The Supreme Court of South Carolina

RE: Amendments to the South Carolina Bar Constitution

O R D E R

The South Carolina Bar has filed a petition allowing amendments to Article VII, Section 7.2 and 7.3 of the Bar's Constitution. The petition is granted in part and the Bar's Constitution is amended as shown on the attachment to this Order.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 18, 2004

AMENDMENTS TO THE CONSTITUTION OF THE SOUTH CAROLINA BAR

1) Article VII, Section 7.2 The Board of Governors, is amended to read as follows:

Section 7.2 **Composition.** The Board of Governors is composed of the President, the President-Elect, the Immediate Past President, the Secretary, the Treasurer, the immediate past two presidents of the Young Lawyers Division, the Chairman of the House of Delegates, and the Dean of the School of Law at the University of South Carolina, all of whom shall be members *ex officio*, together with two members (the "elected member") from each judicial region and three additional members (the "at large member") who shall be elected as hereinafter provided.

2) The fourth sentence of Article VII, Section 7.3 Eligibility and Term, is amended to read as follows:

The at large members shall serve staggered terms of three years each and shall not be eligible to succeed themselves. Before assuming the office of President, the President-Elect shall appoint with the approval of the Board of Governors an at large member whose term shall begin July 1.

The Supreme Court of South Carolina

In the Matter of Erika T. Flierl, Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 25, 2001, Erika T. Flierl was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated January 31, 2004, Erika T. Flierl submitted her resignation from the South Carolina Bar. We accept Ms. Flierl's resignation.

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

In addition, she 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 her resignation.

Ms. Flierl shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Erika T. Flierl shall be effective upon full compliance with this order. 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/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 18, 2004

The Supreme Court of South Carolina

In the Matter of Maura McNally, Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 15, 2002, Maura McNally 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 February 27, 2004, Maura McNally submitted, her resignation from the South Carolina Bar. We accept Ms. McNally's resignation.

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

In addition, she 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 her resignation.

Ms. McNally shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Maura McNally shall be effective upon full compliance with this order. 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/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 18, 2004

The Supreme Court of South Carolina

In the Matter of Deborah T. Gourdin, Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 1, 1981, Deborah T. Gourdin was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated December 31, 2003, Ms. Gourdin submitted her resignation from the South Carolina Bar. We accept Ms. Gourdin's resignation.

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

In addition, she 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 her resignation.

Ms. Gourdin shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Deborah T. Gourdin shall be effective upon full compliance with this order. 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/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 18, 2004

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Civil Procedure

NOTICE

The attached amendments to the South Carolina Rules of Civil Procedure were submitted to the General Assembly on January 29, 2004. Unless disapproved in the manner provided by Article V, § 4A, of the South Carolina Constitution, these amendments will become effective on April 28, 2004.

Columbia, South Carolina
March 22, 2004

AMENDMENTS TO THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE

(1) Rule 3 is amended to read as follows:

RULE 3
COMMENCEMENT OF ACTION

(a) Commencement of civil action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(b) Filing In Forma Pauperis. A plaintiff who desires to file an action *in forma pauperis* shall file in the court a motion for leave to proceed *in forma pauperis*, together with the complaint proposed to be filed and an affidavit showing the plaintiff's inability to pay the fee required to file the action. If the motion is granted, the plaintiff may proceed without further application and file the complaint in the court without payment of filing fees.

(2) The following note is added to the end of Rule 3:

Note to 2004 Amendment:

This amendment rewrote subsection (a), deleted subsection (b), and renumbered subsection (c) as subsection (b). These changes are intended to reflect the legislative intent expressed in § 15-3-20 as amended by 2002 S.C. Act No. 281, § 1.

(3) Rule 63 is amended to read:

RULE 63
DISABILITY OF A JUDGE

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

(4) The following note is added to the end of Rule 63:

Note to 2004 Amendment:

The 2004 Amendment rewrote this Rule to provide a clear procedure when a judge who has heard some or all of a case is unable to proceed. The language is similar to Rule 63 of the Federal Rules of Civil Procedure.

(5) Rule 71.1(f) is re-lettered 71.1(g) and new Rule 71.1(f) shall read as follows:

(f) Filing and Service of Order. The post-conviction relief judge shall submit the signed final order or judgment to the clerk for filing and the clerk of court shall provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRCP.

(6) The following note is added to the end of Rule 71.1:

Note to 2004 Amendment:

The 2004 Amendment clarifies the process for filing and notification of parties of filed orders in post-conviction relief actions.

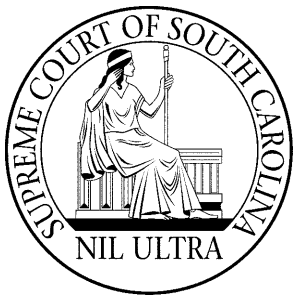
(7) The following two sentences are added to the end of Rule 77(d):

In addition to the above, in post-conviction relief actions, the post-conviction relief judge shall submit the signed order or judgment to the clerk of court for filing and the clerk shall promptly provide notice of the entry of judgment and serve a copy of the signed order to the parties. Pursuant to Rule 5(b) service shall be made solely on the attorney when the applicant is represented by counsel and, where an applicant is proceeding *pro se*, service shall be made upon the applicant at the last known address provided to the clerk by the applicant.

(8) The following note is added to the end of Rule 77:

Note to 2004 Amendment:

The 2004 amendment clarified the process for clerks of court providing notice of entry of judgment and copies of the final signed order to the parties. It made clear that service is to be made on the attorney of a represented applicant and only on applicants when they are proceeding *pro se*.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

March 22, 2004

ADVANCE SHEET NO. 11

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2004-UP-173-The State v. Alterrick Smith
(Georgetown, Judge Paula H. Thomas)

2004-UP-174-The State v. Harvey L. Spain
(Horry, Judge John M. Milling)

2004-UP-175-The State v. Otis M. Robinson
(Charleston, Judge John M. Milling)

2004-UP-176-The State v. Billy Ray Williams
(York, Judge John C. Hayes, III)

2004-UP-177-The State v. Michael Wayne Seawright
(Pickens, Judge John W. Kittredge)

2004-UP-178-The State v. Jeffrey Houghten
(Lexington, Judge Marc H. Westbrook)

2004-UP-179-The State v. Jim D. Conyers
(Horry, Judge John L. Breeden, Jr.

2004-UP-180-The State v. John R. Crawford
(York, Judge John C. Hayes, III)

2004-UP-181-Timothy McBride v. Charlene McBride
(Clarendon, Judge R. Wright Turbeville)

2004-UP-182-The State v. Trevor B. Doby
(Florence, Judge James E. Brogdon, Jr.)

2004-UP-183-The State v. Curtis Lee Parmer
(York, Judge Lee S. Alford)

2004-UP-184-The State v. Timothy Jerome Byers
(York, Judge John C. Hayes, III)

2004-UP-185-The State v. Alex Bernard Mason
(Greenville, Judge John C. Few)

2004-UP-186-The State v. Annette W. Randolph
(Newberry, Judge James W. Johnson, Jr.)

2004-UP-187-Zepher Frederick, as personal representative of the estate of Forriest Cave v. Manly Dunbar, First Citizens Bank & Trust Company of South Carolina, and Lang Dunbar
(Barnwell, Richard B. Ness, Special Referee)

PETITIONS FOR REHEARING

3720-Quigley v. Rider	Denied 3/18/04
3725-In the interest of Christopher H.	Pending
3728-State v. Rayfield	Denied 3/18/04
3729-Vogt v. Murraywood Swim	Denied 3/18/04
3730-State v. Anderson	Pending
3733-Smith v. Rucker	Denied 3/18/04
3737-West v. Newberry Electric et al.	Denied 3/18/04
3739-Trivelas v. SCDOT	Denied 3/18/04
3740-Tillotson v. Keith Smith Builders	Pending
3741-Ellie, Inc. v. Miccichi	Pending
3742-State v. McCluney	Denied 3/18/04
3743-Kennedy v. Griffin	Denied 3/18/04
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3748-Ellis v. Davidson	Pending
3749-Goldston v. State Farm	Pending

2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2004-UP-009-Lane v. Lane	Denied 3/18/04
2004-UP-010-Munnerlyn et al. v. Moody	Denied 3/18/04
2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-024-State v. Foster	Pending
2004-UP-039-SPD Investment v. Cty. of Charleston	Denied 3/18/04
2004-UP-047-Matrix Capital v. Brooks	Denied 3/18/04
2004-UP-050-Lindsey v. Spartan Roofing	Denied 3/18/04
2004-UP-055-Spartanburg Cty. v. Lancaster	Denied 3/18/04
2004-UP-056-Greene v. Griffith	Denied 3/18/04
2004-UP-059-Burdette v. Turner	Denied 3/18/04
2004-UP-061-SCDHEC v. Paris Mtn. (Hiller)	Denied 3/18/04
2004-UP-062-Blake v. Logan	Denied 3/18/04
2004-UP-064-Davis v. Davis	Denied 3/18/04
2004-UP-086-State v. Rice	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-111-Phillips v. Cassidy	Pending
2004-UP-114-State v. Bailey	Pending
2004-UP-119-Williams v. Pioneer Machine	Pending

2004-UP-122-State v. Aiken	Pending
2004-UP-131-Ford v. Georgetown County	Pending
2004-UP-134-Herridge v. Herridge (Ginsberg)	Pending
2004-UP-135-Phillips v. Brown	Pending
2004-UP-137-State v. Drayton	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3596-Collins Ent. v. Coats & Coats et al.	Pending
3599-State v. Grubbs	Pending
3600-State v. Lewis	Granted 3/4/04
3602-State v. Al-Amin	Pending
3606-Doe v. Baby Boy Roe	Pending
3607-State v. Parris	Pending
3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Pending
3623-Fields v. Regional Medical Center	Pending
3627-Pendergast v. Pendergast	Pending
3629-Redwend Ltd. v. William Edwards et al.	Pending

3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3640-State v. Adams	Pending
3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart Stores	Pending
3646-O'Neal v. Intermedical Hospital	Pending
3647-State v. Tufts	Pending
3649-State v. Chisolm	Pending
3650-Cole v. SCE&G	Pending
3652-Flateau v. Harrelson et al.	Pending
3653-State v. Baum	Pending
3654-Miles v. Miles	Pending
3655-Daves v. Cleary	Pending
3656-State v. Gill	Pending
3658-Swindler v. Swindler	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending
3671-White v. MUSC et al.	Pending

3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Pending
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3708-State v. Blalock	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending

2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-143-State v. Patterson	Pending
2003-UP-144-State v. Morris	Pending
2003-UP-205-State v. Bohannan	Pending
2003-UP-244-State v. Tyronne Edward Fowler	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-284-Washington v. Gantt	Pending
2003-UP-293-Panther v. Catto Enterprises	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-State v. Holman	Pending
2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-409-State v. Legette	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Bates v. Fender	Pending
2003-UP-444-State v. Roberts	Pending

2003-UP-453-Waye v. Three Rivers Apt.	Pending
2003-UP-458-InMed Diagnostic v. MedQuest	Pending
2003-UP-459-State v. Nellis	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-508-State v. Portwood	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending

2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending

2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2004-UP-038-State v. Toney	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Raby Construction, L.L.P., Respondent,

v.

Henry J. Orr, Jr., H&D Capital, LLC, d/b/a The South City Grill, Stanley C. Gibson, Bank of Travelers Rest, and Debra L. Dailey d/b/a Dailey & Associates, Defendants, Defendants,

of whom Henry J. Orr, Jr. and H&D Capital. LLC d/b/a the South City Grill are Appellants.

and

Raby Construction, L.L.P., Respondent,

v.

Henry J. Orr, Jr., H&D Capital, LLC, d/b/a The South City Grill, Stanley C. Gibson, Bank of Travelers Rest, and Debra L. Dailey d/b/a Dailey & Associates, Defendants, Defendants,

of whom Henry J. Orr, Jr. is Appellant.

Appeal From Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 25793
Heard January 22, 2004 - Filed March 22, 2004

AFFIRMED

T.S. Stern, Jr., of Covington, Patrick, Hagins, Stern & Lewis, of Greenville, for Appellants.

Matthew P. Utecht, of Haynsworth Sinkler Boyd, P.A., of Greenville, for Respondent.

JUSTICE WALLER: These two direct appeals arise from the same mechanic's lien case and therefore have been combined for our review. We affirm on both.

FACTS

In Spring 1999, appellant Henry Orr[1] entered into an oral contract with respondent Raby Construction for the construction/renovation of a restaurant in Greenville to be known as the South City Grill. The contract was a "cost plus" agreement whereby Orr would pay respondent, as general contractor, the actual costs of the project, plus a 12% fee. On September 12, 2000, Orr signed a Statement of Account showing that the total project amount was

[1] While both Orr and H&D Capital, LLC d/b/a the South City Grill are appellants in one of these appeals, only Orr is appellant in the second. For ease of reading, we refer solely to Orr.

$1,047,000 and that Orr had already paid $810,000. The statement expressly stated that the total amount due was $237,000. Both Orr, and Michael Raby, respondent's principal, signed the document. It is undisputed that Orr made no payments after signing the Statement of Account.

Respondent filed a mechanic's lien for $237,000 on November 3, 2000, and in January 2001, respondent filed an action to foreclose on the lien. In his answer, Orr denied the allegations that $237,000 remained due on the project. The litigation proceeded through discovery,[2] and trial was set for December 11, 2001. However, on December 8, 2001, the parties entered into a settlement wherein Orr agreed to pay respondent $150,000 by January 24, 2002. Significantly, the settlement provided that if the $150,000 payment was not made by that date, then a confession of judgment would be filed for $200,000, plus interest and any attorneys' fees incurred in connection with foreclosure of the property. Furthermore, both the settlement and the confession of judgment stated that Orr would not oppose or contest any foreclosure on the property.

Orr did not pay the $150,000 settlement amount, and an order of judgment for $200,000 was entered in February 2002. Shortly thereafter, the trial court issued an order of foreclosure which required Orr to pay $200,000, plus interest, as well as attorneys' fees in the amount of $15,000.

On April 4, 2002, Orr filed a motion pursuant to Rule 60(b)(2) and (3), SCRCP, to vacate the orders of judgment and foreclosure. Orr alleged that relief from the orders was warranted because they were the product of respondent's fraud and misconduct, and also because of after-discovered evidence. The Rule 60(b) motion was based on a sworn statement from Jan Bailey, a former employee of respondent. Bailey gave testimony that respondent had failed to produce computer records related to the South City Grill, including evidence of bills that had not been paid by respondent, and that she had fabricated backup documentation that was produced to Orr.

---

[2] It appears from the record that discovery involved requests for production, requests for admission, interrogatories, and depositions; the only people deposed were Raby and Orr.

Bailey worked for respondent from November 1999 until January 2002. In her own words, the circumstances under which she left respondent "were very strained." There is some contention as to what position Bailey held while employed with respondent. She, at one point, stated that she was "bookkeeper, office manager, secretary, anything." Raby called her his secretary in his deposition. Notably, however, in its response to Orr's first set of interrogatories, respondent identified Bailey (who was formerly known as Jan Whitfield) as follows:

> Ms. Whitfield is an employee of [respondent], and she may testify as to [respondent's] accounting for the South City Grill project **and the amounts owed on the project**.

(Emphasis added).

The trial court conducted an evidentiary hearing on the Rule 60(b) motion at which both Bailey and Raby testified at length. The gravamen of Bailey's testimony was that the computer records were not disclosed, they were more accurate than the manual ledgers (which had been produced during discovery), and that the computer accounting system revealed that respondent had overcharged Orr by at least $30,000. According to her own calculations based on the computer records, Bailey estimated that Orr owed respondent just under $140,000.

Raby, on the other hand, testified that the computer accounting system was started several months **after** the South City Grill project began, and therefore, the computer system was not as accurate as the manual ledgers. In addition, Raby stated that respondent remained liable for the unpaid bills that the computer records indicated.

The trial court denied Orr's motion for relief and his subsequent motion for reconsideration. The trial court specifically noted that the order of foreclosure of the mechanic's lien remained "in full force and effect" except with certain date changes for the auction of the property. On July 15, 2002, Orr filed his notice of appeal from the denial of the Rule 60(b) motion.

Meanwhile, the proceedings for the sale of the property had continued pursuant to the February order of foreclosure. Indeed, just days before Orr filed the Rule 60(b) motion, a Contract of Sale for the property had been executed on April 1, 2002. After the trial court denied the Rule 60(b) motion, Orr filed a motion to stay the judicial sale of the property. The sale of the property was finalized in October 2002; however, respondent was still left with a deficiency in the judgment. Orr then filed a petition for appraisal in November 2002. Respondent opposed the motion and filed its own motion for attorneys' fees. After a hearing, the trial court dismissed the petition for appraisal and granted respondent additional attorneys' fees in the amount of $31,025.75. Orr moved for reconsideration, but the motion was denied.

Orr now appeals from both the denial of the Rule 60(b) motion and the granting of additional attorneys' fees.

ISSUES

1. Did the trial court err in denying Orr's Rule 60(b) motion?

2. Did the trial court lack jurisdiction to award additional attorneys' fees?

1. Rule 60(b) Motion

Orr argues that the trial court erred in denying him relief from judgment because respondent withheld documents and fabricated evidence. Specifically, Orr contends the trial court erred by: (1) applying the intrinsic/extrinsic fraud distinction since the judgment was not more than one year old; (2) finding there was no extrinsic fraud; and (3) applying improper standards on after-discovered evidence. Respondent disputes these arguments and raises several additional sustaining grounds.

Rule 60, SCRCP, is entitled "Relief from Judgment or Order," and subsection (b) states in pertinent part as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) **newly discovered evidence** which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) **fraud, misrepresentation, or other misconduct of an adverse party**;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> **The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.** A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.

(Emphasis added).

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Our standard of review, therefore, is limited to determining whether there was an abuse of discretion.

The trial court found that relief under Rule 60 for fraud is **only** available for extrinsic fraud and because the allegations of fraud in the instant

case amounted to intrinsic fraud, there could be no relief from judgment. Orr argues this was error because the intrinsic/extrinsic fraud analysis should **only** be used if the attack is on a judgment **more than one year old**.[3] We disagree.

Orr relies in part on Mr. G v. Mrs. G, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995), for his argument that relief for intrinsic fraud may be had if a Rule 60(b)(3) motion is brought within one year of the judgment. In that case, the Court of Appeals stated the following: "A party may not use **intrinsic** fraud to mount an attack upon a judgment **if the judgment is more than one year old**." Id. at 307-08, 465 S.E.2d at 102-03 (citing Rule 60(b)(3), SCRCP; emphasis added). Looking at the above emphasized language, the Court of Appeals arguably indicated that if the judgment is less than a year old, intrinsic fraud could be the basis for relief.

However, the Court of Appeals also discussed the distinction between extrinsic and intrinsic fraud and stated that intrinsic fraud is not a valid ground for setting aside a judgment. Id. at 308, 465 S.E.2d at 103. In addition, we note that factually, the Mr. G v. Mrs. G case involved a request for relief from judgment two and a half years after the original divorce decree was entered. Therefore, this opinion by itself does not resolve the issue presented by Orr. Instead, the issue of whether relief under Rule 60(b)(3) may be had for intrinsic fraud if the motion is brought within one year is a novel one.

---

[3] We note that the trial court initially made a finding that where there is a consent judgment, it is generally conclusive and not subject to collateral attack, citing Johnson v. Johnson, 310 S.C. 44, 425 S.E.2d 46 (Ct. App. 1992). Respondent argues that because Orr has not appealed this finding, it is the law of the case. We disagree. In its order, the trial court correctly stated the **general** rule. See id. at 46, 425 S.E.2d at 48 ("**Ordinarily**, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding.") (emphasis added). Furthermore, we note the Johnson court ultimately granted relief pursuant to Rule 60(b)(5); therefore, even consent judgments are subject to attack under particular circumstances.

Historically, this Court has held that in order to obtain equitable relief from a judgment based on fraud, the fraud must be extrinsic. See Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951). In Bryan, we explained as follows:

> There is no doubt that a court of equity has inherent power to grant relief from a judgment on the ground of fraud. However, not every fraud is sufficient to move a court of equity to grant relief from a judgment. Generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determined in the action in which the judgment was rendered; intrinsic fraud is not sufficient for equitable relief.

Id. at 167-68, 66 S.E.2d at 610.

As recently as last year, we discussed the important distinction between extrinsic and intrinsic fraud. See Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003).[4] We reiterated in Chewning that "[i]n order to secure equitable relief on the basis of fraud, the fraud must be extrinsic." Id. at 80, 579 S.E.2d at 610 (citing Bryan v. Bryan, supra). "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" Id. at 81, 579 S.E.2d at 610 (citation omitted). Intrinsic fraud, on the other hand, is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Id. The classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial. See, e.g., Bryan v. Bryan, 220 S.C. at

[4] We recognize that Chewning was **not** a Rule 60 matter, but instead was an independent action for fraud upon the court. In that case, we found that where the **attorney** allegedly suborned perjury and concealed documents, a claim for **extrinsic** fraud had been sufficiently stated. Nevertheless, our general discussion on extrinsic and intrinsic fraud is instructive on the issue raised in this case.

169, 66 S.E.2d at 611; James F. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE at 485 (2d ed. 1996). Allegations that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic, fraud. Chewning, 354 S.C. at 82, 579 S.E.2d at 610-11.

"Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments." Mr. G v. Mrs. G, 320 S.C. at 308, 465 S.E.2d at 103 (citation omitted); see also Bryan v. Bryan, 220 S.C. at 168, 66 S.E.2d at 610 ("relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment").

Furthermore, it is significant to note that when considering whether to grant relief from final judgments, "a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute." Chewning, 354 S.C. at 80, 579 S.E.2d at 609. We recognized in Chewning both this Court's longstanding policy towards final judgments and that "important benefits are achieved by the preservation of final judgments." Id. at 86, 579 S.E.2d at 613.

Thus, the weight of South Carolina authority clearly leads us to reject the argument that relief from judgment is permitted for intrinsic fraud if raised within one year of the judgment. This conclusion is compelled not simply from our precedents, as discussed above, but also from comparing our State rule to the Federal Rule. The corresponding clause in Federal Rule 60(b)(3) states that relief from judgment may be had due to "fraud (**whether heretofore denominated intrinsic or extrinsic**), misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), Fed.R.Civ.P. (emphasis added). Significantly, however, this emphasized language, does **not** appear in South Carolina's rule. Accord Flanagan, SOUTH CAROLINA CIVIL PROCEDURE at 485 (Rule 60(b)(3), SCRCP, "preserves state practice that distinguishes between 'intrinsic' and 'extrinsic' fraud.").

Accordingly, we hold that South Carolina maintains the distinction between extrinsic and intrinsic fraud, even when the allegations are raised

through a Rule 60(b)(3) motion filed within one year of the entry of judgment. The trial court therefore properly analyzed the issue as one dependent on the distinction between intrinsic and extrinsic fraud. Because this is clearly a case where the allegations rise only to the level of intrinsic fraud,[5] the trial court correctly denied relief under Rule 60(b)(3). Consequently, we affirm the trial court's decision.

In any event, we also agree with respondent's arguments that, based on various additional sustaining grounds, the trial court's denial of relief should be affirmed.[6] We are particularly persuaded by respondent's argument that Orr is not entitled to relief for after-discovered evidence, pursuant to Rule 60(b)(2), or for any alleged fraud or misconduct pursuant to Rule 60(b)(3), because the evidence that was presented in the motion could have been discovered during the litigation.

Pursuant to Rule 60(b)(2), SCRCP, a court may order relief from judgment based on newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Likewise, "a party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct." Ojeda-Toro v. Rivera-Mendez, 853 F.2d 25, 29 (1st Cir. 1988); see also Bowman v. Bowman, Op. No. 3726 (S.C. Ct. App. filed Jan. 20,

---

[5] Allegations of perjury, failure to produce requested discovery, or use of forged documents amount only to intrinsic fraud. See, e.g., Chewning, 354 S.C. at 82, 579 S.E.2d at 610-11; Bryan v. Bryan, 220 S.C. at 169, 66 S.E.2d at 611; Flanagan, SOUTH CAROLINA CIVIL PROCEDURE at 485. These are the types of allegations made by Orr, and so we reject Orr's alternative argument that this is a case of extrinsic fraud.

[6] See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment."); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.").

2004) (Shearouse Adv. Sh. No. 3 at 67) (where a party could have discovered the "new" evidence prior to trial, the party is not entitled to relief under Rule 60(b)(2) or (3)).[7]

Bailey was identified in respondent's answers to interrogatories as a witness who could testify as to the accounting for the South City Grill project **and the amounts owed on the project**. Yet Bailey was not deposed. In her testimony at the Rule 60(b) hearing, she acknowledged that if she had been deposed prior to the settlement and asked if there were computer records, she would have testified as to the existence of those records. Therefore, we find that **all** of the evidence Bailey presented to support Orr's Rule 60(b) motion could have been discovered by due diligence.

Additionally, testimony given by Raby in his deposition (taken on December 6, 2001, just two days before the parties settled) clearly put Orr on notice of the computer accounting system. Raby testified about this computer system, and how it was brought "up piece by piece." Orr's counsel then **specifically** stated: "Okay. Well, you didn't produce any of these records," to which Raby essentially responded that the computer records were not the "official" records for the project. The following colloquy occurred:

> Q. Okay. But you haven't produced these [computer time sheets]?
>
> A. I have no idea.
>
> Q. Well, I'll represent to you that you haven't produced these. So do you have these documents available?
>
> A. Those documents are available for certain time frames. I don't know if they're available for this job.
>
> …

[7] Indeed, even in cases of extrinsic fraud, a party does not have a claim "if he failed to exercise due diligence in discovering the existence of facts or documents during the underlying litigation." Chewning, 354 S.C. at 82 n.6, 579 S.E.2d at 611 n.6.

Q. Okay. Well, you were requested to produce all of your records in connection with this case.

A. And to my knowledge, I have produced them all.

Q. Okay. Well, if you can find where you produced this to me, I'll stand corrected and offer you my humble apology, but I don't believe it's produced **in this particular form**, is it?

(Emphasis added).

Thus, Raby's deposition alone establishes Orr became aware that computer records were kept by respondent and had not been produced. Notwithstanding this information, Orr settled this case without further inquiry. We find it obvious that Orr could have discovered the alleged "misconduct" and the "after-discovered evidence" that form the basis of his Rule 60(b) motion. For this additional reason, we affirm the trial court's decision to deny relief from judgment.

2. Award of Additional Attorneys' Fees

Orr also argues the trial court lacked jurisdiction to award additional attorneys' fees because the filing of the notice of appeal regarding the denial of the Rule 60(b) motion stayed the matters on appeal. We disagree.

The general rule is that "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree." Rule 225(a), SCACR. The automatic stay "continues in effect for the duration of the appeal…. The lower court retains jurisdiction over matters not affected by the appeal **including the authority to enforce any matters not stayed by the appeal**." Id. (emphasis added).

The order of foreclosure which directed the sale of the property is simply not a matter that was stayed by the appeal of the denial of the Rule

60(b) motion; it was a separate order which Orr did **not** appeal. Thus, the award of additional attorneys' fees, which was requested pursuant to that former order, was within the trial court's jurisdiction. See id.

In other words, because the only appeal pending at the time the trial court awarded additional attorneys' fees was the denial of the Rule 60(b) motion, that is the only order that would be automatically stayed; the general rule does not authorize a stay **of the underlying order** of judgment or order of foreclosure. Cf. In re Zapata Gulf Marine Corp., 941 F.2d 293, 295 (5th Cir. 1991) (where the court, applying analogous federal rules, reversed the district court's stay of execution of the underlying judgment where the only appeal pending was the denial of the Rule 60(b) motion).

Accordingly, Orr's argument that the trial court lacked jurisdiction to award additional attorneys' fees is without merit.

CONCLUSION

For the above stated reasons, the trial court's denial of the Rule 60(b) motion and the award of additional attorneys' fees are both

AFFIRMED.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice James E. Brogdon, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of an Anonymous
Former Probate Judge, Respondent.

Opinion No. 25794
Submitted February 18, 2004 - Filed March 22, 2004

PUBLIC REPRIMAND

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Ben C. Harrison, of Spartanburg, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) entered into an Agreement for Discipline by Consent pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.[1] In the agreement, respondent admitted misconduct and consented to the imposition of a public reprimand. We accept the agreement and issue a public reprimand for the misconduct set forth herein.

Facts

Respondent began serving as probate judge for Cherokee County in 1951. For years, respondent and his staff routinely charged fees to perform

[1] Respondent passed away after entering into the agreement.

marriage ceremonies. All or a portion of the fees were retained by respondent for his personal use. Respondent did not report the receipt of these fees on the annual reports he was required to file with South Carolina Court Administration pursuant to Canon 5(H)(2) of the Code of Judicial Conduct, Rule 501, SCACR, nor did he report the additional compensation on his annual report filed with the South Carolina Ethics Commission.

On October 10, 1994, the Advisory Committee on Standards of Judicial Conduct issued Opinion No. 26-1994 regarding, among other things, the propriety of a probate judge charging a fee for performing marriage ceremonies and the propriety of a probate judge accepting and retaining an honorarium for performing marriage ceremonies. Therein, the Committee advised that probate judges in South Carolina could perform marriage ceremonies only if authorized to do so by the governing body of their respective counties.

Relying on S.C. Code Ann. § 8-21-760 (1976), the Committee also advised that probate judges could collect fees for performing marriage ceremonies but only if the fees charged were authorized by the governing body of their respective counties and if the fees collected were deposited into the county's general fund.[2] The Committee noted that this Court, in In the

---

[2] Section 8-21-760 states the following:

> The probate judges must receive salaries for performance of their duties pursuant to Section 8-21-765.
>
> A probate judge who is receiving a salary greater than provided for his position under the provisions of this chapter must not be reduced in salary during his tenure in office. Tenure in office continues at the expiration of a term if that judge is reelected.
>
> The governing body of the county shall provide the salary, equipment, facilities, and supplies of the support personnel and staff of the probate judge, together with all other costs necessary for the efficient operation of the court, including but not limited to, court reporters, secretaries, clerks, per diem, travel, educational, and other benefits for the judge and his staff. A probate judge is not prohibited from acting as special referee with the agreement of

Matter of Johnson, 302 S.C. 532, 397 S.E.2d 522 (1990), had held that (1) fees collected for services rendered by a probate judge in his capacity as probate judge are governed by Article 7 whether specifically enumerated therein or not, and (2) failure to deposit fees in the county fund was a violation of Canons 1 and 2A of the Code of Judicial Conduct, which require a judge to observe high standards of conduct and respect and comply with the law.

Finally, the Committee advised that a probate judge cannot accept nor retain an honorarium for performing marriage ceremonies. The Committee advised that a judge who accepts an honorarium for performing marital services is exploiting his judicial position for his own personal gain in violation of former Canon 5C(1) of the Code of Judicial Conduct, now Canon 4D(1), and that the honorarium cannot be accepted as a gift because it arises directly from duties and powers conferred upon the judge.

South Carolina Court Administration sent a copy of the advisory opinion to each of the probate judges in South Carolina. Respondent acknowledged he received a copy of the opinion in late 1994 or early 1995.

On February 7, 1995, respondent entered into a contract with Cherokee County which authorized respondent to perform marriages, established a $10 fee to be charged by the probate court for the issuance of a marriage license, and stated that "no less than monthly, [respondent] shall

---

> the county governing body, but no probate judge is eligible to serve as a standing master-in-equity.
>
> The probate judge in each county must serve full time and shall carry out all duties assigned by law.
>
> Fees and costs received under the provisions of this article by the officials of a county must be accounted for and paid into the general fund of the county as directed by the governing body of that county. Any remuneration received by a probate judge for performing duties assigned by the Department of Mental Health must be remitted by the probate judge to the county treasurer for deposit into the general fund of the county.

turn over the county's portion of funds collected . . . to the treasurer together with a report of activity covered by the payment." However, the contract did not set or specifically authorize a fee to be paid to respondent for the performance of marriage ceremonies, it did not specifically authorize respondent to charge a fee for conducting marriage ceremonies, and it did not specifically authorize respondent to retain such a fee for respondent's own use, except for the vague reference to "the county's portion."

Thereafter, respondent and his staff continued to perform marriage ceremonies and collect, in addition to the fees due the county, a fee for the performance of marriage ceremonies in the amount of $10 for residents of Cherokee County and $20 for non-residents. The fees were retained by respondent for his personal use even when ceremonies were performed by respondent's staff instead of respondent.[3]

In 1998, this Court issued an opinion holding former Jasper County Probate Judge Harry C. Brown in contempt for willfully violating an order of the Court instructing him to refrain from retaining for his personal use any further compensation for performing marriage ceremonies.[4] In the Matter of Brown, 333 S.C. 414, 511 S.E.2d 351 (1998). Respondent estimated he became aware of the Brown opinion approximately one month after it was issued.

On December 16, 1999, the Advisory Committee on Standards of Judicial Conduct issued another advisory opinion on this subject, specifically addressing the propriety of a probate judge accepting all or a percentage of a

[3] For several months during 2003, when respondent was unable to perform his judicial duties due to an injury, his staff continued to perform marriage ceremonies and collect fees for performing the ceremonies, and then paid the fees collected to respondent or someone acting on respondent's behalf.

[4] The Court had previously issued a private admonition stating that the personal retention of payment for performing marriages involved an exploitation of judicial office for the judge's own personal gain. The Court stated further that even if it was assumed the payments were gratuitously given, the personal retention of the payments was improper since it involved a gift from a person who appeared before the judge in his official capacity as a probate judge. Moreover, the Court noted that it gave rise to a strong appearance of impropriety for a probate judge to personally retain compensation for performing marriages.

fee collected by the judge for performing marriage ceremonies. The Committee concluded a probate judge may collect a fee for performing marriage ceremonies if (1) the fee is authorized by the county governing body and if (2) the fee collected is deposited in the general fund of the county. See S.C. Code Ann. § 8-21-760 (fees and costs received under the provisions of Article 7 by the officials of a county must be accounted for and paid into the general fund of the county as directed by the governing body of that county).

South Carolina Court Administration sent a copy of the opinion to all of the probate judges in the state. Respondent acknowledged he received a copy. However, respondent and his staff continued to collect fees for the performance of marriage ceremonies until Disciplinary Counsel served respondent with a notice of full investigation on September 23, 2003.

On October 14, 2003, the Chief Justice of this Court issued a memorandum to all judges in the state regarding the retention of compensation for performing marriage ceremonies. Therein, the Chief Justice stated that no judge can retain for personal compensation any fees collected for performing marriage ceremonies, even if the fees are characterized as an honorarium or gift. The Chief Justice pointed out that the practice of retaining such fees had been declared a violation of the Code of Judicial Conduct in this Court's opinions in Johnson and Brown, as well as in Advisory Committee Opinion No. 26-1994. The Chief Justice stated further that the impropriety of retaining such fees should be clear from reading S.C. Code Ann. § 8-21-760 and Canons 1, 2A, 2B, 4D(1) and 4D(5) of the Code of Judicial Conduct.

The Chief Justice also stated in the memorandum that neither the governing body of a county nor a local act of the legislature can authorize a judge to personally retain compensation for performing marriages contrary to the Code of Judicial Conduct, and that the prohibition against a judge receiving compensation for performing marriage ceremonies applies to all judges regardless of when or where or under what circumstances the marriage ceremony is performed, or in what capacity the judge takes the oath, whether

as a judge or a notary public, all arguments which were made in the Brown matter.

The Chief Justice instructed any judge who had retained compensation for the performance of marriages while serving as a judge in the South Carolina Unified Court System to promptly make a report of having done so to the Office of Disciplinary Counsel, initiate an audit to determine the amount of compensation retained, and repay that compensation to the general fund of their respective county.

"With the advantage of hindsight, the Chief Justice's Memorandum, and the advice of counsel," respondent admitted that charging fees for the performance of marriage ceremonies and retaining those fees for his own use and benefit violated the provisions of S.C. Code Ann. § 8-21-760, the published of opinions of this Court in Johnson and Brown, and the Code of Judicial Conduct. Thereafter, respondent ceased charging fees for the performance of marriage ceremonies.

In addition, at the request of Disciplinary Counsel, respondent provided an accounting of the fees collected by the Probate Court of Cherokee County, and retained and paid over to respondent for his personal use and benefit, from July 1, 1998 until the time he stopped collecting the fees.[5] Based on that accounting, it was estimated respondent and his staff collected, and respondent retained, approximately $51,380 during that time. Respondent agreed that the fees collected and retained by him or his staff during that time should have been paid into the general fund of Cherokee County and that he was obligated to repay the funds. Respondent remitted that amount to the general fund of Cherokee County. Respondent further represented that no refund, rebate, bonus or any other compensation based on the amount refunded was paid by Cherokee County to respondent. Respondent agreed that it would be inappropriate under statutory law, this Court's opinions in Johnson and Brown, and the Code of Judicial Conduct, for respondent to accept forgiveness, a refund or a bonus of any portion of the amount remitted to Cherokee County, and respondent agreed not to accept

[5] The parties agreed on a date of July 1, 1998 because it is approximately thirty days after the issuance of this Court's opinion in Brown, supra.

such a refund, bonus or forgiveness of the amount owed in the future, although it was agreed this proviso would not operate to prevent Cherokee County from raising respondent's salary in a fashion provided by law as long as no such raise was contingent on fees collected by the probate court.

Law

Respondent admitted that his conduct was in violation of the following canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 1A (a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3B(2) (a judge shall be faithful to the law and maintain professional competence in it); Canon 3C(1) (a judge shall diligently discharge the judge's administrative responsibilities and maintain professional competence in judicial administration); Canon 4D(1)(a) (a judge shall not engage in financial dealings that may reasonably be perceived to exploit the judge's judicial position); Canon 4D(1)(b) (a judge shall not engage in financial dealings that involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves); Canon 4D(5) (a judge shall not accept a gift, bequest, favor or loan from anyone except for in certain situations not applicable to this case); Canon 4H(1) (a judge may receive compensation and reimbursement of expenses for extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of impropriety); and Canon 4H(2) (a judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received; the judge's report shall be made at least annually and shall be filed as a public document in the Office of Court Administration).

Respondent also admitted that his conduct 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 a ground for discipline for a judge to violate or attempt to violate the Code of Judicial Conduct) and Rule 7(a)(7) (it shall be a ground for discipline for a judge to willfully violate a valid court order issued by a court of this state or another jurisdiction).

Conclusion

We accept the Agreement for Discipline by Consent and issue a public reprimand in this matter. We take the unusual step of issuing this reprimand, despite respondent's death, because of the recurring nature of this problem.

Further, we take this opportunity to address our concern over the ongoing and willful violation of S.C. Code Ann. § 8-21-760, this Court's opinions, and opinions of the Advisory Committee on Standards of Judicial Conduct by probate judges in this state.

Just recently, the Advisory Committee on Standards of Judicial Conduct was asked to issue yet another opinion on this topic - an opinion very similar to the one it was asked to issue in 1994. In Opinion No. 20-2003, the Committee addressed the propriety of a county procedure which grants probate judges a percentage of the fees collected by the probate court for performing marriage ceremonies.[6] Relying on Canon 4D(1)(a) of the Code of Judicial Conduct, the Committee advised that while a county may take into consideration all of a probate judge's duties, such as performing marriage ceremonies, when determining the judge's salary, that salary must remain constant and may not be dependent on fees the probate judge collects

[6] The opinion states that Spartanburg County Council has recently approved a contract which provides that a minimum fee of $35 will be charged for the performance of marriage ceremonies, that the probate judge may establish a different, larger fee for ceremonies that require additional efforts, and that for each ceremony performed by the probate judge or his staff, the county will receive $25, with the balance going to the probate judge or his designee for his services in performing the ceremonies, collecting the fees and maintaining proper records. The contract also states that fees received by the probate judge or his designee shall be in addition to the salary paid to the judge or his designee.

for the performance of marriage ceremonies. The Committee advised that a judge who accepts a percentage of the court's fees for marital services performed is exploiting his judicial position for his own personal gain in violation of Canon 4D(1)(a). The Committee further advised that by merely keeping a portion of a fee charged for a marriage ceremony and granting the balance to the probate judge for his or her services, a county is granting the probate judge an honorarium. Finally, the Committee advised that the fee split cannot be accepted as a gift under Canon 4D(5)(a)-(c) because it arises directly from duties and powers conferred upon the judge.

Statutory law and judicial standards are clear on the prohibition against probate judges being compensated for the performance of marriage ceremonies. Despite this fact, this Court and the Advisory Committee on Standards of Judicial Conduct continue to be faced with judges intent on flouting the law and governmental entities intent on devising schemes to circumvent the law. The fact that the Chief Justice was forced, due to the refusal of certain judges to comply with the opinions, to issue a "cease and desist" memorandum reiterating that the practice violates statutory law and the Code of Judicial Conduct, is a clear indication that this matter is not being taken seriously. The Chief Justice, in her memorandum, directed any judge who has retained compensation for the performance of marriages while serving as a judge in the South Carolina Unified Court System to promptly make a report of having done so to the Office of Disciplinary Counsel, initiate an audit to determine the amount of compensation retained, and repay that compensation to the general fund of their respective county. We take this opportunity to reiterate that directive. Judges who fail to promptly comply with this directive and who continue to exhibit a cavalier attitude toward the statutory law, the opinions of this Court, the opinions of the Advisory Committee on Judicial Standards and the provisions of the Code of Judicial Conduct regarding this subject will receive a harsher sanction than those who promptly comply.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jerome Mackey, Petitioner

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Pickens County
Frank Eppes, Trial Judge
A. Victor Rawl, Post Conviction Judge

Opinion No. 25795
Submitted October 22, 2003 - Filed March 22, 2004

REVERSED

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, Assistant Attorney General W. Bryan Dukes, all of Columbia, for Respondent.

PER CURIAM: On May 11, 1995, Petitioner was indicted for grand larceny, resisting arrest and first-degree burglary. On June 27, 1995, the prosecution *nolle prossed* Petitioner's indictments. Although Petitioner was never re-indicted, he was tried and convicted of these charges on May 30, 1996. We vacate Petitioner's conviction and sentences.

FACTUAL/PROCEDURAL BACKGROUND

On May 30, 1996, Petitioner was convicted of grand larceny, resisting arrest and first-degree burglary and received an aggregate sentence of fifteen-years imprisonment.[1] The Court of Appeals affirmed Petitioner's conviction. *State v. Mackey*, 97-UP-566 (filed October 30, 1997).

Petitioner filed an application for post-conviction relief ("PCR") dated January 21, 1999. On December 8, 1999, the State filed an amended return and motion to dismiss the case for failure to file within the statute of limitations. The Honorable A. Victor Rawl granted the State's motion without a hearing and dismissed the case by written order dated August 12, 2000.

On January 24, 2002, this Court granted Petitioner's petition for a writ of certiorari to review the following question:

> Did the State need to re-indict Petitioner so that the trial court could retain subject matter jurisdiction and convict him after the indictments were *nol prossed*?

LAW/ANALYSIS

Petitioner argues that because his charges were *nol prossed*, the State needed to re-indict him so that the trial court would retain subject matter jurisdiction. We agree that Petitioner needed to be re-indicted, but we do not need to conduct a subject-matter-jurisdiction analysis to reach this conclusion.

---

[1] These documents were not provided in the Record on Appeal.

A *nolle prosequi* is an entry by the prosecuting officer indicating that he has decided not to prosecute a case. *State v. Gaskins*, 263 S.C. 343, 347, 210 S.E.2d 590, 592 (1974). This Court has held that all proceedings following an entry of a *nolle prosequi* are void because the indictment was no longer valid. *State v. Charles*, 183 S.C. 188, 199, 190 S.E. 466, 470 (1937). In the case *In re Brown*, this Court has also held that a solicitor's *nolle prosequi* of an indictment charging police officer with fatally shooting third party prevented the trial court from taking jurisdiction, thus rendering any subsequent proceedings void. 294 S.C. 235, 237, 363 S.E.2d 688, 689 (1988). Given this precedent, we hold that when a solicitor enters a *nolle prosequi*, charges are extinguished.

In this case, the solicitor did, however, retain the right to re-indict Petitioner because jeopardy does not attach until a jury has been empaneled and sworn. In fact, this Court has held that "if the *nolle prosequi* is entered prior to the jury being empaneled and sworn, there is no bar to further prosecution for the same offense because the innocence or the guilt of the defendant would not have been adjudicated." *State v. Patrick*, 318 S.C. 352, 357, 457 S.E.2d 632, 636 (1996). In *Patrick*, the solicitor re-indicted the defendant before seeking a conviction upon charges that were *nol prossed*. In the case at bar, the solicitor should have re-indicted Petitioner.

CONCLUSION

A requirement of re-indictment upon charges *nol prossed* should not be based upon a subject-matter-jurisdiction analysis. This type of analysis would suggest that subject matter jurisdiction attaches upon indictment and in turn detaches upon a solicitor's entry of *nolle prosequi*.

We adopt a specific, bright-line rule that (1) establishes that a *nolle prosequi* upon charges extinguishes the State's prosecution upon those charges; (2) treats charges *nol prossed* as if they never existed; and (3) requires a court to dismiss charges when a solicitor has *nol prossed* the charges and failed to re-indict a criminal defendant upon those charges.

Based upon the foregoing reasoning, we Reverse the PCR judge's ruling and Vacate Petitioner's sentences and convictions.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph R. Sheppard, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Henry F. Floyd, Post-Conviction Relief Judge
Costa M. Pleicones, Circuit Court Judge

Opinion No. 25796
Submitted January 22, 2004 - Filed March 22, 2004

REVERSE, GRANT BELATED REVIEW, AFFIRM

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Chief Capital and Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General Christopher L. Newton, all of Columbia, for respondent.

JUSTICE MOORE: We granted this writ of certiorari to determine whether the post-conviction relief (PCR) court erred by denying petitioner's request for a belated appeal. We reverse the PCR court and, after a review of petitioner's direct appeal issues, we affirm his convictions for murder and possession of a firearm during the commission of a violent crime.

PROCEDURAL FACTS

Petitioner was convicted of murder and possession of a firearm during the commission of a violent crime and received consecutive sentences of life imprisonment for murder and five years on the firearm charge. No direct appeal was taken. Thereafter, petitioner filed a PCR application seeking a belated review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Following the White hearing, the PCR court issued an order finding petitioner was not entitled to a belated review of his direct appeal issues.

Post-Conviction Relief Issue

Did the PCR court err by failing to grant petitioner a belated review of his direct appeal issues?

DISCUSSION

Petitioner contends the PCR court erred by finding he voluntarily waived his right to a direct appeal because trial counsel misadvised him that if his convictions were reversed on appeal, the State could again seek the death penalty.

To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). The Court will reverse a PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

Petitioner was convicted of murdering a Greenville city police officer. During the sentencing hearing, the State introduced evidence of only one aggravating circumstance, that the victim was a law enforcement officer killed during the performance of his duties. *See* S.C. Code Ann. § 16-3-20(C)(a)(7) (2003). The jury found the aggravating circumstance was present, but recommended life imprisonment instead of death.

At the White hearing, petitioner testified he called trial counsel's office the day after his trial and told counsel to appeal his case. Counsel met with petitioner and told him it would be unreasonable to file an appeal because the State could seek the death penalty again if he was granted a new trial. Based on counsel's advice, petitioner did not file a direct appeal. Trial counsel confirmed the facts as stated by petitioner. Counsel testified, however, that he believed, and continues to so believe, the State would do everything to execute petitioner, including attempting to have a pertinent United States Supreme Court case overturned.

The general rule in capital punishment cases is that when a defendant's conviction is reversed on appeal, the original conviction is nullified and the slate is wiped clean. Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001). If the defendant is convicted again on retrial, the death penalty may be validly imposed. This doctrine is known as the clean slate rule and was enunciated by the United States Supreme Court (USSC) in United States v. Ball, 163 U.S. 662 (1896), and North Carolina v. Pearce, 395 U.S. 711 (1969).

In Bullington v. Missouri, 451 U.S. 430 (1981), the USSC recognized a limited exception to the clean slate rule -- when a jury or appellate court finds the prosecution has failed to "prove its case" for the death penalty, and a life sentence is imposed, the clean slate rule does not apply, and the State cannot seek a harsher sentence upon retrial. *Id.* The USSC held that where the first jury returns a unanimous verdict of life imprisonment, the Double Jeopardy Clause of the Fifth Amendment bars the imposition of the death penalty on retrial. The first jury, by choosing life, impliedly decides the prosecution has not proved its case for death, and impliedly acquits the defendant of the death penalty. According to Bullington, the clean slate rule is inapplicable whenever a jury agrees or an appellate court decides the prosecution has not

proved its case.

Under South Carolina's sentencing scheme, there are three possible outcomes following the jury's determination that a statutory aggravating circumstance is present: (1) the jury recommends death and the trial judge imposes death; (2) the jury fails to recommend death and the trial judge imposes life without parole; or (3) the jury is deadlocked as to whether death should be imposed and the trial judge imposes a sentence of life imprisonment. S.C. Code Ann. § 16-3-20 (2003).

In the instant case, the sentencing jury found the presence of a statutory aggravating circumstance and failed to recommend death. Therefore, counsel's advice that petitioner would face the death penalty was erroneous given the jury's actions constituted an acquittal of the death penalty under Bullington, *supra*. Although counsel testified he believed the State would attempt to overturn Bullington, counsel's speculation about what the State would argue is not a sufficient justification for his failure to correctly explain the law or effectively convey to petitioner that his advice was based on speculation about the State's strategy, rather than the law. Further, petitioner desired to file an appeal, but chose not to after counsel informed him he could face the death penalty if he was retried. Accordingly, the PCR court erred by finding petitioner voluntarily waived his right to a direct appeal.

Direct Appeal

FACTS

On the day of the crime, Officer James Russell Sorrow attempted to arrest petitioner pursuant to a felony warrant. The officer eventually chased petitioner into the home of petitioner's aunt, Nancy Workman. The officer cornered petitioner and attempted to place handcuffs on him. Petitioner was able to escape from the officer and another chase ensued. Subsequently, petitioner shot the officer two times in the face, four times in the back of his head, and once in the buttocks. The officer died as a result of his wounds. Petitioner was captured a few days later at a local motel. He was charged with murder and possession of a firearm during the commission of a violent

crime. After a trial, the jury convicted petitioner of both charges.

ISSUE I

Did the trial court err by denying petitioner's motion for a change of venue due to pretrial publicity?

DISCUSSION

Petitioner argues his motion to change venue should have been granted due to the nature of the crime, *i.e.* a "cop killing," and due to the large percentage of potential jurors that were aware of the media coverage. He argues this established inherent prejudice because the case was easily remembered.

During voir dire, the trial court asked eighty-seven prospective jurors whether they had been exposed to pretrial publicity. Out of eighty-seven potential jurors, all but five had been exposed to pretrial publicity. The trial court then asked these prospective jurors whether they had formed an opinion about the case and whether they could put aside what they had heard and base their verdict on the evidence presented at trial. Fourteen of the prospective jurors indicated they had formed an opinion that petitioner was guilty. Out of those fourteen, eight prospective jurors stated they could not set it aside. Of the eight who said they could not set it aside, only one of these was qualified to be in the pool from which the jury would be empanelled.[1] This person was not seated on the jury.[2]

---

[1]Out of the fourteen who said they had formed an opinion petitioner was guilty, six persons stated they could set that opinion aside for trial. Of those six persons, one was empanelled as an alternate on the jury.

[2]The jury that was empanelled consisted of eleven people who had been exposed to the pretrial publicity and had not formed an opinion as to petitioner's guilt. One person had not been exposed to the publicity. The three alternates consisted of two people who had not formed an opinion from

The trial court denied petitioner's motion for a change of venue based on excessive pretrial publicity. The court stated pervasive pretrial publicity alone was not sufficient to relocate the trial. The court concluded the jury pool, after being subjected to extensive voir dire, was fair and impartial.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997) (finding trial court abused discretion by granting State's motion to change venue based on pretrial publicity because no evidentiary facts supported finding of actual juror prejudice toward State). When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). When jurors have been exposed to pretrial publicity, a denial of a change of venue is not error when the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. State v. Manning, *supra*. Therefore, mere exposure to pretrial publicity does not automatically disqualify a prospective juror. *Id.* Instead, the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. *Id.* It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity. State v. Caldwell, *supra*.

The trial court properly denied petitioner's motion for a change of venue because petitioner did not show extraordinary circumstances why this decision should be disturbed given the adequacy of the voir dire examination of the jurors. *See* State v. Caldwell, *supra*. The potential jurors' mere exposure to the pretrial publicity did not automatically disqualify them. *See* State v. Manning, *supra*.

---

the publicity and one person who had formed the opinion that petitioner was guilty but that person stated he could set that opinion aside.

Petitioner has not met his burden of demonstrating actual juror prejudice as a result of the publicity. *See* State v. Caldwell, *supra* (no abuse of discretion where eleven of seated jurors and two alternates acknowledged awareness of media coverage but stated they could be impartial and decide case based on evidence presented). His mere assertion he established inherent prejudice due to the nature of the crime and the large percentage of prospective jurors who remembered the case is insufficient to show actual prejudice. *See* State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (defendant's mere assertion that jurors could have been subconsciously affected by media exposure is insufficient to show prejudice). Although there was intense pretrial media coverage, there was no indication the trial court's voir dire failed to produce an impartial jury. *See id.*

Accordingly, the trial court did not err by denying the motion to change venue due to pretrial publicity.

ISSUE II

Did the trial court err by denying the motion to quash the indictment because racial discrimination existed in the county grand jury selection process?

DISCUSSION

Prior to trial, petitioner moved to quash the indictment because there was racial discrimination in selecting and seating jurors for the Greenville County grand jury. For purposes of the motion, it was assumed by all parties that the African American population in Greenville County was about 16-18%. At the request of the trial court, the county clerk compiled information regarding the race of the grand jurors for the years 1994 to 1997. The clerk was also questioned by the court and testified the selection procedures for the grand jurors had not deviated from the law. The trial court denied the motion and stated petitioner had not established a presumption of racial discrimination based on the statistical data available.

In Castaneda v. Partida, 430 U.S. 482 (1977), the United States

Supreme Court outlined the following test to be utilized when a defendant makes a grand jury discrimination claim:

> [I]n order to show . . . an equal protection violation[,] . . . [t]he *first* step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. *Next*, the degree of under-representation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. . . . *Finally*, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial under-representation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

State v. George, 331 S.C. 342, 503 S.E.2d 168 (1998), *cert. denied*, 525 U.S. 1149 (1999) (quoting Castaneda, 430 U.S. at 494-95) (emphasis added by George).

Under the Castaneda test, petitioner satisfied the first element of belonging to a group that is a recognizable, distinct class, *i.e.* African American. The second element of the Castaneda test is that the degree of under-representation must be proved by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.

In 1994, 13.6 % of the seated grand jurors, including alternates, were African Americans. In 1995, 15.7% were African Americans. In 1996, 23% were African Americans. In 1997, 21% were African Americans. Given the Greenville County African American population was assumed to be 16-18% at trial, these statistics do not indicate racial discrimination in the

composition of the grand jury. Therefore, petitioner cannot meet the second element of the Castenada test.

Accordingly, petitioner has not made a prima facie showing under the Castenada test, and, as a result, the trial court did not err by denying petitioner's racial discrimination claim.

ISSUE III

Did the trial court err by denying petitioner's motion for a mistrial due to the State's failure to submit witness statements to the defense?

DISCUSSION

Petitioner argues the trial court erred by denying his motion for a mistrial due to the State's failure to produce two prior statements of Reggie Cole until the conclusion of the State's direct examination of the witness.[3] Petitioner argues the State's failure to produce the statements violated Brady

[3]Petitioner also argues the State failed to produce two prior statements of Nancy Workman until the conclusion of Workman's direct testimony. However, Workman's statements were not included in the record. Accordingly, the State's failure to produce Workman's statements to petitioner will not be considered. *See* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.").

Further, although counsel was given Workman's prior statements before cross-examination commenced, counsel did not question Workman as to those statements. When defense counsel brought to the court's attention that the State had failed to timely produce the statements, the court informed defense counsel that Workman could be recalled for whatever purpose counsel desired. Defense counsel did not recall Workman to testify.

v. Maryland, 373 U.S. 83 (1963).

As noted previously, following a chase in petitioner's neighborhood, a struggle in Nancy Workman's home, and another chase, petitioner shot Officer Sorrow six times in the head. Petitioner's forensic expert testified on his behalf that the evidence of the two gunshot wounds to the officer's face was consistent with the position of defendant being held by the neck and reaching his gun over and shooting the officer, which coincided with petitioner's testimony at trial.[4]

Reggie Cole, who was charged with accessory after the fact of murder for allowing petitioner to stay in his home and acquiring a hotel room for petitioner, testified for the State at trial. Cole testified petitioner admitted the officer was chasing him and that after petitioner exited Workman's home, the officer told petitioner to freeze. Petitioner did so and raised his hands. When the officer holstered his gun and pulled out the handcuffs, Cole testified petitioner stated he said "Man, I can't go to jail" and he made a motion indicating he shot the officer. This testimony conflicted with petitioner's testimony of how the shooting occurred. *See* footnote 4 *infra*.

Cole gave two statements to the police, one a week after the crime and one almost a month after the crime. In the first statement, Cole did not relate the alleged statements petitioner made about the killing. Later, Cole's attorney advised him it would be to his benefit to tell everything he knew. As a result, Cole made another statement and this statement correlated with what he testified at trial.

---

[4]Petitioner testified, the second time he fled from the officer, the officer was not chasing him and so he hid behind a barn. He then saw the officer running down the street and he assumed the officer was gone. Suddenly, an unknown person choked him from behind. He could not get the person to stop choking him so he reached in his back pocket, retrieved his gun and shot two times. He testified he was still being choked and when he finally got the person off of his neck, he turned around and shot without trying to see who had been choking him. He shot until his gun was empty. He testified he then realized he had shot the officer.

Prior to cross-examining Cole, defense counsel alleged a Brady violation had occurred because the State had failed to produce Cole's statements until after the State had completed its direct examination of Cole. Defense counsel asked the court to consider the appropriate sanction because petitioner's right to impeach the witness was impeded. Defense counsel noted they would have liked the opportunity to investigate Cole's second statement because, in that statement, Cole indicated he had been at a bar for several hours before petitioner allegedly told him about how the shooting occurred. Defense counsel wanted to determine how intoxicated Cole was at the time. The State countered, as to the second statement, that it had been read into the record at the preliminary hearing so defense counsel had advance notice of that statement. The court reserved ruling until after the testimony was proffered.

Following the proffer of Cole's testimony, the court found Cole's statements were not within Brady and that the new information did not amount to impeachment on issues that were substantive or germane to the issues in the case. During the cross-examination before the jury, Cole admitted he was intoxicated at the time he allegedly heard the statement by petitioner and he agreed that drinking could affect a person's ability to recall the details of a conversation.

Pursuant to Brady, the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). This rule applies to impeachment evidence as well as exculpatory evidence. *Id.* (citing United States v. Bagley, 473 U.S. 667 (1985)).

Favorable evidence is material if there is a reasonable probability that,

had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Bagley, *supra*; State v. Hinson, 293 S.C. 406, 361 S.E.2d 120 (1987). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.*

Petitioner has not established a Brady claim. The prosecution did not suppress the evidence because Cole's second statement, which related what petitioner allegedly told Cole, was read into the record at the preliminary hearing. Further, the contents of the statements the State initially failed to produce do not create a reasonable probability that the outcome of the proceeding would have been different had the information been disclosed. *See* State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981) (State's failure to disclose does not warrant reversal unless defendant deprived of fair trial).

Petitioner had the opportunity to review and use the inconsistent statements in his cross-examination of Cole. *Cf.* Kyles v. Whitley, 514 U.S. 419 (1995) (Brady violation where prosecution failed to disclose, until collateral review of Kyles' conviction, various statements, made to police by informant who did not testify at trial, that showed informant could have been actual perpetrator of the crime). During cross-examination, defense counsel acquired an admission by Cole that he was intoxicated at the time petitioner allegedly made the statements. However, he chose not to impeach Cole any further with his previous inconsistent statements. Given the fact he was given Cole's statements in time for cross-examination, there is not a reasonable probability the outcome of the trial would have been different had the statements been disclosed prior to trial.

Accordingly, the trial court did not err by denying petitioner's Brady claim.

ISSUE IV

Did the trial court err by allowing hearsay testimony?

DISCUSSION

Petitioner argues the court erred by allowing Melinda Lynch to testify

regarding statements she overheard petitioner make a few days before he killed the officer.

Lynch testified at trial that a few days before the officer was killed, she overheard petitioner talking with his friends. At this point, petitioner made a hearsay objection. Lynch testified *in camera* she heard petitioner say there was a warrant for his arrest and that "before I let an MF, mother fucker cop take me down, police take me down I will shoot and kill one of the SOB's." Lynch testified she told petitioner that no one has a right to kill another person. Petitioner then stated, "fuck that, before I let them take me down I will shoot and kill one of the SOB's."[5]

The court, citing Rule 803(3), SCRE,[6] ruled the statements were admissible as a clear exception to the hearsay rule, and that the statement was relevant. Lynch repeated her testimony in front of the jury.

Petitioner argues Lynch's testimony is inadmissible hearsay and does not fall into the category of nonhearsay as set out in Rule 801(d)(1)(A), SCRE.

Rule 801(d)(1)(A) provides that a statement is not hearsay if the declarant[7] testifies at the trial and is subject to cross-examination concerning

---

[5]Later, in his direct testimony, petitioner denied making the statements and denied he saw Lynch. Thereafter, on cross-examination, petitioner testified Lynch may have overheard something he and his friends were talking about.

[6]Rule 803(3) provides that a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design) is excluded from the hearsay rule, even if the declarant is available as a witness.

[7]"Declarant" is defined as a person who makes a statement. Rule 801(b), SCRE.

the statement, and the statement is inconsistent with the declarant's testimony. Due to the State's admission of Lynch's testimony during its case, petitioner is correct that the statement is *not* nonhearsay under Rule 801(d)(1)(A). While the declarant, *i.e.* petitioner, testified at the trial and was subject to cross-examination concerning the statement and the statement was inconsistent with petitioner's testimony that he unintentionally killed the officer, the State offered Lynch's testimony *prior* to petitioner's testimony. Accordingly, Rule 801(d)(1)(A) is inapplicable.[8] *See* State v. Anders, 331 S.C. 474, 478, 503 S.E.2d 443, 444, n.3 (1998) (error in admitting declarant's prior inconsistent statement without declarant first taking stand and denying having made it is not cured when declarant is subsequently called as witness by defendant; once declarant's statement was introduced by State, declarant has little alternative but to take stand and either explain or deny statement attributed to him).

Therefore, the statement was hearsay and could not be admitted before petitioner testified unless an exception to the hearsay rule applied. As noted previously, the trial court ruled the statement was admissible under Rule 803(3), SCRE. Because petitioner does not appeal the trial court's ruling that the statement is a Rule 803(3) exception to the hearsay rule, that ruling is the law of the case.[9] *See* State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) (unchallenged ruling, right or wrong, is law of the case). Accordingly, the trial court did not err by admitting Lynch's testimony.

---

[8]If the State had cross-examined petitioner and obtained a denial that he made the statement, the State could have admitted Lynch's testimony in its reply as nonhearsay under Rule 801(d)(1)(A).

[9]In any event, the statement is admissible under Rule 803(3) because it is a statement of petitioner's intent to kill a police officer if an officer attempted to arrest him. *See* State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999) (statement must relate to present or look to future, but cannot look back to past condition).

ISSUE V

Did the trial court err by commenting on the facts in his malice charge to the jury?

DISCUSSION

Petitioner argues the court erred when charging malice to the jury. The court charged the jury:

> Murder is defined as the unlawful killing of a human being with malice aforethought. . . . Malice may be either expressed as if it is stated in no uncertain terms . . .
> The malice does not have to exist for any appreciable period of time before the killing occurs. The malice may be conceived at the moment that the act occurs. But there must be a conjunction, that is a coincidence in time of the act, the guilty act and the state of mind. *Even if the defendant had had malice at some point in the past he has not committed murder unless the malice actually existed at the time of the killing.*
>
> *It may be expressed, malice can be expressed where there is manifested a deliberate intention to violently and unlawfully take the life of another human being. For instance with words.* Or it may be inferred, that is deduced by you from certain circumstances. . . .
>
> One of the ways that malice can be inferred is from the use of a deadly weapon. . . .
>
> The term deadly weapon means any weapon, device, instrument, material or substance which in the manner it is used or is intended to be used is known

> to be capable of producing death or serious bodily injury, that is what a deadly weapon is.
>
> *Under the law of our State a pistol is a deadly weapon.*

(Emphases added).

Petitioner objects to the malice charge on the basis the court instructed the jury could find express malice where, by the use of words, there is manifested a deliberate intention to violently and unlawfully take the life of another. Petitioner argues this language comments on the facts of the case because the State was attempting to rely on prior statements by the defendant in an effort to show malice. *See* State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989) (trial court should refrain from all comment that tends to indicate to jury his opinion on credibility of witnesses, weight of evidence, or guilt of accused).

The charge given does not refer to *prior* statements. The trial court indicated malice could be expressed with words, that malice must *accompany* the physical act of killing, that there must be a coincidence in the guilty act and the state of mind, and that, "[e]ven if the defendant had . . . malice at some point in the past he has not committed murder unless the malice actually existed at the time of the killing." Further, the court instructed the jury that it was the sole arbiter of the facts and the credibility of the witnesses. Accordingly, the court's instructions to the jury when considered as a whole are not reversible. *See* State v. Jackson, *supra* (jury instructions must be considered as whole and, if as whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error).

Additionally, as stated in State v. Jackson, the test is what a reasonable juror would have understood the charge as meaning. It is unlikely that a reasonable juror would have singled out this portion of the charge and interpreted it as an opinion on the facts of this case or as an instruction as to the weight to be given the evidence.

Petitioner also objects to the court's statement that a pistol is a deadly weapon under South Carolina law as a comment on the facts of the case. However, under the law of South Carolina, a pistol is a deadly weapon. *See* State v. Campbell, 287 S.C. 377, 339 S.E.2d 109 (1985) (deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm); *cf.* State v. Heck, 304 S.C. 345, 404 S.E.2d 514 (Ct. App. 1991), *cert. denied*, 502 U.S. 1043 (1992) (BB gun found to be deadly weapon for purposes of armed robbery charge). Accordingly, the trial court properly charged the jury on the law, *i.e.* that a pistol is a deadly weapon for the purposes of inferring malice.

ISSUE VI

Did the trial court err by commenting on the facts when explaining deadly force to the jury?

DISCUSSION

Petitioner argues the court erred when explaining deadly force to the jury. The court charged the jury:

> Examples of an act of provocation which would be sufficient would be an unprovoked assault. By the same token, the exercise of a legal right no matter how offensive to another is never in the law deemed a provocation sufficient to justify or to mitigate an act of violence. *That which is perfectly justifiable on the part of the deceased cannot in anyway [sic] be legal provocation to the slayer.*
>
> *In that regard, a person, a law enforcement officer may use whatever force is necessary to effect the arrest of a felon including deadly force, if necessary, to effect that arrest.*

(Emphases added).

In general, the trial court is required to charge only the current and correct law of South Carolina. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). A jury charge is correct if it contains the correct definition of the law when read as a whole. *Id.*

The trial court correctly stated that an exercise of a legal right is never deemed a provocation sufficient to justify or to mitigate an act of violence. The trial court also properly charged that an officer may use whatever force is necessary to effect the arrest of a felon including deadly force to effect that arrest. *See* Tennessee v. Garner, 471 U.S. 1 (1985) (during felony arrest, if arresting officer has probable cause to believe suspect poses threat of serious physical harm, officer may prevent escape by using deadly force). This correct legal charge also conformed to the evidence in this case. *See* State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979) (trial judge's inclusion of lack of consent was not impermissible charge on facts of case, but rather correct statement of law, in conformity with the evidence). Accordingly, the trial court did not err in his explanation of deadly force.

CONCLUSION

We reverse the PCR court's decision to deny petitioner's request for a belated review of his direct appeal issues. After a review of petitioner's direct appeal issues, we affirm.

REVERSE, GRANT BELATED REVIEW, AND AFFIRM.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Helena Chemical Company, Appellant,

v.

Allianz Underwriters Insurance Company, CIGNA Property and Casualty Insurance Company, Insurance Company of North America, Lexington Insurance Company, Lloyd's of London, Maryland Casualty Company, The Central National Insurance Company of Omaha, The Home Insurance Company, and United States Fire Insurance Company, Defendants,

Of Whom Lexington Insurance Company, Lloyd's of London, and The Home Insurance Company are Respondents.

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

Opinion No. 25797
Heard April 23, 2003 - Filed March 22, 2004

AFFIRMED IN PART; REVERSED IN PART

William B. Harvey, III, of Harvey & Battey, P.A., of Beaufort; and Kim K. Burke, of Taft, Stettinius & Hollister LLP, of Cincinnati, Ohio, for Appellant.

A. Camden Lewis and Mary G. Lewis, both of Lewis, Babcock & Hawkins, L.L.P., of Columbia; Ellis B. Drew, III, of Wells Jenkins Lucan & Jenkins, of Winston-Salem, North Carolina; Jay Russell Sever, of Phelps Dunbar, LLP, of New Orleans, Louisiana; Michael P. Horger, of Horger & Horger, of Orangeburg; Richard Kuhl and Robert N. Kelly, both of Jackson & Campbell, P.C., of Washington, D.C.; and Thomas C. Salane, of Turner, Padget, Graham & Laney, of Columbia, for Respondents.

Andrea C. Pope, of Barnes, Alford, Stork & Johnson, L.L.P., of Columbia; Laura A. Foggan, John C. Yang, and Kimberly M. Hrabosky, all of Wiley Rein & Fielding, LLP, of Washington, D.C., for Amicus Curiae Insurance Environmental Litigation Association.

William B. Harvey, III, of Harvey & Battey, P.A., of Beaufort; Howard T. Weir, III, of Morgan Lewis & Bockius LLP, of Washington, D.C.; John E. Failla and Seth D. Amera, both of Morgan Lewis & Bockius LLP, of New York, New York, for Amicus Curiae Federal Pacific Electric Company.

CHIEF JUSTICE TOAL: This is an insurance coverage case in which appellant Helena Chemical Company (Helena) seeks, among other things, indemnification from its various primary and excess insurers for environmental cleanup costs. The trial court granted summary judgment for the insurers, and Helena appeals. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Helena is in the business of formulating, distributing, and selling agricultural chemicals, including pesticides, to the farming industry.[1] Helena began its South Carolina operations in 1970 when it merged with Blue Chemical Company. At issue in the instant case are three of Helena's South Carolina sites—Fairfax, Cameron, and Mayesville—where, in conjunction with the Environmental Protection Agency (EPA) and the South Carolina Department of Health and Environmental Control (DHEC), Helena conducted extensive cleanups of polluted soil.

The majority of the costs Helena is seeking relate to the Fairfax site. In December 1988, the EPA advised Helena in a letter that it considered Helena a "potentially responsible party" (PRP) for pollution at the Fairfax site. The EPA told Helena that pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), it was "considering spending public funds to respond to the release and threatened release of hazardous substances and contaminated materials" at the Fairfax site, unless such action would be done "properly by a responsible party." The letter encouraged Helena to "undertake voluntary cleanup activities" and invited Helena to commence "formal negotiations" with the agency.

In response to the letter, Helena entered into an agreement with the EPA and conducted a Remedial Investigation/Feasibility Study (RI/FS). The RI/FS revealed that there was significant environmental damage to the soil, and Helena conducted a major removal and off-site disposal action of pesticide-contaminated soil. In its complaint, Helena sought legal defense costs and over $8 million for "responding to and addressing" the claims made by the EPA and DHEC.

With regard to pollution at Helena's Cameron site, DHEC informed Helena in 1994 that it considered Helena to be a "potentially responsible

[1] Pesticide formulation consists of mixing a product with agricultural chemicals in order to get the desired concentration. Helena formulates both dry and liquid pesticides.

party" (PRP) under CERCLA. Although Helena did not enter into any formal agreement, it did conduct a removal of pesticide-contaminated soil at the Cameron site, incurring over $1 million in costs.

With regard to pollution at Helena's Mayesville site, DHEC notified Helena in 1995 that it had found pesticide contamination, and Helena conducted a cleanup there as well.

The insurers denied Helena coverage for the monies expended for the cleanups. Helena instituted this declaratory judgment action seeking reimbursement for all costs incurred. The trial court granted summary judgment in the insurers' favor. Specifically, the trial court found there was no insurance coverage because: (1) Helena's cleanup costs were not "damages" and (2) Helena's claims fell under the insurance policies' pollution exclusion. Additionally, the trial court granted summary judgment on Helena's bad faith claims, holding that the insurers had a reasonable basis to deny coverage.

Helena now appeals, asking this Court to consider the following issues:

I. Did the trial court err in finding that the costs incurred by Helena were not "damages" within the meaning of the insurance policies?

II. Did the trial court err in finding that the pollution releases were not "sudden and accidental," and therefore Helena's claims were barred under the policies' pollution exclusion?

III. Did the trial court err in granting summary judgment on Helena's bad faith claims?

LAW/ANALYSIS

I. "DAMAGES"

Each insurance policy issued to Helena specifies that the insurer will pay the insured for all sums the insured is "legally obligated to pay" as "damages" because of property damage.[2] Helena argues the trial court erred when it decided as a matter of law that the environmental cleanup costs did not qualify as "damages." We agree.

The trial court found that the plain, ordinary, and popular meaning of the term "damages" does not include environmental cleanup costs because these costs are not sums payable to a third party as a result of a lawsuit brought by that party. The trial court relied primarily on two Fourth Circuit cases: *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987) and *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979 (4th Cir. 1988).

In *Armco*, the Fourth Circuit was predicting Maryland law. The *Armco* court noted Maryland's rule of construction for insurance contracts that the policy terms should be given their ordinary meaning. *Armco*, 822 F.2d at 1352. Nonetheless, the court held that the term "'damages' is to be construed in consonance with its 'accepted **technical** meaning in law.'" *Id.* (emphasis added, citation omitted). The court explained there was a difference between legal and equitable damages, and this technical meaning of "damages" encompassed only legal damages, i.e., payments to a third party who has a legal claim for damages. *Id.* (citation omitted).

The underlying lawsuit in *Armco* was an action brought by the United States against Armco for reimbursement of remedial costs and injunctive relief in connection with the cleanup of a hazardous waste site. Because the relief sought by the United States was equitable and remedial in nature, the *Armco* court held there was no insurance coverage: "The general comprehensive liability policy … covers 'damages,' but not the expenditures

[2] Although the exact language in the policies differs somewhat, this is essentially how the policies define general coverage.

which result from complying with the directives of regulatory agencies." *Id.* The court noted that if "damages" were given a broad meaning, then the term "damages" in the contract "would become mere surplusage, because any obligation to pay would be covered." *Id.*

In *Milliken*, the Fourth Circuit applied **South Carolina** law and followed *Armco*'s reasoning:

> We perceive no material distinctions between the South Carolina and Maryland laws in the construction and interpretation of insurance policies that should cause us to deviate from *Armco* …. Absent ambiguity, in South Carolina the language of an insurance policy is given its plain, ordinary, and popular meaning.… In the insurance context the word "damages" is not ambiguous. It means legal damages.… We have no doubt that South Carolina law, in concert with Maryland and Missouri, would recognize that a general comprehensive liability policy which obligated the insurer to pay "all sums which the insured shall become legally obligated to pay as damages" would not cover claims for which the insured is equitably obligated to pay.

857 F.2d 980-81 (citations omitted).

But when faced with the same issue presented in the instant case, the highest state court in Maryland flatly **rejected** the reasoning and holding of *Armco*. *See Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021 (Md. 1993). The *Bausch & Lomb* court held that the ordinary and accepted meaning of damages was not a narrow, technical one, but instead was a broad one, encompassing environmental response costs, even when those costs are incurred **without** a government directive. The Maryland court stated as follows:

> To the extent it suggests that the term "damages" imports a distinctively legal meaning in insurance matters, *Armco* misperceives the law of Maryland.… [W]e accord to words their usual and accepted signification. "Damages" in common usage

> means the reparation in money for a detriment or injury sustained. The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity. Absent an express provision in the document itself, insurance policy-holders surely do not anticipate that coverage will depend on the mode of relief, i.e. a cash payment rather than an injunction, sought by an injured party. Policy-holders will, instead, reasonably infer that the insurer's pledge to pay damages will apply generally to compensatory outlays of various kinds, including expenditures made to comply with administrative orders or formal injunctions. The ordinary person understands "damages" as meaning money paid to make good an insured loss.… In this context, environmental response costs fall within that definition.

Id. at 1032-33 (footnote omitted).

We agree with the reasoning of the *Bausch & Lomb* court. As that court pointed out, the Fourth Circuit's logic contains an inherent paradox: although insurance policy terms are to be construed in their ordinary and usual way, the *Armco* and *Milliken* courts both accorded the term "damages" a narrow, technical meaning. This goes against South Carolina precedent which holds that this Court must give policy language its plain, ordinary, and popular meaning. *E.g.*, *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002).

The plain, ordinary meaning of "damages" is monies paid on an insured's loss, in this case, from property damage. An "ordinary" meaning of the term is not a legalistic one dependent on whether the damages are classified as legal versus equitable. *See*, *e.g.*, *Bausch & Lomb*, 625 A.2d at 779; *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 619 (Iowa 1991) ("The policy language, 'all sums which the insured shall become legally obligated to pay as damages because of property damage,' can reasonably be interpreted to cover any claim asserted against the insured arising out of property damage, which requires the expenditure of money, regardless of whether the claim can be characterized as legal or equitable in

nature."); *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 510 (Mo. 1997) ("To give words in an insurance contract a technical meaning simply by reading them 'in the insurance context,' would render meaningless our law's requirement that words be given their ordinary meaning unless a technical meaning is plainly intended.").

We note further that there is a split of authority over whether environmental cleanup costs constitute "damages" under an insurance policy. The majority of state courts have held that there is coverage for these costs. *See*, *e.g.*, *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992); *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 S.W.2d at 622; *Bausch & Lomb*,625 A.2d at 1033; *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990); *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d at 509; *Coakley v. Maine Bonding and Cas. Co.*, 618 A.2d 777 (N.H. 1992); *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 388 S.E.2d 557 (N.C. 1990); *Boeing Co. v. Aetna Cas. and Sur. Co.*, 784 P.2d 507 (Wash. 1990). *But see Certain Underwriters at Lloyd's of London v. Superior Court*, 16 P.3d 94, 106 (Cal. 2001); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990).

Moreover, the fact that "different courts have construed the language of an insurance policy differently is some indication of ambiguity." *Greenville County v. Ins. Reserve Fund*, 313 S.C. 546, 548, 443 S.E.2d 552, 553 (1994). Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted. *Id.* at 547-48, 443 S.E.2d at 553 (citations omitted). Therefore, the split of authority amongst the other courts that have addressed this issue militates in favor of a finding of ambiguity and an interpretation in favor of the insured. *Id.*; *accord A.Y. McDonald Indus.*, 475 N.W.2d at 619 (viewing the term "damages" as ambiguous and holding that "the ordinary meaning of 'damages' is broad enough to include government mandated response or cleanup costs under CERCLA and similar state environmental protection statutes"); *C.D. Spangler Constr. Co. v. Indus. Crankshaft and Eng'g Co.*, 388 S.E.2d at 569 (finding that "damages" is capable of "several reasonable interpretations" and concluding that "a 'reasonable person in the position of

the insured' may have understood that the term 'damages' included state-ordered environmental cleanup costs").

Nonetheless, in the present case, the insurers argue that the trial court's ruling is correct pursuant to the Court of Appeals' opinion in *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989). *Braswell*, however, does not support the insurers' argument. In *Braswell*, a lessee of property (the insured) left hazardous waste on the lessor's property. The corrosive chemicals left by the insured ate through a valve on one of the storage tanks and 1000 gallons of chemicals spilled onto a field adjacent to the tank. DHEC later issued an administrative consent order requiring the cleanup of the property. When the lessor sued the insured, the insurer denied coverage. The trial court granted summary judgment in favor of the insurer, finding neither an 'occurrence' nor 'property damage.'

The Court of Appeals reversed in part, finding the chemical spill constituted an 'occurrence,' and therefore the cleanup costs associated with the spill should be covered by the insurer. But because most of the costs were for removal of stored wastes that had not leaked, the Court of Appeals held these costs were not recoverable since no property damage had yet resulted. In making this holding, the Court of Appeals cited both *Armco* and *Milliken*, apparently approving of these cases. The court's holding, however, clearly rested upon a finding that there was no 'property damage,' not on an interpretation of the term 'damages.' For this reason, the *Braswell* court's reliance on the Fourth Circuit cases was misplaced.[3]

---

[3] Further, despite the seemingly positive treatment of *Armco* and *Milliken*, *Braswell* ultimately allowed insurance coverage for environmental cleanup costs where property damage had occurred. Thus, it is questionable whether *Braswell* actually applied the holdings of *Armco* and *Milliken*. Indeed, in a recent Fourth Circuit case, a concurring judge has made this same observation. *See Ellett Brothers, Inc. v. United States Fidelity & Guar. Co.*, 275 F.3d 384, 389 (4th Cir. 2001) (Michael, J., concurring), *cert. denied*, 537 U.S. 818, 123 S. Ct. 94 (2002) (where Judge Michael stated that "the ultimate holding in *Braswell* appears to conflict with *Milliken*'s legal/equitable distinction"). We agree with Judge Michael that *Braswell* actually rejected

For all of the above reasons, we find the trial court erred in ruling that Helena's environmental cleanup costs were not "damages" contemplated under the insurance policies. We specifically reject the reasoning of *Armco* and *Milliken*, and instead, align South Carolina with the majority of jurisdictions that have allowed insurance coverage for this type of loss, provided that an exclusion does not apply.

II. POLLUTION EXCLUSION

Next, Helena argues the trial court erred in finding the pollution exclusion in the insurance policies barred Helena's claims. Helena contends there is a genuine issue of material fact that precludes summary judgment on this issue. We disagree.

All of the insurance policies contain a pollution exclusion, which states that coverage does not apply to:

> property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; **but this exclusion does not apply if such discharge, release or escape is sudden and accidental**.

(emphasis added).[4] Accordingly, property damage caused by pollution arising from ordinary business operations is not covered. But if the damage

---

Milliken's "categorical rule excluding equitable relief from the term 'damages.'" *Id.* at 390. Thus, to the extent *Braswell* could be read to approve of the logic in *Armco* and *Milliken*, it is hereby modified.

[4] There are minor variations among the pollution exclusion clauses. Some policies state that the exception to the exclusion applies if the pollution is caused by a "sudden, unintended, and unexpected happening."

were caused by a "sudden and accidental" discharge, release, or escape of pollutants, then the insurers must provide coverage.

In *Greenville County v. Ins. Reserve Fund*, 313 S.C. 546, 443 S.E.2d 552 (1994), this Court specifically held that the term "sudden" is to be interpreted as "unexpected." Consequently, we must determine whether the discharge, release, or escape of the pesticide was unexpected and accidental.

The trial court found that Helena had not put forth any evidence on the cause of the contamination and thus had not met its burden to create a factual issue.[5] According to the trial court, the evidence showed that the pesticide contamination resulted from the "incidental release of pesticides during the routine operations of grinding pesticide into dust, loading, unloading, bagging and formulating pesticides." Respondents argue that because the contamination was caused by Helena's "routine" operations, the releases of pesticide could not be considered unexpected and accidental. Helena, on the other hand, argues the releases were not "routine," and thus the evidence permits the conclusion that the releases were unexpected and accidental.

After reviewing the record, we find that the contamination at the various sites was caused by Helena's routine business operations and was, therefore, not unexpected and accidental. For that reason, we hold that Helena's claims do not fall within the exception to the pollution exclusion,

---

[5] We note the trial court also made a finding that while the insurers bear the burden of proving that the exclusion applies, Helena bears the burden of proving the exception to the exclusion. This is a novel issue in South Carolina, and there exists a split of authority in other jurisdictions. *Compare N. Ins. Co. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 194-95 (3d Cir. 1991) (noting split on the question but predicting that under Pennsylvania law, the insured bears the burden) *with New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1181-82 (3d Cir. 1991) (also noting split, but predicting that under Delaware law, the insurer bears the burden). We agree with the trial court that it is the insured who bears the burden of proving an exception to the exclusion.

and thus the insurance companies are not liable for the environmental cleanup in this case.

Helena employees tell a story of routine contamination that occurred during the ordinary course of operations. First, Bobby Pace, who worked for Helena for 38 years, testified about the release of dust into the air during grinding operations:

> Q. And dust, is that referring to the fact that dust at some points in the operations at Fairfax escaped into the environment?
>
> A. There would be some dust.
>
> Q. Do you know in general how that dust would have escaped during the formulating process?
>
> A. Yes. … In formulation you have a grinding operation. Creates a lot of dust. And you normally call it a baghouse that collects the dust, but it did not collect 100 percent of it so some dust would get out into the atmosphere.
>
> Q. All right. So even during Helena's operations, do I understand correctly that at least some percentage of the dust that is released by the grinding operation would have actually escaped out of the processing area?
>
> A. It's possible, if the dust collectors were not operating 100 percent.

Pace also explained that bags of pesticide would break open during the loading and unloading process, causing pesticide particles to escape into the air and onto the loading docks. Pace described the breaking open of bags as just "something that happens."

Second, James Blue, the founder of Blue Chemical Company (which merged with Helena around 1970), testified as to dust spillage:

Q. In the regular day-to-day usage of the facility was there ever any just in the normal in the course of doing operations amounts that were spilled?

A. Well, generally if you take a dust mill, sure, you've got spillage on the floor. But that stuff is swept up, put back in the blender and bagged back up.

In addition to dust spillage, Blue testified as to the spillage of liquid pesticide that occurred when pesticide was transferred from rail cars and trucks to Helena's storage tanks. He stated there "probably was some" spillage when the liquid pesticide was pumped into the storage tanks. Further, in the absence of a major, accidental spill, Blue explained that any liquid release would be "very small." He also admitted that such spillage, though small, was a normal part of operations, and he could not recall a single instance in which a sudden or accidental spill occurred at the various sites.

Third, Charles Hooks, a Blue Chemical salesman, testified that liquid contaminants routinely spilled onto the ground. Hooks explained that the liquid chemical toxaphene was brought in by rail and tank cars. Upon arrival, the chemical would be pumped into storage tanks through a hose. When the hose was disconnected, small amounts of toxaphene would drip out. Hooks testified that "[t]here was probably a small amount [of leakage] every time you disconnected the couplings from the bottom of the tank car." Finally, Hooks testified that it was standard procedure, at the time, to deliver toxaphene to the sites in this manner.

A plant inspection conducted by Helena at the Mayesville site in 1985—to "look at possible environmental problems"—confirmed that contamination had occurred in the area where the trucks and railroad cars unloaded as described by Hooks. In addition, the inspection revealed that "the railroad track area around the warehouse door show[ed] signs of contamination."

Lastly, James Whosendove, a Helena employee of 13 years, testified that he could not remember any unexpected events in which tanks leaked, fell over, exploded, or otherwise caused a sudden emission of pesticides into the atmosphere or ground.

Together, these testimonies lead to no other conclusion than that routine discharge of pollutants occurred at the various Helena facilities during ordinary operations.

Summary judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *R. J. Hendricks, II v. Clemson Univ.*, 353 S.C. 449, 455, 578 S.E.2d 711, 714 (2003) (citation omitted). This Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 455-56, 578 S.E.2d at 714. Furthermore, since it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Given that Helena did not present any evidence that the pollution damages at issue here were the result of unexpected or accidental discharges of pesticide and other contaminants, we find that the trial court properly resolved an issue of fact when it decided that the pollution releases were not sudden and accidental. Accordingly, the exception to the pollution exclusion does not apply, and the insurance companies are not liable for the environmental cleanup.

III. BAD FAITH CLAIMS

The trial court also decided that the insurers were entitled to summary judgment on Helena's bad faith claims. Helena argues this was error. We disagree.

Under South Carolina law, an insurer acts in bad faith when there is no reasonable basis to support the insurer's decision. *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996). But "[i]f there

is a reasonable ground for contesting a claim, there is no bad faith." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992).

The insurers had a reasonable ground for contesting the claims associated with recovering the environmental cleanup costs. The Fourth Circuit's *Milliken* decision, which predicted South Carolina law, certainly provides a reasonable basis for finding that the cleanup costs were not "damages" within the meaning of the policies. Therefore, the insurers did not improperly contest coverage, and the trial court correctly granted summary judgment on the bad faith claims.[6]

CONCLUSION

In sum, we hold that the plain, ordinary meaning of "damages" includes environmental cleanup costs. Therefore, the trial court erred in granting summary judgment on this issue. But because no genuine issue of material fact was presented that would lead a jury to conclude that the manner in which pollutants were discharged on the property was sudden and accidental, the trial judge properly granted summary judgment in favor of the insurers as to the pollution exclusion issue. Finally, given that the insurers had a reasonable ground for contesting Helena's claims, summary judgment was properly granted as to the bad faith claims as well.

Accordingly, the trial court's decision is **AFFIRMED IN PART** and **REVERSED IN PART**.

MOORE, WALLER, BURNETT, JJ., and Acting Justice J. Ernest Kinard, Jr., concur.

---

[6] In their brief, respondents raise an additional sustaining ground for summary judgment involving an issue related to the excess insurers on which the trial court did **not** rule. We decline to address this issue. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

The Supreme Court of South Carolina

In the Matter of Karl P. Jacobsen, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. While he initially opposed the request, respondent states that he no longer contests the petition for interim suspension.

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

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

from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that C. Jennalyn Dalrymple, 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 C. Jennalyn Dalrymple, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Dalrymple's office.

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

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

Columbia, South Carolina
March 18, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Calvin L. Jeter and Quantilla B. Jeter, Respondents,

v.

The South Carolina Department of Transportation, Appellant,

v.

Phyllis P. Brown, Respondent.

Appeal From Fairfield County
Larry R. Patterson, Circuit Court Judge
Kenneth G. Goode, Circuit Court Judge

Opinion No. 3762
Heard January 14, 2004 – Filed March 22, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Andrew F. Lindemann, of Columbia, and Charles V. Verner, of Newberry, for Appellant.

Albert V. Smith, of Spartanburg, and Henry Hammer, Howard Hammer and Arthur K. Aiken, all of Columbia, for Respondents.

GOOLSBY, J.: This is an action under the South Carolina Tort Claims Act. The South Carolina Department of Transportation (SCDOT) appeals the damages awards to Calvin L. Jeter, Quantilla Jeter, and Phyllis P. Brown, arguing the trial court erred in (1) moving the action to Fairfield County, (2) directing a verdict on the issue of Brown's negligence, and (3) refusing to charge the defense of unavoidable accident. We affirm in part, reverse in part, and remand.

FACTS

Calvin Jeter was operating a motorcycle on Secondary Road 37, also known as Herbert Road, in Union County on July 12, 1997. SCDOT had recently resurfaced a portion of the road and left behind loose gravel. Phyllis Brown, Jeter's sister, was driving her vehicle in the opposite direction when she saw a deer on the side of the road and applied her brakes. Brown lost control of her car, which collided with Jeter's motorcycle before falling down a ravine.

Several people who saw the road at or near the time of the accident testified there was enough loose gravel on the road to scoop up handfuls of it. At trial, there was conflicting testimony from eyewitnesses and SCDOT employees regarding whether any signs warning of loose stones were posted at the time of the accident. Brown maintained excess gravel left on the road during the resurfacing caused her car to swerve into Jeter's lane of travel when she applied her brakes.

Jeter and his wife Quantilla filed two complaints against SCDOT in the Union County Court of Common Pleas under the South Carolina Tort Claims Act, alleging SCDOT had failed to maintain the road in a safe condition and to warn travelers on the road that dangerous conditions existed. Contending Brown was a necessary party to the litigation so as to allow for apportionment of fault under section 15-78-100(c) of the Act,[1] SCDOT filed

[1] Section 15-78-100(c) of the South Carolina Tort Claims Act provides that "[i]n all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity,

a third-party complaint in each action naming Brown as a third-party defendant. Brown then filed an answer and counterclaim against SCDOT under the Act for personal injuries she allegedly sustained during the accident.

Brown later settled with the Jeters and then moved under Rule 12(b)(6), SCRCP, to dismiss the third-party complaint filed against her. The trial court ruled that, under Rule 19, SCRCP, Brown was a necessary party to the action "solely for the purposes of satisfying the statutory requirement of section 15-78-100(c), that the trier of fact must apportion liability in a special verdict specifying the proportion of monetary liability of each defendant."

Brown then filed an amended answer and counterclaim, in which she objected to venue in Union County. Several days later, she moved for a change of venue to Fairfield County based on the fact that she was a resident of that county. Over SCDOT's objection, the trial court granted the motion and transferred the case to Fairfield County.

During the merits hearing, Brown moved for directed verdicts on the issue of her negligence and SCDOT's defense of unavoidable accident. The Jeters joined in the motions. After hearing arguments from counsel, the trial court granted both motions. Based on the finding that Brown was not negligent as a matter of law, the trial court declined to submit to the jury a special verdict form that would have allowed the jury to apportion fault pursuant to South Carolina Code section 15-78-100(c).

The jury returned verdicts of $1,950,000 for Calvin Jeter, $100,000 for Quantilla Jeter, and $150,000 for Brown. By consent order, the trial court reduced the verdicts in accordance with the statutory caps set forth in the

---

the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined." S.C. Code Ann. § 15-78-100(c) (Supp. 2003).

Act.[2] After unsuccessfully moving for a new trial absolute on numerous grounds, SCDOT filed this appeal.

LAW/ANALYSIS

1. SCDOT argues the trial court erred in trying the case in Fairfield County instead of Union County. We disagree.

The Jeters brought this action under the South Carolina Tort Claims Act. Section 15-78-100(b) of the Act provides that "[j]urisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred."[3]

SCDOT argues section 15-78-100(b) "provides that only the Circuit Court in the county where the act or omission occurred has subject matter jurisdiction over an action brought pursuant to the Tort Claims Act." According to SCDOT's reasoning, because the accident occurred in Union County, the Union County Court of Common Pleas had exclusive subject matter jurisdiction to hear this action.

We agree, however, with Brown and the Jeters that section 15-78-100(b) addresses the issue of jurisdiction only so far as to confer jurisdiction to hear such cases in the "circuit court"[4] while the remaining language in that section, "and brought in the county in which the act or omission occurred,"

---

[2] See S.C. Code Ann. § 15-78-120 (Supp. 2003) (limiting liability "[f]or any action or claim for damages brought under" the South Carolina Tort Claims Act).

[3] S.C. Code Ann. § 15-78-100(b) (Supp. 2003).

[4] See S.C. Const. Art. V, § 1 ("The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.").

addresses the issue of venue.[5] The caption to section 15-78-100 reads in pertinent part "When and where to institute action."[6] Moreover, nothing in part (b) of the statute can be read to require that a case arising under the Act must be "heard" or "tried" in "the county in which the act or omission occurred."[7]

We therefore hold section 15-78-100(b) did not prohibit the trial court from considering Brown's motion to change venue. Moreover, considering the fact that Brown resided in Fairfield County, we hold the trial court acted within its discretion in granting the motion.[8] Because the action was originally brought in Union County, where the accident occurred, we further hold the requirements of section 15-78-100(b) were satisfied.[9]

---

[5] See Ellis v. Oliver, 307 S.C. 365, 367, 415 S.E.2d 400, 401 (1992) (citing section 15-78-100(b) for the proposition that under the Tort Claims Act, "venue is proper where the act or omission occurred") (emphasis added).

[6] S.C. Code Ann. § 15-78-100 (Supp. 2003) (emphasis added).

[7] See In re Asbestosis Cases, 276 S.C. 579, 581, 281 S.E.2d 112, 114 (1981) ("'Venue' refers to the county where the action should be brought.") (emphasis added).

[8] See S.C. Code Ann. § 15-7-30 (1976) (stating "the action shall be tried in the county in which the defendant resides at the time of the commencement of the action"); Durant v. Black River Elec. Co-op., 271 S.C. 466, 467, 248 S.E.2d 264, 265 (1978) ("It is well settled that motions to change the venue of a trial are addressed to the sound discretion of the trial court."); McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 334, 479 S.E.2d 67, 70 (Ct. App. 1996) ("Where the facts concerning a defendant's residence are uncontradicted, the trial court must, as a matter of law under § 15-7-30, change venue to the county where the defendant resides.").

[9] SCDOT further argues that, even under the interpretation of section 15-78-100(b) as a venue provision, the trial court's decision to transfer venue was error because (1) when the action was commenced, the sole defendant was

2. We agree, however, with SCDOT's argument that the trial court erred in directing a verdict in favor of Brown on the issue of her negligence and in not allowing the jury to apportion fault among all potential tortfeasors, including Brown, as provided in South Carolina Code section 15-78-100(c).[10]

In South Carolina, motorists have a common law duty to keep a reasonable lookout to avoid hazards on the roadway.[11] In addition, motorists are required by statute to adjust their speeds to reasonable and prudent levels considering the "actual and potential hazards then existing"[12] and to drive their vehicles within their lanes of travel.[13]

SCDOT, for whom venue was proper in Union County and (2) Brown's residence in Fairfield County should not have "trumped" the Jeters' original venue choice. Although these arguments appear in SCDOT's new trial motion, there is nothing in the record to indicate that they were expressly raised to the trial court before it issued the order transferring the case to Fairfield County. Because these arguments concern venue rather than subject matter jurisdiction, we are not at liberty to disregard the rule that, unless issues are timely raised to the trial court, we cannot address them on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). We further note that after venue was changed to Fairfield County, SCDOT unsuccessfully moved for a change of venue and did not appeal the order denying its motion.

[10] This section provides that "[i]n all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined." S.C. Code Ann. § 15-78-100(c) (Supp. 2003).

[11] Thomasko v. Poole, 349 S.C. 7, 12, 561 S.E.2d 597, 599 (2002).

[12] S.C. Code Ann. § 56-5-1520 (1991 and Supp. 2003).

Several witnesses testified "loose stone" warning signs were in place at the time of the accident. Larry Crocker, a sign foreman for SCDOT, testified he was working in the area the day before the accident and made sure signs warning of loose stones were in place. In addition, Junior Jenkins, who worked on Crocker's crew, testified "they have to put the signs up before anything hits the highway." Finally, Martha Jolly, a resident maintenance foreman for SCDOT, testified (1) the road was resurfaced the day before the accident, (2) she was on the site the day before the accident and saw warning signs erected on the road, and (3) such signs normally stay up a few days after the work is done. Although there was some testimony suggesting the signs were not easily visible when the accident occurred, the evidence to the contrary created a jury question on this issue.[14] A finding by the jury the signs had been in place could have led to the inference that Brown had failed to keep her vehicle under control and adjust her speed to conditions of which she either was or should have been aware.

Similarly, there was evidence the hazards were open and obvious. Dr. Robert B. Roberts, who investigated the scene seventeen days after the accident testified he could observe clearly where the road had been re-surfaced. Dr. Larry Josey, the Jeters' expert witness, opined a reasonable person could visually recognize the road had been re-surfaced and Brown "should have been able to tell that this is a new piece of roadway." In addition, Quantilla Jeter testified she could see where the road construction started when she arrived at the scene. Even if SCDOT had not installed adequate warning signs, then, the jury could have found Brown, in

---

[13] Id. § 56-5-1810 (1991).

[14] See Brown v. Smalls, 325 S.C. 547, 558, 481 S.E.2d 444, 450 (Ct. App. 1997) ("Ordinarily, the negligence of a party is a question of fact for the jury.").

overlooking readily apparent hazards in the roadway, had failed to maintain a proper lookout.[15]

Viewing the evidence in the light most favorable to SCDOT, we agree there is more than one reasonable inference regarding whether Brown was at fault in the accident. We therefore hold that, under South Carolina Code section 15-78-100(c), the trial court should have given the jury the opportunity to apportion fault among all tortfeasors, including Brown.

3. It appears from SCDOT's brief that the question of whether the trial court erred in refusing to charge the defense of unavoidable accident becomes an issue in this appeal only if the directed verdict in favor of Brown is affirmed.[16] We have reversed the directed verdict; therefore, we do not reach the issue of whether the trial court should have charged the defense of unavoidable accident.

AFFIRMED IN PART, AND REVERSED IN PART, AND REMANDED.

ANDERSON, J., and CURETON, A.J., concur.

---

[15] See Brown v. Howell, 284 S.C. 605, 609, 327 S.E.2d 659, 661 (Ct. App. 1985) (holding it was proper to deny the plaintiff's motion for a directed verdict because the jury could reasonably infer that the plaintiff "did not exercise due care for his own safety in that he failed to keep a proper lookout, drove too fast for conditions, violated the laws regulating traffic at a stop intersection, and failed to take evasive action").

[16] SCDOT's brief reads in pertinent part: "If the lower court was correct in directing a verdict and/or striking SCDOT's defenses that Phyllis Brown's negligence caused the accident, then clearly the court at the very least erred in refusing to charge the law on unavoidable accident."