the benefit of that holding. *Id.* at 333, 563 S.E.2d at 318. Accordingly, we do not believe Wilds' trial counsel was deficient for failing to cite the Confrontation Clause when arguing to the trial court that he should be allowed to cross-examine Wilds' co-defendants. Trial counsel vigorously argued Wilds had the right to cross-examine his co-defendants concerning the potential sentences they faced, and his failure to specifically cite the Confrontation Clause in support of his argument did not rise to the level of deficient performance, especially considering the fact that *Mizzell* had not been decided by our supreme court at the time of trial. We further find trial counsel's error was harmless because additional evidence linked Wilds to the crime, specifically Rumph's blood found on Wilds' shoe and Simmons' statement to Myers that his cousin had just shot someone. *See State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); *id.* ("[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively

proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989))).

CONCLUSION

Accordingly, the decision of the PCR court is

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gerald Smith, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-164866

ON WRIT OF CERTIORARI

Appeal From Richland County
Clifton Newman, Plea Judge
Reginald Lloyd, Sentencing Judge
L. Casey Manning, Post-Conviction Relief Judge

Opinion No. 5194
Heard October 15, 2013 – Filed February 5, 2014

REVERSED AND REMANDED

Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan Wilson, Assistant Deputy Attorney General David A. Spencer, Assistant Attorney General Megan Elizabeth Harrigan, all of Columbia, for Respondent.

WILLIAMS, J.: Petitioner Gerald Smith ("Smith") appeals the post-conviction relief (PCR) court's order denying his application for PCR based on ineffective assistance of counsel during his guilty plea. We reverse the PCR court's order, vacate Smith's sentence, and remand for resentencing.

FACTS/PROCEDURAL HISTORY

Smith was indicted for murder.[1] Pursuant to a negotiated plea agreement, Smith pled guilty to the lesser-included offense of voluntary manslaughter in exchange for testifying against his codefendant. As part of the plea agreement, the State agreed to remain silent as to sentencing. However, this part of the plea agreement was not put on the record at the plea hearing, in part because Smith's sentencing was to be deferred until after his codefendant's trial.[2]

During the plea colloquy before the Honorable Clifton Newman ("the plea court"), Smith stated he understood the sentence for voluntary manslaughter was between two and thirty years' imprisonment and a voluntary manslaughter conviction was classified as a "most serious offense." Additionally, the plea court asked Smith whether "anyone promised [Smith] anything to get him to plead guilty to [manslaughter]." Smith responded the only promise was to reduce the charge from murder to voluntary manslaughter, which plea counsel confirmed. After Smith pled guilty, the solicitor provided the plea court with the facts of the case, summarized Smith's previous statements,[3] and proffered Smith's testimony on the

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[1] Although Smith's account of what transpired changed several times, he and his codefendant were accused of bludgeoning the victim to death with a piece of rebar in the victim's mobile home after a dispute over a drug deal.

[2] We are aware of the supreme court's holding in *State v. Thrift* that appellate review of a plea agreement is limited to the terms that are fully set forth in the record and that neither the State nor the defendant can enforce plea agreement terms which do not appear on the record before the trial judge who accepts the plea. 312 S.C. 282, 296-97, 440 S.E.2d 341, 349 (1994). However, we review Smith's PCR claim consistent with the supreme court's consideration of the same issue in *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000).

[3] In the first statement to police, Smith claimed no involvement in the victim's murder. In his second account, Smith said he drove his codefendant to the victim's mobile home but did not go inside the mobile home. However, in his third

record. At the conclusion of the hearing, the plea court retained jurisdiction and deferred sentencing until the solicitor prosecuted Smith's codefendant.

At the subsequent sentencing hearing before the Honorable Reginald Lloyd ("the sentencing court"), the solicitor put the negotiated plea agreement between the State and Smith on the record. The solicitor indicated the agreement (1) "reduce[d] the charge from murder to manslaughter" and (2) deferred sentencing to allow Smith to testify at his codefendant's trial for murder. The solicitor acknowledged Smith suffered drug-related memory impairment but claimed Smith "continually minimized his role" in the death of the victim. Furthermore, the solicitor indicated counsel for Smith's codefendant filed a motion to disqualify Smith from testifying at his codefendant's trial, which caused the solicitor major concerns about using Smith's testimony against his codefendant. The solicitor stated the State could not proceed against Smith's codefendant for murder because Smith failed to truthfully articulate his role in the murder. As a result, the State was forced to mitigate the codefendant's charge to accessory after the fact of murder. The solicitor then requested the sentencing court impose the maximum sentence upon Smith.

Plea counsel neither objected to the solicitor's sentencing request nor withdrew Smith's guilty plea. Instead, plea counsel requested the sentencing court give Smith credit for the time he had served and further asked the sentencing court to impose a ten-year sentence. The sentencing court initially sentenced Smith to twenty-seven years, taking into consideration Smith's efforts to help the solicitor as well as the problems Smith caused in his codefendant's case. Subsequently, plea counsel moved for the sentencing court to reconsider the length of Smith's sentence, and the sentencing court reduced Smith's sentence to twenty-four years' imprisonment.

Smith appealed his conviction, and this court dismissed the appeal on April 11, 2008. *See State v. Smith*, Op. No. 2008-UP-226 (S.C. Ct. App. filed April 11, 2008). Smith then filed an application for PCR, alleging ineffective assistance of counsel.

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account, Smith stated he went inside the home. In Smith's fourth statement to police, Smith alleged his codefendant started an argument with the victim because the victim would not sell the codefendant more drugs. In that statement, Smith admitted to hitting the victim over the head with a piece of rebar but stated his codefendant actually killed the victim.

At the PCR hearing, Smith argued his plea counsel was ineffective because she failed to object or bring his plea agreement to the sentencing court's attention when the solicitor requested the court impose the maximum sentence. Smith claimed if he cooperated with the solicitor in testifying against his codefendant, the solicitor would reduce his charge to voluntary manslaughter. In addition, the solicitor would agree to an open plea and would remain silent as to sentencing, so Smith would likely receive "somewhere between eight and ten years. . . ." Smith stated he met with the solicitor for approximately four hours to prepare to testify at his codefendant's trial. Smith argued the solicitor knew he had drug-related memory issues from the beginning and that he had problems recalling details during his meeting with the solicitor because the incident happened three years prior. Smith told the PCR court he was shocked when the solicitor recommended the maximum sentence. Smith stated that had he known the solicitor was going to recommend the maximum sentence, he would have withdrawn his plea and let the jury "decide [his] fate."

Plea counsel also testified at the PCR hearing. She stated the solicitor's official plea offer was for voluntary manslaughter. She advised Smith that he could be sentenced from anywhere between two to thirty years, but she would request ten years because he would be assisting the solicitor. Plea counsel further testified she had done two previous pleas involving similar circumstances in front of the sentencing judge, and he had given the defendants about ten years when the murder involved a drug dealer, much like Smith's case. Moreover, plea counsel testified the solicitor was always aware Smith had memory issues because she told the solicitor about Smith's memory problems on the day the solicitor made the plea offer. Furthermore, plea counsel stated no one with the solicitor's office ever told her Smith's memory problems would be an issue.

Plea counsel testified she was surprised when the solicitor requested the sentencing court impose the maximum sentence at the sentencing hearing. She testified she recalled thinking the solicitor did not abide by the State's promise to remain silent because Smith was unable to uphold his end of the plea deal. Additionally, plea counsel acknowledged she made a mistake in failing to object or put on the record the portion of the agreement that the solicitor would remain silent on sentencing. She stated she was "a little taken aback" when the solicitor recommended the maximum sentence. Although she thought about having Smith withdraw his plea, she testified she had not come to court prepared to try the case that day.

After the hearing, the PCR court issued an order denying and dismissing Smith's application for PCR. Smith filed a motion pursuant to Rule 59(e), SCRCP, which the PCR court denied. Counsel for Smith filed a petition for a writ of certiorari. This court granted Smith's petition to review the following issue:

> Did the PCR court err in failing to find plea counsel was ineffective for not objecting when the solicitor recommended Smith be sentenced to the maximum term of imprisonment in violation of the negotiated plea agreement with the State?

STANDARD OF REVIEW

In a PCR proceeding, the burden is on the petitioner to prove the allegations in the application. *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Thus, an appellate court gives great deference to the PCR court's findings of fact and conclusions of law. *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). However, a PCR court's findings will not be upheld if no probative evidence exists to support those findings. *Thompson*, 340 S.C. at 115, 531 S.E.2d at 296.

LAW/ANALYSIS

Smith argues plea counsel was ineffective for failing to object when the solicitor recommended the sentencing court impose the maximum sentence. We agree.

Trial counsel must provide reasonably effective assistance under "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Reviewing courts presume counsel was effective. *Id.* at 690. Therefore, to receive relief, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance prejudiced the applicant's case. *Id.* at 687. Prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

Smith must first establish his plea counsel's failure to object "fell below prevailing professional norms." We find Smith established counsel's performance was deficient and rely on the case of *Thompson v. State*, 340 S.C. 112, 116, 531 S.E.2d 294, 296 (2000), to support our conclusion. In *Thompson*, plea counsel failed to object after the solicitor recommended the maximum sentence in violation of the plea agreement. 340 S.C. at 115, 531 S.E.2d at 296. Thompson was indicted for murder and pled guilty to voluntary manslaughter. *Id.* at 113, 531 S.E.2d at 295. Thompson testified at the PCR hearing that he chose to plead guilty because he was under the assumption the solicitor was not going to make a sentencing request or recommendation. *Id.* at 114, 532 S.E.2d at 295. In addition, Thompson's attorney testified she told him prior to the plea the solicitor was not going to make a sentencing recommendation. *Id.* Thompson's attorney also confirmed to the plea court that the solicitor had correctly and completely stated the plea agreement and there was nothing further that needed to be added regarding the plea negotiations. *Id.* at 116, 531 S.E.2d at 296. Our supreme court found there was a reasonable probability that Thompson would not have pled guilty but for his attorney's ineffective assistance because he entered his guilty plea in reliance on the sentencing range and the solicitor's agreement not to make any sentencing recommendations. *Id.* at 117, 531 S.E.2d at 297.

Like the attorney in *Thompson*, we find plea counsel's failure to object fell below prevailing professional norms. At the PCR hearing, plea counsel testified she told Smith the solicitor was not going to make a sentencing recommendation. Plea counsel admitted she made a mistake in failing to put all of the terms of the plea agreement on the record and in failing to object when the solicitor requested the maximum sentence. Further, plea counsel acknowledged she did not object when questioned by the sentencing court as to whether the solicitor had correctly and completely stated the plea agreement. Based on the foregoing, we find plea counsel's conduct to be deficient.

To establish a claim for ineffective assistance of counsel, Smith must also be prejudiced by his counsel's deficient performance. *See Strickland*, 466 U.S. at 690, 692 (holding a PCR applicant must prove counsel's deficient performance and resulting prejudice to establish a claim for ineffective assistance of counsel). We find the record shows that but for his plea counsel's deficient performance, Smith would not have pled guilty but would have insisted on going to trial. First, the record indicates both plea counsel and Smith intended to go to trial on the murder charge before the solicitor offered Smith the plea deal. It was only when the

solicitor offered to mitigate the charge to voluntary manslaughter and agreed to remain silent on sentencing in exchange for his cooperation that Smith changed his mind about going to trial and pled guilty. Smith presented probative evidence that he attempted to uphold his end of the plea agreement by proffering his testimony at the plea hearing and by meeting with the solicitor for more than four hours on the eve of his codefendant's trial. Although the State argued Smith failed to uphold his end of the bargain, plea counsel testified she explained to the solicitor that Smith had a memory problem. Further, no one at the solicitor's office ever indicated Smith's memory issues would be a problem, even after his proffered testimony and his codefendant's motion to disqualify.

Because Smith presented probative evidence that the solicitor's promise to remain silent at sentencing was a material term of the plea agreement, we likewise find there is enough evidence to demonstrate Smith would not have pled guilty if he had known the solicitor was going to make a sentencing recommendation. Accordingly, we hold plea counsel's failure to object amounted to ineffective assistance of counsel. *See Jordan v. State*, 297 S.C. 52, 54, 374 S.E.2d 683, 684-85 (1998) (granting PCR when defendant pled guilty based on belief that solicitor would not oppose or recommend probation and finding defense attorney's failure to draw the plea court's attention to solicitor's violation of plea agreement fell below prevailing professional norms).

CONCLUSION

For the foregoing reasons, we **REVERSE** the PCR court's denial of relief, **VACATE** Smith's sentence for voluntary manslaughter, and **REMAND** for resentencing on this charge consistent with the original plea agreement.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Laura Riley, as the Personal Representative of the Estate of Benjamin Riley, Respondent,

v.

Ford Motor Company, Appellant.

Appellate Case No. 2012-207489

Appeal From Bamberg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5195
Heard September 11, 2013 – Filed February 5, 2014

AFFIRMED IN PART AND REVERSED IN PART

Curtis Lyman Ott and Laura Watkins Jordan, both of Gallivan, White & Boyd, PA, of Columbia; Joseph Kenneth Carter, Jr., Carmelo Barone Sammataro, and David Christopher Marshall, all of Turner Padget Graham & Laney, PA, of Columbia, for Appellant.

Ronnie Lanier Crosby, of Hampton, and Daniel E. Henderson and Matthew Vernon Creech, of Ridgeland, all of Peters Murdaugh Parker Eltzroth & Detrick, PA, for Respondent.

FEW, C.J.: Jasper County Sheriff Benjamin Riley's estate ("the Estate") brought this products liability lawsuit against Ford Motor Company after Riley was ejected from his 1998 Ford F-150 pickup truck in an accident and killed. The Estate settled with the at-fault driver before trial, and the jury awarded $300,000 against Ford. We affirm the trial court's denial of Ford's motion for judgment notwithstanding the verdict (JNOV). However, we reverse the denial of Ford's motion for setoff and the granting of the Estate's motion for new trial *nisi additur*.

I. Facts and Procedural History

On August 29, 2007, Riley was driving his Ford F-150 pickup truck near Ehrhardt in Bamberg County when a vehicle driven by Andrew Marshall Carter II pulled from a side road into Riley's lane of travel. The resulting impact caused Riley's truck to leave the road and roll over. The driver's door of the truck opened in the initial collision with Carter, and Riley was ejected through the open door. First responders found Riley's body eighty-five feet from where he was ejected.

Riley's wife Laura, serving as personal representative of the Estate, brought wrongful death and survival claims against Ford and Carter. The claims against Ford were based on a products liability negligence theory. Specifically, the Estate alleged Ford's negligent design of the door-latch system in Riley's truck allowed the door to come open, and Riley would not have died if he had not been ejected. The Estate settled with Carter for $25,000, with the Estate and Carter agreeing to allocate $20,000 to the survival claim and $5,000 to the wrongful death claim. The trial court approved the settlement.

At trial, the Estate withdrew its survival claim, and the court submitted the wrongful death claim against Ford to the jury. The jury returned a verdict in favor of the Estate for $300,000 in actual damages.

Ford moved for JNOV, arguing the Estate failed to prove both the existence of a defect in the door-latch system and a reasonable alternative design. Ford also requested a setoff from the verdict in the amount of $25,000 to account for the Estate's settlement with Carter. The trial court denied both motions in a form order without explanation.

The Estate filed a motion seeking a new trial *nisi additur*. At the hearing on the motion, the trial court stated that a "$300,000 [verdict] for this type of case could

very well be found to be shockingly inadequate" "because of the stature of [Riley] and what he's done in life, what he's contributed to his family." The trial court granted the motion and ordered Ford to pay "an additional $600,000 in actual damages . . . , bringing the total verdict to $900,000." Ford appeals each of these three rulings.

II. Ford's JNOV Motion

Ford raises in its brief three arguments as to why the trial court erred in not granting Ford's motion for JNOV: (1) the Estate did not present sufficient evidence of a design defect, but relied on the "mere failure" of the door latch; (2) the Estate did not prove the existence of a reasonable alternative design as required by *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010); and (3) the Estate did not present adequate expert testimony to prove a design flaw or a reasonable alternative design.[1] At oral argument, Ford presented more detail for its argument that the Estate did not satisfy the requirements of *Branham*. We hold the trial court correctly denied Ford's motion for JNOV.

A. Reasonable Alternative Design

We begin by addressing Ford's argument that the Estate did not satisfy the requirements of *Branham*. In *Branham*, the supreme court noted that "South Carolina . . . [has] traditionally employed two tests to determine whether a product was unreasonably dangerous as a result of a design defect: (1) the consumer expectations test and (2) the risk-utility test." 390 S.C. at 218, 701 S.E.2d at 13. The court held, however, that "the consumer expectations test . . . is ill-suited in design defect cases," 390 S.C. at 220, 701 S.E.2d at 14, and adopted the risk-utility test as "the exclusive test in a products liability design case." *Id.* The court held

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[1] Each of these arguments is stated within one of Ford's issues on appeal:

> Did the trial court err in submitting the case to the jury and denying Ford's motion for judgment notwithstanding the verdict when, as a matter of law, Ford's design was not defective or unreasonably dangerous because the Estate failed to present expert testimony of either a design flaw beyond mere failure or an alternative feasible design that was crashworthy?

that to satisfy the risk-utility test, a plaintiff must meet the "requirement of showing a feasible alternative design." *Id.* The court explained the requirement: "The very nature of feasible alternative design evidence entails the manufacturer's decision to employ one design over another. This weighing of costs and benefits attendant to that decision is the essence of the risk-utility test." 390 S.C. at 223, 701 S.E.2d at 16. Summarizing its holding, the court stated:

> [I]n a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design.

390 S.C. at 225, 701 S.E.2d at 16.

We find the Estate met the requirements of *Branham* by presenting evidence of Ford's own alternative design for a door-latch system, which Ford used in F-150 trucks manufactured before Riley's 1998 model, and which Ford originally incorporated into the design of the 1998 model.

To explain our finding that the Estate met the requirements of *Branham*, we first describe the mechanics of two door-latch systems—the rod-linkage system and the cable-linkage system. Riley's 1998 F-150—which Ford internally called the PN96—contained a rod-linkage door-latch system. According to the evidence presented in this case, a rod-linkage system contains a metal rod that connects the door handle to a latch. When a person pulls the door handle, the rod activates the latch, which causes the door to open. The type of rod-linkage system in Riley's PN96 is a compression rod system, in which the action of pulling the door handle pushes the rod, or "compresses" it, to activate the latch and cause the truck door to open. The Estate presented evidence that when a vehicle containing a compression rod system is involved in a frontal collision such as this one, the force of the collision may cause "foreshortening"—a decrease in the distance between the

handle and the latch,[2] which in turn compresses the rod as though a person pulled the handle. When a certain amount of foreshortening occurs, the rod may activate the latch and allow the door to open without the handle being pulled.

The Estate presented evidence that at the time Ford manufactured the PN96, Ford was also using a different door-latch system in other models—the cable-linkage system. As the Estate's mechanical engineering expert, Andrew Gilberg, explained, "you can't push on a cable and cause the latch to release." For this reason, the cable-linkage system prevents the effects of foreshortening during collisions—doors opening without a person pulling the handle. According to Ford witnesses and internal documents, Ford originally designed the PN96 to contain a cable-linkage system.

Gilberg testified the door latch on Riley's PN96 activated during the collision due to foreshortening, which allowed the door to open. According to Ford's own internal documents, the compression rod system in a PN96 allowed the door latch to activate with only 12 millimeters of foreshortening. Gilberg testified he was "100 percent confident that the latch reached the trigger point" and allowed the door to open during the crash. Although Gilberg measured the post-crash foreshortening in Riley's PN96 to be 11.58 millimeters, he explained that the elasticity of the "all steel structure[]" of the truck caused "spring-back" after the collision, which made the post-crash measurement less than what it actually was when the crash occurred.

According to Gilberg's testimony, the cable-linkage system was a safer design and had "[n]o safety risks associated with [it]." Gilberg testified the cable system "was clearly more crashworthy" and prevented "unwanted door opening due to foreshortening" in frontal collisions. Ford's own internal documents established that it knew compression rod systems "have a tendency to unlatch during crash if doors are crushed beyond a certain limit," and cable systems "provide a solution to this problem." In 1989, Ford conducted two frontal crash tests on F-150s that had rod-linkage systems, and the test results indicated that doors opened upon impact. Gilberg testified this occurred due to "compression of the door—the same thing that opened the door in Sheriff Riley's vehicle." Based on these crash test results,

[2] Reading from a Ford document on how to design door-latch systems, a Ford engineer defined foreshortening as "the relative movement between the release handles and the latch due to vehicle crash deformation."

the Estate asserted Ford installed a cable system in the 1992-1995 F-series instead of the rod system because the cable system prevented the effects of foreshortening and the resulting "unwanted door opening" in frontal collisions. Ford continued to crash test the F-series trucks once the cable systems were installed, and the results showed no doors opened due to foreshortening.

Despite the safety advantages associated with cable systems, Ford changed its original design for a cable-linkage system in the PN96 and incorporated the compression rod system. Ford asserts it made the change because it discovered water could invade the cable-linkage system and freeze the cable, preventing the door from opening. Ford produced evidence that it recalled the 1992 F-150 series trucks for this reason. Thus, Ford argues that although it used the cable system in the PN96's predecessor models, it was not "feasible" in the PN96 due to the cable freezing issue.

The record does not support Ford's assertion. One of Ford's engineers testified that by 1993, Ford corrected the freezing cable concerns. This is corroborated by a study conducted by Ford in 1994, which sought to determine whether cable systems were "a viable alternative to rod systems." The report generated from the study stated that "freezing cable concerns [have been] corrected." In fact, Ford's engineers advocated for the use of cables once the problem was fixed.

The Estate's primary evidence establishing the reasonableness and feasibility of the cable-linkage system was the fact that Ford designed, manufactured, and sold F-150 trucks with the cable-linkage door-latch system only three model years before Riley's PN96. In addition, the Estate presented extensive evidence concerning Ford's cable-linkage design. According to the report of the 1994 study, the advantages of cables, when compared to rods, included: (1) packaging—"[c]able systems require less package space"; (2) safety—"[c]able systems are more robust to crash"; (3) performance—"[c]able systems provide better performance to the customer"; and (4) manufacturing—"[c]able systems are easier for assembly plants to handle," "are tolerant to build variations between latch and handle," "reduc[e] cost and reduc[e] operator dependence," and "reduce[] complexity in service." The only disadvantage indicated by the report was that "[c]able systems are from two to three times as expensive as rods," costing $9.00 per door instead of $4.25 per door if Ford used a rod system. A second report Ford produced sometime after 1993, which compared rod and cable systems, concluded cable systems "improved

quality," were "easier to install," and were more "[r]obust to door foreshortening." The only disadvantage listed was "higher cost"—"$0.85/door more than rods."

These reports demonstrate Ford conducted its own risk-utility analysis. Specifically, Ford "consider[ed] . . . the costs, safety and functionality associated with the alternative design," *Branham*, 390 S.C. at 225, 701 S.E.2d at 16, and concluded the cable-linkage system was a feasible, if not superior, alternative design to the compression rod system.

We find the Estate presented ample evidence of a reasonable alternative design. This evidence supports a finding that "the increased costs . . . of altering the design [to incorporate a cable-linkage system] would have been worth the resulting safety benefits," and thus satisfies the risk-utility test. *See* 390 S.C. at 224, 701 S.E.2d at 16 (explaining the central inquiry of the risk-utility test, quoting David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro–Balancing" Costs and Benefits,* 75 Tex. L. Rev. 1661, 1687 (1997))). We find the Estate met the requirements of *Branham*.

However, Ford makes other arguments based on *Branham*, which we address in turn.

First, Ford argues the Estate did not meet the requirements of *Branham* because it failed to prove a specific design flaw in the compression rod system of the PN96. Relying on the *Branham* court's statement that a plaintiff must "point to a design flaw in the product," 390 S.C. at 225, 701 S.E.2d at 16, Ford argues the Estate never identified a defective feature of *this* particular rod system. In support of this argument, Ford asserts it is not enough for the Estate to present evidence showing the compression rod system in the PN96 allowed the door to open with only 12 millimeters of foreshortening and that a different system would have prevented this from occurring. Rather, Ford argues, *Branham* required the Estate to prove how a specific feature of this rod-linkage system allowed the door to open, and then offer a design alternative to that feature.[3] Ford argues the Estate cannot meet the

[3] Ford argued in its brief that Gilberg "failed to specify the facet of Ford's rod-linkage system that was, in his opinion, a design flaw." At oral argument, Ford stated Gilberg "doesn't explain how we improperly implemented" a rod design, and suggested the Estate could have met the requirement Ford reads into *Branham* by

requirements of *Branham* by simply proving another door latch system would have prevented the product from being unreasonably dangerous and that Ford could have prevented Riley's death by using the other system.

We find Ford has misinterpreted the statement from *Branham*—that the plaintiff must "point to a design flaw in the product." *Id.* This statement relates to the plaintiff's burden of proving a reasonable alternative design, not the requirement of proving the existence of a design defect,[4] which the *Branham* court addressed in detail in another section of the opinion. *See* 390 S.C. at 212-18, 701 S.E.2d at 10-12. The statement merely sets up the requirement of a reasonable alternative design by noting that a plaintiff must identify the design feature for which an alternative is offered. We find the Estate met the requirements of *Branham* because the Estate (1) "point[ed] to a design flaw in the product"—the vulnerability of the PN96's compression rod system to foreshortening, which allowed the door to open during the collision without the handle being pulled—and (2) "show[ed] how [the cable-linkage system] would have prevented the [PN96] from being unreasonably dangerous." 390 S.C. at 225, 701 S.E.2d at 16.

Second, Ford argues the Estate failed to meet the requirements of *Branham* because it did not offer an expert who would "champion" the cable-linkage system. This argument by Ford is based on Gilberg's testimony that "there is nothing inherently wrong with rods." We find no basis in *Branham*, or in any other authority, for Ford's argument that an expert must "champion" an alternative design.

Finally, Ford claims the Estate did not propose an alternative design that would have prevented the product from being unreasonably dangerous in all foreseeable

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proving "this rod was . . . defectively designed because it was . . . in the wrong place, . . . not the right size," or "manufactured [with] the wrong material."

[4] A plaintiff must, of course, prove the existence of a design defect. *See Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012) (reciting the elements of a design-defect products liability claim, including "the injury occurred because the product 'was in a defective condition . . .'" (quoting *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985))). The Estate's evidence proving the door latch system of the PN96 was in a defective condition is addressed in section II.B.

collisions. It argues Gilberg's analysis of the crashworthiness of the cable system was limited to this particular accident involving Riley because he was "unwilling to say that the [cable-linkage system] as a whole [wa]s a good design for all reasonably foreseeable crashes." However, the law of crashworthiness does not require the Estate to prove its alternative design would have prevented the door from opening in *every* foreseeable collision. Instead, the law required the Estate to prove (1) the design of the rod system in Riley's PN96 "created an unreasonable risk of injury" that was "readily foreseeable as an incident to the normal and expected use of [the] automobile," *Mickle v. Blackmon*, 252 S.C. 202, 228, 232, 166 S.E.2d, 173, 184, 186 (1969), and (2) the cable system "would have prevented the product from being unreasonably dangerous." *Branham*, 390 S.C. at 225, 701 S.E.2d at 16. We find the Estate met these requirements.

B. Design Defect

Ford argues the Estate did not present sufficient evidence that the door-latch system in Riley's PN96 was defective because the Estate relied on the mere fact that the door opened in the accident as evidence of a defect. *See Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 80, 735 S.E.2d 650, 658-59 (2012) (holding a plaintiff cannot rely on "the mere fact [that] a product failed," but "must offer some evidence beyond the product's failure itself"); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995) (stating "the mere fact that a product malfunctions does not demonstrate the manufacturer's negligence nor does it establish that the product was defective"). We disagree.

In addition to the evidence discussed in section II.A., Gilberg testified extensively about what constitutes a safe door-latch design and, specifically, the safety of the door-latch design in the PN96. He stated the PN96 "did have a design defect" that caused the door to unlatch in this accident. He went on to testify "why it is that [he] believe[d] Sheriff Riley's F-150 had a design defect." He testified the door of Riley's truck "came open without damage to the latch," which "shouldn't have happened." He explained this was the basis for the design defect because the particular rod-linkage system in Riley's truck allowed the door to unlatch due to a "very small amount of longitudinal crush . . . [of] the door." When asked on cross-examination whether the mere use of the rod-linkage system itself rendered the truck defective, he responded, "No sir. What renders it defective is that it fails without even stressing the latch." Gilberg explained this is because a compression

rod-linkage system is "sensitive to longitudinal crush" in that "[i]f the door is crushed longitudinally as little as one inch," the door will open.

Ford relies heavily on *Graves*, but we find that reliance to be misplaced. In *Graves*, the supreme court affirmed the circuit court's exclusion of all the plaintiff's computer experts, 401 S.C. at 78, 735 S.E.2d at 657, leaving the plaintiff with no evidence whatsoever as to how, or even whether, the product malfunctioned. 401 S.C. at 79, 735 S.E.2d at 658. Thus, the plaintiff in *Graves* did not prove a failure, and also did not prove any defect that could have caused a failure. In this case, the failure was that the door opened when no person pulled the handle. The defect that caused the failure was a door-latch system that did not protect against foreshortening, and allowed the door to open when it should not have—with only "a very small amount of longitudinal crush." Through its expert and through Ford's witnesses and documents, the Estate presented extensive evidence of how and why the design of the door-latch system in the PN96 was defective. This case is readily distinguishable from *Graves*.

C. Expert Testimony

Finally, Ford argues "the Estate failed to present expert testimony of either a design flaw beyond mere failure or an alternative feasible design that was crashworthy." Much of the evidence we discussed in sections II.A. and B. came directly from the testimony of the Estate's mechanical engineering expert, Gilberg. We find Gilberg's testimony on the existence of a design defect and a reasonable alternative design required the denial of Ford's motion for JNOV.

III. Ford's Motion for Setoff

Ford also argues the trial court erred in refusing to grant a setoff to account for the $25,000 Carter paid the Estate to settle the claims against him. *See Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) ("A non-settling defendant is entitled to credit for the amount paid by another defendant who settle[d] for the same cause of action."). The Estate in its brief "acknowledges that Ford is entitled to a $5,000 setoff representing that portion of the prior settlement allocated to wrongful death," and thus concedes the trial court erred in part by refusing to grant any setoff. The Estate argues, however, that Ford is not entitled to any of the $20,000 the Estate and Carter allocated to the survival claim because there was "ample evidence" showing Riley suffered conscious pain and suffering.

See Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991) (stating a survival action exists when "there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering"). The Estate essentially argues the trial court should have accepted the allocation of settlement funds it agreed upon with Carter, despite the fact Ford did not participate in those negotiations. Ford argues, on the other hand, it is entitled to a credit for the entire $25,000 because of "an undisputed lack of evidence" of conscious pain and suffering.

We disagree with both the Estate and Ford. We find there is some evidence that Riley suffered consciously, and hold both parties were entitled to have the trial court analyze the proper allocation of the settlement and make findings of fact on the record as to whether, and if so how, the remedy of setoff should be applied to the facts of this case. Because the trial court's form order denying setoff reflects no analysis, and because the Estate concedes Ford is entitled to at least $5,000, we reverse the trial court's decision to deny any setoff. Because we find the record is sufficient to allow this court to engage in the required analysis, we decide the question without remand. *See Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011) (stating setoff is equitable in nature, and thus an appellate court may find facts in accordance with its own view of the preponderance of the evidence).

In this crashworthiness action, the Estate has no claim against Ford for Riley's injuries resulting solely from the initial impact with Carter. Rather, the Estate's claim against Ford is limited to the enhanced injuries—in this case, Riley's death—that resulted from the alleged negligent design of the door-latch system that allowed Riley to be ejected. *See Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 452 (4th Cir. 2001) (applying South Carolina law) ("Under the crashworthiness doctrine, liability is imposed not for defects that cause collisions but for defects that cause injuries after collisions occur."). Thus, the Estate's theory against Ford necessarily depends on Riley being alive after the initial collision because if Riley died before he was ejected, Ford's negligent design of the door-latch system could not have proximately caused his death. The jury's verdict against Ford, therefore, requires a finding that Riley was alive after the collision with Carter. Additionally, the first witness to arrive at the scene of the accident testified that when he looked for the ejected driver of the pickup, he "heard something in the bushes," saw Riley

on the ground, and heard "a gasping sound." Though it is minimal, we find the existence of some evidence to support a survival action against Carter.[5]

It makes sense, therefore, that the Estate and Carter allocated some portion of the settlement to the Estate's survival claim, particularly when Carter alone is liable for any pain and suffering Riley endured consciously before he was ejected from the truck. However, the minimal evidence of survival damages in this record does not support an allocation of eighty-percent of the settlement to the survival claim. This is particularly true because Carter is jointly liable for all of the wrongful death damages. Moreover, Ford was not a party to the settlement negotiations between the Estate and Carter, and thus is not bound by their agreement. *See Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 426 (Ct. App. 2000) (holding a defendant who is "not a party to the settlement . . . is not bound by its terms" when requesting setoff).

The Estate would have us focus only on the amount of money Carter paid to settle the survival claim, and not on the percentage of the settlement allocated to one claim or the other. Doing so, the Estate argues, requires the conclusion that the $20,000 allocated to the survival action in its settlement with Carter was reasonable. We concede that $20,000 is not an unreasonable amount for Carter to pay to settle the survival claim on the facts of this case. We disagree, however, with the premise of the Estate's argument because allocating eighty-percent of the settlement to survival is not reasonable. We hold that in the context of a non-settling defendant's claim for setoff, the court should examine whether the percentages allocated to one claim or the other by the settling parties are reasonable. *See id.* If the allocation is not reasonable, the court may reallocate the funds.

Rutland supports a fair reallocation of the settlement by this court. In *Rutland*, the decedent died in a car accident, and the personal representative settled with the at-fault driver's insurance company and the automobile manufacturer for a total settlement of $305,000. 400 S.C. at 212, 734 S.E.2d at 143. The settling parties agreed to allocate $138,000 to a survival claim and $167,000 to wrongful death. *Id.* The plaintiff proceeded to trial against a third defendant only on the wrongful

[5] Funeral expenses are also recoverable in a survival action. *See* S.C. Code Ann. § 15-5-100 (2005) ("Damages recoverable under . . . [the survival statute] . . . may include reasonable funeral expenses . . . .").

death claim. 400 S.C. at 213, 734 S.E.2d at 143. After the jury awarded the plaintiff $300,000 in actual damages, the trial court reallocated the entire amount of the settlement exclusively to wrongful death. *Id.* The supreme court found "no evidence of conscious pain or suffering," 400 S.C. at 214, 734 S.E.2d at 144, and affirmed the trial court's reallocation of the settlement. 400 S.C. at 217, 734 S.E.2d at 146. The court's finding of "no evidence" of pain and suffering meant there was *no* factual support for the agreed-upon allocation.

Although our finding of some evidence of conscious pain and suffering makes this case different from *Rutland*, we believe the reasoning of *Rutland* permits a reallocation of the settlement proceeds in this case. *Rutland* is based in part on the policy that "[c]ompensatory damages are intended to make the plaintiff whole." 400 S.C. at 217, 734 S.E.2d at 146. When an agreed-upon allocation of settlement proceeds is not reasonable under the evidence, that policy is not advanced because of the possibility of double recovery. *See id.*; *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998) (stating "[t]he reason for allowing [setoff] is to prevent an injured person from obtaining a second recovery" (citation omitted)). Thus, when an agreed-upon allocation of settlement proceeds is not reasonably based on the evidence and does not fairly advance the policy of preventing double-recovery, a non-settling defendant who is entitled to a setoff but was not involved in the settlement negotiation is entitled to have the court consider reallocating the proceeds.[6]

The minimal evidence of conscious pain and suffering in this case weighs in favor of allocating the majority of the proceeds to the wrongful death claim. However, the fact that Carter alone is liable for the pain and suffering Riley endured before being ejected weighs in favor of some portion being allocated to the survival claim. Further, settling parties must support the settlement agreement with consideration for the release of both claims. *See Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (stating "settlement agreements are

[6] We use permissive language such as "may," "permit," and "consider reallocating" because setoff is an equitable remedy a court is not required to grant. *See Church*, 391 S.C. at 342, 705 S.E.2d at 485 (stating setoff is equitable in nature); *Siau v. Kassel*, 369 S.C. 631, 640, 632 S.E.2d 888, 893 (Ct. App. 2006), *overruled on other grounds by Buffington v. T.O.E. Enters.*, 383 S.C. 388, 680 S.E.2d 289 (2009) (providing that all equitable remedies are "granted as a matter of sound judicial discretion, and not as a matter of legal right" (citation omitted)).

viewed as contracts"); *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("The necessary elements of a contract are an offer, acceptance, and valuable *consideration*." (citation omitted) (emphasis added)). This also weighs in favor of some portion being allocated to the survival claim. Considering the entire record before us, we find that a fair allocation of the Estate's settlement with Carter is eighty-percent to the wrongful death claim and twenty-percent to the survival action. Thus, we find Ford is entitled to a $20,000 setoff from the jury's verdict.

IV. The Estate's Motion for New Trial *Nisi Additur*

Finally, Ford argues the trial court erred by increasing the jury verdict from $300,000 to $900,000. We agree.

We begin our analysis of this issue by focusing on both parties' right to a trial by jury. Article I, section 14 of the South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." The right to trial by jury is "guaranteed in every case,"[7] and includes the right to have the jury determine the amount of damages. *See Hatchell v. McCracken*, 243 S.C. 45, 51, 132 S.E.2d 7, 10 (1963) (stating "[t]here [is] no question as to the legal right . . . to have the amount of damages . . . determined by a jury").

In potential conflict with this constitutional right, a trial court has the power to grant a motion for new trial *nisi additur* when the court determines the jury's verdict is inadequate in light of the evidence presented. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). To balance "the wide discretion given to a trial judge in ruling on a new trial [*nisi additur*] motion," *Luchok v. Vena*, 391 S.C. 262, 264, 705 S.E.2d 71, 72 (Ct. App. 2010), against a litigant's constitutional right to a trial by jury as to the amount of damages, our courts give "substantial deference . . . to a jury's determination of damages," *id.*, and we require trial courts to "offer compelling reasons for invading the jury's province." *Green v. Fritz*, 356

[7] *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.").

S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003) (*citing Bailey*, 318 S.C. at 14, 455 S.E.2d at 691).[8]

Thus, our analysis of the decision to grant *additur* must be made in deference to the jury's verdict, and turns on whether the trial court gave compelling reasons for invading the province of the jury. We agree with Ford that the court did not offer compelling reasons.

The trial court found it was "compelled to grant [*additur*] because every element of wrongful death damages was proven by the [Estate] and the $300,000 verdict d[id] not reflect the evidence on these issues." The court found the Estate presented "undisputed, uncontroverted evidence" of economic loss in the amount of $228,605. The Estate also presented evidence of a funeral bill for $10,196, which amounts to a total claim of economic loss of $238,801. As to noneconomic damages, the court found the Estate's "uncontested" evidence showed "the beneficiaries . . . suffered each of the compensable elements of [noneconomic] loss," and noted that these damages "were not only established, but shown to be significant through uncontested, emotionally compelling testimony." *See Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (listing the same elements of recoverable damages as are listed in the court's order). The court went on to summarize the testimony of Riley's family and friends, which the court found "showed that this family of beneficiaries, perhaps more than most wrongful death beneficiaries, suffered great loss" and "left no question as to the grief, emotional turmoil, and loss suffered." The court then concluded, "For all of the compelling reasons listed above, it is abundantly clear that the verdict in this case was inadequate, in light of the evidence present[ed] at trial, and a granting of *nisi additur* is appropriate."

By subtracting $238,801—the maximum amount of economic loss suffered by the Estate[9]—from the jury's verdict of $300,000, we can determine the jury awarded at

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[8] *See also Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009); *Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 493, 361 S.E.2d 775, 777 (Ct. App. 1987), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

[9] Ford does not concede these damages. However, Ford did not actively contest any element of the Estate's claim of economic loss, choosing instead to focus its

least $61,199 in noneconomic damages. In essence, the trial court ruled that $61,199 in noneconomic damages was not enough. In other words, the jury awarded noneconomic damages, but the trial court disagreed as to whether the amount was sufficient. We find this is not a compelling reason to invade the province of the jury.[10] *See Krepps v. Ausen*, 324 S.C. 597, 608, 479 S.E.2d 290, 295 (Ct. App. 1996) (stating "the trial court may not impose its will on a party by substituting its judgment for that of the jury").

As a general rule, the "determination of reasonable compensation for non[economic] damages . . . is . . . left to the jury's discretion." *Scott*, 340 S.C. at 169, 530 S.E.2d at 395. The assessment of noneconomic damages "turns on the facts of each case," *id.*, and the value of these damages "cannot be determined by any fixed yardstick." *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 310, 578

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efforts on the issue of liability. Many of the elements of the Estate's economic loss are in fact uncontested, such as Sheriff Riley's lost salary for the remainder of his existing term of office, and the funeral bill. However, the jury could have discounted other elements even though Ford did not actively challenge their values. For example, the Estate's claim for economic loss included lost salary after the Sheriff's reelection, and its expert economist testified the Estate lost household services in the approximate amount of $57,000. As Ford pointed out at oral argument, no elected official's reelection is certain, and no witness testified the expenses for lost household services were actually incurred. For these reasons, the jury could have awarded less than the amounts claimed for those items.

[10] This case is different from those in which our court has affirmed the granting of *additur* when the jury altogether failed to award noneconomic damages. *See, e.g.*, *Waring v. Johnson*, 341 S.C. 248, 255, 261, 533 S.E.2d 906, 910, 913 (Ct. App. 2000) (finding "[t]he jury failed to make any award for other damages such as pain and suffering," which amounted to "compelling reasons . . . justifying the grant of the *nisi additur*"); *Williams v. Robertson Gilchrist Constr. Co.*, 301 S.C. 153, 155-56, 390 S.E.2d 483, 484-85 (Ct. App. 1990), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) (finding the trial court's reason for granting *additur*—the jury disregarded the testimony about the funeral bill and noneconomic losses—was compelling); *Jones*, 293 S.C. at 493-94, 361 S.E.2d at 777 (affirming the granting of *additur* where the jury's award of actual damages equaled the exact amount of the plaintiff's economic loss, but no damages for proven noneconomic loss).

S.E.2d 16, 26 (Ct. App. 2002) (citation omitted). Our civil justice system is built on the foundation that such determinations are to be made by juries, not judges. *See generally* 2 J. Kendall Few, *In Defense of Trial by Jury* 277-87 (1993) (stating, for example, "the judgment of twelve impartial [jurors] of the average of the community, applying their separate experiences of life to the solution of such doubts as may arise, is more likely to be wise and safe than the conclusion of any single judge" (quoting U.S. District Judge William H. Brawley of South Carolina in *Travelers' Ins. Co. v. Selden*, 78 F. 285, 287 (4th Cir. 1897)) and "what individual can so well assess the amount of damages which a plaintiff ought to recover for any injury he has received [than] . . . an intelligent jury?" (quoting Henry Peter Brougham's address to the English House of Commons (Feb. 7, 1828))).

Limiting our holding to the facts of this case, we find the jury awarded damages for noneconomic loss, and the trial court's mere disagreement with the jury's determination of the proper amount of those damages is not a compelling reason for granting *additur*. Therefore, we reverse the award of *additur* and reinstate the jury's verdict of $300,000.

V. Conclusion

For the reasons explained above, we **AFFIRM** the trial court's decision to deny Ford's motion for JNOV, **REVERSE** the decision to deny setoff, and **REVERSE** the decision to grant a new trial *nisi additur*. We reinstate the jury's verdict of $300,000 and award a setoff against the verdict in the amount of $20,000.

PIEPER and KONDUROS, JJ., concur.