The Supreme Court of South Carolina

In the Matter of Melinda Faye Chambers, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 16, 1998, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 29, 2008, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

The records in the office of the Clerk show that Petitioner has filed an affidavit stating she does not represent clients in South Carolina and has returned her Certificate of Admission.

Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

February 21, 2008

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF T. ANDREW JOHNSON, PETITIONER

On December 10, 2007, Petitioner was definitely suspended from the practice of law for one year, retroactive to October 4, 2006. In the Matter of Johnson, 375 S.C. 499, 654 S.E.2d 272 (2007). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than April 21, 2008.

Columbia, South Carolina

February 20, 2008

The Supreme Court of South Carolina

In the Matter of Ronald C. Hallsten, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 14, 1974, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 28, 2008, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Ronald C. Hallsten shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

February 21, 2008

The Supreme Court of South Carolina

In the Matter of Jonathan A. Basten, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Basten and the interests of Mr. Basten's clients.

IT IS ORDERED that Elizabeth S. Hills, Esquire, is hereby appointed to assume responsibility for Mr. Basten's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Basten may have maintained. Ms. Hills shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Basten's clients and may make disbursements from Mr. Basten's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

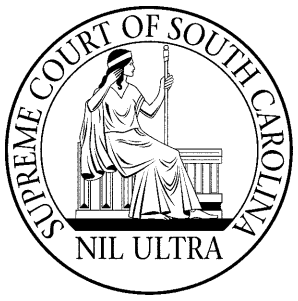
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Jonathan A. Basten, Esquire, shall serve as notice to the bank or other financial

institution that Elizabeth S. Hills, Esquire, has been duly appointed by this Court.

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

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

Columbia, South Carolina
February 22, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7

February 25, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Sumter County Master-in-Equity
Linwood S. Evans, Jr., Respondent.

Opinion No. 26439
Submitted February 5, 2008 – Filed February 25, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and James G. Bogle, Jr., Senior Assistant Attorney General, both of Columbia, for Office of Disciplinary Counsel.

G. Murrell Smith, Jr., of Sumter, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand.[1] The facts as set forth in the agreement are as follows.

[1] Respondent no longer holds judicial office. A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

FACTS

Respondent served as a Master-in-Equity for Sumter County and maintained an official Master-in-Equity bank account. On or about January 14, 2000, respondent issued a check to himself from his Master-in-Equity account in the amount of $10,000.00. The check was used with other funds to purchase a cashier's check in the amount of $25,000.00, payable to Peterbilt of Mississippi, dated January 14, 2000 on behalf of respondent's friend. On or about February 8, 2000, the friend wrote a check for $10,000.00 to respondent. Respondent deposited this check into his attorney escrow IOLTA account on or about the same day. The same day, respondent wrote a check from his attorney escrow account in the amount of $10,000.00 to another individual.

Respondent represents that, shortly thereafter, he returned the $10,000.00 from his escrow account to his Master-in-Equity account. ODC has verified a deposit in that amount into respondent's Master-in-Equity account. Respondent asserts the $10,000.00 came from legal fees in his escrow account. ODC is unable to confirm or dispute respondent's assertion.

Respondent admits he used his official Master-in-Equity funds for purposes other than that for which they were intended. The funds have been replaced.

On or about September 1998, respondent loaned $4,000.00 from his official Master-in-Equity account to another individual. When the individual repaid the funds with interest, respondent returned them to the Master-in-Equity account.

Later, respondent made a second loan of approximately $3,500.00 from the Master-in-Equity account to the same individual. The funds for the second loan were repaid with interest.

Thereafter, in or about January 2002, an "advance" in the amount of $3,000.00 was made to the same individual. Respondent acknowledges approximately $3,000.00 plus interest is still outstanding and owed to the Master-in-Equity account. Respondent further acknowledges that lending or advancing funds to this individual constituted the use of official Master-in-Equity funds for purposes other than that for which they were intended.

LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 4(A)(2) (judge shall conduct all extra-judicial activities so they do not demean the judicial office); and Canon 4(D)(1) (judge shall not engage in financial dealings that may be reasonably perceived to exploit judge's judicial position). Respondent admits his misconduct constitutes grounds for discipline under the following provisions of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1)(it shall be ground for discipline for judge to violate the Code of Judicial Conduct); Rule 7(a)(4) (it shall be ground for discipline for judge to persistently perform judicial duties in an incompetent manner); and Rule 7(a)(9) (it shall be ground for discipline for judge to violate Judge's Oath of Office).

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall neither seek nor accept any judicial office in this State without the express written permission of the Court after due notice in writing to ODC. Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Harry Clayton DePew, Respondent.

Opinion No. 26440
Submitted January 28, 2008 – Filed February 25, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John P. Freeman, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or definite suspension not to exceed nine (9) months. We accept the agreement and definitely suspend respondent from the practice of law in this State for nine (9) months. The facts, as set forth in the agreement, are as follows.

FACTS

On January 14, 2002, respondent applied for and obtained a driver's license from the Department of Motor Vehicles using the name

and other identifying information of his deceased father but bearing his own photograph. A report generated by the Department of Motor Vehicles Document Review and Fraud Detection Unit revealed the fraudulent license when it determined that the credentials used to obtain the license were that of a deceased person. The information was forwarded to the South Carolina Law Enforcement Division which charged respondent with Fraudulent Application for a License. See S.C. Code Ann. § 56-1-510(5) (2006). On June 13, 2007, respondent entered a plea of nolo contendere in the Orangeburg County Summary Court.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) and Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for nine (9) months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James M. Williams, III, Respondent.

Opinion No. 26441
Submitted January 29, 2008 – Filed February 25, 2008

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Assistant Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Larry C. Brandt, of Larry C. Brandt, PA, of Walhalla, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and disbar respondent from the practice of law in this state.[1] The facts, as set forth in the agreement, are as follows.

[1] While the agreement was pending before the Court, respondent submitted a letter requesting permission to resign from the Bar. The request is denied.

FACTS

Since the late 1980s, respondent represented Client and his wife on a variety of legal matters. Presently, Client is an elderly man residing in a retirement community. Client's wife resided in the same facility until her death in November 2002.

Respondent drafted durable powers of attorney for Client and his wife. In each of the documents, respondent was named attorney-in-fact. The durable powers of attorney drafted by respondent contained a provision that respondent, as attorney-in-fact, had authority to "deal with Attorney in Attorney's individual, or any fiduciary capacity in buying and selling assets, and lending and borrowing money, and in all other transactions irrespective of the occupancy by the same person of dual positions."

Respondent's representation of Client and his wife in the preparation and execution of the durable powers of attorney and the naming of respondent as attorney-in-fact presented a conflict of interest. Respondent did not advise Client and his wife of this conflict of interest.

Respondent admits misappropriating more than $400,000 from Client's personal assets for his own use and benefit by executing documents, checks, etc., as Client's attorney-in-fact. Further, respondent borrowed money from Client without obtaining his informed consent to the conflict of interest the transactions presented. Respondent failed to reduce the terms of Client's loans to respondent to writing in the form and with the substance required by the Rules of Professional Conduct.

Client initiated a civil action against respondent. Respondent settled the suit, in part by agreeing to pay restitution.

Respondent pled guilty to one count of exploitation of a vulnerable adult. He was sentenced to eighteen (18) months under house arrest.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.8(a) (lawyer shall not enter into business transaction with a client unless terms are fair and disclosed, client is given opportunity to seek advice of independent counsel, and client consents in writing); Rule 1.15 (lawyer shall hold property of client separate from lawyer's own property); Rule 8.4(b) (lawyer shall not commit criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 8.4(c) (lawyer shall not commit criminal act involving moral turpitude); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice, bring courts or legal profession into disrepute, or conduct demonstrating an unfitness to practice law) and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken upon admission to practice law in this state).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appeal from Georgetown County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 26442
Heard September 20, 2007 – Filed February 25, 2008

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender Katherine H. Hudgins, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor John Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: A jury convicted Appellant Steven C. Stanko of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery and recommended Appellant be sentenced to death. In his appeal, Appellant raises issues regarding 1) the limitation of the scope of *voir dire* and 2) the omission of a statutory mitigating factor from the jury charges in the penalty phase. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case arises out of two brutal attacks in a string of violent crimes committed in Georgetown County. The State alleged Appellant strangled his girlfriend and attempted to murder her daughter by slitting her throat in the course of a robbery and sexual assault of the two women. At trial, Appellant did not deny committing the crimes, but alleged that he was insane.

During *voir dire*, Appellant attempted to question a potential juror as to her views on the insanity defense. The State immediately objected to this line of questioning. The trial judge sustained the objection and ruled that Appellant could ask potential jurors whether they could consider affirmative defenses "and list them all," but could not ask jurors whether they would consider the specific affirmative defense of insanity. After the parties discussed the issue, Appellant indicated he was "abandoning" asking potential jurors questions specifically regarding the insanity defense.

After the State presented its case in chief, Appellant presented expert witnesses in order to prove his insanity defense. The experts testified that medical examinations of Appellant's brain revealed a frontal lobe abnormality. Three of Appellant's experts testified that the frontal lobe abnormality impaired his ability to control his impulses and exercise proper judgment. One of Appellant's experts testified that he was unable to distinguish between right and wrong as required under South Carolina law. *See State v. Pittman*, 373 S.C. 527, 577-78, 647 S.E.2d 144, 170 (2007) (a defendant is considered legally insane if, at the time of the offense, he lacked

the capacity to distinguish moral or legal right from wrong). In rebuttal, the State presented experts who testified that Appellant was able to distinguish between right and wrong and, therefore, could be held criminally responsible for his actions. The trial court submitted a jury charge on the insanity defense and instructed the jury that, in order to be found not guilty by reason of insanity, Appellant had to show by a preponderance of the evidence that he had a mental disease or defect that made him unable to distinguish right from wrong. *See* S.C. Code Ann. § 17-24-10 (2006). At the conclusion of the guilt phase, the jury declined to find Appellant not guilty by reason of insanity and returned a guilty verdict as to all counts.

The trial proceeded to the penalty phase, and during the conference to determine the appropriate jury charges, the trial court informed the parties that it intended to charge the jury on two statutory mitigating factors provided in S.C. Code Ann. §§ 16-3-20(C)(b)(2) and (6).[1] Appellant did not request a charge on any additional statutory mitigating factors and indicated that he had no objection to the jury charges.

At the conclusion of the penalty phase, the jury recommended Appellant be sentenced to death. This appeal followed, and Appellant raises the following issues for review:

I. Did the trial court err in refusing to allow Appellant to ask potential jurors about their feelings and viewpoints concerning the defense of insanity during *voir dire*?

II. Did the trial court err in failing to instruct the jury on an additional and unrequested statutory mitigating circumstance?

[1] These mitigating factors provide: "The murder was committed while the defendant was under the influence of mental or emotional disturbance" and "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." S.C. Code Ann. §§ 16-3-20(C)(b)(2) and (6).

LAW/ANALYSIS

I. *Voir Dire*

Appellant argues the trial court erred in refusing to allow him to question potential jurors about their feelings on the insanity defense during *voir dire*. We disagree.

Initially, we question whether this issue is preserved for review. After the trial court ruled that Appellant could not ask potential jurors about their views on the insanity defense, Appellant indicated that he was "abandoning" this line of questioning, thereby suggesting he accepted the trial court's ruling. *See State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911 (1996) (no issue is preserved for appellate review if the objecting party accepts the trial court's ruling and does not contemporaneously make an additional objection).

In any event, Appellant's argument fails on the merits. The scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court. *State v. Wise*, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A capital defendant's right to *voir dire*, while grounded in statutory law, is also rooted in the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Id.* To constitute reversible error, a limitation on questioning must render the trial "fundamentally unfair." *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991); *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004).

Appellant argues that he was deprived of his right to a fair trial by an impartial jury as a result of the trial court's ruling precluding counsel from questioning potential jurors on their view of the insanity defense. Appellant claims the insanity defense is a controversial legal issue and that some members of the jury may have been unable to follow the law in regard to the defense. We disagree.

Appellant was not entitled to ask potential jurors about their specific views of the insanity defense during *voir dire*. The trial court allowed Appellant to explore the issue of affirmative defenses during *voir dire*, and permitting either side to ask any more case-specific questions would have veered close to allowing the parties to stake out a jury. *See State v. Poindexter*, 314 S.C. 490, 493, 431 S.E.2d 254, 255 n.2 (1993) (*voir dire* is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions).[2] While the Sixth and Fourteenth Amendments to the United States Constitution provide a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. "The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

Our review of the entire *voir dire* process shows the qualified jurors were impartial, unbiased, and capable of following the law. Prior to trial, potential jurors completed a questionnaire indicating whether they were the type of person who: (1) would automatically impose the death penalty; (2) would never impose the death penalty; or (3) would listen to the evidence and apply the law in deciding whether to impose the death penalty. The trial court excused any individual who indicated that he fell into the first or second category. The trial court asked the potential jurors if anyone had bias or prejudice regarding the case and dismissed those who stated they could not remain fair or unbiased. Additionally, the trial court confirmed that each qualified juror would apply the law as charged, even if they disagreed with it, which necessarily includes the law of the insanity defense. Finally, the trial

[2] We disagree with the dissent that *Poindexter* stands for the proposition that questioning jurors about their bias against the insanity defense is appropriate. Nonetheless, the issue in this case is not whether it is appropriate, but rather, the issue is whether the trial court's ruling precluding such questioning rendered Appellant's trial "fundamentally unfair." *See Hill*, 361 at 310, 604 S.E.2d at 703 (affirming trial court's ruling that limited *voir dire* questioning where such limitation did not render the defendant's trial fundamentally unfair).

court permitted Appellant to ask potential jurors whether they would be able to apply the law in favor of Appellant if the facts provided for a defense. Appellant presented no evidence showing the limitation of questioning impacted his right to a fair and impartial jury and failed to present evidence that the jury was biased or incapable of following instructions on the law. Accordingly, under the facts of this case, there is no indication that Appellant's trial was rendered "fundamentally unfair" by the trial court's limit of *voir dire*.

In conclusion, contrary to the dissent's view, our holding in no way imposes an absolute ban on questioning jurors about their views on the insanity defense. Rather, we hold that the trial court's ruling limiting the scope of *voir dire* did not deprive Appellant of a fair trial.

II. Mitigating Factor Charge

Appellant argues that the trial court erred by failing to instruct the jury on the statutory mitigating circumstance provided in § 16-3-20(C)(b)(7): "The age or mentality of the defendant at the time of the crime." We disagree.

In *State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989), we set forth the proper procedure for submission of statutory mitigating factors to the jury in the penalty phase of a capital case:

> Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.

Absent a request by counsel to charge a mitigating circumstance at trial, the issue of whether the mitigator should have been charged is not preserved for review. *State v. Evans*, 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006).

In this case, after the trial court informed the parties that it would charge the mitigating factors in §§ 16-3-20(C)(b)(2) and (6), Appellant stated that he had no objection to the decision and did not request that the court charge any additional statutory mitigating factors. Moreover, after charging the jury, Appellant indicated he had no objection to the charge. Accordingly, this issue is not preserved for our review.

Notwithstanding any preservation issues, we note that Appellant was not prejudiced by the absence of this statutory mitigating factor. Appellant's mental condition was the focus of the guilt phase and was also a main issue in the penalty phase. The jury heard extensive expert testimony regarding Appellant's alleged mental disorders, and the trial court charged the jury on two other mitigating factors through which they could consider Appellant's mental condition. Thus, the jury was clearly aware that they could consider Appellant's mentality in determining whether the death sentence was warranted. In spite of this evidence, the jury found the existence of five statutory aggravating factors beyond a reasonable doubt and recommended Appellant be sentenced to death. Therefore, the absence of this statutory mitigating factor did not preclude the jury from considering Appellant's mentality in the penalty phase, and there is no reasonable probability that had the trial court charged the jury on this additional mitigating factor, the jury would have returned a different recommendation.[3] *See Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendant's mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental condition, and the jury found the existence of five aggravating factors).

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of

[3] We do not base our finding of no prejudice on the fact that the jury found the existence of five aggravating factors.

passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007) (death sentence warranted where defendant was convicted of murder, kidnapping, criminal sexual assault, and grand larceny); *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004) (death sentence upheld where jury found aggravating factors of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996) (death sentence upheld where defendant was convicted of murder, criminal sexual conduct, armed robbery, and grand larceny of a motor vehicle).

CONCLUSION

For the foregoing reasons, we affirm Appellant's convictions and sentence.

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

JUSTICE PLEICONES: I respectfully dissent. In my opinion, a capital defendant who will interpose a diminished capacity or insanity defense is entitled to *voir dire* the jurors whether they entertain any bias against such a defense. In fact, this Court has already recognized the appropriateness of such inquiry. See State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993), footnote 2. The trial judge, of course, must be careful not to allow such questioning to veer into improper "pre-educating or indoctrinating," but I cannot agree with the majority's absolute ban. Moreover, I am not clear what evidence the majority believes was available to appellant to demonstrate either the impact of the denial of his *voir dire* request, or that the jury was in fact biased or incapable of following the instructions. Having been denied the opportunity to probe potential jurors' bias, I would not require that appellant demonstrate its existence in order to obtain relief.

I agree with the majority that the issue whether the jury should have been charged on the statutory mitigating circumstance found in S.C. Code Ann. § 16-3-20 (C)(b)(7) is not preserved for our review and therefore the merits should not be addressed on direct appeal. State v. Stone, S.C. Sup. Ct. Op. No. 26408 filed December 20, 2007. Moreover, since South Carolina is not a "weighing" state, State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004), the fact that the jury found five statutory aggravators is simply not relevant to whether appellant was prejudiced by the absence of a single mitigator, and I specifically decline to join that part of the majority's decision which cites this as a fact in support of its decision to affirm the unpreserved issue.

I would reverse appellant's convictions and sentences, and remand for a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James W. Fields and Rosemary L. Fields, Appellants,

v.

J. Haynes Waters Builders, Inc., Mahoney Brothers, Inc., and Dryvit Systems, Inc., Defendants,

of whom J. Haynes Waters Builders, Inc., is Respondent.

Appeal from Aiken County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 26443
Heard December 4, 2007 – Filed February 25, 2008

AFFIRMED

Charles A. Krawczyk, William R. Padget, and Robert "Sam" Phillips, all of Finkel Law Firm, of Columbia, for Appellants.

John L. McCants, of Ellis Lawhorne & Sims, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This is a direct appeal in a civil case arising out of the allegedly defective construction of a residence. Although the jury returned a verdict in favor of Appellants James and Rosemary Fields, the Fields appealed arguing that the trial court committed several errors relating to the admission of expert testimony, the admission of evidence, and the jury charges. The Fields further argue that the trial court erred in failing to order a new trial, a new trial nisi additur, or grant judgment not withstanding the verdict. We find that the trial court by and large committed no errors, and that where the trial court did err, the errors were harmless. Accordingly, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case arises out of the allegedly defective construction of a residence purchased by Appellants James and Rosemary Fields ("the Fields") in 1999. The Fields are not the original owners of the home in question, but purchased the home from the owners who built the home some eight years earlier. At the time the Fields purchased the home, the exterior of the home was clad with a synthetic stucco material commonly known as an exterior insulation and finish system or E.I.F.S.

Roughly two years after purchasing the home, the Fields became aware of potential moisture intrusion problems associated with E.I.F.S.-clad homes. The Fields contacted a law firm, and the law firm put the Fields in contact with inspectors and investigators who determined that the E.I.F.S. on the Fields' home was allowing moisture to enter the home which was causing significant damage to the structure.

The Fields sued Respondent J. Haynes Waters Builders, the builder of the home ("the Builder"); Dryvit Systems, Inc., the manufacturer of the E.I.F.S. used on the home; and Mahoney Brothers, Inc., the subcontractors who installed the E.I.F.S. Roughly two months prior to trial, the parties attempted to resolve the case through mediation. During mediation, the Fields settled their claims against Dryvit and Mahoney Brothers. Thus, by the time of trial, the Builder was the only remaining defendant.

At bottom, several issues in this appeal arise out of the Fields' decision to repair their home prior to trial. The parties entered into two separate scheduling orders leading up to the trial in this case, and the scheduling order in effect during the summer of 2004 called for discovery to end by August 1st and set the matter for trial on or after October 4th. On July 30th, two days before discovery was to be complete, the Fields notified the defendants of their intention to immediately remove the E.I.F.S. from the home.

Prior to trial, the Builder sought to exclude a great deal of testimony and evidence related to the inspections and repairs of the Fields' home. As a basis for excluding the removal and repair costs from trial, the Builder asserted that the Fields violated the scheduling order by removing the E.I.F.S. and repairing the home past the order's discovery deadline. As a basis for preventing the initial inspector of the home and the repair contractor from testifying, the Builder argued that both the inspector and the general contractor had violated South Carolina's laws relating to the licensing and permissible work of home inspectors and general contractors. While the trial court permitted the Fields' repair contractor to testify and admitted the evidence of removal and repair costs, the trial court found that the initial inspector of the Fields' home was not qualified to testify as an expert.

The Builder also sought extensive discovery regarding the costs of the repairs to the Fields' home. The parties' seeking of discovery beyond the deadline set in the scheduling order became the subject of considerable disagreement prior to and during trial. This disagreement resulted in several motions to compel discovery and in the trial court's admission and exclusion of several items of evidence and types of testimony. Most notably, the trial court allowed the Builder to present expert testimony analyzing the repair costs the Fields incurred in removing the E.I.F.S. from their home. This testimony included an analysis of the Fields' repair contractor's material costs, overhead, and profit margin.

The case went to trial in March 2005. Although the Fields asserted eight causes of action in their complaint, the Fields tried the case on causes of action for negligence, breach of express warranties, breach of the implied

warranty of workmanlike service, and strict liability.[1] At the close of the Fields' case in chief, the trial court granted the Builder a directed verdict as to the Fields' express warranty and strict liability claims. The case proceeded to verdict on the claims for negligence and breach of the implied warranty of workmanlike service, and the jury returned a verdict in favor of the Fields. The jury awarded $6,000 in damages, and the Fields appealed.

This Court certified the case from the court of appeals pursuant to Rule 204(b), SCACR, and the Fields raise the following issues for review:

I. Did the trial court err in (A) failing to qualify one of the Fields' potential witnesses as an expert on the basis that the witness failed to comply with South Carolina's home inspection licensing requirements, or (B) excluding a second bid for the repair of the Fields' home as inadmissible hearsay?

II. Did the trial court err in charging the jury (A) that a general contractor is not automatically liable for the negligence of a subcontractor, (B) regarding the licensing requirements for home inspectors and general contractors, or (C) regarding the acceptance of a product with a patent defect?

III. Did the trial court err in directing a verdict in favor of the Builder on the Fields' claim for strict liability?

IV. Did the trial court err in allowing testimony and evidence regarding the Fields' repair contractor's costs and profit margin?

[1] In addition to these four causes of action, the Fields originally asserted claims for breach of the implied warranties of habitability, merchantability, and fitness for a particular purpose, as well as a claim for unfair trade practices. The trial court granted the Builder summary judgment on these claims roughly one month prior to trial.

V. Did the trial court err in failing to order a new trial, a new trial nisi additur, or grant judgment notwithstanding the verdict?

LAW/ANALYSIS

I. Exclusion of Testimony and Evidence

(A) The Inspector's Qualification as an Expert

The Fields argue that the trial court erred in finding that Bill Flaherty, the initial inspector of the Fields' home, was not qualified to testify as an expert witness on the basis that Flaherty failed to comply with South Carolina's home inspection licensing requirements. We agree, but we ultimately find that the error was harmless.

A person may be qualified as an expert based upon "knowledge, skill, experience, training, or education." Rule 702, SCRE. The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support. *Id*.

Our fairly recent decision in *Baggerly v. CSX Transportation, Inc.*, is instructive. 370 S.C. 362, 635 S.E.2d 97 (2006). In *Baggerly*, this Court addressed a conflict between Rule 702's qualifications for experts and a statute that defined the practice of engineering to include the offering of expert technical testimony. *Id*. at 374-75, 635 S.E.2d at 103-04. Although the Court noted that the practice of engineering statute appeared to contain more specific requirements regarding expert testimony than Rule 702, the Court held that it would not interpret the statute to require that a person offering expert testimony in the field of engineering be licensed as a professional engineer. *Id.* In the Court's words, a contrary interpretation would "radically alter[]" the landscape of qualifying expert testimony. *Id*.

This case throws an important aspect of our decision in *Baggerly* into sharp focus. *Baggerly* properly recognizes that local licensing requirements are arguably inconsistent with Rule 702's operational framework for expert testimony. Rule 702 does not contain a set of mandatory qualifications that a witness must meet in order to be qualified as an expert. Instead, Rule 702 recognizes that there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence. Because a specific licensing requirement is potentially inconsistent with the variety of ways a person may gain specialized knowledge, *Baggerly* recognizes that a trial court's decision to refuse to qualify a person as an expert based solely on the failure to meet a licensing requirement arguably impairs the truth-seeking function of courts.

At the same time, however, this Court's jurisprudence emphasizes the role of the trial court as the gatekeeper in determining both the qualifications of an expert and whether the expert's testimony will assist the trier of fact. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). While *Baggerly* makes it clear that non-compliance with licensing requirements or with the statutory law in specialized areas should not require, *a fortiori*, a trial court to refuse to qualify a witness as an expert, *Baggerly* does not stand for the proposition that a trial court should not consider these factors when judging a purported expert's qualifications. Instead, *Baggerly* supports the notion that in determining a witness's qualification as an expert, the trial court should make an inquiry broad in scope. Specifically, the trial court ought to take into account the factors delineated in the rules of evidence, the statutory law, and any other sources of authority that may be relevant to a purported expert witness's level of skill or knowledge; and the trial court must further determine whether the offered testimony will assist the trier of fact. In this case, the trial court appears to only have considered the fact that Flaherty did not have the required license from the State of South Carolina. In our view, the trial court cannot have such a solitary focus. Although lack

of licensing and violations of statutory law may often coincide with a lack of specialized skill or knowledge, these attributes are not always bedfellows.[2]

Accordingly, we hold that the trial court abused its discretion in failing to qualify Flaherty, the initial inspector of the Fields' home, as an expert.

This finding does not end our analysis on this issue, however, because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice. *Fields v. Reg. Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof. *Id*. In this case, the Builder argues that if the trial court erred in finding that Flaherty was not qualified to testify as an expert, the error was harmless because the expert's testimony would have been cumulative. We agree.

At trial, the Fields presented the testimony of their repair contractor, David Bennett. The trial court qualified Bennett as an expert in residential home building and in E.I.F.S. application, and Bennett testified that the E.I.F.S. on the Fields' house allowed a substantial amount of moisture into the home, that the E.I.F.S. had to be removed to determine the extent of the damage, that he had never seen E.I.F.S. installed correctly, and that the Builder breached the standard of care for a general contractor in several particulars. The Fields also presented the testimony of a forensic architect, Dale Marshall, at trial. The trial court qualified Marshall as an expert in the standard of care for general contractors and in the area of forensic examination and repair of residential construction. Marshall provided testimony that was substantially similar to Bennett's and he specifically

[2] The Fields have argued both at trial and on appeal that Flaherty is a specialty inspector and is thus not required to have a home inspector's license to perform inspections of the type he performed for the Fields. Because compliance with licensing requirements should not be determinative of a purported expert's qualifications, the question of whether Flaherty is actually required to have a home inspector's license is irrelevant.

testified that the Fields' decision to remove the E.I.F.S. from their home was reasonable.

The record suggests that had he been qualified as an expert, Flaherty would have testified that the E.I.F.S. was allowing moisture to enter and damage the Fields' home, that the Builder failed to properly install the E.I.F.S., and that it was necessary for the Fields to remove the E.I.F.S. from their home. This testimony clearly would have been cumulative to the testimony of both Bennett and Marshall. Beyond the plain similarities of the testimonies, this conclusion is further exhibited by the fact that following the trial court's ruling that Flaherty was not qualified to testify as an expert, the Fields argued that Marshall would testify to "essentially the same things" found in Flaherty's report. It is also instructive that although the trial court ruled that Flaherty could not testify as an expert, the trial court additionally ruled that other experts would be permitted to say that they relied on his report in reaching their conclusions.

Accordingly, we hold that the trial court erred in refusing to qualify Flaherty as an expert witness, but that the error was harmless.

(B) The Second Repair Estimate

The Fields argue that the trial court erred in excluding a second estimate for the Fields' home repairs as inadmissible hearsay. We disagree.

Rule 801(c), SCRE, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible except as provided by the rules of evidence or other rules prescribed by this Court or by statute. Rule 802, SCRE.

Part of the Builder's strategy at trial was to attack the reasonableness of the costs the Fields incurred in removing the E.I.F.S. and in repairing the home. To combat this effort, the Fields sought to introduce, through the testimony of James Fields, evidence regarding the amount of an alternative estimate for the removal and repair work on the Fields' home. The trial court

excluded the evidence, reasoning that the alternative estimate was hearsay when offered through James Fields. On appeal, the Fields argue that the alternative estimate is not hearsay, but is a statement containing non-hearsay "words of contract."

The Fields' argument based on "words of contract" derives from the principle that not all words or utterances are offered for the truth of the matter asserted. 6 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 1766 (1976) [hereinafter WIGMORE ON EVIDENCE]. For example, in some scenarios, words or utterances themselves from an out of court declarant may, regardless of their truth, accompany an ambiguous act and give the act legal significance, be used circumstantially, such as to show a state of mind, or form part of an issue in a case. *Id*.

Traditionally "words of contract" were excluded from the prohibition of hearsay as utterances containing specific words forming part of the issue. WIGMORE ON EVIDENCE § 1770. Examples of such words or utterances include words accompanying the making of a contract, utterances evidencing a promise to marry, words accompanying the performance of a contract, words charged as a libel or slander, words evidencing the fact of sending notice, and words evidencing reputation. *Id*. Again, these words or utterances are not defined as hearsay because they are not offered to prove the truth of the matter asserted. *Id*. Instead, their utterance is itself a part of the issue litigated. *Id*.

In this case, it is clear that the second estimate for the Fields' home repairs, provided by a company called Prime South, does not qualify as non-hearsay "words of contract." We believe it is instructive to focus on two aspects of this issue. First, the Fields did not enter into a contract with Prime South. Thus, because no contract exists between these parties, there can be no verbal assertions offered to interpret a contract. But more importantly, the issue regarding the Fields' repair costs is not whether the Fields believed the costs were reasonable, but whether the costs were in fact reasonable, and whether the Fields exercised due care in determining that the costs were reasonable. *See May v. Hopkinson*, 289 S.C. 549, 559, 347 S.E.2d 508, 514

(Ct. App. 1986) (recognizing that the reasonable cost of repairs is competent and probative evidence on the issue of damages).

The relevant question in the hearsay analysis is what the Prime South document is offered to assert. The document is not offered as proof that Prime South simply offered to repair the Fields' home. Instead, the Fields offered the document to show that Prime South offered to repair the home for a specific price and that the price offered was reasonable. This assertion is classic hearsay when offered by an out of court declarant, and the trial court properly excluded the statement from evidence.

Accordingly, we hold that the trial court did not err in excluding a second bid for the Fields' home repairs.

II. Jury Charges

A jury charge is correct if the charge, when read as a whole, adequately covers the current and correct law. *Keaton ex. rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 495-96, 514 S.E.2d 570, 574 (1999). To warrant reversal on appeal, the trial court's instructions must be not only erroneous, but must also be prejudicial. *Id*.

(A) General Contractor's Standard of Care

The Fields argue that, in South Carolina, a general contractor is "automatically responsible" for the negligence of a subcontractor. We disagree.

In the context of their cause of action for negligence, the Fields' argument on this issue seems misguided. The Fields argue that the trial court should have charged a theory of automatic liability, but that the trial court also properly charged the jury that "[a]ny failure to exercise due care on the part of [the Builder] . . . would constitute negligence;" that "[a] builder who undertakes construction of a building impliedly represents that he possesses and will exercise a reasonable degree of skill usually possessed by a member of the building occupation;" and that "[a] builder who undertakes to supervise

the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with the applicable building code . . . and in a good and workmanlike manner." In our view, it would have been wildly inconsistent for the trial court to charge that a general contractor must exercise only the degree of care reasonably expected in the industry in constructing and supervising the construction of the Fields' home, and in the same breath to have charged that a general contractor is automatically liable for any negligence associated with the construction. Liability attaching "automatically," in our opinion, seems more like strict liability than negligence.

The Fields' argument on this issue appears more applicable in the context of their claim for breach of the implied warranty of workmanlike service. Beginning in *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970), and extending through this Court's jurisprudence as evidenced in *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976), and *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730 (1989), this Court has embraced the notion that in constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is free of latent defects. This warranty extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder for a reasonable period after the home's construction. *Terlinde v. Neeley*, 275 S.C. 395, 397, 271 S.E.2d 768, 769 (1980).

The flaw in the Fields' argument on this issue is a result of their incorrect blending of the trial court's charges on negligence with this Court's jurisprudence in the area of warranty liability regarding the sales of homes. Regarding the warranty of workmanlike service, the trial court charged the jury that a builder must build a home "in an ordinarily skillful manner as a skilled workman would do the work," and that "[t]he builder is required to complete the construction that is expected of living quarters of comparable kind and quality." Just as the trial court's charges on negligence correctly stated the law of negligence, these charges correctly stated the law regarding the warranty of workmanlike service. By using this Court's warranty

jurisprudence to analyze the trial court's charges on negligence, the Fields' improperly assert that the trial court's charges were inaccurate. In the instant case, the trial court charged the jury that the Builder was required to construct a home commensurate with the standard expected of living quarters. As we have outlined, this properly stated the law of workmanlike service.

A final point is instructive regarding these jury charges. In the instant case, two central issues at trial were the identification of the standards of care for a general contractor supervising the application of E.I.F.S. and whether the damage caused by moisture intrusion into the Fields' home was the result of contractor negligence, a design defect, or the Fields' failure to maintain the home. The parties presented conflicting testimony regarding each of these questions. While the Fields' experts testified that E.I.F.S. was a defective product and thus required perfect caulking and sealing, the Builder provided expert testimony that it supervised the installation of the E.I.F.S. in accordance with the building code applicable at the time, in a manner consistent with the manufacturer's instructions and in the industry at the time, and that the vast majority of the damage was attributable to the Fields' failure to maintain their home. In this case, the trial court's charges to the jury accurately summarized the law, and appropriately left to the jury the tasks of determining the appropriate standard of care and the cause of the damage to the Fields' home.

Accordingly, we hold that the trial court did not err in charging the jury regarding the standard of care for a general contractor.

(B) Licensing Requirements for Inspectors and Contractors

The Fields argue that the trial court erred in charging the jury regarding the licensing requirements for home inspectors and general contractors. We disagree.

One of the Builder's primary strategies at trial was to attack the Fields' experts, their qualifications, and the contractors that the Fields used to repair their home. The trial court ultimately charged the jury regarding several licensing requirements applicable to home inspectors, general contractors,

and subcontractors in South Carolina. These statutes dealt specifically with statutory requirements for a home inspection report identifying a construction defect in a home, the statutory prohibition of a person who identifies a defect in a home inspection from performing repair work on the home, and the use and supervision of unlicensed specialty subcontractors.

Of course, it was completely reasonable for the Builder to attack the Fields' experts by raising questions regarding their compliance with the statutory and regulatory law. *See Peterson v. Nat'l. R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) (recognizing that defects in an expert witness's education and experience go to the weight of the expert's testimony). Thus, it was also proper for the trial court to charge the jury as to the statutory law in these areas. That a witness has been qualified as an expert does not mean that the witness's credibility and the accuracy of his conclusions are beyond reproach. If the statutory law provides a rubric by which an expert's credibility may be judged, it is proper for the jury to use the statutes to make credibility determinations.

Accordingly, we hold that the trial court did not err in charging the jury regarding the licensing requirements for home inspectors and contractors.

(C) Patent Defects Charge

The Fields argue that the trial court erred in charging the jury regarding the law of acceptance of patent defects. We disagree.

The portion of the trial court's charge to which the Fields object occurred during the trial court's charges regarding the Builder's statute of limitations defense. The trial court charged the jury that the law requires a plaintiff to bring a claim for breach of the implied warranty of workmanlike service within three years of when the plaintiff either knew or through the exercise of reasonable diligence should have known that he had a claim. In this context, the trial court charged the jury that a person who accepts property with a patent defect waives claims arising out of that defect, and that the law thus only protects the purchaser from defects that a reasonably careful inspection would not reveal.

This charge was relevant to the Builder's defense that if the E.I.F.S. on the Fields' home was allowing moisture to enter the home, a pre-purchase home inspection would have discovered this latent defect. The Builder argued that by failing to have the home inspected prior to purchasing the home, the Fields were barred from suing on the breach of warranty cause of action by the three year statute of limitations. The parties offered conflicting testimony at trial as to the circumstances leading up to the Fields' purchase of the home. While the Fields testified that the Builder met them at the home with the original owners, conducted a detailed walk-through of the home, and made several representations about the quality of the home, the Builder testified that he lived in the same neighborhood and that his interaction with the Fields was simply a chance encounter between future neighbors.

As this review of the evidence and arguments at trial demonstrates, the parties disputed whether the Builder made representations which caused the Fields to forego having the home inspected prior to their purchasing it and whether the Fields were themselves unreasonable in failing to have the home inspected prior to purchase. In light of these disputes, the trial court's charge was relevant to an issue in the case, and the charge was not otherwise confusing or misleading.

Accordingly, we hold that the trial court did not err in charging the jury regarding the law of acceptance of patent defects.

III. Strict Liability

The Fields argue that the trial court erred in directing a verdict in favor of the Builder on the Fields' claim for strict liability. We disagree.

The trial court may direct a verdict in favor of a party where there are no material facts in dispute and the case presents only a question of law. Rule 50(a), SCRCP; *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 221, 420 S.E.2d 868, 873 (Ct. App. 1992). The question of whether South Carolina's strict liability statute covers a general contractor supervising the construction of a home is a question of law, and this Court reviews questions

of law de novo. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

In pertinent part, the strict liability statute provides that "[o]ne who sells any product in a defective condition . . . is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if [t]he seller is in the business of selling such a product." S.C. Code Ann. § 15-73-10 (2005). In South Carolina, it is firmly established that the strict liability statute applies only to sales of products and not to the provision of services. *See In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 546, 503 S.E.2d 445, 448 (1998) (citing *Samson v. Greenville Hosp. Sys.*, 297 S.C. 409, 377 S.E.2d 311 (1989)). For this reason, the relevant question in this case is whether a contractor provides a product or services.

In determining whether certain types of vendors or professionals offer services or products within the meaning of the strict liability statute, this Court has focused on the character of the underlying transaction, the law regarding similar transactions in other jurisdictions, and the policy arguments in favor of imposing strict liability in a given situation. This Court has determined that both pharmacists who fill prescriptions pursuant to a physician's instructions and health care providers who perform breast implant procedures offer services and are thus not subject to liability under the strict liability statute. *See Madison v. Am. Home Products Corp.*, 358 S.C. 449, 456, 595 S.E.2d 493, 496 (2004) (pharmacists); *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. at 551, 503 S.E.2d at 451.[3]

In our view, a general contractor building a home performs a service and does not sell a product. Professors Prosser and Keeton have recognized that "[t]he transaction of the building contractor has generally been regarded as a transaction involving the rendition of a service," and that for these

[3] As this Court has noted, authority from other jurisdictions interpreting the principles espoused in the Restatement (Second) of Torts § 402A is persuasive in this determination since the General Assembly, in adopting § 15-73-10, codified the Restatement section nearly verbatim.

reasons, strict liability is generally inapplicable to a general contractor. W. Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 104A (5th ed. 1984). The professors note that this is true "even though the result of the [contractor's] service is to supply a structure or building to the owner." *Id.*[4]

The Fields have not provided any persuasive authority from a foreign jurisdiction interpreting a strict liability statute or similar common law rule to cover a general contractor who builds a home. Although it appears that the Supreme Court of Nevada adopted this interpretation at one time, *see Worrell v. Barnes*, 484 P.2d 573, 576 (1971), the court has since abandoned that rule. *See Calloway v. City of Reno*, 993 P.2d 1259, 1272 (2000). The Nevada court's reasons for abandoning the rule announced in *Worrell* are instructive.

The Nevada court noted that tracing a defective product used in a home to a manufacturer or a supplier generally poses no significant problem. *Id*. at 1271. This is distinguishable, the court observed, from the situation encountered with the remote manufacturer of a product traveling in interstate commerce. *Id*. The Nevada court further noted that a builder is generally not able to limit his liability by warranties and disclaimers, and that most buildings are one-of-a-kind, requiring methods and materials that change with each product. *Id*. For these reasons, the Nevada court held that the marriage of a contractor with the strict liability encompassed by Restatement § 402A was best discarded.

That the application of the strict liability statute to a contractor is unnecessary is exhibited by returning to an examination of this Court's jurisprudence regarding the implied warranties that attach to the construction and sale of a home. As *Kennedy*, *Lane*, and *Rutledge* recognize, implied

[4] The court of appeals relied on this authority in the case *Duncan v. CRS Sirrine Engineers, Inc*., 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999). In that case, the court of appeals held that a worker who fell through an open hatch on a catwalk had no strict liability claim against the contractor who assembled the catwalk. *Id*. at 543 n.3, 524 S.E.2d at 118 n.3. The court of appeals held that assembly work amounted to providing a service rather than a product. *Id*.

warranties ensure that a homebuilder in South Carolina is liable for a reasonable period of time for latent defects in the home which impact the home's suitability as a residence. Given this extension of liability, liability under the strict liability statute seems superfluous in this arena.

Accordingly, we hold that the trial court did not err in directing a verdict on the Fields' claim for strict liability.

IV. Testimony Regarding Contractor Costs & Profit Margin

The Fields argue that the trial court erred in admitting evidence of the Fields' repair contractor's costs and profit margin. We disagree.

The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. *Fields*, 363 S.C. at 25-26, 609 S.E.2d at 509.

The first argument the Fields present on this issue is that the entire subject matter of the Fields' repair contractor's material costs, profit margin, and other component costs should have been excluded as prejudicial, confusing, and misleading. The Fields assert that they did not have access to this information when hiring the repair contractor, and that it is thus unfair to allow the reasonableness of the repair costs to be judged by the amounts of these component costs. In our view, these arguments are inaccurate.

The critical issue regarding the Fields' repair costs was the reasonableness and necessity of those costs. Accordingly, the fact that the Fields did not have access to Bennett's material costs, overhead, and profit margin is irrelevant to a determination of whether Bennett's costs were reasonable and necessary. Again, the relevant question is not whether the Fields believed that Bennett's costs were reasonable, but whether the costs were in fact reasonable. *See May*, 289 S.C. at 559, 347 S.E.2d at 514 (recognizing that the reasonable cost of repairs is competent and probative evidence on the issue of damages).

The testimony resulting from an examination of Bennett's component costs illustrates the usefulness of this information. The Builder's expert estimator testified that he examined Bennett's materials invoices, purported profit margin, and overhead for the Fields' repairs, and that although the expert's examination of this information resulted in similar figures for the job's sunk costs, the Fields paid Bennett roughly $37,000 more than the job should have cost given Bennett's profit and overhead. While the Fields correctly recognize that the Builder could have used (and indeed did use) another contractor to offer additional testimony as to reasonable repair costs, the trial court did not abuse its discretion in adding an analysis of Bennett's component costs to this equation.

As a second argument on this issue, the Fields argue that the trial court erred in admitting the report prepared by Steve Wilkinson, the Builder's estimating expert, regarding the Fields' repair costs. Again, we disagree.

The Fields argue that the report should have been excluded at trial because the Builder first provided the Fields with the report on the day that Wilkinson was to testify. To combat this claim, the Builder argues that the report was based solely on a comparison of Bennett's invoices and an accepted estimating resource, and that the Builder had been provided with Bennett's invoices the Friday before trial. Thus, the Builder argues that the raw information supplying the basis for the report was in the Fields' possession throughout the course of the litigation, and that the expert had been working to prepare the report until the date of his testimony. In addition to these arguments, the Builder argues that pursuant to a prior discovery order entered in the litigation, the Builder did not have to supply the Fields with any additional discovery.

In our view, the Fields cannot demonstrate that the introduction of Wilkinson's report was prejudicial.[5] First, because an expert is permitted to base opinion testimony on information that is not admissible in evidence, *see*

[5] On this issue, we assume, without deciding, that the trial court erred in admitting Wilkinson's report. In our view, the prejudice analysis in this case is rather simple.

Rule 703, SCRE, exclusion of the report would not necessarily have impacted Wilkinson's ultimate opinions regarding his view of a reasonable fee in the instant case. Second, the Fields had the opportunity to cross-examine Wilkinson regarding his report and conclusions, re-call their experts in rebuttal, and also could have asked for a short recess or overnight continuance to prepare for cross-examination. In these circumstances, the Fields were not, as they assert they were, precluded from presenting expert testimony commenting on Wilkinson's methodology. Accordingly, a finding of prejudice from the introduction of Wilkinson's testimony seems to us a tall order.

For these reasons, we hold that the trial court did not err in admitting the Fields' repair contractor's costs and profit. We further hold that if the trial court erred in admitting the report prepared by the Builder's estimating expert, the error was harmless.

V. New Trial, New Trial Nisi Additur, or J.N.O.V.

The Fields argue that the trial court erred in failing to order a new trial, a new trial nisi additur, or grant judgment notwithstanding the verdict. We disagree.

The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion. *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976). On this issue, the Fields primarily argue that the jury's verdict was grossly inadequate in light of the evidence presented at trial. In our view, the Fields do not accurately describe the evidence.

There is ample evidence in the record supporting the jury's verdict. The Fields correctly point out that the Builder, during cross-examination, admitted liability for one area of damage caused by poorly installed flashing, but this was not the full extent of the Builder's testimony. The Builder also opined that only five percent of the house had damage from moisture and that roughly three-quarters of the damages to the home was caused by the Fields'

failure to maintain the home. Furthermore, the Builder's estimating expert opined that removing and replacing the E.I.F.S. from all the areas for which the Builder was responsible should have cost approximately $124,000. It was, of course, possible for the jury in this case to conclude, consistent with this testimony, that only five percent of the house had damage and that the calculations offered by the Builder's estimating expert represented reasonable repair costs. It was thus possible for the jury to arrive at an award of $6,000 based on evidence presented at trial in this case.[6]

Accordingly, we hold that the trial court did not err in failing to order a new trial, a new trial nisi additur, or grant judgment not withstanding the verdict.

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision. We specifically hold that:

(1) the trial court erred in refusing to qualify Flaherty as an expert witness, but that the error was harmless;

(2) the trial court did not err in excluding a second bid for the repair of the Fields' home as inadmissible hearsay;

(3) the trial court did not err in charging the jury that a general contractor is not automatically liable, in negligence, for the negligence of a subcontractor;

(4) the trial court did not err in charging the jury regarding the licensing requirements for home inspectors and contractors;

[6] Five percent of $124,000 is actually $6,200. We can only speculate as to whether the jury performed this or some similar calculation based on the evidence admitted at trial in this case. The calculation does, however, exhibit that there is evidentiary support for the jury's award.

(5) the trial court did not err in charging the jury regarding the law of acceptance of patent defects;

(6) the trial court did not err in directing a verdict in favor of the Builder on the Fields' claim for strict liability;

(7) the trial court did not err in admitting evidence of the Fields' repair contractor's costs and profit margin;

(8) assuming the trial court erred in admitting the report prepared by the Builder's estimating expert, the error was harmless; and

(9) the trial court did not err in failing to order a new trial, a new trial nisi additur, or grant judgment notwithstanding the verdict.

MOORE, WALLER, BEATTY, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

RE: Amendment to 403(g), SCACR

ORDER

Pursuant to Article V, § 4 of the South Carolina

Constitution, Rule 403(g), SCACR, is amended to read:

> **(g) Judge Advocate General Lawyers.** The Judge Advocate General's Corps of any service of the Armed Forces of the United States (including the United States Coast Guard) shall be considered a jurisdiction for the purposes of (f) above. Further, for the purposes of (f) above, an attorney who has been a judge advocate for three years or more, either active or reserve, may use a court-martial with members as equivalent experience for the trial experience required in (c)(2) and may use a separation action or other adverse personnel action before a formal board of officers as equivalent experience for the trial experience required by (c)(4). Additionally, an attorney who has served on active duty as a judge advocate for three (3) years or more may submit a letter from a military judge or staff judge advocate with personal knowledge of the attorney attesting to the attorney's trial competence, and this letter shall have the same effect as the letter from a judge under (f) above. The military judge or staff judge advocate submitting the letter must have the rank of Colonel or above in the Army, Air Force, or Marines or Captain or above in the Navy or Coast Guard. All other requirements of (f) must be complied with.

This amendment is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

February 21, 2008

The Supreme Court of South Carolina

In the Matter of William Grayson Ervin, Respondent.

ORDER

On February 15, 2008, respondent was arrested and charged with pointing and presenting a firearm, which is a felony. As a result, the Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rules 16(c) and 17(a), RLDE, Rule 413, SCACR. The petition is granted.

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

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

Columbia, South Carolina
February 21, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William R. Simpson, Jr., Appellant,

v.

Becky H. Simpson and
Wade Ingle, Defendants, of
whom Becky H. Simpson is Respondent.

Appeal From Clarendon County
Frances P. Segars-Andrews, Family Court Judge

Opinion No. 4340
Heard November 6, 2007 – Filed February 8, 2008

AFFIRMED

Steven S. McKenzie, of Manning, for Appellant.

James McLaren, C. Dixon Lee, and Jan L. Warner, all of Columbia, for Respondent.

PER CURIAM: William Robert Simpson, Jr., (Husband) appeals the family court's denial of Husband's motion for the family court's recusal

based on its finding that there are no conflicts of interests or other reasons why it should disqualify itself or grant a new trial. We affirm.

FACTS

Husband is the son of Daisy Wallace Simpson (Mother) and William Robert Simpson, Sr. (Father). In December 2004, Judge R. Wright Turbeville granted Mother and Father a divorce. As a shareholder/member of W.R. Simpson Farms, L.L.C., Husband was named a party to Mother and Father's divorce action.

Husband and Becky H. Simpson (Wife) were granted a divorce in March 2005 through a bifurcated Decree of Divorce. In March 2006, Judge Frances P. Segars-Andrews heard the remaining issues pursuant to the bifurcated Divorce Decree. Husband and Wife entered into a Consent Order on the issues of child custody and visitation, and Judge Segars-Andrews issued written instructions for a Final Order on all remaining issues.

Lon Shull (Shull), a partner in the law firm of Andrews and Shull in Mt. Pleasant, South Carolina, was a witness, via affidavit, at the request of Mother's attorneys, in Mother and Father's divorce action regarding the issue of attorneys' fees. Shull's law partner is Mark O. Andrews, the husband of Judge Segars-Andrews.

Subsequent to Judge Segars-Andrews' issuance of instructions for the Final Order, Husband filed a motion for a new trial which asserted a conflict of interest had not been disclosed. Husband alleged a conflict due to Shull's involvement in Mother and Father's case and his connection to Judge Segars-Andrews' husband. Husband's motion did not allege any prejudice or bias as a result of this conflict, and after a hearing on this motion, Judge Segars-Andrews denied the motion.

At this same hearing, however, Judge Segars-Andrews, acting sua sponte, orally stated she would recuse herself. Judge Segars-Andrews raised the question of whether she should disqualify herself because James McLaren, Wife's counsel in the present divorce action, and Shull had been

co-counsel in a personal injury case. This unrelated case ended in late 2004 or early 2005 and resulted in a substantial fee to Shull's firm, which in turn benefited his law partner, Judge Segars-Andrews' husband.

After receiving memos from both parties on this question, Judge Segars-Andrews found the situation did not require her to disqualify herself, and therefore, she had a duty to hear the case. This appeal follows.

STANDARD OF REVIEW

"Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify [herself] will not be reversed on appeal." Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004).

LAW/ANALYSIS

We begin by addressing Wife's argument, which was made for the first time at oral argument, that this Court is procedurally barred from hearing this appeal. Wife argues a denial of a motion for disqualification of a judge is an interlocutory order, and therefore, it may only be reviewed by this Court on an appeal from a final order. See Rogers v. Wilkins, 275 S.C. 28, 29-30, 267 S.E.2d 86, 87 (1980) (finding the denial of a motion for disqualification is interlocutory and reviewable only after an appeal from final judgment); see Townsend v. Townsend, 323 S.C. 309, 312, 474 S.E.2d 424, 427 (1996) ("A denial of a motion for disqualification of a judge is an interlocutory order not affecting the merits and, thus, is reviewable only on appeal from a final order.").

Wife is correct in her statement of the law; however, the case before us is distinguishable from the cases Wife references to support her argument. In the current case, although two separate appeals[1] have been filed, each follows a final order from the family court. Neither party moved to consolidate the

[1] This appeal concerns Judge Segars-Andrews' denial of Husband's motion for disqualification. Husband also appeals Judge Segars-Andrews' Final Order for Equitable Division, Child Support, Attorney's Fees and Costs.

two appeals, so they have proceeded separately. Because this appeal of Judge Segars-Andrews' denial of a motion for disqualification follows a final order, it is not an interlocutory appeal and is, therefore, properly before this Court.

Husband argues the family court erred in overturning its sua sponte recusal. We disagree.

South Carolina's Code of Judicial Conduct states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Canon 2 of the Code of Judicial Conduct, Rule 501, SCACR. The Code requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Canon 2 of the Code of Judicial Conduct, Rule 501, SCACR. When disqualification is not required, however, the Code states, "A judge shall hear and decide matters assigned to the judge . . . ." Canon 3B(1) of the Code of Judicial Conduct, Rule 501, SCACR. "A judge's impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." Patel, 359 S.C. at 524, 599 S.E.2d at 118.

In the current case, Judge Segars-Andrews' findings are supported by the record. Judge Segars-Andrews provided a detailed list of findings in support of her decision on how to equitably divide the assets of Husband and Wife. Judge Segars-Andrews made these findings and included them in her "Instructions for Order" before she remembered the previous relationship between her husband's law partner and Wife's counsel. Facts in the record support Judge Segars-Andrews' findings. We see no evidence showing bias or prejudice.

The party seeking disqualification must do more than merely allege bias on the judge's behalf; the party must present some evidence of judicial prejudice or bias. Id. at 524, 599 S.E.2d at 118. "In applying Canon 3[(E)](1), the South Carolina Supreme Court has stated that the movant or petitioner must show some evidence of the bias or prejudice of the judge." Lyvers v. Lyvers, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct. App. 1984) (internal quotations and citations omitted). When an appellant offers no

evidence to support his claim of partiality, the trial judge is correct to deny a Motion for Recusal. See Christensen v. Mikell, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996) ("Appellant offered no evidence to support his claim of partiality. Accordingly, the trial judge properly denied the Motion to Recuse.").

Husband has not shown any evidence of bias or prejudice on behalf of Judge Segars-Andrews. Husband argues Judge Segars-Andrews' own statements about the need to disclose the previous working relationship between her husband's law partner and Wife's counsel might reasonably question her impartiality. Husband fails, however, to provide any evidence of how the former relationship actually resulted in some prejudice or bias in Judge Segars-Andrews' ruling. Thus, Judge Segars-Andrews was correct to deny Husband's request for recusal.

In Doe v. Howe, the trial judge chose to make disclosures to both sides about his contacts with Howe and his law clerk's contacts with the law firm representing Howe. 367 S.C. 432, 439, 626 S.E.2d 25, 28 (Ct. App. 2005). The trial judge did not then recuse himself; Doe, therefore, alleged judicial prejudice. Id. This Court held,

> Because Doe made no showing here of actual prejudice, we find no abuse of discretion in the trial judge's refusal to disqualify himself. If anything, the trial judge demonstrated sensitivity toward any concerns Doe might have had regarding his impartiality by voluntarily making full disclosure of his and his law clerk's contacts with Howe and Howe's counsel.

Id. at 441, 626 S.E.2d at 29.

Just as in Doe, we find Husband has made no showing of actual prejudice on behalf of Judge Segars-Andrews. We find Judge Segars-Andrews' remarks about her concern for not disclosing the information at the beginning of the hearing do not show any bias or prejudice but instead show her sensitivity to any apprehension each side might have in her ability to make a fair and impartial ruling in the case.

Husband also argues Judge Segars-Andrews' written order denying his request for recusal is a reversal of her earlier oral disqualification, but we find this argument without merit. Judge Segars-Andrews' oral ruling regarding recusal did not constitute a final order by the Judge, and therefore, her final order denying Husband's request for recusal was not a reversal of a previous order. South Carolina law is clear that "[n]o order is final until it is written and entered." Corbin v. Kohler Co., 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002). "Until written and entered, the trial judge retains discretion to change his [or her] mind and amend his [or her] oral ruling accordingly." Id. at 621, 571 S.E.2d at 96. A written order may be issued which is inconsistent with a prior oral ruling, and to the extent the two conflict, the written order controls. Id. at 621, 571 S.E.2d at 97. "The written order . . . constitutes the final judgment of the court." Id.

Judge Segars-Andrews made an initial oral ruling deciding she would recuse herself from this matter but also agreed to accept memoranda on the issue. After reviewing the memoranda and affidavits from each side, however, she found she had no reason to recuse herself and, therefore, had a duty to adjudicate the case. Judge Segars-Andrews' final, written order denied Husband's request for recusal. The written order controls.

Having found no evidence that could question the impartiality of Judge Segars-Andrews, or any other reason requiring her recusal, we find Canon 3B(1) to be controlling, which imposes a "duty to sit." When disqualification is not required, the South Carolina Code of Judicial Conduct holds, "A judge *shall* hear and decide matters assigned to the judge . . . ." Canon 3B(1) of the Code of Judicial Conduct, Rule 501, SCACR (emphasis added). This duty has been recognized and imposed in both state and federal courts. See McBeth v. Nissan Motor Corp. U.S.A., 921 F.Supp. 1473, 1477 (D.S.C. 1996) ("No judge, of course, has a duty to sit where his impartiality might be reasonably questioned."); Barritt v. State, No. CACR06-1261, 2007 WL 2713593, at *6 (Ark. Ct. App. Sept. 19, 2007) ("When recusal is in issue, this court has held that a judge has a duty to sit on a case unless there is a valid reason to disqualify . . . ."") (internal citations omitted); In re Turney, 533 A.2d 916, 920 (Md. 1987) ("Moreover, a judge's duty to sit where not

disqualified is equally as strong as the duty not to sit where disqualified."); Adair v. State, 709 N.W.2d 567, 579 (Mich. 2006) ("[W]here the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited.")(internal quotations and citations omitted); Millen v. Eighth Judicial Dist. *ex rel*. County of Clark, 148 P.3d 694, 700 (Nev. 2006) ("Thus, a judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification."); Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 385 (W. Va. 1995) ("Also important, however, is the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal.").

CONCLUSION

Husband has failed to present any evidence of prejudice or bias on Judge Segars-Andrews' behalf which would require her to recuse herself, and thus, Judge Segars-Andrews had the duty to sit for this matter.

Accordingly, the family court's decision is

AFFIRMED.

ANDERSON, SHORT, and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William R. Simpson, Jr., Appellant,

v.

Becky H. Simpson and
Wade Ingle, Defendants, of
whom Becky H. Simpson is Respondent.

Appeal From Clarendon County
Frances P. Segars-Andrews, Family Court Judge

Opinion No. 4341
Submitted November 1, 2007 – Filed February 8, 2008

AFFIRMED

Steven S. McKenzie, of Manning, for Appellant.

James McLaren, C. Dixon Lee, Jan L. Warner, all of Columbia, for Respondent.

PER CURIAM: In this domestic action, William Robert Simpson, Jr., (Husband) appeals the family court's order, arguing the family court erred in

(1) its equitable distribution of marital property; (2) finding Simpson Farms, LLC, was marital property; (3) failing to correctly ascertain the inventory of the Buck and Bull store; (4) failing to give Husband credit for $16,000 in monies he paid to his former wife, Becky H. Simpson (Wife); (5) finding the parties' residence was transmuted into marital property; and (6) awarding Wife attorney's fees and costs. We affirm.

FACTS

Husband and Wife were married on September 3, 1989. At the time of the marriage, Husband was nineteen and Wife was seventeen years of age. During the marriage, Wife primarily stayed at home and took care of the parties' two children. She maintained periodic outside employment, including a job at the children's private school, Clarendon Hall, for which the parties received reduced tuition.

Throughout the marriage, Husband worked as a farmer with his father, William Simpson, Sr. (Simpson, Sr.).[1] In exchange for Husband earning a nominal salary and working hard, Simpson, Sr. awarded him a fifty percent interest in Simpson Farms. Husband also bought other property that he farmed separately from his father. He financed the purchase of the additional land in various ways. At times, he farmed the land or cut timber in order to pay the purchase price. At other times, he borrowed money from banks.

At the beginning of the marriage, the parties purchased a mobile home, using $6,000 Wife inherited, which was located on Simpson, Sr.'s property. Over time, the parties cleared the land, and in 1995, they built the marital residence. On May 15, 1996, Simpson, Sr. formally deeded the property to Husband. At the time of the final hearing, the residence had $78,600 outstanding on the mortgage.

In late 2003, Wife began acting somewhat erratically and appeared depressed. Husband found Wife to be more irritable and believed she

[1] Husband was also a named party in Simpson, Sr.'s divorce. See Simpson v. Simpson, Op. No. 2007-UP-147 (S.C. Ct. App. filed April, 4, 2007) (unpublished opinion).

preferred to be alone without him or the children. To support Husband's claim that Wife was acting irrationally, he testified that when Wife returned from a trip to Florida in July 2004, she had three tattoos. Eventually, Wife was diagnosed as bipolar. Thereafter, Husband asked Wife for a divorce.

At this point, Wife was not represented by counsel. Husband took Wife, who was accompanied by her elderly grandfather, to his attorney's office to sign a separation agreement. Wife signed the separation agreement, which was later approved by the family court. When she signed the agreement, Wife claimed she was unaware of the parties' finances because Husband handled the financial aspects of their marriage. In the time frame between Husband asking Wife for a divorce and the signing of the separation agreement, Wife began dating Wade Ingle.

A few months later, Wife retained counsel and moved to have the separation agreement set aside, claiming she was undergoing psychotherapy and taking medication at the time she signed the separation agreement. She also argued Husband had not made a full financial disclosure. The family court, noting it would not have approved the separation agreement had it known Wife's mental condition, set aside the agreement.

After the family court set aside the separation agreement, Husband instituted this action seeking a divorce based upon Wife's adultery. While the divorce proceedings were pending, Husband closed the Buck and Bull store he operated and attempted to auction off the inventory. The family court halted the sale in order to determine the inventory's value.

The family court subsequently issued a bifurcated decree of divorce, granting Husband a divorce based upon Wife's adultery, which occurred after the parties separated. The family court left open all other issues, noting, "This [o]rder shall not be construed as making any finding relative to the issues of fault of either party . . . as may affect equitable division, custody, counsel fees, [and] suit money."

After a two-day hearing on the remaining issues, the family court issued its final order.[2] The order provided Wife was barred from alimony because of her adultery. The family court awarded Husband sixty percent of the marital property, totaling $320,655, and awarded Wife forty percent of the marital estate, totaling $213,876, pursuant to the family court's consideration of the equitable distribution statute. Additionally, the family court ordered Husband to pay half of Wife's attorney's fees and costs.

Accordingly, Husband filed a Rule 59(e), SCRCP, motion to reconsider, which the family court denied. This appeal follows.

STANDARD OF REVIEW

On appeal from the family court, this Court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not require us to disregard the family court's findings, and we remain mindful that the family court, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

LAW/ANALYSIS

I. Equitable Distribution

Husband argues the family court erred in its equitable distribution of the marital property. Specifically, Husband contends the family court's equitable division attempted to compensate Wife for her failure to receive alimony. We disagree.

The division of marital property is within the sound discretion of the family court, and on appeal, it will not be disturbed absent an abuse of discretion. Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct.

[2] At the hearing, both parties agreed Husband was to have custody of the two children.

App. 2002). Section 20-7-472 of the South Carolina Code (Supp. 2006) imparts the family court with fifteen factors to consider in equitably apportioning marital property. The statute vests the family court with the discretion to decide the weight to assign various factors. See id. ("In making apportionment, the court must give weight in such proportion as it finds appropriate . . . ."). On appeal, "this [C]ourt looks to the overall fairness of the apportionment, and it is irrelevant that this [C]ourt might have weighed specific factors differently than the family court." Doe v. Doe, 370 S.C. 206, 213-14, 634 S.E.2d 51, 55 (Ct. App. 2006).

In Berry v. Berry, 294 S.C. 334, 335, 364 S.E.2d 463, 464 (1988), the family court's order, which awarded an adulterous spouse an equal share of the marital property, provided,

> Although it was . . . adultery that precipitated this divorce action, no deduction has been made from her share by reason of her fault. . . . Were it not for the length of this marriage and the fact that [she] is barred from alimony, I would have awarded her a substantially lower percentage of the marital property.

In affirming this Court's reversal of the family court's order, the Supreme Court noted, "[T]he preclusion of an alimony award to a spouse cannot be used to increase an equitable distribution award." Id.

In the present case, Husband alleges the family court attempted to compensate Wife through equitable distribution because she was statutorily barred from receiving alimony. He points to what he believes is the family court's "skewed" factual findings in favor of Wife to award her forty percent of the marital estate.

We find the record fails to support Husband's contention. In its order, the family court granted Husband a divorce based upon Wife's adultery that took place after the parties separated. Further, the order provided, "There is no evidence of marital misconduct from either party that would rise to the

level to [a]ffect the division of property. The wife's adultery took place only after the parties' separation." Unlike the situation presented in Berry, the family court specifically stated Wife's marital misconduct did not affect the equitable distribution.

In this case, the family court awarded Husband twenty percent more than Wife, dividing the property in a sixty-forty split. The court took into consideration the direct and indirect contributions of both parties and the substantial "sweat equity" of Husband. The award considered the appropriate statutory factors and this State's public policy that a party's marital misconduct does not justify a severe penalty for equitable apportionment purposes. See Doe, 370 S.C. at 216, 634 S.E.2d at 57 (finding South Carolina law "expressly disallow[s] fault as a penalty" in determining equitable apportionment between a husband and wife). Therefore, we agree with the family court that a forty percent award of the marital property to Wife is proper.

II. Marital Property

Husband argues the family court erred in finding Simpson Farms was marital property. Husband maintains his fifty percent interest in Simpson Farms was a gift from Simpson, Sr. and, as such, is a nonmarital asset. We disagree.

Marital property is defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held." S.C. Code Ann. § 20-7-473 (Supp. 2006). However, property may be considered nonmarital if it is acquired by gift or inheritance. S.C. Code Ann. § 20-7-473(1). Because of the general presumption that property acquired during the marriage is an asset of the marriage, "[t]he burden to show an exemption under S.C. Code Ann. Section 20-7-473 is upon the one claiming that property acquired during the marriage is not marital." Brandi v. Brandi, 302 S.C. 353, 356, 396 S.E.2d 124, 126 (Ct. App. 1990) (citations omitted).

Husband points to the testimony of Wife's expert, Mark Hobbs, a certified public accountant, to show Simpson Farms was a gift from his father. During Simpson, Sr.'s divorce proceedings, Hobbs testified the only way Husband could have amassed all of his property was through gift or inheritance because the income shown on Husband's tax returns could not support Husband's vast land holdings. During this trial, Hobbs testified he still believed his earlier conclusions to be true.

After reviewing the record, we find Husband mischaracterizes and omits much of Hobbs' testimony. Although Hobbs stated he believed Husband's interest in Simpson Farms was a gift, he did so to highlight his belief that Husband could not have amassed his land holdings with the little amount of income he reported on his tax returns. In fact, the very substance of Hobbs' testimony indicated Husband's financial records were inaccurate and incomplete. Hobbs noted Husband's personal expenses "greatly exceeded" the amount of money he reported as income. Further, Hobbs testified he did not see any gift tax returns filed by Husband or Simpson, Sr. to verify Simpson Farms was a gift rather than something Husband acquired through his hard work during the marriage. In addition, the agreement between Husband and Simpson, Sr. provides, "[A]ll farm equipment and farm land of Simpson Farms will become shared equally for invested interest for work on [the] farm . . . ." Husband's own testimony at the hearing was that he worked for his interest in Simpson Farms: "I earned it all, I worked for it, and he gave it to me."

The evidence in this case establishes Simpson Farms was marital property, and Husband has failed to carry his burden to show otherwise. During the marriage, Husband farmed and received a nominal salary of $120 a week in exchange for an interest in Simpson Farms. Husband's fifty percent interest in Simpson Farms was payment for labor expended during the marriage, and therefore, the family court properly concluded it was an asset of the marriage.

III. Inventory of Buck and Bull

Husband avers the family court failed to properly determine what the inventory of the Buck and Bull store included at the time this action was commenced. We disagree.

Although the sale of the store's inventory was halted pursuant to a court order, Husband offered no figure during the hearing as to the inventory's value at the time he instituted this action. Therefore, we cannot determine how much this value depleted between the filing of the action and the final hearing. See Honea v. Honea, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987) ("We have stated before, and we reiterate here, that a party cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to support the family court's findings."). Further, even if the family court's valuation was too low, as Husband alleges, because the family court awarded him the inventory, we can discern no prejudice to Husband if the inventory should be worth more than what the family court found. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize . . . an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter.").

IV. Credit

Husband argues the family court erred in failing to reimburse him for the $16,000 he paid to Wife under the August 2004 separation agreement, which was later overturned by the family court. In Husband's view, the $16,000 should be treated as an advance on the equitable distribution Wife received. We disagree.

In support of his contention that he is entitled to a $16,000 credit, Husband submitted a document that listed his purported payments to Wife from August 2004 until January 2005. However, Husband failed to include any checks, bills, or receipts that actually showed the amount he paid. Wife also testified that at most, she received two payments from Husband under the agreement. Considering the family court found "Husband's financial

declaration and financial disclosures [were not] accurate depictions of his actual income and assets," we find no credible evidence Husband actually paid Wife $16,000. Further, the family court considered whether Husband was entitled to a $16,000 credit and specifically declined to give Husband any credit. However, Husband did receive twenty percent more of the marital estate, a factor the family court most certainly considered when declining to give Husband a credit. Therefore, because we affirm the overall apportionment of the marital property, we find no error in the family court's failure to give Husband a credit. See Deidun v. Deidun, 362 S.C. 47, 58, 606 S.E.2d 489, 495 (Ct. App. 2004) (holding on appeal, we look to the overall fairness of the apportionment, and if the end result is equitable, it is irrelevant if we would have arrived at a different apportionment).

V. Transmutation

Husband argues the family court erred in concluding the residence where the parties lived during the marriage was transmuted into marital property. Husband contends the land on which the marital residence was built was a gift from Simpson, Sr. and, therefore, his separate property. We disagree.

In South Carolina, property acquired by either party during the marriage by gift from an individual other than the spouse is nonmarital property. S.C. Code Ann. § 20-7-473(1). Nonmarital property may be transmuted into marital property if: "(1) it becomes so commingled with marital property as to be untraceable; (2) it is jointly titled; or (3) it is utilized by the parties in support of the marriage . . . so as to evidence an intent by the parties to make it marital property." Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001) (citing Pool v. Pool, 321 S.C. 84, 86, 467 S.E.2d 753, 756 (Ct. App. 1996)). Whether transmutation of separate property into marital property has occurred "is a matter of intent to be gleaned from the facts of each case." Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988).

Although the evidence shows Husband acquired the land by gift from Simpson, Sr. during the marriage, the parties, using funds earned during the

marriage, built the marital home. Together, they cleared the land where the house was built. The residence was occupied by both the parties from the time it was built in 1995 until this action was commenced in 2004. Clearly, the parties utilized the home and land in support of the marriage. See Cooper v. Cooper, 289 S.C. 377, 380, 346 S.E.2d 326, 328 (Ct. App. 1986) ("Although the evidence shows that the husband acquired the land by gift from his father during the marriage, it also shows, and we so find, that the property lost its nonmarital character and therefore became subject to equitable distribution when the husband, nine years before the parties separated, erected the marital home thereon and thereby used the 1.4 acre tract in support of the marriage."). Accordingly, we find the family court properly concluded the house was transmuted into marital property.

VI. Attorney's Fees

Lastly, Husband argues the family court erred in awarding Wife attorney's fees and costs. He maintains he will be unable to pay the fees because he has less acreage to farm as a result of the equitable distribution. He also claims Wife did not receive a beneficial result in the litigation. We disagree.

Section 20-7-420(38) of the South Carolina Code (Supp. 2006) provides, "Suit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court." The award of attorney's fees is within the sound discretion of the family court and absent an abuse of discretion, will not be disturbed on appeal. Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). In determining whether to award attorney's fees, the family court should consider "each party's ability to pay his or her own fee; the beneficial results obtained by the attorney; the parties' respective financial conditions; and the effect of the fee on each party's standard of living." Id. (citing E.D.M. v. T.A.M, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992)).

At the outset, we note Husband does not appeal the reasonableness of the fees and costs, but simply that he was ordered to pay half the fees. Accordingly, we need not decide whether the fee amount was proper. See

State v. Hiott, 276 S.C. 72, 86, 276 S.E.2d 163, 170 (1981); Rule 208(b)(1)(B), (D), SCACR (stating an issue not argued in the brief is deemed abandoned and precludes consideration on appeal).

In the final order, the family court ordered Husband to pay half of Wife's attorney's fees and the cost of the certified public accountant for a total of $83,0391.91. In his brief, Husband argues his acreage has been reduced, and he is responsible for the debt on the land the family court awarded Wife. Therefore, he maintains he does not have a greater ability than Wife to pay fees. However, Husband submitted no documentation to prove the land Wife received through equitable distribution is mortgaged. The family court determined Wife was unlikely to be able to earn more than $25,000 a year, while Husband, a successful farmer, had the proven ability to earn $100,000 a year.[3] In addition, Husband received twenty percent more of the marital estate. We agree with the family court that because Husband was awarded substantially more assets, he will be able to pay the debts with less impact on his standard of living.

Further, the fact that Wife received a greater share of the marital estate after the separation agreement was set aside is evidence of Wife's beneficial results. Additionally, Husband's lack of candor with the family court and failure to fully cooperate throughout the litigation process support an award of attorney's fees. See Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989) (finding the wife was entitled to attorney's fees and costs because "the wife's attorney faced difficulty and lack of cooperation from the husband, which serve[d] as an additional basis for the award of attorneys' fees"). Therefore, because the family court fully examined the necessary factors in determining Wife was entitled to fees and costs, we can discern no abuse of discretion in the award.

[3] Husband's first financial declaration disclosed an income of $1,730.76 per month while his last disclosure to the court provided his income was $8,350 per month. In concluding Husband had the ability to earn $100,000 in any given year, the family court also acknowledged Husband's inconsistent declarations created difficulty in ascertaining Husband's actual income.

CONCLUSION

For the reasons stated above, the order of the family court is

AFFIRMED.[4]

ANDERSON, SHORT, and WILLIAMS, JJ., concur.

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