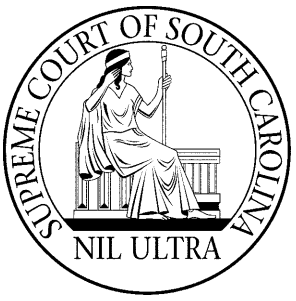

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48
December 29, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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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, Circuit Court Judge

Opinion No. 26543
Heard June 26, 2008 – Re-filed December 29, 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, of Clement Law Office, 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. After we issued our original opinion affirming in part, reversing in part, and remanding for a new sentencing hearing, the State petitioned for rehearing. We deny the petition for rehearing, withdraw our original opinion, and substitute it with this opinion which revises footnote number seven.

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,

[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).

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 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

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

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).

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 aid 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

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

incompetent was not ripe for consideration. The judge found that even though Respondent was incompetent under the standards of Singleton[4] 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

[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.

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

[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.

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.

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 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

[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.

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 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,

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

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beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice). We cannot say 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 was not prejudicial.

competence." As a result, the judge granted a continuance staying review of this allegation until Respondent regains competence.[8]

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.

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[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-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.

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 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); *see also Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997) (holding that, considering the "sheer magnitude" of the aggravating evidence, the defendant failed to show prejudice from trial counsel's failure to present certain mitigating 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

E. Ervin Dargan, Jr. and New River Corporation, Appellants,

v.

James B. Tankersley; Donnie S. Tankersley; First Union National Bank, Charlotte, North Carolina, f/k/a Southern Bank and Trust Company, as Trustee of the Posey D. Tankersley Estate; Marilyn Tankersley; Brett Tankersley; Shay Tankersley; Bonnie Lynn Bridwell, individually and as co-Personal Representative of the Lowell H. Tankersley Estate and as co-Trustee of the Revocable Trust Agreement dated November 22, 1991; Tracy Karen Tankersley, individually and as co-Personal Representative of the Lowell H. Tankersley Estate and as co-Trustee of the Revocable Trust Agreement dated November 22, 1991, Respondents.

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

Opinion No. 26574
Heard October 9, 2008 – Filed December 22, 2008

REVERSED

J. Chris Brown and Jonathan P. Whitehead, both of Babb & Brown, of Greenville, for Appellants.

Cecil H. Nelson, Jr., of Nelson Law Firm, of Greenville, and Stephen R. H. Lewis, of Covington Patrick Hagins Stern & Lewis, of Greenville, for Respondents.

JUSTICE BEATTY: In this quiet title action, E. Ervin Dargan, Jr. and New River Corporation (Appellants) appeal from an order finding James B. Tankersley and the remaining parties (collectively, Respondents) were the owners of a disputed parcel of property and awarding them damages. We reverse.

I. FACTS

Appellants brought this quiet title action to establish their ownership of a tract of real property in Greenville County, South Carolina. Respondents claimed an interest in the property and asserted counterclaims for damages. The disputed parcel is mountainous property measuring approximately twenty-seven acres.

The case was referred to a master-in-equity, who found (1) Appellants failed to prove by the preponderance of the evidence that they were the owners of the property; (2) Respondents did prove by the preponderance of the evidence that they were the owners of the disputed property; and (3) Appellants have damaged the property owned by Respondents by cutting

trees and preparing the foundation for a road. The master ordered Appellants to execute a quitclaim deed to the property in favor of Respondents and to pay Respondents $25,000 in damages. Appellants appeal from this order.

II. LAW/ANALYSIS

On appeal, Appellants argue the master erred in finding they had not proven their ownership claim and that Respondents have established their entitlement to the property and to damages. We agree.

Although actions to quiet title are usually in equity, "when the defendant's answer raises an issue of paramount title to land, such as would, if established, defeat [the] plaintiff's action, the issue of title is legal." Hilton Head Plantation Prop. Owners' Ass'n v Donald, 375 S.C. 220, 223, 651 S.E.2d 614, 616 (Ct. App. 2007) (citing Mountain Lake Colony v. McJunkin, 308 S.C. 202, 204, 417 S.E.2d 578, 579 (1992)). In a case tried by a judge without a jury, the factual findings of the judge will not be reversed on appeal unless found to be without evidence that reasonably supports the judge's findings. Id.

Appellants and Respondents own multiple tracts of property around the disputed twenty-seven-acre parcel. For simplicity, the property owned by Appellants, which is south of the disputed parcel, shall be called the Dargan Property, and the area owned by Respondents, which is north of the disputed parcel, shall be called the Tankersley Property. At issue is whether the disputed parcel, which is in an overlap area between the two properties, is part of the Dargan Property or the Tankersley Property.

As noted by the master, it is undisputed that the Dargan Property, the Tankersley Property, and the overlap area were once owned by a common grantor, the Saluda Land and Lumber Company. Saluda executed two deeds that eventually led to the competing claims for the twenty-seven acres.

Respondents' Title. Respondents trace their title to a deed executed by Saluda to one of their predecessors-in-title, Earle Hart, in 1943 (the Hart Deed). The Hart Deed conveyed several large tracts of land described as the

"Betty Orr Tract" or "Tract 1" (1,517 acres plus 82 acres) and the "L. I. Jennings Tract" or "Tract 2" (835 acres). The Hart Deed described the property by metes and bounds and referenced a plat prepared by surveyor Howard Wiswall, 1918-20 (the Wiswall Plat). The Hart Deed description does not include the twenty-seven disputed acres. The twenty-seven disputed acres are specifically shown on the Wiswall Plat as an overlap area lying between the L. I. Jennings Tract, which is to the north, and the J. N., R. M. and Harvey Cleveland (Dolton [T]ract),"[1] which is to the south. The Wiswall Plat includes a notation about what is variously referred to as the Dolton Tract or the Dalton Tract. The notation is "400 Ac." – meaning 400 acres, and under that is the phrase, "Laps not included."

In 1951, Hart conveyed approximately 704 acres of this property to William Goldsmith, Jr. Hart simultaneously recorded a plat entitled the "Hart Valley Ranch" Survey, which had been prepared in 1944, some sixteen months after the deed from Saluda to Hart, and it was prepared at Hart's request. The Hart Valley Ranch Survey includes the twenty-seven-acre overlap area in the property owned by Hart and transferred to Goldsmith. In 1952, Goldsmith conveyed the 704 acres to some of the Respondents (James Tankersley and the now-deceased Lowell and Posey Tankersley) by a deed that also referenced the Hart Valley Ranch Survey. The property owned by Respondents is what is now called the Tankersley Property.

Appellants' Title. Appellants trace their title to a deed from Saluda to E. E. Dargan (the father of appellant E. Ervin Dargan, Jr.) that was signed on June 28, 1951 and recorded on April 11, 1952 (the Dargan Deed). The Dargan Deed conveyed various interests in 85 parcels to E. E. Dargan, including an undivided one-half interest in "Parcel 10" that now forms part of the Dargan Property. Appellants' remaining one-half interest in the Dargan Property was conveyed by various deeds recorded between 1980 and 1995.

[1] The Wiswall Plat itself appears to refer to the "Dolton [T]ract," but the plat is not clear and the parties (and other documents) have also referred to this as the "Dalton Tract."

Appellants contend their title to the disputed property comes from either of two clauses in the Dargan Deed. They first assert the description of Parcel 10 conveys the property. In the alternative, they assert the language contained after all the property descriptions, which they refer to as a "catch-all provision," conveys the disputed property.

Parcel 10 Description. Appellants first rely upon the description of Parcel 10 in the Dargan Deed, which provides for conveyance of the following property from Saluda to E. E. Dargan:

> An undivided one-half interest in and to that certain tract of land in Cleveland Township, Greenville County, State of South Carolina, containing 400 acres, more or less, situate and lying to the South of the property designated on the plat mentioned above as "L. I. Jennings Tract", and fully described on said plat as "J. N., R. M., and Harvey Cleveland (Dalton Tract) 400 acres", reference to which plat is hereby craved for a complete and accurate description of the area, metes and bounds of said property.
>
> There is expressly excluded from this tract the following:
> (a) 16 acres, more or less, conveyed by the Grantor to Mark Jones, by deed dated May 26, 1934, recorded in the said [R.M.C.] Office in Deed Book 132, at page 196.
> (b) Right-of-way granted by the Grantor to Duke Power Co., by deed dated May 27, 1937, recorded in the said R.M.C. Office in Deed Book 199, at page 121.
> The tract above conveyed contains approximately 384 acres.

Appellants assert the master should have found the Parcel 10 legal description in the Dargan Deed conveyed the disputed area to them because it indicated the property being conveyed was the tract of land lying to the south of the L. I. Jennings Tract as shown on the Wiswall Plat, and the tract of land to the south is the Dalton Tract. Additionally, since Parcel 10 refers to the Wiswall Plat, the plat is part of the deed. Appellants assert that an ambiguity arises as to whether the overlap area shown on the Wiswall Plat is included in the Dalton Tract, which is the parcel of land lying to the south of the L. I. Jennings Tract referred to in the Parcel 10 description in the Dargan Deed. Appellants argue that due to the ambiguity, the master should have considered the surrounding circumstances and found the overlap property was conveyed in the Parcel 10 description of the Dargan Deed. They note the metes and bounds description of the property in the deed from Saluda to Hart, Respondents' predecessor-in-title, excluded the overlap area; thus, it fell within the parameters of what was conveyed to them in Parcel 10.

In rejecting Appellants' claim that the Parcel 10 legal description in the Dargan Deed conveyed the overlap area to Appellants, the master made the following findings: (1) the disputed property is shown on the Wiswall Plat as an overlap in the southern portion of what is now the Tankersley Property and on the northern portion of what is now the Dargan Property, (2) the Wiswall Plat specifically states on its face that "laps" are not included in what was called the Dalton Tract and is now the Dargan Property, (3) a calculation of acreage based on the calls, metes, and bounds shown on the Wiswall Plat confirms that the overlap area is not part of the Dargan Property, (4) the Hart Valley Ranch Survey includes the overlap property in the Tankersley Property, (5) the overlap area is not included in a metes and bounds description in the 1943 deed from Saluda to Hart in Respondents' chain of title, (6) the property is included by reference to the Hart Valley Ranch Survey in the 1951 deed from Hart to Respondents' predecessor-in-title, and (7) the property is not included in the Dargan Deed in the Parcel 10 description because the description craves reference to the Wiswall Plat, which the master noted he had already determined did not include the overlap area as part of the Dalton Tract that had become the Dargan Property.

We agree with the master's conclusion that the Parcel 10 description in the Dargan Deed did not convey the overlap property to Appellants. Although the Dargan Deed describes the property as being south of the L. I. Jennings Tract, it further identifies it as being the 400 acres shown on the Wiswall Plat as the Dalton Tract, and the Wiswall Plat expressly indicates the Dalton Tract is 400 acres with "[l]aps not included."

As noted by the master, Appellants' own witness, surveyor Ray Dunn, acknowledged during cross-examination that the overlap area is not included on the Wiswall Plat as being part of what is now the Dargan Property because it is designated on the Wiswall Plat as a "lap" and is specifically excluded from the acreage description.

An expert witness for Respondents, surveyor Dick Williams, testified that he found the Wiswall Plat to be very reliable, and he calculated the acreage of the Dargan Property from the calls, metes, and bounds shown on the Wiswall Plat for the Dalton Property and determined that Wiswall's calculation of 400 acres does not include the disputed overlap property. He stated the Wiswall Plat itself notes that the Dalton Tract consists of 400 acres and indicates "Laps not included," which he said "means that any laps are not included in that 400 acres."

Based on the foregoing, the Parcel 10 description did not convey the overlap property to Appellants. It is not necessary to rely upon the additional grounds enumerated by the master to reach this conclusion.

Catch-All Provision. Appellants next assert the master erred in finding the catch-all provision in the Dargan Deed did not provide an alternative basis for finding they owned the twenty-seven acres in dispute. We agree.

The Dargan Deed enumerates and describes 85 separate parcels, after which there is the following provision wherein Saluda states it is conveying to E. E. Dargan all other real estate that Saluda owned in Greenville County and Pickens County:

> TOGETHER with any and all other real estate owned directly by the Grantor in Greenville and Pickens Counties, State of South Carolina, together with all easements, rights-of-way, reversions or other rights of any kind, as the Grantor may own directly in connection with any of the above described real estate, it being the intent of the Grantor by this deed to convey to the Grantee herein named, all real estate or other rights in real estate owned directly by the Grantor. [Emphasis added.]

The master found this catch-all provision was "so broad as to be ineffective because it offers no means of identifying the Property [the parcel in dispute], particularly in light of the fact that the Dargan Deed contains no fewer than 85 specific, identifiable, and fully-described parcels of property." The master observed that "a conveyance through a deed is not like a will, and deeds must necessarily identify the property being conveyed."

In their briefs, Appellants and Respondents state South Carolina courts have not directly ruled on the validity of catch-all provisions, although they note we have made a passing reference to such provisions in one case, Hamilton v. CCM, Inc., 274 S.C. 152, 155, 263 S.E.2d 378, 379-80 (1980) ("In 1975 Lighthouse Beach Company was dissolved and its properties were divided between Sea Pines and Travelers through the execution of two deeds. Each of these deeds conveyed numerous parcels of land, although neither deed made specific reference to Parcel B-2. It was thereafter discovered that Parcel B-2 had not been specifically conveyed to either Travelers or Sea Pines but that title to a tract of land which included Parcel B-2 had in fact passed by virtue of a residual or catch-all clause contained in the dissolution deed from Lighthouse Beach Company to Sea Pines. Upon this discovery, this tract of land was conveyed in 1976 by Sea Pines to Travelers. Travelers then conveyed the property, including Parcel B-2, to CCM.").

Respondents state the Court in Hamilton did not cite the language of the dissolution deed, but they concede that "it would appear that South Carolina courts will accept the use of a catch[-]all provision under certain

circumstances." Respondents argue the description here was too vague, however, to operate as a valid conveyance.

South Carolina has expressly recognized the validity of a catch-all provision. In Sally v. Gunter, 47 S.C.L. (13 Rich.) 72 (1860), one of the issues on appeal concerned a challenge to a deed that was issued from an executor to an individual. The first part of the deed described twenty-seven tracts of land to be conveyed, then provided for the conveyance of all additional real estate owned in South Carolina as follows: "[T]ogether with all other lands and real estates whatsoever and wheresoever situated in the State of South Carolina." Id. at 74 note (a). The land in dispute was not included in the property that was specifically described. Id.

The appellant challenged the deed on the basis that it did not describe the land in dispute with legal and sufficient certainty and that the deed was, therefore, void for uncertainty. Id. at 73. The appellate court rejected this argument and found the description was sufficient, citing the maxim "id certum est, quod certum reddi potest" – i.e., "that is certain which can be made certain." Id. at 76; see also Carolina Helicopter Corp. v. Cutter Realty Co., 139 S.E.2d 362, 366 (N.C. 1964) (defining this legal maxim).

The weight of authority holds that such catch-all provisions are sufficient to transfer title. See W.S.R., Annotation, Sufficiency and Construction of Description in Deed or Mortgage as 'All' of Grantor's Property, or 'All' of his Property in Certain Locality, 55 A.L.R. 162, 163 (1928) ("By the weight of authority, a deed or mortgage, describing the subject-matter as 'all' of the grantor's property, or 'all' of his property in a certain locality, is not defective or void for want of a sufficient description." (citing, among other cases, Sally v. Gunter)). This principle has long been recognized by various courts, including the Supreme Court of the United States. See, e.g., Wilson v. Boyce, 92 U.S. 320, 325 (1875) (holding a deed "of all my estate" or "of all my lands wherever situated" is sufficient to pass title).

Although there may be situations where a party may not be on notice of a catch-all provision, that does not appear to be the situation in the current

appeal. Notice is sufficient if it puts anyone in the chain of title on notice. See Fuller-Ahrens P'ship v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 177, 181, 427 S.E.2d 920, 923 (Ct. App. 1993) (citing Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975)). The catch-all provision was in a deed recorded within the chain of title of what is now the Dargan Property, and the overlap area was clearly exempted from the metes and bounds description of what is now the Tankersley Property in Respondents' chain of title.

The master concluded Respondents had established title to the disputed parcel. In so doing, however, the master specifically acknowledged and found that the disputed parcel "is not included in a metes and bounds description in the 1943 deed from Saluda to Hart in [Respondents'] chain of title." Nevertheless, the master found the disputed parcel "is included by reference to the Hart Valley Ranch Survey in the 1951 deed from Hart to [Respondents'] predecessor in title. The clear inference is that Hart was conveying what he felt he owned, including the [disputed parcel]." The master further noted that the Hart Valley Ranch Survey includes the disputed parcel in the area that is now the Tankersley Property.

The master correctly observed that the metes and bounds description of the L. I. Jennings Tract (or Tract 2) in the Hart Deed does not include the overlap area, as the description expressly follows a path around the overlap. Based on this fact, the master erred in finding that, simply because Hart included the disputed parcel in a plat he prepared and then purported to transfer this property, that he (and his successors) somehow acquired legal title to the disputed parcel. The fact that Hart included property that "he felt he owned" does not transform the legal title. Although Respondents pled other grounds for acquiring ownership the master did not rule on them.[2] The

[2] Although not ruled upon by the master, Respondents pled adverse possession and the forty year statute, S.C. Code Ann. § 15-3-380 (2005). At oral argument, Respondents asserted the evidence showed they had been using the property for thirty-seven years. This is less than the statutory period, in any event.

basis for the master's ruling is that Respondents had legal title to the property from their chain of title. We hold this was error as the deeds in this case indicate the property was conveyed in Appellants' chain-of-title under the catch-all provision whereby Saluda expressly stated it was its intent was to distribute all of its remaining property.

III. CONCLUSION

Based on the foregoing, we conclude Appellants have established their ownership of the twenty-seven-acre parcel via the catch-all provision in the deed in their chain of title. Therefore, we reverse the master's ruling that Respondents are the owners of the disputed parcel and that they are entitled to a quitclaim deed and damages.[3]

REVERSED.

WALLER and PLEICONES JJ., concur. KITTREDGE, J., concurring in a separate opinion in which TOAL, C.J., concurs.

[3] Based on our disposition, we need not reach Appellants' remaining allegation of error regarding the exclusion of an expert witness.

JUSTICE KITTREDGE: I concur in result and the reasoning of the majority concerning Respondents' lack of ownership of the disputed tract, a tract of approximately thirty acres referred to as the "laps" or the overlap area. I write separately because of the incongruity of a deed that excludes a tract of land juxtaposed to a catch-all provision.

I begin with the premise that the relevant inquiry is to ascertain the intent of the grantor, the Saluda Land and Lumber Company (Saluda). *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987) ("In construing a deed, the intention of the grantor must be ascertained and effectuated . . . ."). In the construction of deeds, we are usually confronted with a detailed description of the property sought to be conveyed. Yet jurisprudence is fairly uniform to the effect that catch-all provisions are not defective for want of a sufficient description. The majority opinion cites to W.S.R., Annotation, *Sufficiency and Construction of Description in Deed or Mortgage as "All" of Grantor's Property, or "All" of his Property in Certain Locality*, 55 A.L.R. 162, 163 (1928) ("A deed is generally held not to be ineffective because it describes the property conveyed as all the real estate belonging to the grantor."). *See also* 23 AM. JUR. 2D *Deeds* § 49 (2002) ("A deed describing land as 'all' the grantor's property or 'all' his property in a certain locality is not defective or void for want of a sufficient description . . . .").

Catch-all provisions may even convey all of a grantor's property when the deed specifically describes property which does not include the property in question. *Sally v. Gunter*, 47 S.C.L. (13 Rich.) 72 (1860) (holding that disputed land not included in the twenty-seven tracts described in deed was conveyed under a catch-all provision); *see also Hightower v. Blakely Hard Wood Lumber Co.*, 137 S.E. 22, 23 (Ga. 1927) (holding that a deed containing several described tracts, followed by a conveyance of "also any and all other lots owned by me anywhere not herein enumerated," was sufficiently definite to convey the disputed, non-described tract). The consistent theme in the cases giving efficacy to catch-all provisions is the recognition that the grantor intended to convey the disputed tract, notwithstanding the absence of a detailed description.

Appellants' ownership claim of the disputed tract—the "laps"—turns on the construction of the deed recorded on April 11, 1952 (the Dargan Deed). The Dargan Deed conveyed eighty-five specifically described tracts, followed by a broad catch-all provision, including language that the property was conveyed "TOGETHER with any and all other real estate owned directly by the Grantor in Greenville and Pickens Counties . . . [and it is] the intent of the Grantor by this deed to convey to the Grantee herein named, all real estate or other rights in real estate owned directly by the Grantor." As determined in the majority opinion, Appellants may not rely on "Parcel 10" referenced in the Dargan Deed. Parcel 10 incorporates the Wiswall Plat; the Wiswall Plat shows the disputed tract, but the metes and bounds description in the plat specifically *excludes* the disputed tract. We are thus presented with the unusual situation of an exclusion of a tract juxtaposed to a catch-all provision. Does a catch-all provision include a tract that is identified but excluded in the deed? I answer that question with—it depends. More to the point, it depends on the intent of the grantor.

In this case, it is manifest that Saluda intended the catch-all to convey all of its interest in the property, including the disputed tract. Saluda at one time owned thousands of acres in this area. Saluda ceased its lumber business and began selling its property in Greenville and Pickens Counties years prior to the Dargan Deed.[4] Saluda's final sale was the Dargan Deed, which went to great lengths to specifically describe eighty-five separate parcels. The Dargan Deed concluded with the broad catch-all provision noted above. Given the multiple deeds out from Saluda, the intended finality of the Dargan Deed, and the arguably difficult task associated with construing the Wiswall Plat, I find the grantor Saluda intended to convey the disputed tract to Appellants' predecessor-in-title through the catch-all provision in the Dargan Deed.

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[4] One example of a previous conveyance is the 1943 Hart Deed from Saluda to one of Respondents' predecessors-in-title. For the reasons discussed in the majority opinion, Respondents' claim to the "laps" fails because of the inclusion of the Wiswall Plat in the 1943 Hart Deed and the exclusion of the "laps" by the plat's mete and bounds description.

Under the circumstances presented, the unmistakable intention of Saluda was to convey whatever remaining interest in real property it had in 1952. It defies all reason to infer an intent on the part of Saluda to convey all of its property except this inaccessible small tract. In concurring with the result of the majority, my analysis rests on ascertaining the intent of the grantor.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christopher A. Eadie, Appellant,

v.

Steven M. Krause and Krause & Moorhead, P.A., Respondents.

Appeal From Anderson County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 4472
Heard September 17, 2008—Filed December 22, 2008

AFFIRMED

Thomas A. Pendarvis, of Beaufort, for Appellant.

R. Hawthorne Barrett and Charles E. Hill, of Columbia, for Respondents.

PIEPER, J.: In this legal malpractice action, Christopher A. Eadie (Eadie) appeals from a trial court order granting summary judgment in favor of Steven M. Krause and the law firm of Krause and Moorhead, P.A. (Krause). We affirm.

FACTS

The instant case arises from a workers' compensation claim in which Krause was retained to represent Eadie in an action seeking workers' compensation benefits for injuries he sustained while completing a job for Complete Company, Inc. (Complete).

Complete is a small commercial industrial maintenance business incorporated in Tennessee and wholly owned by Ronald Rigsby (Rigsby). In May 1997, Eadie, a resident of Anderson, South Carolina, learned that Rigsby was looking for help doing concrete repair for Home Depot. Having performed concrete repairs in the past, Eadie, while in South Carolina, called Rigsby in Tennessee to inquire about the work. During their conversation, Rigsby allegedly offered to pay Eadie to perform concrete repairs at a Home Depot store in North Carolina. Eadie allegedly accepted Rigsby's offer and began work at the North Carolina Home Depot shortly thereafter.[1]

After completing the job in North Carolina, Complete retained Eadie to perform four similar repairs at Home Depot locations in North Carolina and Florida. For each job, Eadie personally purchased or rented the necessary supplies and equipment to complete the work. Eadie's rate of pay was calculated by Rigsby based upon the square footage of the concrete repair.

On June 10, 1997, Eadie was seriously injured in a one-vehicle accident while picking up concrete in Atlanta, Georgia, for a concrete repair job at a Home Depot store in Charlotte, North Carolina. Eadie was rendered paraplegic as a result of the accident.

In August 1997, Eadie retained Krause to represent him in the workers' compensation and personal injury claims arising from the accident. On September 19, 1997, Krause filed a Form 50 with the South Carolina Workers' Compensation Commission indicating Complete as Eadie's employer. In response, Complete filed a Form 51 asserting the South Carolina Workers' Compensation Commission lacked jurisdiction on the

[1] The parties disagree as to who made the offer; however, we may resolve this case without a determination of this issue.

grounds that the employer and "alleged employee" were not subject to South Carolina law and that the employer-employee relationship did not exist. Depositions of Eadie and Rigsby were conducted on February 16, 1998, and a hearing on the matter was scheduled for April 14, 1998. The hearing was eventually postponed and no further proceedings were commenced before the South Carolina Workers' Compensation Commission.

In June 1998, Eadie filed notices of claim with the Georgia State Board of Workers' Compensation and the North Carolina Industrial Commission. Krause's office assisted Eadie in filing these notices to toll the statute. At this time, Krause associated attorney Philip R. Newman (Newman) of Puryear & Newman, in Franklin, Tennessee, to represent Eadie in a Tennessee action. Newman filed a complaint in the circuit court for Williamson County, Tennessee, seeking workers' compensation benefits against Complete and Home Depot.

Subsequently, Krause associated Georgia counsel and filed a civil action on behalf of Eadie. Eadie alleged that Construction Materials Ltd., the company from which Eadie received the concrete, improperly loaded the trailer that Eadie was towing at the time of the accident. This case settled in April 2001 and Eadie received $590,000 as a result of that lawsuit.

In the Tennessee case, Home Depot, Complete, and Complete's insurer moved for summary judgment on the basis that Eadie was not an employee. Additionally, Complete alleged that Eadie had affirmatively sought workers' compensation benefits in three other states and therefore had made a binding election of remedies, under Tennessee law, barring him from recovery in Tennessee. The Tennessee trial court found in favor of Complete as to the election of remedies argument and granted Home Depot's summary judgment motion on the ground that Eadie was not an employee of Home Depot.

Thereafter, Eadie appealed to the Tennessee Special Workers' Compensation Appeals Panel (Tennessee Appeals Panel). In a memorandum opinion dated December 19, 2003, the three-judge panel affirmed the trial court's finding that Eadie was not an employee of Home Depot and unanimously reversed the trial court's ruling as to Complete on the election of remedies issue. The Tennessee Appeals Panel held that Eadie's filing of

notices of claim in other states did not amount to an election of remedies. In arriving at its determination, the panel noted that Eadie did not receive any compensation benefits in the other three states, nor had any of his claims been denied.

Complete and its insurer appealed the decision of the Tennessee Appeals Panel to the Supreme Court of Tennessee. In its final opinion, dated August 27, 2004, the Tennessee Supreme Court held that the filing of a claim in South Carolina, the request for a hearing here, and the taking of depositions in the matter constituted affirmative acts to obtain benefits in another state sufficient to constitute a binding election of remedies that barred Eadie's claim in Tennessee.

On November 16, 2005, Eadie filed the instant action against Krause and his law firm alleging that the defendants failed to timely and properly commence workers' compensation proceedings on Eadie's behalf and that as a result of defendants' acts and omissions, Eadie lost the ability to recover workers' compensation benefits. Krause and his law firm filed a motion for summary judgment on the ground that Eadie did not have a valid South Carolina workers' compensation claim because: (1) he was an independent contractor; and (2) his purported employer, Complete, was not subject to the jurisdiction of the South Carolina Workers' Compensation Commission as it lacked the requisite number of employees to fall within the purview of the South Carolina Workers' Compensation Act. Eadie opposed Krause's motion asserting his complaint was broader than a consideration of the South Carolina workers' compensation matter. Eadie argued that material facts are in dispute with regard to whether he was an employee of Complete and entitled to workers' compensation benefits under Tennessee, North Carolina, or Georgia law.

At oral argument before the trial court, the parties focused primarily on the question of whether Eadie was an employee or an independent contractor of Complete at the time of his injury. As such, the trial court requested the parties submit additional memoranda on independent contractor law in the four states at issue. Additionally, the trial court requested that any further materials pertinent to the motion be submitted by May 28, 2007. Eadie responded by filing several affidavits, exhibits, and supplemental memoranda

on or shortly after the deadline. Krause filed a responsive affidavit as well as Eadie's responses to requests to admit.

The trial court granted summary judgment in favor of Krause on July 9, 2007. Eadie filed a motion to alter or amend the judgment, which was denied on August 23, 2007. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Boyd v. Bellsouth Telephone Telegraph Co., Inc., 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). Summary judgment is proper where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Town of Summerville v. City of North Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 36, 637 S.E.2d 560, 561 (2006). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. Law v. S.C. Dep't of Corrs., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

LAW/ANALYSIS

Eadie maintains the trial court erred in granting summary judgment on the ground disputed issues of material fact exist concerning whether Krause's alleged professional errors proximately caused injuries to Eadie. Specifically, Eadie argues the existence of disputed issues of material fact concerning: (1) whether the acceptance of the telephone offer of employment took place in Tennessee and was sufficient to establish jurisdiction in Tennessee;[2] (2) whether Eadie was an employee of Complete under

[2] The trial court indicated its concern as to a possible sham affidavit by Eadie; however, since the court never excluded the affidavit on this basis, the affidavit is part of the record for purposes of this action.

Tennessee law or an independent contractor; and (3) whether the application of Tennessee's election of remedies doctrine was reasonably foreseeable.[3]

In order to prevail in a legal malpractice claim, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) the damage was proximately caused by the breach of duty. Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). The plaintiff must prove that he most probably would have been successful in the action if the attorney had not committed the alleged malpractice. Brown v. Theos, 345 S.C. 626, 629, 550 S.E.2d 304, 306 (2001) (internal citation omitted). Accordingly, where a plaintiff alleging legal malpractice fails to show that the underlying claim would have been successful, defendant is entitled to judgment as a matter of law. Id. This principle accords with the requirement that the alleged act of negligence proximately causes damage.

Given the burden of the plaintiff in a legal malpractice action to prove the probability of success of the underlying claim, the requisite analysis of the underlying claim that accompanies this burden requires, in essence, a trial within a trial.[4] Shearon v. Seaman, 198 S.W.3d 209, 210 (Tenn. Ct. App. 2005). Under this trial within a trial scenario, we must address the viability

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[3] Eadie also asserts on appeal the trial court erred in denying his motion to recuse based upon the trial judge's previous professional relationship with Krause and the fact the trial judge allowed less than 40 business days for the parties to complete discovery. The fact the trial judge had a previous professional relationship with Krause is insufficient evidence, standing alone, of bias or prejudice. See Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (stating "[i]t is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice."). Moreover, while we acknowledge the short time frame for discovery, there is no evidence the time frame harmed Eadie so as to demonstrate the trial judge's alleged bias against Eadie. As such, we do not find evidence of bias or prejudice sufficient to warrant reversal of the trial judge's denial of appellant's motion to recuse.

[4] On appeal, Eadie challenges the trial court's finding only as to the Tennessee workers' compensation claim.

of Eadie's Tennessee workers' compensation claim under Tennessee law in order to determine whether the elements of the instant legal malpractice claim can be satisfied.

Turning to the underlying Tennessee workers' compensation claim, we note that pursuant to Section 50-6-225(a)(3) of the Tennessee Code, civil actions for workers' compensation benefits are commenced before a judge in the circuit or chancery court. Tenn. Code Ann. § 50-6-225(a)(3) (West 2008) ("Neither party in a civil action filed pursuant to this section shall have the right to demand a jury."). When the facts are undisputed, the question is one of law. Travelers Ins. Co. v. Dozier, 410 S.W.2d 904, 907 (Tenn. 1966). When there is a dispute as to particular facts, the question becomes one of mixed law and fact for the court. Id. Accordingly, it is through this specialized lens that we would normally address the question of whether Eadie had a legal basis for a workers' compensation claim in Tennessee in order to determine the probability of success absent any malpractice.

However, before reaching the underlying claim, we note the Tennessee Supreme Court held the affirmative acts of filing, taking a deposition, and requesting a hearing in South Carolina constituted a binding election of remedies barring Eadie's claim in Tennessee; because of these same acts, Eadie claims Krause breached a duty to foresee a Tennessee election of remedies bar that proximately caused him damage.

We are mindful of and respect the interpretation of Tennessee law by the Tennessee Supreme Court since we must, in the context of this malpractice action, utilize Tennessee law in our analysis. However, in this South Carolina malpractice litigation, we nonetheless must scrutinize the action of the attorney involved to determine whether there are any factual disputes for purposes of summary judgment. Even assuming Eadie's status as an employee for purposes of our analysis, we nonetheless may resolve this case as a matter of law on the issue of whether Krause should have foreseen his actions in attempting to preserve his client's rights in South Carolina would preclude the Tennessee workers' compensation claim under the election of remedies doctrine of Tennessee which existed at that time.

As indicated, essential elements of a legal malpractice claim are duty and proximate cause. Proximate cause requires proof of causation in fact and legal cause. Sims v. Hall, 357 S.C. 288, 298, 592 S.E.2d 315, 320 (Ct. App. 2003). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability. Id. When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability.[5] Stone v. Bethea, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968). In the context of a legal malpractice action, the plaintiff bears the burden of proving the alleged malpractice proximately caused damage to plaintiff and the defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. Sims, 357 S.C. at 298, 592 S.E.2d at 320. Consequently, since Eadie alleges malpractice from Krause's actions in South Carolina, we address whether the Tennessee court's conclusion that Krause's pursuit of a claim in South Carolina constituted a binding election of remedies was reasonably foreseeable by counsel thus constituting a breach of duty proximately causing damage to his client.

Under the doctrine of election of remedies, Tennessee case law at the time of Eadie's claim held that an employee injured on the job in another state who files a workers' compensation claim in that jurisdiction and obtains either an award, or a court-approved settlement of the claim, or who actively pursues a claim in a venue that has jurisdiction, is barred from filing a subsequent claim in Tennessee. Gray v. Holloway Construction Co., 834 S.W.2d 277, 279 (Tenn. 1992).

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[5] Generally, issues of foreseeability and proximate cause are questions for a jury. However, to survive a motion for summary judgment, the plaintiff must offer some evidence that a genuine issue of material fact exists as to each element of the claim unless that element is either uncontested or agreed to by stipulation; otherwise, the plaintiff cannot meet his burden of proof and the claim may be determined as a matter of law by the trial judge. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) (defendant entitled to judgment as a matter of law where plaintiff failed to demonstrate one element of the claim and therefore could not meet the required burden of proof).

In the instant case, the Tennessee Supreme Court only addressed whether the actions taken by Krause in South Carolina constituted an election of remedies. While we might view those same acts differently for purposes of South Carolina law, we need not distinguish the effect of these acts for even if these acts are deemed sufficient affirmative acts under Tennessee law, the Tennessee Supreme Court did not address whether the alleged affirmative acts occurred in a forum with jurisdiction over the matter. See Gray, 834 S.W.2d at 279 (stating an employee injured on the job in another state who actively pursues a claim in a venue that has jurisdiction is barred from filing a subsequent claim in Tennessee) (emphasis added).

As we previously indicated, we must respect the interpretation of Tennessee law by the Tennessee Supreme Court. Notwithstanding, our review cannot be premised on speculation as to why the Tennessee Supreme Court did not address its past precedent on the "venue with jurisdiction" element of its earlier cases. However, we may consider the question before us from two perspectives: 1) whether counsel should have foreseen that Tennessee would not address one of the components of the doctrine established at the time; or, alternatively, 2) whether counsel should have foreseen that the Tennessee Supreme Court would modify its common law on the election of remedies doctrine by removing the "venue with jurisdiction" element. While we do not suggest that the Tennessee Supreme Court has modified its doctrine, we find it appropriate to consider both alternatives because we are reviewing whether counsel erred in not foreseeing the possible application of the doctrine before taking action in South Carolina.

Here, as the trial court in South Carolina correctly found, the South Carolina Workers' Compensation Commission did not have jurisdiction over Eadie's workers' compensation claim because Complete lacked the requisite number of employees in South Carolina as required by Section 42-1-360(2) of the South Carolina Code. This ruling was not appealed; thus, it is the law of the case. See Charleston Lumber Co., Inc. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (stating an unchallenged ruling, right or wrong, is the law of the case).

Thus, utilizing Tennessee's own interpretation of its election of remedies precedent at the time of counsel's conduct, this court cannot find the alleged "affirmative" acts in South Carolina constituted a breach of duty or proximately caused damage since Tennessee law at the time would require that Krause's affirmative acts occur in a venue that had jurisdiction, which does not include South Carolina. See Gray, 834 S.W.2d at 279. Under our first alternative, if we were to consider only one element of the Tennessee election of remedies doctrine existing at the time, we would be prevented from objectively assessing the conduct of counsel; thus, we also must consider the "venue with jurisdiction" element even if the Tennessee Supreme Court failed to do so. We are sympathetic to a claim that the Tennessee Supreme Court may not have been presented with the argument that South Carolina was not a "venue with jurisdiction" and that Tennessee's election of remedies law should not actually apply; however, the alleged malpractice raised by the pleadings is whether counsel should have reasonably foreseen the application of the Tennessee election of remedies bar such that counsel should have avoided the alleged acts he took in South Carolina to preserve any rights his client might have here.

Therefore, because we may affirm for any ground appearing in the record, we conclude, as a matter of law, that the application of Tennessee's election of remedies doctrine under this alternative was not foreseeable by Krause since, even if the acts in South Carolina were sufficient affirmative acts under Tennessee law, the acts occurred in a venue in which there was no workers' compensation jurisdiction.[6] See Rule 220(c), SCACR; Upchurch v. New York Times Co., 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) ("We may affirm the trial judge for any reason appearing in the record."). We further hold, in deference to the possibility that the Tennessee Supreme Court signaled a change in its prior precedent under the alternative consideration we suggested, that counsel could not have reasonably foreseen any modification of the existing precedent since no other case at the time actually indicates or signals a change in precedent. Accordingly, since material facts are not in dispute as to this component of the claim, summary judgment in the South Carolina litigation is appropriate.

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[6] As previously indicated, even Complete asserted in its Form 51 that South Carolina lacked jurisdiction.

Given the dispositive nature of this determination, the court need not address Eadie's remaining arguments including, but not limited to, the acceptance of the contract for hire and whether Eadie was an employee of Complete.[7] See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); see also Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous."); see also State v. Hiott, 276 S.C. 72, 86, 276 S.E.2d 163, 170 (1981) (stating all other grounds not argued or briefed are deemed abandoned on appeal).

CONCLUSION

Accordingly, we find the trial court did not err in granting summary judgment on the ground the application of the election of remedies doctrine as a bar to Eadie's claim in Tennessee was not reasonably foreseeable.

AFFIRMED.

SHORT and THOMAS, JJ., concur.

[7] For similar reasons, we need not address whether the parties consented to litigate the merits of the Tennessee claim on the motion for summary judgment. While we note the court in this type of proceeding would ultimately address the viability of the underlying claim, we need not address this ground since our opinion focuses only on the alleged act of negligence as to failing to foresee the application of the election of remedies bar, not the underlying merits of the Tennessee claim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Maria A. Hollins, as parent and guardian ad litem of Jane Doe, a minor under the age of fourteen years, Appellant,

v.

Wal-Mart Stores, Inc., Respondent.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 4473
Heard October 8, 2008 – Filed December 22, 2008

AFFIRMED

David E. Massey, of Columbia, and M. David Scott, of Lexington, for Appellant.

Stephen G. Morrison, of Columbia, for Respondent.

HEARN, C.J.: Maria Hollins appeals from a jury verdict in favor of Wal-Mart in this action for negligent hiring and retention. We affirm.

FACTS

Ten-year-old Jane Doe accompanied her mother, Hollins, and sister to the Wal-Mart located on Forest Drive in Columbia. While her mother and sister shopped in another area of the store, Doe browsed through the merchandise in the electronics department. There, Randall, a Wal-Mart employee, touched Doe's private areas and began masturbating in her presence. As a result of this incident, Hollins commenced negligent hiring and retention claims against Wal-Mart on behalf of Doe.

The incident in question generated vast amounts of pre-trial media coverage. Recognizing this, the trial court implemented extraordinary procedures to ensure the selection of an impartial jury. In addition to performing its traditional function of questioning potential jurors during general qualification, the trial court also required potential jurors to complete questionnaires. Additionally, the court permitted counsel to conduct extended voir dire of the potential jurors.

During general qualification, the trial court asked whether a relationship existed between the potential jurors and counsel for the parties. Juror B, an attorney, acknowledged she opposed Hollins' counsel in a previous proceeding. However, Juror B affirmed she could still be fair and impartial. Hollins' counsel asked the trial court to strike Juror B for cause and requested permission to question her about this matter. The trial court noted Juror B already indicated she could be fair and impartial. Counsel for Hollins made no objection to the denial of further voir dire and began discussing the next juror.

In her questionnaire, Juror D acknowledged her brother worked at the Wal-Mart where the incident occurred. Because of this, the trial court permitted counsel for Hollins to conduct additional voir dire of Juror D. In her dialogue with Hollins' counsel, Juror D explained she had not discussed the lawsuit with her brother; furthermore, she stated she possessed no knowledge of the lawsuit whatsoever. Finally, Juror D affirmed her brother's employment at Wal-Mart would not affect her ability to be fair and impartial. Subsequently, Hollins' counsel moved to dismiss Juror D for cause. The trial court denied the request.

After jury selection, Juror B informed the trial court that a partner in her firm's Charleston office had previously represented Wal-Mart in a class action lawsuit. The trial court posed several questions to Juror B in light of this discovery. Juror B responded by noting she never worked in the Charleston office, did not personally work on the case, and her firm no longer represented Wal-Mart. Again, Juror B acknowledged she could still be fair and impartial. Hollins failed to seek additional voir dire of Juror B; instead, Hollins simply moved to strike Juror B for cause. The trial court denied this request.

On two previous occasions, Randall exposed himself to young girls while working for Wal-Mart. The first incident was revealed to the jury during Francis Parker's testimony. Parker testified Randall exposed himself to her sixteen-year-old daughter in JD's Beauty Supply Store, situated across from the Forest Drive Wal-Mart. After the incident, Parker informed the assistant manager at Wal-Mart and another store employee of Randall's actions. The second incident concerned Randall's arrest outside of a different Columbia-area Wal-Mart. Hollins attempted to introduce this evidence through the testimony of Sergeant William Connors. However, the trial court excluded Sgt. Connors' testimony as irrelevant. In the trial court's view, Hollins failed to connect the incident with any evidence tending to demonstrate Wal-Mart's actual or constructive knowledge of the arrest.

According to Sgt. Connors' deposition, two young girls and their mother informed him that Randall exposed himself to the girls. Thereafter, Sgt. Connors arrested Randall on the edge of the Wal-Mart location without capturing the attention of on-lookers or Wal-Mart employees. Sgt. Connors placed Randall inside his unmarked patrol car until one City of Columbia squad car and one unmarked car arrived on the scene. At that time, Sgt. Connors transferred custody of Randall to the City of Columbia. Sgt. Connors stated no sirens or flashing lights were used, and no employee from Wal-Mart arrived on the scene. Although Randall worked at the Wal-Mart located on Forest Drive, he was not working when he was arrested and was dressed in plain clothes. Thus, Wal-Mart was not contacted about the arrest. Thereafter, Randall asked for and received a leave of absence from Wal-Mart, offering no reason for his request.

The jury returned a verdict in favor of Wal-Mart. Hollins filed timely written post-trial motions seeking a new trial absolute and/or judgment notwithstanding the verdict (JNOV). In these motions, Hollins claimed the trial court denied her right to a fair and impartial jury and erroneously excluded the testimony of Sgt. Connors. The trial court issued a written order denying Hollins' post-trial motions on August 3, 2006. On August 17, Hollins submitted a motion to reconsider, alter, and amend the order pursuant to Rule 59(e), SCRCP. In this Rule 59(e) motion, Hollins primarily noted small disagreements with the manner in which the trial court characterized portions of its order. In addition, she asked the court to reconsider its previous order denying her motion for a new trial/JNOV. The trial court denied Hollins' motion in writing on November 2, noting she "raises no additional legal or factual basis for amending my order of August 3, 2006." This appeal followed with the service of Hollins' notice of appeal on November 29, 2006.[1]

STANDARD OF REVIEW

The manner and scope of voir dire is largely within the discretion of the trial judge. State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997). "On appeal, this court will rely on the judgment of the trial judge who is able to observe the character and demeanor of the jurors, unless the record firmly establishes an abuse of discretion." Creighton v. Colingy Plaza Ltd. P'ship, 334 S.C. 96, 109, 512 S.E.2d 510, 517 (Ct. App. 1998). The exclusion of evidence is within the sound discretion of the trial court. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). The court's decision will not be disturbed on appeal absent an abuse of discretion. Id.

[1] Wal-Mart contends Hollins' August 17 motion did not toll the time for appeal; therefore, service of her notice of appeal was untimely. We believe a close question is presented in this evolving area of the law. See Matthews v. Richland County Sch. Dist. One, 357 S.C. 594, 594 S.E.2d 177 (Ct. App. 2004), overruled by Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). Accordingly, we reach the merits of this appeal.

LAW/ANALYSIS

a. Juror Issues

Hollins alleges the trial court abused its discretion by not allowing her to conduct extensive voir dire of Juror B on two separate occasions. The first incident occurred when Juror B disclosed she opposed counsel for Hollins in prior litigation. The second incident occurred when Juror B informed the court that a member of her law firm previously represented Wal-Mart in a class action lawsuit.

These arguments are not preserved for appeal. After Juror B disclosed she opposed counsel for Hollins in prior litigation, Hollins accepted the trial court's denial of additional voir dire without objection. After the court made its ruling, Hollins stated "[a]ll right, we won't—Okay," and immediately began discussing the next juror. No objection was made to the denial of further voir dire. Because Hollins acquiesced in the trial court's ruling, she failed to preserve the issue of the denial of additional voir dire for appellate review. See Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (affirming on preservation grounds where counsel accepted the trial court's refusal to allow additional voir dire). After learning a member of Juror B's law firm previously represented Wal-Mart in another matter, Hollins failed to ask the trial court to conduct further voir dire of Juror B. Instead, Hollins only asked the trial court to strike Juror B for cause. Accordingly, this argument is also not preserved for appeal. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) (holding a contemporaneous objection must be made to preserve the issue for review).

Next, Hollins claims the trial court denied her right to an impartial jury by refusing to strike Juror B for cause after learning a member of her law firm previously represented Wal-Mart in a class action lawsuit. In addition, Hollins argues the trial court erred by refusing to strike Juror D for cause after learning her brother worked at the Wal-Mart where the incident took place. Hollins argues this error was particularly egregious in light of the court's knowledge that Juror D's brother's direct supervisor would sit at the defense table during trial.

The decision to disqualify a juror is within the sound discretion of the trial court. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986). "A prior business relationship between a juror and a party to the case does not as a matter of law disqualify a juror." Id.

The trial court did not abuse its discretion in refusing to strike Juror B. Upon learning this information, the trial court immediately questioned Juror B about the matter. Juror B responded by informing the trial court that the lawyer representing Wal-Mart worked in the firm's Charleston office while she worked in the Columbia office, the representation had terminated, and she had no involvement with the matter. Finally, Juror B again acknowledged she could be fair and impartial. Similarly, the trial court did not abuse its discretion in refusing to strike Juror D for cause. The court allowed Hollins the opportunity to fully question Juror D, and Juror D responded by asserting she had no knowledge of the matter, had not discussed it with her brother, and could be fair and impartial. Accordingly, we find the trial court acted within its discretion in refusing to strike Jurors B and D for cause. See State v. Spann, 279 S.C. 399, 402, 308 S.E.2d 518, 520 (1983) (finding the trial court did not abuse its discretion in refusing to strike a juror who stated he could be fair and impartial).

b. Evidentiary Matters

Lastly, Hollins argues the trial court abused its discretion by excluding Sgt. Connors' testimony. According to Hollins, Sgt. Connors' testimony was relevant to her negligent supervision claim.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The admission or exclusion of evidence in general is within the sound discretion of the trial court. Fields, 363 S.C. at 25, 609 S.E.2d at 509. In addressing the law of negligent supervision, our supreme court has cited the Restatement (Second) of Torts § 317 (1965). See Degenhart v. Knights of Columbus, 309 S.C. 114, 116-17, 420 S.E.2d 495, 496 (1992). Comment c to section 317 of the Restatement (Second) of Torts provides "the master may subject himself to liability under the rule stated in this Section by

retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others."

The trial court properly excluded Sgt. Connors' testimony as irrelevant because Hollins failed to demonstrate that Wal-Mart knew of the arrest or should have known about it. According to Sgt. Connors, the arrest took place on the edge of the Garners Ferry Wal-Mart property without the use of sirens or flashing lights and without attracting the attention of on-lookers. Although Randall worked at another Wal-Mart in the Columbia area, he was "off the clock" at the time of his arrest and dressed in plain clothes. Finally, Wal-Mart was not contacted about the incident. In addition, contrary to Hollins' assertions, we fail to see how Randall's request for a leave of absence charges Wal-Mart with constructive knowledge of his arrest. Therefore, absent evidence Wal-Mart either was aware of the incident or should have been aware of it, the trial court properly excluded the evidence as irrelevant.

Accordingly, the decision of the trial court is

AFFIRMED.

HUFF, J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andrew F. Stringer, III, **Respondent,**

v.

State Farm Mutual Automobile Insurance Company, **Appellant.**

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4474
Heard November 19, 2008 – Filed December 23, 2008

AFFIRMED

Charles R. Norris, of Columbia, and John P. Riordan, of Greenville, for Appellant.

Donald Leverette Allen, of Anderson, for Respondent.

ANDERSON, J.: In this action arising from an automobile accident, the circuit court held Andrew F. Stringer, III (Stringer) had uninterrupted automobile coverage with State Farm Mutual Automobile Insurance

Company (State Farm) and dismissed Stringer's claims for breach of contract accompanied by a fraudulent act, breach of the duty of good faith and fair dealing, emotional damages, and attorneys fees. State Farm appeals. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On July 31, 2002, Stringer was involved in an automobile accident in which he was driving a 1984 Chevrolet truck. The accident was caused by an uninsured driver named Troy Robinson. Stringer suffered various injuries, some of which are permanent. Stringer made a payment of $424.76 to State Farm for a six month policy on the truck running from February 15, 2002 until August 15, 2002. After Stringer paid State Farm, there were two policy adjustments that caused an additional $47.25 premium to be due.

State Farm mailed Stringer a bill that he failed to pay. The $424.76 premium paid was sufficient to carry the policy to July 29, 2002. On July 11, State Farm mailed Stringer a notice of cancellation that stated payment of $47.25 by the cancellation date of July 29, 2002 would provide uninterrupted coverage. The notice informed that in the event of payment after that date, there would be no coverage between the date and time of cancellation and the date and time of reinstatement based upon a post-cancellation payment.

On August 1, Stringer notified Sherry Jennings (Jennings), an employee of the Quincy Waters State Farm agency, about his accident on the previous day. Stringer testified that Jennings told him there would be uninterrupted coverage if he paid the $47.25 due. Stringer sent his son to the agency where he paid the additional $47.25 premium on August 2, 2002, after the accident. Jennings accepted the payment, issued a receipt, and promptly mailed form FR-10 to the Department of Motor Vehicles. The form FR-10 verified that Stringer had valid coverage with State Farm at the time of the accident.

The circuit court held Stringer paid his entire premium pursuant to the insurance policy prior to the expiration of the six month policy period, which fulfilled his obligations under the insurance policy. State Farm appeals this ruling. The circuit court dismissed Stringer's claims for breach of contract

accompanied by a fraudulent act, breach of the duty of good faith and fair dealing, emotional damages, and attorneys fees. These issues are not appealed.

ISSUE

Did the trial court err in ruling Stringer had uninterrupted automobile insurance coverage for the full policy period?

STANDARD OF REVIEW

The determination of coverage under an insurance policy is an action at law. Auto-Owners Ins. Co. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006), cert. granted, May 24, 2007; Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings . . . . The judge's findings are equivalent to a jury's findings in a law action." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); accord Patricia Grand Hotel, LLC v. MacGuire Enterprises, Inc., 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007); Cohens v. Atkins, 333 S.C. 345, 347, 509 S.E.2d 286, 288 (Ct. App. 1998); Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). "[Q]uestions regarding the credibility and the weight of evidence are exclusively for the trial judge." Golini v. Bolton, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct. App. 1997).

"This court is bound by the trial court's factual findings unless they are clearly erroneous." State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005); accord State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Quattlebaum, 338 S.C. 441, 442, 527 S.E.2d 105, 111 (2000)). The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. Mattison, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003).

On appeal, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Edwards, 374 S.C. 543, 649 S.E.2d 112 (Ct. App. 2007), cert. granted, July 10, 2008; State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), cert. granted, June 7, 2007; State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981); see also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) (" '[E]rror at law' exists: (1) when the circuit judge, in issuing [the order], was controlled by some error of law . . . or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support."); McSween v. Windham, 77 S.C. 223, 226, 57 S.E. 847, 848 (1907) ("[T]he determination of the court will not be interfered with, unless there is an abuse of discretion, or unless the exercise of discretion was controlled by some error of law.").

LAW/ANALYSIS

The circuit court made the following conclusions of law:

1. It is well established that the terms of an insurance policy must be construed most liberally in favor of the insured and, where they are ambiguous or where they are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured. Garrett vs. Pilot Life Insurance Company, 241 S.C. 299, 128 S.E.2d 171 (1962).

2. An insured has a right to rely on the representation made by an employee of his insurance company regarding coverage. Giles vs. Lanford and Gibson, Inc., 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985).

3. If the insurer or insurer's agents assumes the duty to advise the insured, liability arises for failure to exercise reasonable

skill and care in counseling the insured. Giles vs. Lanford and Gibson, Inc., 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985). See also Riddle-Duckworth, Inc. vs. Sullivan, 253 S.C. 411, 171 S.E.2d 486 (1969).

4. When the employee of State Farm advised the insured, she had a duty to exercise due care in giving advice. Carolina Production Mantenance, Inc. vs. U.S. Fidelity and Guaranty Co., 310 S.C. 32, 38, 425 S.E.2d 39, 43 (Ct. App. 1993) (quoting Trotter vs. State Farm, supra).

In light of the cardinal rules governing construction of insurance contracts, the Plaintiff complied with the language of State Farm's coverage provision. The Plaintiff paid all premiums due within the six-month and before the end of the, then, current policy period ending August 15, 2002. Moreover, and in addition, the post-collision remittance of $47.25 by the insured and the insurer's receipt and retention of the consideration bound the insurer to the coverage.

State Farm argues the case of Jones v. State Farm Mutual Auto Ins. Co., 364 S.C. 222, 612 S.E.2d 719 (Ct. App. 2005), is controlling. We disagree. In Jones, State Farm provided insurance for three of Jones's vehicles as late as November 1999, including a 1986 Mazda pickup truck. On November 5, 1999, State Farm sent a cancellation notice informing Jones that effective November 24, 1999, coverage of the 1986 Mazda would be cancelled due to nonpayment of premiums. On December 19, 1999, Jones was seriously injured in a motor vehicle collision while driving the 1986 Mazda. Sometime after the accident, Jones's State Farm agent signed a Form FR-10 which stated: "I hereby affirm that to the best of my knowledge the vehicle described above was insured by State Farm insurance company on the date and time of the accident."

After settling with the at-fault driver's liability carrier, Jones sought a declaration that (1) the 1986 Mazda was covered by State Farm at the time of the collision, (2) he was entitled to $50,000 of underinsured motorist coverage on the Mazda, and (3) he was entitled to stack $50,000 of

underinsured motorist coverage from each of the two additional vehicles covered by State Farm. State Farm moved for summary judgment, claiming the policy had been cancelled. The trial judge ruled that State Farm was entitled to summary judgment because State Farm's cancellation notice complied with the applicable statute and the Form FR-10 did not affect the cancellation.

This Court held the trial judge properly granted summary judgment. In a light most favorable to Jones, the FR-10 did not raise an issue as to the validity of State Farm's cancellation notice. We elucidated:

> The form simply states "to the best of my knowledge the vehicle described above was insured by State Farm insurance company on the date and time of the accident." (Emphasis added). State Farm presented evidence that Jones, in fact, was not insured by State Farm at the time of the accident because his policy had been cancelled weeks earlier. Jones cites no legal authority establishing that a policy, once effectively canceled, can somehow become renascent by virtue of a qualified representation of coverage by an agent after a loss.

In the case at bar, Jennings not only completed Form FR-10 acknowledging coverage, but she also accepted and retained consideration from Stringer. The insured has a right to rely on the representations made by an employee of his insurance company regarding coverage. Giles v. Lanford & Gibson, Inc., 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985). If the insurer or insurer's agents assume the duty to advise the insured, liability arises for failure to exercise reasonable skill and care in counseling the insured. Id. See also Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 171 S.E.2d 486 (1969). When the employee of State Farm advised the insured, she had a duty to exercise due care in giving advice. Carolina Prod. Maint., Inc. v. U.S. Fid. & Guar. Co., 310 S.C. 32, 38, 425 S.E.2d 30, 40 (Ct. App. 1993).

The contemporaneous representations made by Jennings are inconsistent with State Farm's subsequent legal contention that the coverage was interrupted. State Farm's intentions were clear when it made its representations to Stringer and its assertions to the Department of Motor

Vehicles, all of which were done after receiving and retaining the $47.25 premium on August 2, 2002.

The circuit court did not make an express finding of fact in its order that the policy is ambiguous, but the court did reference ambiguity in its first conclusion of law. This implies that the court found the policy to be ambiguous and relied on that ambiguity in reaching its conclusions of law. "It is a well settled rule that the terms of an insurance policy must be construed most liberally in favor of the insured and where the words of a policy are ambiguous or where they are capable of two reasonable interpretations that construction will be adopted which is most favorable to the insured." Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 304, 128 S.E.2d 171, 174 (1962).

The circuit court quoted a section of the policy titled "When Coverage Applies" in its findings of fact. That provision states:

> The policy period is shown under "Policy Period" on the declarations page and is for successive periods of six months each for which you pay the renewal premium. Payments must be made on or before the end of the current policy period. The policy period begins and ends at 12:01 A.M. Standard Time at the address shown on the declarations page.

[Emphasis in original.] Because Stringer paid the additional $47.25 before the end of the stated policy period, August 15, 2002, he was entitled to continuous, uninterrupted coverage. The circuit court correctly adopted an interpretation most favorable to the insured based on the ambiguity and an application of Garrett.

CONCLUSION

In light of the cardinal rules governing construction of insurance contracts, Stringer complied with the provisions of State Farm's insurance policy. Stringer paid all premiums due within the six-month coverage period and before the end of the policy period on August 15, 2002. The post-

collision remittance of $47.25 by the insured and the insurer's receipt and retention of the consideration bound the insurer to the coverage.

Accordingly, the order of the circuit court is

AFFIRMED.

HUFF, J., concurs.

THOMAS, J., dissents in a separate opinion.

THOMAS, J. (dissenting): I respectfully dissent from the majority.

The majority correctly points out that when construing the language of an insurance policy, the cardinal rule of construction is in favor of finding coverage for the insured. Garrett v. Pilot Life Ins., Co., 241 S.C. 299, 128 S.E.2d 171 (1962). This rule of construction, however, applies only if the policy is ambiguous. See id. at 304, 128 S.E.2d at 174 ("[I]n cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense.").

As the majority acknowledges, the trial court made no express finding that the policy in question was ambiguous. While the majority states that such a finding is implied by the language of the order, this Court does not sit to speculate as to the holdings of the trial court. See S.C. Coastal Conservation League v. S.C. Dep't of Health and Envt'l Control, Op. No. 4450 (S.C. Ct. App. filed October 23, 2008) (Shearouse Adv. Sh. No. 40 at 65, 90 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the Court] with a platform for meaningful appellate review.") (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (internal quotations omitted)). An issue must be both raised to the trial court *and ruled on by the trial court* to be preserved for review by this Court. Pye v. Est. of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006); Singleton v. Sherer, 377 S.C. 185, 208, 659 S.E.2d 196, 208 (Ct. App. 2008) (emphasis added). Accordingly, as the trial court made no ruling

as to any ambiguity in the policy, construction of the language of the policy is not an issue before this Court.[1] Rather, the issue is simply whether the laws of this state provide for coverage under these particular facts; and absent an ambiguity, they do not.

The terms of the insurance policy at issue in this case clearly state: "[The insured] agrees that…[the insurer] may increase the premium during the policy period based upon…changed information." Further, the insured agrees "that if the premium is decreased or increased during the policy period…[the insured] will pay for any increase in premium."

Based on adjustments to the policy made by Stringer, an additional $47.25 in premium came due in order to keep the policy in place until the stated termination date of August 15, 2002.[2] It is undisputed that Stringer received two notifications informing him that failure to pay this amount would result in cancellation of the policy at 12:01 am on July 29, 2002. Such cancellation is specifically provided for in the plain language of the policy: "[State Farm] will not cancel your policy before the end of the current policy period unless…you fail to pay the premium when due." In the case at hand, it is not contested that the payment of the $47.25 overdue premium was not paid until after July 29, 2002. Thus, the only issue before this Court is whether Jennings' statement can retroactively provide coverage. It cannot.

Our courts have held that an insured is entitled to rely on representations made by the employee of the insured. Giles v. Lanford & Gibson, Inc., 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985); however, "whether or not reliance upon a representation in a particular case is justifiable or excusable, what constitutes reasonable prudence and diligence with respect to such reliance, and what conduct constitutes a reckless or conscious failure to exercise such prudence, will depend upon the various

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[1] Had there been a finding that the policy was ambiguous and had the policy in fact been ambiguous, I would concur in the result reached by the majority as it would be the policy of this state to construe the contract in favor of coverage.

[2] According to the trial court's order, the increase in premium was due to the addition of a driver to the policy at the request of the insured.

circumstances involved, such as the form and materialty [sic] of the representations, the respective intelligence, experience, age, and mental and physical condition of the parties, and the relation and respective knowledge and means of knowledge of the parties." Id. In the present case, Stringer's reliance was simply unreasonable. The record reflects that Stringer was fully aware that the policy would terminate on July 29, 2002, and as such was fully aware that after such date he was uninsured. While the trial court found that Stringer's payment of $47.25 was in reliance on an unsubstantiated representation that coverage would be continuous, such reliance could not have been to Stringer's detriment as it arose after the accident had occurred. Moreover, it is significant that Stringer did not plead estoppel as basis for asserting coverage, and the majority cites no authority that a lapsed insurance policy can be resurrected in the absence of estoppel being plead or preserved.[3]

The majority's decision not only rewards Stringer's misconduct and languidness but also extends the law on this issue beyond that supported by our jurisprudence.

State Farm relies heavily on this Court's decision in Jones v. State Farm Mutual Auto Insurance Co., 364 S.C. 222, 612 S.E.2d 719 (Ct. App. 2005), for the proposition that post cancellation representations may not be relied on. While I do not believe Jones to go so far as State Farm suggests, the majority languishes to distinguish it from the case at hand. I agree with

[3] The majority cites authority that an insured may rely on representations made by an employee of an insurance company as to coverage. However, these authorities are not analogous to the case at hand because the representations were made before any loss or accident had occurred. See Giles v. Gibson, Inc., 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985) (finding that when an insured specifically requested particular fire coverage and an employee, in writing the policy, represented the policy provided such coverage, the insurer could not deny coverage when the loss subsequently occurred); Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 171 S.E.2d 486 (1969) (holding that an insured was entitled to rely on representations that he was "fully covered," and accordingly when an accident later occurred the insurer could not deny coverage).

the majority that Jones has no binding effect on this issue; however, this is because the language relied on by State Farm and distinguished by the majority, is not the law of the case. In Jones, this Court specifically held that the issue of the legal effect of the agent's representation on the FR-10 form was not preserved for appeal. Id. at 234, 612 S.E.2d at 725.[4]

Moreover, in discussing the merits of the issue in Jones, this Court noted the insured "cites no legal authority establishing that a policy, once effectively canceled, can somehow become renascent by virtue of a qualified representation of coverage by an agent after a loss." Id. at 236, 612 S.E.2d at 726. Similarly, no such authority exists that would support Stringer's claim that he had insurance coverage at the time of his accident.

The majority's holding would allow a situation in which an insured could wait until after a policy has lapsed, and then, with the certainty of hindsight, determine if he wants to pay the premiums. Effectively, the decision circumvents the purpose of insurance and creates a system which would allow an insured to retroactively insure himself *after* an accident or loss has occurred.

Accordingly, while I am sensitive to the position of the majority to prefer a finding of coverage, neither the policy at issue nor the laws of this State support such a finding. Accordingly, I would reverse the judgment of the trial court.

[4] Additionally, much of the discussion in Jones, concerned Jones' claim that the insurer was estopped from denying overage. In the case at hand Stinger did not plead estoppel as a basis for asserting coverage. Moreover, even had estoppel been plead, Stinger would not be able to demonstrate any detrimental reliance as the representation was made to him *after* the accident had already occurred.