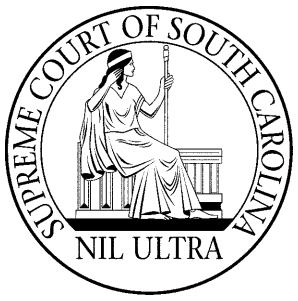

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
September 8, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Beachfront Entertainment, Inc. d/b/a Bert's Bar, John Elder, Mary Lynn Sheppard, and Cole Charles, Appellants,

v.

Town of Sullivan's Island, Respondent.

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

Opinion No. 26539
Heard June 25, 2008 – Filed September 8, 2008

AFFIRMED IN PART; REVERSED IN PART

Stephen P. Groves, Sr., Bradish J. Waring, and Paul A. Dominick, of Nexsen Pruet, LLC, all of Charleston, for appellant Beachfront Entertainment, Inc.

John F. Martin, of The Martin Law Firm, of Charleston, for appellants John Elder, Mary Lynn Sheppard, and Cole Charles.

Mark C. Tanenbaum and John P. Algar, both of Mark C. Tanenbaum, P.A.; and Frances I. Cantwell and William B. Regan, both of Regan and Cantwell, LLC, all of Charleston, for respondent.

Charles W. Patrick, Jr., Gregory A. Lofstead and Matthew D. Hamrick, all of Richardson, Patrick, Westbrook & Brickman, of Charleston, for Amicus Curiae Tobacco Control Legal Consortium.

JUSTICE MOORE: This appeal is from a circuit court order upholding respondent's (Town's) ordinance banning smoking in the workplace. We find the penalty provision of the ordinance invalid and reverse that part of the circuit court's decision.

FACTS

Town's Ordinance § 14-29 provides in essential part:

(D) Prohibition of Smoking in the Workplace

(1) The employer shall provide a smoke free environment for all employees working in all Work Space, Work Spaces and Work Places as those terms are defined herein. Further, the employer and all employees shall prohibit any persons present in said Work Space, Work Spaces and Work Places from smoking tobacco products therein.

A violation is punishable by a fine of $500 and/or thirty days in jail.

Restaurants are included in the definition of "workplace." Appellants are the owner of a restaurant and its employees. They brought this action claiming the ordinance is invalid because (1) the regulation of smoking is preempted by State law, and (2) the ordinance

criminalizes conduct that is legal under State law. The circuit court found the ordinance valid and granted summary judgment to Town.

ISSUES

1. Is the ordinance preempted by State law?

2. Is the ordinance unconstitutional because of the penalty it imposes?

DISCUSSION

1. Preemption

In determining the validity of a local ordinance, the inquiry is twofold: did the local government have the power to enact the ordinance; and, if so, is the ordinance consistent with the Constitution and general law of this State. Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997).

Appellants claim Town did not have the power to enact the ordinance because the regulation of smoking is preempted by State law. After the briefs were filed in this case, we addressed this argument in Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), and concluded that State law does not expressly preempt the regulation of smoking by a local government. Further, we find no implied preemption. *See* South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006) (under the implied preemption doctrine, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject as to occupy the entire field, or when the subject mandates statewide uniformity).

Appellants also argue the regulation of indoor tobacco smoke is preempted by the federal Occupational Safety and Health Administration (OSHA) and our State Occupational Health and Safety laws, S.C. Code Ann. § 41-15-10 *et seq.* (1986 and Supp. 2007).

Federal courts have declined to find OSHA preempts state law, *e.g.*, Empire State Restaurant and Tavern Assoc., v. New York State, 360 F. Supp. 2d 454 (N.D. N.Y. 2005), and we conclude there is no federal preemption of local regulation. Further, we find nothing in our State laws regarding workplace safety indicating the legislature intended to preempt the regulation of indoor tobacco smoke in the workplace.

2. Penalty

Town's ordinance imposes a fine of $500 and/or thirty days in jail. Appellants contend the ordinance is invalid because it criminalizes conduct that is not illegal under State law. We agree.

As we held in Foothills Brewing, Article VIII, § 14, of our State Constitution[1] requires uniformity regarding the criminal law of this State and local governments may not criminalize conduct that is legal under a statewide criminal law. *See also* Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996)).[2] Here, the State has not preempted the regulation of indoor smoking; a local government may therefore criminalize indoor smoking, but only to the extent consistent with State law. *See* City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) (local governments may not enact ordinances that impose

[1] Article VIII, § 14 reads:

> In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside . . . (5) criminal laws and the penalties and sanctions for the transgression thereof; . . . .

[2] In Foothills Brewing, we examined the ordinance in question and concluded it did not constitute a criminal law because a violation of the ordinance was designated an "infraction" and the only penalty imposed was a fine. In this respect, the ordinance in Foothills Brewing is different from the ordinance here which imposes a fine and/or thirty days in jail. Foothills Brewing therefore is not dispositive on this issue.

greater or lesser penalties than those established by state law). Town's ordinance is invalid in that it imposes a criminal penalty for smoking in places where smoking is not illegal under State law.

Town contends, however, that the offending provision regarding a thirty-day jail term should be severed pursuant to the ordinance's severance clause and the remaining fine be construed as a civil penalty. We disagree. The fine imposed under the ordinance is $500.[3] A violation of the provisions of the Clean Indoor Air Act restricting indoor smoking is a misdemeanor punishable by a fine of $25 to $100. *See* S.C. Code Ann. § 44-95-50 (2002). The fine imposed by Town's ordinance is substantially greater than the criminal fines imposed under the Clean Indoor Air Act for tobacco smoking offenses and cannot be construed as simply a civil fine.

Accordingly, we find the penalty provision of the ordinance unconstitutional because it conflicts with State criminal law by imposing a criminal penalty for conduct that is not illegal under State law. The order of the circuit court is

AFFIRMED IN PART; REVERSED IN PART.

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

[3] The recent amendment of the ordinance changing the penalty is not before us.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Betsy M. Campbell and Robert S. Campbell, Jr.,

Mary Schuyler Campbell, Respondent,

v.

Betsy M. Campbell and Robert S. Campbell, Jr., of whom Betsy M. Campbell is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Cherokee County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26540
Heard June 12, 2008 – Filed September 8, 2008

AFFIRMED AS MODIFIED

R. David Massey and E. Zachary Horton, both of Brown Massey Evans McLeod & Haynsworth, of Greenville, James R. Thompson, of Saint-Amand Thompson & Brown, of Gaffney, and William E. Winter, Jr., of Winter & Rhoden, of Gaffney, for Petitioner.

Randall Scott Hiller, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: This Court granted Petitioner Betsy M. Campbell's (Mother) petition to review a court of appeals decision setting aside a probate court order appointing two examiners to evaluate Mother's mental competency in a conservatorship proceeding brought by her daughter, Respondent Mary Schuyler Campbell (Daughter). We affirm the decision of the court of appeals as modified in accordance with our interpretation of the statute governing the appointment of examiners in conservatorship proceedings.

FACTUAL/PROCEDURAL BACKGROUND

Daughter petitioned to have herself appointed as conservator of Mother's assets before the probate court for Cherokee County, claiming that (1) Mother was no longer mentally capable of caring for herself or her assets due to dementia, and (2) Mother's assets were being reduced due to undue influence over Mother by her financial advisor William W. Brown (Brown).[1] Mother filed an answer denying the need for the appointment of a conservator and arguing that if the court determined she needed a conservator, Brown had priority to assume the role as her attorney in fact.

In April 2002, Mother listed Dr. John Cathcart and Dr. Preston Edwards to testify at the conservatorship proceeding as expert witnesses on her behalf. Drs. Cathcart and Edwards were both lifelong personal friends of Mother, and Dr. Edwards had occasionally seen Mother for medical reasons over a period of nearly fifty years when Mother primarily resided in Gaffney. Shortly after being designated as expert witnesses, Mother invited each of the doctors and their wives to dinner while she was in Greenville on other matters. Although the doctors were family friends of Mother, their respective social outings with her at this time were also for purposes of observation and

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[1] Daughter brought the conservatorship proceeding with respect to both her parents, however, the probate court's appointment of examiners at issue in this case only pertains to Mother. Incidentally, Father passed away during the pendency of this appeal.

evaluation of Mother as her expert witnesses. The record reveals that Mother's counsel provided Dr. Edwards with a document entitled "Outline of Testimony" summarizing what he might be asked at trial as an expert witness. The document was also intended to guide Dr. Edwards in his conversation with Mother at their dinner together, indicated by the document's listing of "discussion of business or financial matters," followed by the exclamation "don't ask if none!"

In August 2002, the probate court ordered the appointment of Drs. Cathcart and Edwards to examine Mother, evaluate her mental competency, and render an opinion to the probate court on the need for the appointment of a conservator pursuant to S.C. Code Ann. § 62-5-407 (1987). Mother does not dispute that the probate court conferred with Mother's counsel during the preparation of the order appointing Drs. Cathcart and Edwards. On the other hand, Daughter was entirely unaware that the probate court was considering an appointment of examiners until Daughter's counsel received a copy of the order from Mother's counsel postmarked two days after the probate court had actually issued the order. Daughter immediately filed a motion to reconsider the appointment on the grounds that Drs. Cathcart and Edwards were not "disinterested parties." The probate court scheduled a hearing for October.

Prior to the probate court's appointment of examiners, however, arrangements had already been made for Drs. Cathcart and Edwards to evaluate Mother, and therefore, only seven days after the court's appointment, a privately chartered jet flew Drs. Cathcart and Edwards, accompanied by Brown, to see Mother at her current residence in Florida. The doctors each testified that they met with Mother's Florida psychiatrist, visited with Mother and Father during the afternoon, and flew back by the same private jet that same evening. Each doctor was compensated $2,000.00.

At the October hearing, the probate court determined that § 62-5-407 did not require the appointed examiners to be disinterested and that the doctors were "well know[n] to this Court as outstanding physicians and as qualified to act as the Court-appointed examiners in the matter." Therefore, the probate court denied Daughter's motion to reconsider the appointment of Drs. Cathcart and Edwards.

At the same hearing, Daughter moved for recusal after the probate judge directed unfavorable personal comments at Daughter's counsel. Daughter additionally based her motion for recusal on the ex parte communications with Mother's counsel prior to the appointment of mental health examiners. The probate court denied the motion and proceeded to a hearing on the merits of Daughter's petition to appoint a conservator.

The only evidence presented as to the merits of Daughter's petition was the testimony of Drs. Cathcart and Edwards.[2] The doctors testified that they did not perform any medical or psychological examinations of Mother, however both were confident in their findings that Mother was competent to handle her financial affairs based on their personal friendship with Mother, their informal dinner with Mother in April 2002, communication with Mother's Florida psychiatrist, and the August 2002 visit with Mother in Florida. The probate court therefore dismissed Daughter's petition for appointment of a conservator.

Daughter appealed the probate court's orders to the circuit court, alleging that the probate court erred in (1) appointing examiners that were the product of ex parte communications; (2) appointing examiners that were not disinterested parties; (3) failing to grant Daughter's motion for recusal; and (4) finding Mother mentally competent. The circuit court set aside the probate court's order appointing the examiners, finding that § 62-5-407 implicitly required court-appointed examiners to be disinterested, and that the probate court therefore abused its discretion in naming Drs. Cathcart and Edwards as examiners when Mother had previously designated them as expert witnesses on her behalf. Because of the probate court's error in this regard, the circuit court set aside the probate court's order dismissing Daughter's petition to appoint a conservator. The circuit court also found that the Cherokee County probate judge should have recused himself and therefore transferred the case to Spartanburg County Probate Court.

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[2] Counsel for Daughter explained to the probate court that he was not prepared to proceed with a hearing on the merits because the notice of hearing had given him the impression that the court would only be hearing Daughter's motion to reconsider the appointment of Mother's examiners.

Mother appealed and the court of appeals affirmed the circuit court's ruling setting aside the probate court's appointment of examiners and order of dismissal. *In the Matter of Campbell*, 367 S.C. 209, 625 S.E.2d 233 (Ct. App. 2006). The court did not address the issue of recusal, noting that Mother conceded the issue had been rendered moot due to the death of the probate judge during the pendency of the appeal. *Id.* at 212 n.1, 625 S.E.2d at 235 n.1.

This Court granted certiorari, and Mother raises the following issue for review:

> Did the court of appeals err in affirming the circuit court's order setting aside the probate court's orders based upon a determination that S.C. Code Ann. § 62-5-407 implicitly requires that court-appointed physicians be disinterested?

STANDARD OF REVIEW

The interpretation of a statute is a question of law for the Court. *Vaughan v. McLeod Regional Med. Ctr.*, 372 S.C. 505, 509, 642 S.E.2d 744, 746 (2007). An appellate court may decide questions of law with no particular deference to the trial court. *Dreher v. Dreher*, 370 S.C. 75, 79, 634 S.E.2d 646, 648 (2006).

LAW/ANALYSIS

Petitioner argues that the court of appeals erred in interpreting S.C. Code Ann. § 62-5-407 to implicitly require that court-appointed examiners in a conservatorship proceeding be disinterested and independent.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Dreher*, 370 S.C. at 80, 634 S.E.2d at 648. To this end, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). If the language of a statute is

unambiguous, then the rules of statutory construction are unnecessary and the court may not impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Section 62-5-407(b) provides that upon receipt of a petition for appointment of a conservator due to alleged mental deficiency, "the court shall direct that the person to be protected be examined by one or more physicians designated by the court, preferably physicians who are not connected with any institution in which the person is a patient or is detained."

Initially, we find that the circuit court and the court of appeals erred in interpreting § 62-5-407 to implicitly require that the court-appointed examiner be disinterested. In drafting the provisions governing conservatorship proceedings, the legislature undoubtedly sought to establish a framework within which the probate court could exercise its discretion with the best interests of the allegedly incapacitated person in mind. It would be inconsistent with the subjective theory of "best interests" for the Court to find an overriding requirement that all examiners appointed under § 62-5-407 be completely disinterested parties. In fact, in certain instances of alleged mental incapacity, it may actually be preferable to seek the opinion of a treating physician who is familiar with the patient.

This is not to say, however, that the court of appeals' analysis entirely misses the point. Rather, the primary flaw in the opinion below is that it fails to distinguish between a "disinterested" party and an "unbiased" party. Although the statute does not impose a per se requirement of disinterestedness, basic tenets of justice in our jurisprudence dictate that the appointed examiners must be able to render an objective opinion. As the court of appeals rightly acknowledged, the obvious purpose of the statute permitting the appointment of examiners "is to provide the probate court with a medical opinion regarding the person's mental capacity, and it is inherent that such an opinion come from a neutral physician." *Campbell*, 367 S.C. at 213, 625 S.E.2d at 236. The statute's "preference" for the examiner to be unaffiliated with any institution in which the examinee is a patient lends support to the notion that the legislature intended for the appointed examiner to be unbiased, for presumably, only an unbiased examiner can render an

opinion to the probate court that considers the best interests of the allegedly incompetent party.

Accordingly, although the court of appeals erred in interpreting an overriding requirement of disinterestedness into § 62-5-407, we hold that the probate court is nevertheless obligated to appoint neutral and objective examiners and that failure to do so amounts to an abuse of discretion subject to reversal on appeal.[3]

To this end, we hold that the court of appeals was correct in affirming the setting aside of the probate court's appointment of Drs. Cathcart and Edwards. Mother had previously designated the doctors as expert witnesses and it is evident in the record that Mother's counsel had coached them as such prior to their evaluative meetings with Mother. Mother also compensated the doctors for the work they performed as her expert witnesses. In our view, these circumstances illustrate the fundamental incompatibility in assuming a dual role as an expert witness for a party to the litigation *and* as a neutral examiner for the court. Accordingly, we hold that the probate court committed an abuse of discretion in appointing Drs. Cathcart and Edwards as examiners in the conservatorship proceeding.

Additionally, although Mother does not raise to this Court the issue of whether the circuit court erred in recusing the probate judge, we briefly address the circuit court's ruling on the matter because we disagree with the court of appeals' apparent finding that the death of the probate judge during the pendency of the appeal rendered the issue moot.

In our view, the circuit court properly ordered the recusal of the probate judge. In addition to the preparation of an order of appointment that we find was strongly influenced by ex parte contact, the probate judge expressed his own favorable opinions on Mother's counsel and the appointed examiners in open court, while directing disparaging personal remarks at Daughter's

[3] *See Parkman v. Hanna*, 311 S.C. 20, 22, 426 S.E.2d 743, 744 (1992) ("The authority of the Probate Court, derived from the statute and precedent case law, will not be disturbed absent a clear abuse of discretion.").

counsel. These incidents, in our view, are manifestations of a clear bias on the part of the probate judge, and therefore, we hold that the circuit judge properly ordered the recusal of the probate judge and the transfer of the case from Cherokee County Probate Court to Spartanburg County Probate Court.

CONCLUSION

For the foregoing reasons, we affirm as modified the court of appeals' decision setting aside the probate court's order appointing Drs. Cathcart and Edwards as examiners in a conservatorship proceeding. Accordingly, we remand the case to the Spartanburg County Probate Court for further proceedings consistent with this opinion.

MOORE, WALLER, PLEICONES, JJ., and Acting Justice Letitia H. Verdin, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phyllis J. Lukich, Petitioner,

v.

George Peter Lukich, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Wayne M. Creech, Family Court Judge

Opinion No. 26541
Heard June 26, 2008 – Filed September 8, 2008

AFFIRMED

Donald Bruce Clark and Margaret D. Fabri, both of Charleston, for Petitioner.

Peter D. DeLuca, Jr., of DeLuca & Maucher, of Goose Creek, for Respondent.

JUSTICE PLEICONES: The Court granted certiorari to consider a Court of Appeals' decision affirming, by a vote of 2-1, a family court order holding that petitioner (Wife) was barred from using an order annulling her first marriage as a defense to respondent's (Husband #2) allegation that their marriage was bigamous. Lukich v. Lukich, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006). We affirm.

FACTS

In 1973, Wife married Husband #1. They never lived together, but never divorced. In 1985, Wife and Husband #2 participated in a marriage ceremony. In 2002, Wife filed an action seeking separate support and maintenance and ancillary relief from Husband #2. During the course of discovery, Husband #2 learned Wife had never been divorced from Husband #1, although she had filed but never served a complaint in 1973. In 2003, Husband #2 filed an action seeking to declare their marriage void as bigamous. After that action was filed, Wife filed a separate suit seeking an annulment of her marriage to Husband #1. This case was expedited[1] and an order granting an annulment filed October 31, 2003.

Wife then filed a motion to dismiss Husband #2's bigamy action based on the October 31, 2003, order granting her an annulment and declaring her first marriage void *ab initio*. The family court held Wife was "barred from defending against [Husband #2's] action to void the parties [sic] marriage on the basis of the Order of Annulment…," Wife appealed, and the Court of Appeals affirmed.

ISSUE

Did the Court of Appeals err in affirming the family court's decision that Wife could not assert her annulment to defeat Husband #2's bigamy claim?

[1] The complaint was filed October 21, 2003, the hearing was held October 31, 2003, and the order annulling that marriage signed the same day as the hearing.

ANALYSIS

The Court of Appeals majority affirmed the family court, relying primarily on S.C. Code Ann. § 20-1-80 (Supp. 2007), titled "Bigamous marriage shall be void: exceptions":

> All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, not [sic] to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

We agree with the Court of Appeals that this statute is dispositive of Wife's claim.

Under the statute, since Wife's Husband #1 was still living in 1985, her purported marriage to Husband #2 was void unless one of the three statutory exceptions is met. The first exception, the five year abandonment clause is not implicated here, nor is the second, since Wife was not divorced from Husband #1. Wife relies upon the third exception, which excepts from the bigamy definition an individual "whose first marriage shall be declared void by the sentence of a competent court."

The question is whether the October 2003 annulment order declaring Wife's first marriage void *ab initio* relates back so as to validate her purported 1985 marriage. In construing a statute, we need not resort to rules of construction where the statute's language is plain. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003). Under the statute's terms, Wife's "marriage" to Husband #2 was "void" from the inception since at the time of that marriage she had a living spouse and that marriage had not been "declared void." § 20-1-80.

While an annulment order relates back in most senses, it does not have the ability to validate the bigamous second "marriage." Since there was no

marriage under the plain terms of the statute when the ceremony between Wife and Husband #2 was performed in 1985, there was nothing to be "revived" by the annulment order in 2003. See e.g., Day v. Day, 216 S.C. 334, 58 S.E.2d 83 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable")[2]; Howell v. Littlefield, 211 S.C. 462, 46 S.E.2d 47 (1947) ("[Husband's] existing marriage…incapacitated him…to contract another marriage…."). The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of § 20-1-80 would lead to uncertainty and chaos.

Moreover, under South Carolina's current view of bigamy, the family court has jurisdiction to decide all ancillary matters where it annuls a marriage and declares it void *ab initio.* Rodman v. Rodman, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004). It would be inconsistent at best to hold that a marriage declared void *ab initio* never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support. The Court of Appeals correctly affirmed the family court ruling on this issue.

CONCLUSION

The decision of the Court of Appeals is

AFFIRMED.

TOAL, C.J., MOORE, BEATTY, JJ., and Acting Justice Georgia V. Anderson, concur.

[2] Wife would distinguish Day since it involves the first exception to the bigamy statute rather than the third. What is important about Day is not the exception, but rather the rule: the bigamous marriage is not a marriage at all.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phyllis J. Wogan, individually and as Personal Representative of the Estate of James J. Wogan, Petitioner,

v.

Kenneth C. Kunze, M.D.; Hilton Head Gastroenterology, P.A.; Thomas P. Rzecycki, M.D.; Hilton Head General and Laparoscopic Surgery, P.A.; Gary W. Thomas, M.D.; and Gary W. Thomas M.D., P.A., Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Curtis L. Coltrane, Circuit Court Judge

Opinion No. 26542
Heard May 7, 2008 – Filed September 8, 2008

AFFIRMED AS MODIFIED

Samuel S. Svalina and Jennifer I. Campbell, both of Svalina Law Firm, of Beaufort; and Timothy M. Wogan, of Hilton Head Island, for Petitioner.

Elliott T. Halio and Andrew S. Halio, both of Halio & Halio, of Charleston; and Mary Bass Lohr and James S. Gibson, Jr., both of Howell Gibson & Hughes, of Beaufort, for Respondents.

Frederick A. Crawford and Anthony E. Rebollo, both of Richardson, Plowden & Robinson, of Columbia, for Amicus Curiae SC Association of Certified Public Accountants.

Johannes S. Kingma and John C. Rogers, of Atlanta, and Lenna S. Kirchner, of Carlock Copeland Semier & Stair, of Charleston, for Amicus Curiae Abram Serotta & Serotta, Maddocks, Evans & Co.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Wogan v. Kunze, 366 S.C. 583, 623 S.E.2d 107 (Ct. App. 2005). We affirm the grant of summary judgment in favor of Dr. Kunze, as modified.

FACTS

Petitioner's husband, James J. Wogan, was diagnosed with rectal cancer in 1997 and was treated with chemotherapy by an oncologist, Dr. Thomas. Mr. Wogan developed a very severe case of diarrhea, resulting in malnutrition and dehydration, for which he was referred to Respondent, Dr. Kunze, a gastroenterologist. A colostomy was performed to stop the diarrhea but did not remedy the problem. Dr. Kunze placed Wogan on the drug Sandostatin SC, which was inserted subcutaneously three times a day and was not covered by Medicare. Sandostatin SC stopped the diarrhea within a few days.

A few weeks later, Dr. Kunze suggested Mr. Wogan try a new drug, Sandostatin LAR, which could be administered monthly, and was, according

to Wogan's complaint, covered by Medicare. Dr. Kunze refused to pre-order the Sandostatin LAR and administer it in his office because he did not believe it was covered by Medicare unless the diarrhea was caused by the chemotherapy. The chemotherapist, Dr. Thomas, was of the opinion that it was not covered. Dr. Thomas also refused to prescribe and administer the medication. Dr. Kunze ultimately agreed to administer the Sandostatin LAR, but he required the Wogans to purchase the monthly doses directly from a pharmacy.

The Wogans purchased Sandostatin LAR at a cost of $2000 per month for three months.[1] Neither Dr. Kunze nor Dr. Thomas would assist them with filing a Medicare claim. Mr. Wogan died in October 2001.

Mrs. Wogan filed this action against Dr. Kunze and others, alleging (1) negligence based on both medical malpractice from the surgery and Dr. Kunze's failure to file Medicare claims for the Sandostatin LAR; (2) breach of Dr. Kunze's contract with Medicare under which it was alleged Mr. Wogan was a third-party beneficiary; (3) violations of the South Carolina Unfair Trade Practices Act (UTPA); (4) breach of fiduciary duty in failing to file the Medicare claim; and (5) loss of consortium.

The trial court granted partial summary judgment to Dr. Kunze, holding Mrs. Wogan could not assert a state law negligence claim based on Kunze's failure to comply with a federal act, where the federal act (Medicare Act) did not allow a private right of action. The trial court further rejected Wogan's breach of fiduciary duty claim, finding the only breaches alleged (medical malpractice and failure to file a claim) had been alleged in the negligence cause of action. The Court of Appeals affirmed.[2]

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[1] The Wogans paid approximately $1,278 a month for Sandostatin SC; they paid approximately $2,094 a month for Sandostatin LAR.

[2] The claims for violation of the UTPA and breach of third party beneficiary contract were also dismissed, as were the claims against Dr. Thomas. No issue is raised on certiorari regarding these claims.

ISSUES[3]

1. Did the Court of Appeals err in affirming the trial court's ruling that Wogan could not maintain a state negligence claim against Dr. Kunze based upon his failure to file the Medicare claim?

2. Was summary judgment properly granted on the breach of fiduciary duty claim?

STANDARD OF REVIEW

When reviewing the grant of summary judgment, this Court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether triable issues of fact exists, the evidence and all factual inferences must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). If evidentiary facts are not disputed but the conclusions or inferences to be drawn from them are, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

1. NEGLIGENCE[4]

Wogan contends the Court of Appeals erred in affirming the grant of summary judgment to Dr. Kunze. She asserts liability is based, not on a violation of the Medicare Act,[5] but upon a violation of the standard of care of

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[3] In light of our holding, we need not address Wogan's remaining issue.

[4] The underlying medical malpractice claims remain pending against Dr. Kunze.

[5] Wogan does not contest the fact that case law generally holds there is no private right or action under the Medicare Act. See Brogdon v. Nat'l Healthcare Corp., 103 F.Supp.2d 1322, 1340

a reasonable physician. Wogan claims it was a breach of the standard of care for Dr. Kunze to refuse to file a Medicare claim on her behalf. The trial court and Court of Appeals held that, inasmuch as there is no right of action under the Medicare Act, Wogan could not base her state law claim on Dr. Kunze's failure to file such a claim. We agree with the result reached in this case; however, we find the Court of Appeals' holding overly broad.

Contrary to the Court of Appeals' ruling, there are some circumstances in which a state law negligence claim may be maintained against a third party as a result of the denial of Medicare benefits. The United States Supreme Court addressed this issue peripherally in Heckler v. Ringer, 466 U.S. 602, 615 (1984). Heckler involved a suit brought by three people who were denied reimbursement for bilateral carotid body resection (BCBR) surgery and one person who declined the surgery because he was unable to pay for it. They brought an action challenging the Secretary of Health and Human Services' ruling that the surgery was neither reasonable nor necessary. Although the case involved the issue of whether the plaintiffs could maintain suit in federal court, or were first required to exhaust their administrative remedies via review pursuant to 42 USC § 405 (g) of the Medicare Act, the Supreme Court held "[I]t seems to us that it makes no sense to construe the claims of those three respondents as anything more than, at bottom, a claim that they should be paid for their BCBR surgery." 466 U.S. at 614. Accordingly, the Court held that because the plaintiffs' claims were "inextricably intertwined" with their claim for benefits, that they were required to proceed under the Medicare Act. The Court recognized that there may be an exception in certain special cases where claims are "wholly collateral" to a claim for benefits under the Act, or where there is a colorable claim that an erroneous "**denial of benefits in the early stages of the administrative process will injure them in a way that cannot be remedied by the later payment of benefits."** 466 U.S. at 618 (emphasis supplied).

(N.D.Ga.2000) (Congress did not intend to create a private right of action when it enacted the Medicare and Medicaid Acts and authorized their accompanying regulations); Abner v. Mobile Infirmary Hospital, 149 Fed. Appx. 857 (11th Cir. 2005) (noting that Medicare Act does not create a private right of action for negligence); Ratmansky ex rel. Ratmansky v. Plymouth House Nursing Home, Inc., 2005 WL 770628 (E.D.Pa. 2005) (Medicare Act and regulations do not create a private right of action against nursing home).

An example of such an exception was demonstrated in Ardary v. Aetna Health Plans of California, Inc. 98 F.3d 496 (9th Cir. 1996), *cert. denied* 520 U.S. 1251 (1997). There, the decedent suffered a heart attack and was taken to a small, rural hospital near her home, which had neither intensive care nor cardiac facilities. The decedent's husband requested she be air-lifted to Loma Linda University Medical Center, a larger and better equipped facility, but the request was denied, and Mrs. Ardary died. Ardary filed a wrongful death suit alleging Mrs. Ardary died because of the failure to authorize an airlift to Loma Linda. The Ninth Circuit held the plaintiffs' claims were state common law claims, which were not "inextricably intertwined" with the denial of benefits. Ardary, 498 F.3d at 500. The court found that, "[a]lthough the Ardarys . . . wrongful death complaint is predicated on Arrowest's failure to authorize the airlift transfer, the claims are not 'inextricably intertwined' because the Ardarys are **at bottom not seeking to recover benefits**." Id. (emphasis supplied). But see Biometric Health Services v. Aetna, 903 F.2d 480 7th Cir. (1990) (party cannot avoid Medicare Act's jurisdictional bar simply by styling its attack as a claim for collateral damages instead of a challenge to the underlying denial of benefits; if litigants may routinely obtain judicial review of these decisions by recharacterizing their claims under state causes of action, the Medicare Act's goal of limited judicial review for a substantial number of claims would be severely undermined).

Heckler has been interpreted as "sweeping within the administrative review process only those claims that, at bottom, seek reimbursement or payment for medical services." McCall v. PacificCare of Cal., 21 P.3d 1189, 1199 (Calif.), *cert denied* 535 U.S. 951 (2001) See also Regional Medical Transport Inc. v. Highmark Inc., ___ F.Supp2d___, 2008 WL 872255 (E.D. Pa. 2008) (in assessing whether a claim falls into this category, courts must discount any "creative pleading" which may transform Medicare disputes into mere state law claims, and painstakingly determine whether such claims are ultimately Medicare disputes).

Accordingly, contrary to the Court of Appeals'' opinion, whether a state common law action for negligence may be maintained depends, under Heckler and subsequent cases, on whether or not the plaintiff's claims are, at

bottom, a claim seeking payment of reimbursement of sums which are alleged to be covered by Medicare, or whether the claims are wholly independent, but nonetheless stemming from the failure to provide some type of Medicare service. To the extent the Court of Appeals' opinion fails to acknowledge the possibility of a state law claim, it is hereby modified.

However, we concur with the result reached by the Court of Appeals. Although Wogan characterizes her cause of action as a state law claim for negligence, it is, at bottom, a claim for reimbursement of the $2000 per month which was expended on Sandostatin LAR prior to Mr. Wogan's death. Her claim is therefore "inextricably intertwined" with the refusal to file a Medicare claim and is therefore not cognizable on state law negligence grounds.[6] The grant of summary judgment to Dr. Kunze is affirmed.

2. BREACH OF FIDUCIARY DUTY

Wogan also asserts the trial court erred in granting summary judgment on her claim for breach of fiduciary duty. Once again, the underlying basis of the breach of fiduciary duty claim is that Wogan seeks reimbursement of the expenses she suffered by having to pay for the Sandostatin LAR for three months out-of-pocket. Pursuant to Heckler and Ardary, we find Wogan's claim is **at bottom** an attempt to recover monies which would otherwise have been paid by Medicare. Since such a claim is not cognizable as an independent state negligence claim, it was properly dismissed.

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[6] We agree with Wogan's contention that the violation of a statute or regulation may, in a proper case, be used as evidence of negligence. See e.g., Wise v. Broadway, 315 S.C. 273, 433 S.e.2d 857 (1993); Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978); Shearer v. DeShon, 240 S.C. 472, 126 S.E.2d 514 (1962) (causative violation of a statute constitutes negligence per se). Violation of a Medicare statute could conceivably be used to support of a state negligence claim where the state law claim is not inextricably intertwined with a claim for Medicare reimbursement. For example, in Ardary, the plaintiffs would be entitled to demonstrate that the defendant's failure to authorize an airlift to the regional hospital violated a Medicare statute or regulation, thereby causing Mrs. Ardary's untimely death.

The Court of Appeals' opinion is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donney S. Council, a/k/a
Donnie S. Council, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Aiken County
James R. Barber, III, Circuit Court Judge

Opinion No. 26543
Heard June 26, 2008 – Filed September 8, 2008

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown, all of Columbia, for Petitioner.

Teresa L. Norris, of Blume Weyble & Norris, of Columbia, Theresa Lee Clement, both of Columbia, for Respondent.

JUSTICE BEATTY: In this death penalty post-conviction relief (PCR) case, the Court granted the State's petition for a writ of certiorari to review the PCR judge's decision to: vacate Donney S. Council's (Respondent's) sentence of death; grant a new hearing for the penalty phase of his capital murder trial; and continue indefinitely one of his PCR grounds until Respondent regained competence. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL HISTORY

On the evening of October 9, 1992, police discovered the body of seventy-two-year-old Elizabeth Gatti underneath a bedspread in her basement. She had been hogtied with a white cord and layers of duct tape were wrapped around her entire head. Her clothes had been ripped, and the crotch of her underwear had been cut out. Surrounding her body were various bottles of cleaning fluids which she had been forced to ingest. Mrs. Gatti had been sexually assaulted as evidenced by a gaping laceration extending from her vagina into the rectal area.

Respondent was arrested for the crimes on October 12, 1992. In two separate statements, Respondent admitted to being in Mrs. Gatti's house on the night she was killed and that he had sex with her. However, he denied committing the murder and implicated a man named "Frankie J," who Respondent alleged was present with him at the time of the crime. "Frankie J" was later identified as Frank Douglas. None of the physical evidence found in Mrs. Gatti's house or in her car matched Douglas.

Because Respondent admitted to being in Mrs. Gatti's home when the crime took place, trial counsel pursued the theory that Respondent did not murder Mrs. Gatti but was merely present at the time of the crime. The jury found Respondent guilty of murder, administering poison, first-degree burglary, grand larceny of a motor vehicle, petty larceny, kidnapping, and two counts of first-degree criminal sexual conduct (CSC).

Prior to the beginning of the penalty phase, trial counsel moved to allow into evidence the results of Frank Douglas' polygraph test which indicated deception. Trial counsel sought to present this evidence to the jury in an effort to establish that Douglas was the actual perpetrator and Respondent was merely present at the time of the crime.[1] The trial judge declined to admit the polygraph test.

As part of its case, the State called several witnesses to testify regarding Respondent's juvenile and adult records as well as his numerous disciplinary problems while incarcerated for these offenses at the Department of Juvenile Justice (DJJ) and the Department of Corrections (DOC). The testimony established that Respondent entered the DJJ system at ten years old with his adult criminal activity escalating to more violent offenses which included resisting arrest, assault and battery with intent to kill, and armed robbery. After outlining Respondent's prior record, the State offered testimony to establish the aggravating circumstances surrounding Mrs. Gatti's murder.

In response, trial counsel offered Respondent's mother, Betty Council, as the sole defense witness. She told the jury that Respondent is the youngest of ten children. She testified she took Respondent to "mental health" between the ages of seven and fourteen and that he had been teased as a child while at school. She also showed the jury a childhood picture of Respondent. Respondent's mother further testified that Respondent suffered third-degree burns from a cooking accident, and that the treating physician told her that it would "take effect" on Respondent. In terms of Respondent's adulthood, Respondent's mother testified that he has two young sons. When asked by defense counsel what she would do as Respondent's mother when faced with

[1] Counsel contended the polygraph test was relevant to establish the following two statutory mitigating circumstances: (1) Respondent was an accomplice in the murder committed by another person and his participation was relatively minor; and (2) Respondent acted under duress or under the domination of the other person. S.C. Code Ann. § 16-3-20(C)(b)(4), (5) (1985).

the jury's decision as to life without parole or death, she pleaded for the jury to impose a life sentence.

The jury found beyond a reasonable doubt that the murder was committed in the commission of the following aggravating circumstances: criminal sexual conduct; kidnapping; burglary; larceny with the use of a deadly weapon; killing by poison; and physical torture. As a result, the jury recommended Respondent be sentenced to death. The trial judge denied all of Respondent's post-trial motions and ordered Respondent to be put to death on December 6, 1996.

On appeal, this Court affirmed Respondent's convictions and sentences. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). After the United States Supreme Court denied Respondent's petition for a writ of certiorari,[2] he petitioned this Court for a stay of execution to pursue state PCR remedies.

Following this Court's grant of the stay, Respondent filed his initial PCR application. Shortly thereafter, Respondent indicated that he wished to withdraw his PCR application and be executed. Pursuant to this request, a hearing was held before the circuit court on December 8, 2000. As a result of this hearing, the circuit court judge ordered a competency evaluation of Respondent. Three months later, the Department of Mental Health found that Respondent was not competent to waive PCR or be executed because he suffered from schizophrenia, undifferentiated type. Respondent's PCR counsel then moved to stay the PCR proceedings.

After a hearing, a circuit court judge ordered the capital PCR proceedings to be stayed indefinitely due to Respondent's incompetence. The State petitioned for and was granted certiorari by this Court to review the circuit court's order. This Court set aside the stay and ordered the PCR proceedings to continue. Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004).

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[2] Council v. South Carolina, 528 U.S. 1050 (1999).

Following this Court's decision, Respondent filed two amended applications. In his final application, Respondent alleged he was entitled to relief based on the following grounds: ineffective assistance of counsel during voir dire and jury selection; ineffective assistance of counsel during the sentencing phase for: (i) failing to obtain a mitigation investigator or to otherwise adequately prepare and present powerful mitigating evidence; (ii) failing to develop a consistent, credible theme for a sentence of life imprisonment; (iii) failing to obtain the assistance of a pathologist and failing to challenge the testimony of the State's expert pathologist regarding the circumstances surrounding Mrs. Gatti's death; Respondent may not be executed because he is incompetent; ineffective assistance of counsel in investigating Respondent's competency to stand trial; and ineffective assistance of counsel in investigating Respondent's mental state at the time of the offenses.

At the hearing, PCR counsel called Respondent as a witness. However, due to his incompetence, Respondent was essentially unintelligible in his testimony. As a second witness, PCR counsel called Dr. Tora Brawley, a clinical neuropsychologist who reviewed Respondent's records and interviewed several of his family members. Based on the results of a battery of tests, Dr. Brawley believed there was evidence of brain dysfunction, particularly in the frontal lobe. Dr. Brawley testified Respondent began having problems when he was seven years old. Although Respondent had an I.Q. of 106 at that time, he was diagnosed with a learning disability and enrolled in special education classes. When Respondent was tested again at ten years old, his I.Q. had dropped approximately twenty-three points. In Dr. Brawley's opinion, this significant decrease represented an overall decline in general cognitive functioning.

Next, PCR counsel called Marjorie Hammock a forensic social worker who compiled a "social family history" for Respondent. Based on her investigation, Hammock found that several of Respondent's family members suffered from mental illness, were involved in criminal activity, and have "significant educational deficit problems." Hammock also discovered that Respondent's father was an alcoholic

who was extremely violent. Divorce records indicated Respondent's mother was granted a divorce on the ground of physical cruelty. After the father left the home, Respondent's family moved at least seven times from one bad neighborhood to another and lived in several homes which did not have running water and indoor plumbing. The family members also depended on government assistance for their financial existence. Respondent's individual records revealed that he: failed the first, seventh, and ninth grades; suffered two head injuries prior to the age of ten years old; suffered a burn injury which occurred when he was cooking without adult supervision at age seven; was treated at seven or eight years old for nervousness, sleepwalking, and nightmares at the local mental health center; and had attempted suicide.

The next witness called by PCR counsel was Dr. Donna Schwartz-Watts, a forensic psychiatrist who began evaluating Respondent in the summer of 1999. At that time, she believed Respondent was acutely psychotic and unable to assist his appellate counsel due to his "paranoid ideation" and "delusions of grandeur." In 2001, Dr. Schwartz-Watts conducted an additional evaluation of Respondent in preparation for a competency hearing. Dr. Schwartz-Watts diagnosed Respondent with "undifferentiated schizophrenia," which she believed began in early adolescence or childhood.

In its case, the State called James Whittle, Jr., Respondent's lead trial counsel. In terms of trial preparation, Whittle testified he filed pre-trial motions seeking the following records: DJJ records; school records; state mental health records, as well as Respondent's family's DSS records; and records from the vocational school attended by Respondent. Whittle turned the records he obtained over to Dr. Everett Kuglar, a forensic psychiatrist who was court-appointed on August 8, 1995, for his evaluation of Respondent. Although Dr. Kuglar reviewed these records, trial counsel decided not to call him as a witness because he believed the State's cross-examination would have hurt the case.

In terms of compiling additional mitigation evidence, Whittle met with several of Respondent's family members. However, Whittle testified they did not offer anything that could be used in mitigation.

Additionally, Whittle filed a motion seeking authorization and funding approval for a social history investigator to aide in preparing mitigation evidence. After receiving all of the requested records through the efforts of his investigator and law partner, Whittle decided not to procure a social history investigator even though funding had been approved.

Instead of offering social history evidence, Whittle focused on presenting the defense theory that Respondent did not participate in the murder but was merely present when Douglas committed the murder. Whittle believed the strongest mitigating evidence was Respondent's statement that he was not the perpetrator, the presence of another individual's DNA evidence at the scene, and Douglas' polygraph test which indicated deception. Based on this theory, Whittle testified he wanted to be consistent throughout the guilt phase and the penalty phase and that "it was basically an all-or-nothing approach." Because he believed the trial judge's decision not to admit Douglas' polygraph results limited what he could do in mitigation, Whittle decided to only call Respondent's mother as a witness.

In his deposition, Dr. Kuglar testified he was court appointed in August 1995, but did not meet with Respondent until September 1996 when Whittle scheduled the first meeting. He stated the only records he received were Respondent's incomplete high school records and the state mental hospital records from 1992-93. Dr. Kuglar testified that he met with Respondent for the specific purpose of evaluating Respondent's mental competency and criminal responsibility. Additionally, Dr. Kuglar testified that although he met with several members of Respondent's family, the interviews were not "very satisfactory of getting anything."

The PCR judge partially denied Respondent's application for relief, finding trial counsel was not ineffective: (1) during voir dire and jury selection; and (2) during sentencing for failing to develop a credible theme, failing to obtain an independent pathologist, and failing to investigate whether Respondent was mentally competent to stand trial.

The PCR judge granted Respondent relief, finding trial counsel's conduct was both deficient and prejudicial during the penalty phase of the trial in that he failed to adequately prepare and present evidence in mitigation. Relying extensively on the United States Supreme Court's opinion in Wiggins,[3] the judge found trial counsel was deficient in failing to obtain Respondent's background records prior to the beginning of trial. The judge also found that trial counsel neglected to pursue Respondent's earlier childhood records even though mental health records revealed that Respondent had a significant drop in I.Q. between the ages of seven and ten and had been medicated to "settle his nerves" during this time period. Additionally, the judge found trial counsel "unreasonably failed to expand the investigation to include obtaining records of [Respondent's] immediate family members" and to conduct more than just "limited" interviews with Respondent's family. The PCR judge also found trial counsel's conduct regarding Dr. Kuglar was unreasonable given trial counsel failed to provide him with adequate records and only asked him to examine Respondent with respect to the issues of competency to stand trial and his criminal responsibility or capacity at the time of the offenses.

The judge concluded this deficient conduct was prejudicial to Respondent, stating "[i]f counsel had adequately investigated and presented the available mitigation evidence, the jury would have heard substantial evidence in mitigation which was presented by [Respondent] in the PCR hearing." Ultimately, the PCR judge set aside Respondent's death sentence and ordered a new sentencing trial.

As to Respondent's remaining grounds, the judge ruled the allegation that Respondent should not be executed because he is incompetent was not ripe for consideration. The judge found that even though Respondent was incompetent under the standards of Singleton,[4]

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[3] Wiggins v. Smith, 539 U.S. 510 (2003).

[4] In Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993), this Court adopted a two-prong analysis to determine a convicted defendant's competency to be executed.

the issue would not be procedurally proper until execution was imminent. Moreover, given his decision to set aside Respondent's death sentence, the judge concluded that no remedy was necessary. Finally, the judge held the allegation that Respondent was incompetent at the time of the offenses and trial counsel was ineffective for failing to adequately investigate Respondent's mental state should be continued until such time as Respondent regains competence.

The State petitioned for and was granted certiorari by this Court to consider the PCR judge's decision to vacate Respondent's death sentence and to grant a continuance as to whether trial counsel was ineffective in failing to adequately investigate Respondent's mental state at the time of the offenses.

DISCUSSION

I.

The State argues the PCR judge erred in finding trial counsel was ineffective in failing to investigate and present mitigation evidence. We disagree.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). We will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

Although the State admits that trial counsel did not obtain all records for Respondent's immediate family, it asserts trial counsel adequately investigated Respondent's background and was aware of his

disadvantaged background, learning disabilities, family turmoil, his siblings' criminal activities, his prior record, and his drug use. In light of trial counsel's investigation, the State avers there is no evidence to support the PCR judge's ruling because trial counsel made an informed, strategic decision to omit certain mitigating evidence in an effort to present a consistent theory that Respondent was present but did not participate in Mrs. Gatti's murder. Even if trial counsel's conduct is found to have been deficient, the State asserts Respondent failed to establish that he was prejudiced.

As will be more fully discussed, we hold the PCR judge correctly determined that trial counsel was ineffective in failing to adequately investigate and present mitigating evidence.

Initially, we believe the PCR judge properly relied on the United States Supreme Court's decision in Wiggins v. Smith, 539 U.S. 510 (2003). In Wiggins, the defendant was tried and convicted for capital murder before a judge. After his conviction, the defendant elected to be sentenced by a jury. Id. at 515. In a pre-sentencing motion, defendant's counsel sought to bifurcate the proceedings so that he could first present his theory that the defendant did not act as the principal in killing the victim. Counsel then intended to present a mitigation case. After this motion was denied, the sentencing proceeding commenced immediately. Although counsel made a general reference to the defendant's "difficult life," counsel did not present any evidence of the defendant's life history. The jury sentenced Wiggins to death. On appeal, Wiggins' convictions and sentences were affirmed. Id. at 516.

Subsequently, Wiggins filed an application for post-conviction relief, alleging his trial attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. Id. at 516. After he exhausted his state PCR remedies, Wiggins filed a petition for habeas corpus in federal district court. The federal court's grant of relief was reversed by the Fourth Circuit, which held that Wiggins' trial counsel

made "a reasonable strategic decision to focus on petitioner's direct responsibility." Id. at 519.

The United States Supreme Court granted certiorari and reversed the Fourth Circuit's decision. The Supreme Court found trial counsel was ineffective in failing to adequately prepare and present mitigating evidence. Although trial counsel obtained a pre-sentencing investigation report and DSS records, which revealed Wiggins' tumultuous childhood and low I.Q., counsel failed to investigate further. Counsel also chose not to retain a forensic social worker despite the fact that funds were made available to commission a social history report. Id. at 524. The Court found counsel's decision not to expand their investigation beyond the retained records was unreasonable given it fell short of professional state standards and the American Bar Association standards governing capital defense work. Id.

The Court also determined that counsel's performance prejudiced Wiggins. Specifically, the Court found that had trial counsel further investigated they would have discovered the following powerful mitigating evidence: Wiggins was abused by his alcoholic mother during the first six years of his life; he suffered physical and sexual abuse while in foster care; he was homeless at times; and suffered from diminished mental capacities. Id. at 535. Given the strength of the mitigating evidence, the Court believed there was a reasonable probability that the jury would have returned a different sentence had they been presented with this evidence. Id. Not only did the Court find that it was unreasonable for counsel not to investigate and present this mitigating evidence, it also rejected counsel's assertion that the omission of the evidence constituted a trial strategy.

In recent decisions, this Court has adhered to the principles and analysis in Wiggins in determining whether counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence. See Ard v. Catoe, 372 S.C. 318, 332 n.14, 642 S.E.2d 590, 597 n.14 (2007), cert. denied, Ozmint v. Ard, 128 S. Ct. 370 (2007) (referencing Wiggins and affirming PCR court's decision finding trial

counsel ineffective in failing to further investigate gunshot residue evidence in capital murder case); Nance v. Ozmint, 367 S.C. 547, 557 n.8, 626 S.E.2d 878, 883 n.8 (2006), cert. denied, 127 S. Ct. 131 (2006) (noting the holding in Wiggins and concluding defense counsel in capital murder case should have, among other things, investigated and presented evidence of defendant's "adaptability" to confinement and presented mitigating social history evidence outlining defendant's troubled childhood and mental illness); Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), cert. denied, 544 U.S. 943 (2005) (concluding case was sufficiently analogous to Wiggins and holding that trial counsel in capital murder case was ineffective in failing to adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide expert witness with crucial medical records and related information which prevented witness from conveying an accurate diagnosis of defendant's mental condition to the jury).

Applying the foregoing to the facts of the instant case, we find the PCR judge correctly relied on Wiggins and there is evidence to support his finding that Respondent's trial counsel was deficient in failing to sufficiently investigate and present mitigating evidence.

We believe it was unreasonable for trial counsel not to further investigate Respondent's background and present even the minimal mitigating evidence that was obtained. Initially, trial counsel was deficient in not beginning his investigation into Respondent's background once the State served its notice of intent to seek the death penalty, counsel discovered that Respondent's DNA was found at the scene of the crime, and counsel learned of Respondent's inculpatory statements to police indicating that he sexually assaulted the victim. Clearly, counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence. Yet, despite this knowledge, trial counsel: only obtained the DJJ and state hospital records before trial; did not request certain background records until the day of jury selection; did not set up a meeting between Dr.

Kuglar and Respondent until one month before trial; and provided Dr. Kuglar with only limited records. As in Wiggins, counsel's conduct fell below the standards set by the ABA. See American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, 11.4.1(2)(C) (1989) (once counsel is appointed in any case in which the death penalty is a possible punishment, he or she should begin, among other things, collecting information relevant to the sentencing phase including, but not limited to: medical history, educational history, family and social history, and prior adult and juvenile record).[5]

Even the limited information obtained should have put counsel on notice that Respondent's background, with additional investigation, could potentially yield powerful mitigating evidence. See Williams v. Taylor, 529 U.S. 362, 398 (2000) ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating that mitigating evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); see also Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 317-339 (1983) (discussing counsel's preparation of and impact of mitigating evidence in capital cases).

However, not only did counsel delay in investigating Respondent's background, he failed to conduct an adequate investigation. Significantly, he failed to provide his only expert witness, Dr. Kuglar, with sufficient records and only directed him to evaluate Respondent's competency to stand trial and criminal responsibility. Additionally, Dr. Kuglar, at the direction of counsel, only met with Respondent on two occasions, the first being shortly before trial.

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[5] We note that these guidelines were revised in 2003. However, we cite to the 1989 guidelines given they were in effect at the time of Council's trial.

Furthermore, even though the funding was available, trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was qualified, in terms of social work experience, to evaluate the information to assess Respondent's background.

Finally, we believe it was unreasonable for trial counsel not to obtain Respondent's family records. First, it is inexplicable that trial counsel deemed these records unimportant because they did not directly involve Respondent. See Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (stating "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who have no such excuse'" (quoting California v. Brown, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring))), abrogated by Atkins v. Virginia, 536 U.S. 304 (2002) (holding executions of mentally retarded criminals constituted cruel and unusual punishments prohibited by the Eighth Amendment); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation."); American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, 11.8.3(F)(1) (1989) (in preparing for the sentencing phase, trial counsel should consider investigating "[w]itnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client"); 11.8.6(B)(5) (stating that trial counsel should consider presenting in mitigation: "Family, and social history . . . professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof"). Secondly, even counsel's brief interviews with several of Respondent's family members and the DJJ records should have alerted him to the fact that the family was dysfunctional, Respondent had been raised in a violent home environment, and experienced learning disabilities. All of these factors constituted mitigating evidence and warranted further investigation.

Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence. Trial counsel's mitigation presentation consisted solely of Respondent's mother's extremely limited testimony.

Additionally, we disagree with the State's argument that Respondent is not entitled to post-conviction relief given trial counsel made a strategic decision not to present additional evidence in mitigation. "[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). For several reasons, counsel's decision was not reasonable and any strategic reason asserted would not excuse the deficient conduct.

First, as outlined above, counsel's investigation was inadequate and incomplete. "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). Secondly, counsel was already aware the jury had rejected the defense theory that Respondent was not the actual perpetrator but was merely present. Therefore, counsel's "all or nothing" approach was unreasonable. Thirdly, it would not have been inconsistent for trial counsel to have pursued this theory in the guilt phase but then offered mitigating evidence in the penalty phase. Clearly, trial counsel could have argued to the jury that even if Respondent was the actual perpetrator he suffered from these mental deficiencies and mental illness at the time of the crime. As the Supreme Court indicated in Wiggins, it is not inconsistent to present the accomplice theory during the guilt phase but mitigation evidence in the penalty phase. Wiggins, 539 U.S. at 535 ("While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two

sentencing strategies are not necessarily mutually exclusive."). Finally, given the State had already presented damaging character evidence, we do not believe Respondent's character could have been damaged any further by the presentation of additional mitigating evidence. Trial counsel essentially would have had "nothing to lose" and "everything to gain" by presenting this evidence.

Based on the foregoing, we hold the PCR judge properly found trial counsel's conduct was deficient. There is also evidence to support his finding that Respondent was prejudiced by counsel's deficient performance.

"When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)). This Court explained, "[t]he bottom line is that we must determine whether or not [Respondent] has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about [Respondent's] mental condition. In making this determination, we must consider the totality of the evidence before the jury." Jones, 332 S.C. at 333, 504 S.E.2d at 824.

In light of Respondent's burden and this Court's standard of review, we agree with the PCR judge that counsel's deficient performance prejudiced Respondent. Admittedly, the State produced overwhelming evidence of Respondent's guilt[6] and the jury found six aggravating factors beyond a reasonable doubt. However, there was

[6] In Council v. Catoe, 359 S.C. 120, 128, 597 S.E.2d 782, 786 (2004), this Court noted the State presented an overwhelming amount of evidence of Respondent's guilt.

very strong mitigating evidence to be weighed against the aggravating circumstances presented by the State. We believe, as did the PCR judge, this evidence may well have influenced the jury's assessment of Respondent's culpability. See Rompilla v. Beard, 545 U.S. 374, 393 (2005) ("[A]lthough we suppose it is possible that a jury could have heard [the mitigation case] and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Respondent's] culpability'" (quoting Wiggins, 539 U.S. at 538)).

The only evidence presented in mitigation was Respondent's mother's brief testimony. Although the jury heard that Respondent had received mental health treatment between the ages of seven and fourteen, there was no medical evidence or other testimony describing his mental health issues or that several of his immediate family members suffered from mental illness. Furthermore, the jury never heard that: Respondent's father was an extremely violent alcoholic who was divorced by Respondent's mother on the ground of physical cruelty; Respondent and his siblings resided in bad neighborhoods, lived in poverty, and often lived in homes without running water or indoor plumbing; Respondent and his siblings were neglected by their parents and, as a result, on one occasion Respondent suffered severe burns while trying to cook without supervision; Respondent had a significant drop in his I.Q. between the ages of seven and ten which may have been the result of a head injury or the onset of mental illness; Respondent began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings; Respondent's immediate family members had been diagnosed with mental illnesses such as schizophrenia, schizoid, bipolar disorder, depression, and borderline personality disorder; Respondent had learning disabilities; DJJ caseworkers recognized Respondent's emotional and mental problems; Respondent began using drugs and alcohol at sixteen years old; Respondent attempted suicide in his twenties; Respondent has a borderline I.Q. and frontal lobe brain dysfunction; and the onset of Respondent's current diagnosis of schizophrenia may have begun in early adolescence or childhood.

Although this mitigating evidence may not have risen to the level of "abuse, neglect, and predator and prey situations found in other cases," as the State contends, it nevertheless may have swayed the jury as in Wiggins. See Rompilla, 545 U.S. at 390-93 (finding trial counsel's failure to investigate prior conviction file which revealed mitigation evidence concerning defendant's mental health issues, troubled upbringing, and alcoholism fell below the level of reasonable performance and was prejudicial to defendant in death penalty case); Williams v. Taylor, 529 U.S. 362, 397-98 (2000) (finding defendant in capital murder case was prejudiced where trial counsel failed to investigate and present substantial mitigating evidence during the sentencing phase given "the graphic description of [defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability"); Von Dohlen, 360 S.C. at 608, 602 S.E.2d at 743 (holding trial counsel failed to adequately investigate and prepare expert testimony regarding petitioner's mental condition, "adjustment reaction disorder," severe chronic depression, and pathological intoxication, at the time of the murder and petitioner was prejudiced given the outcome of the trial might have been different had the jury heard the available information regarding petitioner's mental condition); cf. Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (reversing PCR judge's conclusion that capital defendant suffered prejudice from trial counsel's failure to offer sufficient social history evidence in the mitigation case where trial counsel interviewed a number of witnesses about defendant's childhood and life; hired a private investigator to gather background information on defendant; called several witnesses, including three experts, to offer mitigating evidence that defendant grew up in a drug environment, had trouble in school, had been abandoned, had a low I.Q., tested "highly abnormal" on the scales of paranoia, schizophrenia, and mania, suffered from chronic depression, ADD, and post-traumatic stress-disorder, and had a history of drug and alcohol abuse); Jones, 332 S.C. at 336-39, 504 S.E.2d at 826-27 (holding capital defendant was not prejudiced by trial counsel's alleged failure to thoroughly investigate and present mitigating evidence regarding his mental impairments where the following evidence was presented in mitigation:

six witnesses, who were familiar with defendant's background, testified regarding defendant's learning difficulties and "unusual behavior;" a clinical psychologist who testified that defendant had "some mental deficiency," was "mentally retarded," had some brain damage, and acted impulsively; concluding that "new" evidence presented at PCR hearing was the same as trial evidence and at best was a "fancier mitigation case").

In sum, we believe there is evidence to support the PCR judge's conclusion that Respondent's trial counsel was ineffective in failing to adequately investigate and present mitigating evidence during the penalty phase of Respondent's trial.[7]

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[7] In no way should our decision be construed as minimizing the brutality of the victim's murder. We are, nevertheless, bound by a standard of review which mandates our affirmance of the PCR judge's decision if there is any probative evidence to support it. Moreover, we are cognizant of appellate decisions in this state which determined that counsel's deficient performance in a death penalty case did not warrant reversal where, beyond a reasonable doubt, the error did not contribute to the verdict. See Plath v. Moore, 130 F.3d 595, 601-02 (4th Cir. 1997) (finding trial counsel's alleged failure to present additional mitigating evidence in sentencing phase of capital trial did not warrant habeas relief for petitioner; stating "in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor"); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (finding, in capital case, trial counsel's failure to object to unconstitutional malice charge was harmless where, beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice). We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence for Respondent. Thus, we are unable to find trial counsel's deficient performance constituted harmless error.

II.

The State argues the PCR judge erred in granting a continuance regarding whether Respondent's trial counsel was ineffective in failing to adequately investigate Respondent's mental competence at the time the crimes were committed. We agree.

The PCR judge found neither Dr. Kuglar nor the court-appointed examiners, who examined Respondent only for competence to stand trial, determined Respondent was mentally ill at the time of the crime. The judge noted, however, that Dr. Kuglar had not been provided with the necessary and relevant background information to make this determination. The judge believed that Dr. Kuglar would have found "plenty of red flags pointing up to a need to test further."

The PCR judge opined "[a]ll of this information raises questions about whether [Respondent] was mentally ill prior to these offenses and what if any impact his mental illness had on his thinking and behavior at the time of these offenses." The judge believed these questions were not adequately addressed prior to trial because the court-appointed examinations were conducted solely on the issue of competence to stand trial. Furthermore, the judge found that Dr. Schwartz-Watts was unable to adequately examine Respondent with respect to his mental state at the time of the crimes due to his current state of incompetence.

In light of these findings, the PCR judge ruled the issue of whether Respondent's trial counsel was ineffective for failing to adequately investigate Respondent's mental state at the time of the crime was a "fact-based challenge to his defense counsel's conduct at trial that cannot be adequately addressed until [Respondent] regains competence." As a result, the judge granted a continuance staying review of this allegation until Respondent regains competence.[8]

[8] The PCR judge inferred that it would be unlikely that Respondent would regain competence. Based on our review of the record and the opinion of Dr. Schwartz-Watts, we agree with the PCR judge's assessment. Thus, even if Respondent is sentenced to death after a re-

We agree with the State's assertion that the PCR judge's legal conclusions are "flawed." We find the PCR judge analyzed this issue without properly applying the rule adopted by this Court in Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004).

Initially, there appears to be no dispute that Respondent was, and is currently, incompetent. Thus, pursuant to the mandate in Council v. Catoe,[9] the PCR judge should have ruled on the allegation for relief unless Respondent's PCR counsel could establish that this issue constituted a "fact-based challenge" to Respondent's counsel's conduct at trial. If Respondent's incompetency inhibited the PCR challenge, then a continuance would have been proper. We believe Respondent's assistance was not required and, thus, the PCR allegation was properly before the judge.

In our view, the collateral attack on trial counsel's conduct regarding Respondent's mental state and criminal responsibility at the time of the crime was dependent on Respondent's records as well as the testimony of experts and others who observed Respondent around the time of the crime. Therefore, we do not believe Respondent's assistance or decision making was required. Moreover, all of the

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sentencing hearing, we believe it is doubtful that he will ever be executed in light of our decision in Singleton.

[9] In Council v. Catoe, this Court stated:

> the default rule is that PCR hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until petitioner regains his competence. All other PCR claims will not be subject to a continuance based on a petitioner's incompetence.

Council v. Catoe, 359 S.C. at 130, 597 S.E.2d at 787.

evidence needed to rule on this issue was presented at the PCR hearing. Specifically, the PCR judge had before him the trial transcript, the testimony of defense counsel, Dr. Kuglar, Dr. Brawley, and Dr. Schwartz-Watts, as well as Respondent's records. Accordingly, we find the PCR judge erred in granting a continuance.

In light of our holding, the question becomes whether this Court should rule on the merits of the ineffectiveness of counsel issue. Because this Court reviews PCR decisions pursuant to an "any evidence" standard, we find it is procedurally proper to remand this issue for the PCR judge to make a definitive ruling. On remand, the PCR court shall consider the evidentiary record established at the prior PCR hearing in addition to any relevant evidence admitted on remand.

CONCLUSION

Given there is evidence to support the PCR judge's holding that Respondent's trial counsel was ineffective in failing to investigate and present mitigating evidence at the penalty phase of Respondent's trial, we affirm the PCR judge's decision vacating Respondent's sentence and ordering a new sentencing hearing. We, however, find the PCR judge erred in continuing indefinitely one of the PCR grounds until Respondent regains competence. Because Respondent's assistance is not required for PCR counsel to present the issue regarding whether Respondent's trial counsel was ineffective in failing to adequately investigate Respondent's mental competence at the time the crimes were committed, we reverse the PCR judge's order on this issue and remand for the PCR judge to rule based on the evidentiary record presented at the PCR hearing in addition to any relevant evidence admitted at the hearing on remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MOORE, WALLER and PLEICONES, JJ., concur. TOAL, C.J., concurring in part and dissenting in part in a separate opinion.

CHIEF JUSTICE TOAL: Although I agree that the PCR court erred in granting a continuance as to trial counsel's investigation of Respondent's mental competence at the time the crime was committed, I disagree with the majority regarding trial counsel's performance during the mitigation phase of trial. In my view, even assuming trial counsel was deficient in presenting mitigating evidence, Respondent was not prejudiced. Considering the overwhelming evidence against Respondent, the violent and brutal nature of this crime, and the fact that the jury found the existence of six aggravating factors beyond a reasonable doubt, in my opinion, it is not reasonably likely that the jury would have returned a different sentence. *See Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (recognizing that the PCR applicant bears the burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional mitigation evidence). Accordingly, I would reverse the PCR court's order finding trial counsel ineffective during the mitigation phase of Respondent's trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Collins Holding Corporation, Respondent,

v.

Wausau Underwriters Insurance Company and Marsh USA, Inc., Defendants,

of whom Wausau Underwriters Insurance Company is the, Appellant.

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26544
Heard June 25, 2008 – Filed September 8, 2008

REVERSED

Evans T. Barnette and Susan F. Campbell, both of McCutchen Blanton Johnson & Barnette, of Columbia, for Appellant.

George J. Kefalos, of Charleston, and Richard S. Rosen and Daniel F. Blanchard, III, both of Rosen Rosen & Hagood, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: This case is an appeal from a grant of summary judgment in favor of Respondent Collins Holding Corporation ("Collins"), in which the trial court found that Appellant Wausau Underwriters Insurance Company ("Insurance Company") breached its duty to defend Collins. Finding that Insurance Company was not obligated to defend Collins on the underlying claim, we reverse.

FACTUAL/PROCEDURAL BACKGROUND

Collins is an owner, operator, and distributor of amusement devices and gambling machines. In 1997, several parties ("the Plaintiffs") filed suit against Collins and several other defendants alleging harm caused by the then-legal gambling machines. Collins maintained a commercial general liability and umbrella insurance policy with Insurance Company. The policy provided that Insurance Company would "pay those sums that the insured becomes legally obligated to pay . . . because of 'bodily injury,'" only if such injury was caused by an occurrence, and defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Collins notified Insurance Company of the suit on June 1, 2000, and on June 16, 2000, Insurance Company issued a letter stating that it did not have a duty to defend Collins and would not indemnify Collins for any loss resulting from the suit since the allegation in the complaint did not create a potential for coverage under the policy. Consequently, Collins hired private counsel and eventually settled the lawsuit for $500,000.[1]

[1] The suit was removed to federal court and the district court initially granted an injunction and partial summary judgment against Collins and the other defendants. The Fourth Circuit held that the district court should have abstained based on the authority of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and the court therefore vacated and remanded the case to the district court. *Johnson v. Collins Entm't Co., Inc.*, 199 F.3d 710 (4th Cir. 1999). The district court then certified the state law questions, which this Court answered. *Johnson v. Collins Entm't Co., Inc.*, 349 S.C. 613, 564 S.E.2d 653 (2002). The parties settled the suit following this Court's opinion.

Subsequently, Collins brought a declaratory judgment action against Insurance Company to determine whether Insurance Company breached its duty to defend Collins in the underlying lawsuit. After reviewing the Plaintiffs' complaint, the trial court granted partial summary judgment in favor of Collins and determined that Insurance Company breached its duty to defend Collins in the underlying lawsuit because the Plaintiffs asserted a negligent misrepresentation cause of action against Collins which created the possibility of an accident or occurrence. The trial court further found that Insurance Company waived any defense to coverage under the policy based on Collins's untimely notice of the lawsuit because it failed to assert this defense to coverage in its answer.

Insurance Company appealed the trial court's order, and this Court certified the case pursuant to Rule 204(b), SCACR. Insurance Company presents the following issues for review:

I. Did the trial court err in finding Insurance Company had a duty to defend Collins because the Plaintiffs' complaint did not assert an "occurrence" as defined in the insurance policy?

II. Did the trial court err in ruling that Insurance Company waived any defense to coverage based on Collins's untimely notice of the underlying lawsuit?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

LAW/ANALYSIS

I. Duty to Defend

Insurance Company argues that the trial court erred in ruling that it had a duty to defend Collins in the underlying lawsuit because the Plaintiffs' complaint did not allege an "occurrence." We agree.

In an action for a declaratory judgment, the obligation of a liability insurance company to defend and indemnify is determined by the allegations in the complaint. *Mfrs. and Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 162, 498 S.E.2d 222, 227 (Ct. App. 1998) (citing *R.A. Earnhardt Textile Mach. Div. Inc. v. S.C. Ins. Co.*, 277 S.C. 88, 282 S.E.2d 856 (1981)). If the facts alleged in the complaint fail to bring a claim within the policy's coverage, the insurer has no duty to defend. *S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry*, 291 S.C. 460, 463, 354 S.E.2d 378, 380 (1987). In examining the complaint, a court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against the insurer. *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991) (citing *Ferry*, 291 S.C. at 462, 354 S.E.2d at 379-80).

We hold that Insurance Company did not breach its duty to defend Collins against the underlying lawsuit because the Plaintiffs' complaint did not allege the possibility of an "occurrence" as defined in the policy. The facts of the complaint asserted that Collins systematically violated South Carolina laws specifically enacted to protect the public from excessive gambling losses. For example, the Plaintiffs asserted Collins exceeded the maximum daily payout limit of $125 and engaged in advertising schemes which fraudulently induced the Plaintiffs to believe that they could win "jackpots" in excess of the $125 limit. Additionally, the Plaintiffs employed words and phrases such as: "unlawfully and fraudulently seek to induce and entice;" "engaged in advertising about and offering inducements . . . that are clearly and expressly prohibited by South Carolina law;" "racketeering activity;" "conspiring;" "knowingly engaging;" and "knowingly conducting."

These allegations constitute intentional, deliberate, and illegal acts executed with the purpose of addicting patrons to gambling machines, and in our view, such alleged conduct cannot be construed as accidental in nature. *See Green v. U. Ins. Co. of Am.*, 254 S.C. 202, 205, 174 S.E.2d 400, 402 (1970) (defining accident as an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt). Therefore, we hold that there is no possibility of coverage under the policy and that Insurance Company did not violate its duty to defend.

We further hold that the trial court erred in basing its finding of the possibility of coverage on the negligent misrepresentation cause of action. In *Manufacturer and Merchants Mutual Insurance Company v. Harvey*, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998), the parents of children whom Norman Harvey sexually abused filed suit against Harvey and his wife alleging, among other things, negligent supervision. The court of appeals looked beyond the mere label of "negligence," and determined that the underlying facts of the complaint did not support a cause of action for negligent conduct. Specifically, the court found that the facts alleged that Harvey committed intentional acts and then incorporated the acts into the negligence cause of action. Accordingly, the court held that Harvey's insurance company did not have a duty to defend.

In our view, this case presents a similar situation. The Plaintiffs alleged eight causes of action including Racketeer Influenced and Corrupt Organizations (RICO) Act violations, fraud and deceit, South Carolina Unfair Trade Practices Act violations, and civil conspiracy. While the complaint does state a cause of action for negligent misrepresentation, we must look beyond the label of negligence to determine if Insurance Company had a duty to defend Collins. *See id*. at 163, 498 S.E.2d at 228 (holding that where a complaint mischaracterizes intentional conduct as negligent conduct, a court may find no duty to defend despite the label of negligence in the complaint). To support their negligent misrepresentation claim, the Plaintiffs incorporated the previous facts and alleged Collins sold, leased, and distributed machines that were equipped in a manner "as to permit manipulation" and that were configured to be used in a manner that violated laws expressly designed to

protect the public from the lure of excessive gambling. In our view, these allegations do not support a claim for negligent conduct. *Compare Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994) (finding a duty to defend where the complaint alleged a negligent termite inspection caused property damage). Therefore, because the negligent misrepresentation claim incorporates the same facts and does not allege an "occurrence," we hold that this cause of action did not trigger Insurance Company's duty to defend.

II. Waiver

Insurance Company argues that the trial court erred in ruling that it waived any defense based on Collins's untimely notice of the underlying lawsuit. In light of our holding regarding the duty to defend, this issue is moot, and we therefore decline to address the merits of this issue. *See Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) (recognizing that this Court will not decide moot questions in which a judgment rendered will have no practical legal effect).

CONCLUSION

For the foregoing reasons, we reverse the trial court's order granting summary judgment, and hold that Insurance Company had no duty to defend Collins in the underlying lawsuit.

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

JUSTICE PLEICONES: I respectfully dissent. As the majority holds, when considering whether an insurance company has the duty to defend, the court must look beyond the adjectives and labels used in the complaint to describe the acts to the acts themselves. Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n, 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1997). Here, the circuit court judge looked beyond the labels and determined that the negligent misrepresentation claim gave rise to a duty to defend because he found the "fraudulent unlawful promotion" which suggested players could win more than the daily maximum allowable by law and offered special inducements to gamblers, might also be characterized as "unintentionally unlawful." I find the trial judge correctly held that the Plaintiffs alleged a negligent misrepresentation claim based on intentional acts that may have inadvertently violated the law. Unlike the "inherently injurious" conduct in Mfr. and Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998), the allegations that Collins advertised, offered food and beverages, and extended credit to Plaintiffs to promote participation in a then legal activity do not allege conduct that is in all particulars illegal.

The facts alleged in the third amended complaint[2] support the circuit court's conclusion that the complaint alleges an occurrence within the meaning of this CGL policy. E.g., Isle of Palms Pest Control v. Monticello Ins. Co., 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1995). Moreover, I would hold that the trial court correctly held appellant waived any right to rely on the alleged untimeliness of respondent's notice when it failed to plead it. While an issue not raised by the pleadings may be tried by consent at a summary judgment hearing, Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000), such was not the case here.

I recognize that based solely on the assertions in the Plaintiffs' third amended complaint, it is unlikely that Collins, as owner/lessor of the machines, could ultimately be liable for negligent misrepresentation.

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[2] Although the Plaintiffs incorporate their previously stated facts and allegations into their negligent misrepresentation cause of action, they also include six paragraphs of additional facts and allegations that specifically pertain to negligent misrepresentation.

However, when determining whether an insurer has a duty to defend, the obligation is determined by the allegations in the complaint. Harvey, 330 S.C. at 162, 498 S.E.2d at 222. Accordingly, I would affirm the trial court's order granting Collins summary judgment.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Berrien W. Smith, Respondent,

v.

J. Drayton Hastie, Jr., and
Everett L. Smith, Jr., Defendants,

of whom J. Drayton Hastie, Jr.
is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 26545
Heard June 24, 2008 – Re-filed September 8, 2008

DISMISSED AS IMPROVIDENTLY GRANTED

Richard S. Rosen, of Rosen, Rosen and Hagood, of Charleston, for Petitioner.

Thomas A. Pendarvis, of Beaufort, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' opinion in Smith v. Hastie, 367 S.C. 410, 626 S.E.2d 13 (Ct. App. 2005). We dismiss the writ as improvidently granted.

TOAL, C.J., MOORE, WALLER, PLEICONES, JJ., and Acting Justice Howard P. King, concur.

The Supreme Court of South Carolina

In re: Amendments to Alternative Dispute Resolution Rules,
Appendix G, Part IV, South Carolina Appellate Court Rules

O R D E R

The South Carolina Commission on Alternative Dispute Resolution has proposed several amendments to the regulations contained in Appendix G to Part IV, SCACR, which govern discipline for third party neutrals. Specifically, the proposed changes allow for a three-member hearing panel and grant the Commission Chair the authority to appoint members of a hearing panel. Additionally, the amendments confirm that three members of the Board of Arbitrator and Mediator Certification constitute a quorum in matters of decertification, discipline and processing of complaints. Finally, the changes add two new subsections to Section V(D) of Appendix G, which concern access to disciplinary information, communications among parties, and immunity.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Appendix G to Part IV, South Carolina Appellate Court Rules, as set forth in the attachment to this Order.

The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
September 4, 2008

REGULATIONS FOR THE COMMISSION ON ALTERNATIVE DISPUTE RESOLUTION

. . .

V. SOUTH CAROLINA BOARD OF ARBITRATOR AND MEDIATOR CERTIFICATION

. . .

D. Decertification, Discipline and Processing of Complaints of Misconduct.

. . .

8. If probable cause exists and the matter cannot otherwise be resolved, the Board shall notify the Commission Chair who shall appoint three (3) members of the Commission, who have not been involved previously in the matter, as a Hearing Panel. Neither the Chair of the Commission nor the members of the Board shall participate as members of the Hearing Panel. The Commission Chair shall designate one member as Chair of the Hearing Panel. The Hearing Panel shall schedule a hearing in accordance with the ADR Rules and these Regulations. The Hearing Panel may petition the Supreme Court to temporarily suspend a neutral's certification pending outcome of the hearing. Counsel shall prosecute the matter.

9. In matters of decertification, discipline and processing of complaints, three (3) members of the Board or the Hearing Panel shall constitute a quorum. In the event that members of the Board or Hearing Panel disqualify themselves in a pending matter leaving less than a quorum, the Commission Chair shall appoint *ad hoc* members to restore the Board or Hearing Panel to full membership in that matter. Decisions and recommendations shall be by majority vote.

10. Access to Disciplinary Information.

a. Except as otherwise provided in the ADR Rules and these Regulations or ordered by the Supreme Court, all complaints, proceedings, records, information or orders relating to an allegation of misconduct shall be confidential and shall not be disclosed to the public. While the matter remains confidential, the members of the Board, the ADR Commission, the staff of the Commission, the members of the Supreme Court and the staff of the Supreme Court shall not in any way reveal the existence of the complaint except to persons directly involved in the matter and then only to the extent necessary for the proper disposition of the matter. A violation of this provision may be punished as a contempt of the Supreme Court.

b. When charges are filed regarding allegations of misconduct, the charges and any answer shall become public 30 days after a hearing panel is appointed. Thereafter, except as otherwise provided in the ADR Rules and these Regulations or by the Supreme Court, all subsequent records and proceedings relating to the misconduct allegations shall be open to the public inclusive of any sanction imposed after the filing of charges. If allegations of incapacity are raised during the misconduct proceedings, all records, information and proceedings relating to these allegations shall be held confidential.

c. The Board and/or Commission may, however, disclose information at any stage of the proceedings:

i. When the chair, vice chair or a panel of the Commission has determined that there is a need to notify another person to protect that person or to notify a government agency in order to protect

the public or the administration of justice;

ii. To appropriate law enforcement officials when the chair, vice chair or a panel of the Commission determines that it is in possession of reliable information indicating that a person has violated the criminal laws of this state, any other state, the District of Columbia or the United States;

iii. Upon waiver in writing by the neutral; or

iv. To the appropriate disciplinary authority in any jurisdiction in which a neutral is admitted to practice law or any other profession or has applied for admission to practice law or any other profession concerning a matter where there is evidence the neutral committed misconduct under the alternative dispute rules or regulations of that jurisdiction or where a neutral receives any sanction under these regulations.

d. In order to protect the interests of a complainant, witness, third party or neutral, the hearing panel may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted in a manner to preserve the confidentiality of the information that is the subject of the application.

e. Either party may disclose in proceedings before a hearing panel statements and other evidence gathered prior to the matter becoming public after a filing of charges, that were subject to discovery under the ADR Rules and these Regulations to the extent admissible under the South Carolina Rules of Civil Procedure or

South Carolina Rules of Evidence.

11. Communications to the Board, Commission or their staffs relating to misconduct or incapacity in testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be initiated against any Complainant or witness. Members of the Board, Commission and staff shall be absolutely immune from civil suit for all conduct in the course of their official duties.