The Supreme Court of South Carolina

Request for Written Comments

The South Carolina Bar has proposed amending Rule 45(b)(1) of the South Carolina Rules of Civil Procedure to alter how witness fees and reimbursement for mileage are tendered to witnesses subpoenaed to testify at proceedings. The Court has elected to defer taking action on the proposed change pending receipt of written public comments. The language of the Bar's proposed amendment is attached.

Persons or entities desiring to submit written comments regarding the proposal may do so by filing an original and seven (7) copies of their written comments with the Supreme Court. The written comments must be sent to the following address:

> The Honorable Daniel E. Shearouse
> Clerk of Court
> Supreme Court of South Carolina
> P.O. Box 11330
> Columbia, South Carolina 29211

The Supreme Court must receive any written comments by August 20, 2014. Additionally, the Court requests that an electronic version of the comments in Microsoft Word or WordPerfect be e-mailed to rule45@sccourts.org by that same date.

Columbia, South Carolina
July 21, 2014

The South Carolina Bar proposes that Rule 45(b)(1), SCRCP, be amended as follows. Additions to the rule are underlined and deletions are shown in strike-through text.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made in the same manner prescribed for service of a summons and complaint in Rule 4(d) or (j)~~,~~. ~~and, if~~ If the person's attendance is commanded, then that person shall, upon his arrival in accordance with the subpoena, ~~by tendering to that person the~~ be tendered fees for ~~one~~ each day's attendance of $25.00 and the mileage allowed by law for official travel of State officers and employees from his residence to the location commanded in the subpoena. When the subpoena is issued on behalf of the State of South Carolina or an officer or agency thereof, fees and mileage need not be tendered. Unless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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

N O T I C E

IN THE MATTER OF KRISTIE ANN McAULEY, PETITIONER

Petitioner was definitely suspended from the practice of law for eighteen (18) months, retroactive to August 24, 2011. *In the Matter of McAuley*, Opinion No. 27399 (S.C. Sup. Ct. filed June 18, 2014)(Shearouse Adv. Sh. No. 24 at 16). Petitioner has now filed a petition seeking to be reinstated.

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

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

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
July 21, 2014

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

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

N O T I C E

In the Matter of Gregory Lance Morris

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on August 27, 2014 beginning at 3:00 p.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

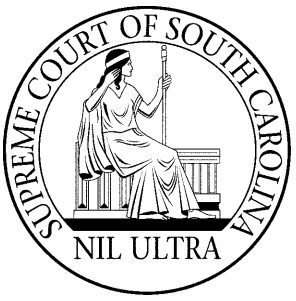
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Susan Taylor Wall, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 21, 2014

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 23, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ashley II of Charleston, L.L.C., Plaintiff,

v.

PCS Nitrogen, Inc., Defendant-Third-Party Plaintiff,

v.

Ross Development Corporation; Koninklijke DSM N.V.; DSM Chemicals of North America, Inc; James H. Holcombe; J. Holcombe Enterprises, L.P.; J. Henry Fair, Jr.; Allwaste Tank Cleaning, Inc.; Robin Hood Container Express; and the City of Charleston, Third-Party Defendants.

Appellate Case No. 2013-001766

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
Margaret B. Seymour, United States District Judge

Opinion No. 27420
Heard March 4, 2014 – Filed July 23, 2014

CERTIFIED QUESTION ANSWERED

Wm. Howell Morrison, of Haynsworth Sinkler Boyd, P.A., of Charleston, John B. Williams, of Cozen O'Connor, of Washington, D.C.; and Sandra Kaczmarczyk, of Alton Associates PLLC, of Washington, D.C., for Defendant/Third-Party Plaintiff.

G. Trenholm Walker, and Daniel S. "Chip" McQueeney, Jr., both of Pratt-Thomas Walker, P.A., of Charleston; and T. McRoy Shelley, III, of Rogers Townsend & Thomas, PC, of Columbia, for Third-Party Defendant.

JUSTICE KITTREDGE: We certified the following question from the United States District Court for the District of South Carolina:

> Does the rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts, unless such intention is expressed in clear and unequivocal terms, apply when the indemnitee seeks contractual indemnification for costs and expenses resulting in part from its own strict liability acts?

In the context of the underlying claim in federal court, we answer the certified question, "no."

I.

Central to this certified question is the operation of a fertilizer-manufacturing site (Site) in Charleston, South Carolina, that spanned approximately forty-three acres, and was owned at various times by the parties. In 1906, Ross Development Corp.[1] purchased the Site and operated a fertilizer manufacturing facility until 1966. The fertilizer manufacturing process led to arsenic, lead, and acid contamination at the Site.

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[1] Ross Development Corp. was formerly known as Planters Fertilizer & Phosphate Co. (Planters). We refer to Ross and Planters collectively as "Ross."

In 1966, Ross sold the Site to PCS Nitrogen, Inc.[2] The purchase agreement included an indemnity provision, which stated: "[Ross] agrees to indemnify and hold harmless [PCS] in respect to all acts, suits, demands, assessments, pr[o]ce[e]dings and cost and expenses resulting from any acts or omission[s] of [Ross] occurring prior to the closing date . . . ."

During the approximately twenty years PCS owned the site, it contributed to the environmental contamination by continuing to manufacture fertilizer and disturbing the contaminated soil during various demolition activities. In 2003, Ashley II of Charleston, Inc. (Ashley II) purchased 27.62 acres of the Site. Since that time, Ashley II has incurred substantial costs in remediating the environmental contamination.

In July 2008, Ashley II filed a complaint against PCS seeking a declaration of joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act[3] (CERCLA) due to costs of the environmental cleanup at the Site. PCS asserted federal statutory contribution claims against Ross and others, contending those named were also liable for environmental cleanup costs. Additionally, PCS asserted a third-party indemnification claim against Ross based on the indemnity provision in the 1966 purchase agreement, seeking indemnification for attorney's fees, costs, and litigation expenses incurred in establishing that Ross contributed to the contamination.

After a bench trial, the district court found that PCS was liable to Ashley II for environmental cleanup costs and PCS was entitled to indemnification for attorney's fees and costs from Ross. Following Ross's motion for reconsideration, the district

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[2] PCS Nitrogen, Inc. is the successor-in-interest to Columbia Nitrogen Corp. (CNC). We refer to PCS and CNC collectively as "PCS."

[3] 42 U.S.C. §§ 9601–9675 (2006). "CERCLA imposes strict liability on all entities that have owned or operated 'facilities' at which hazardous substances were 'disposed.'" *Anderson Bros. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923, 929 (9th Cir. 2013) (footnote and citations omitted). "Congress enacted CERCLA 'to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.'" *Litgo New Jersey Inc. v. Comm'r N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 378 (3d Cir. 2013) (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009)).

court vacated its indemnification order and certified the above question to this Court.

II.

We have long recognized "that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Laurens Emergency Med. Specialists, PA v. M.S. Baily & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (quotations and citation omitted). In this case, we are asked whether this "negligence rule" also bars indemnification in cases where the liability is strict and not fault-based. Based on the public policy underlying the negligence rule, the nature of CERCLA liability, and our law respecting the freedom of parties to contract, we would decline to extend the negligence rule to bar indemnification in this case.

A.

The policy basis for the negligence rule is simple—barring indemnification when the indemnitee is at fault for the damages serves to deter negligent conduct in the future, for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care. *Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E. 231, 232 (1934). However, we have declined to apply the negligence rule to bar indemnification, even in the context of a negligence action, when application of the rule would have no deterrent value. *See S.C. Elec. & Gas Co. v. Utils. Constr. Co.*, 244 S.C. 79, 82–90, 135 S.E.2d 613, 614–19 (1964) (rejecting an independent contractor's attempt to invoke the negligence rule where "the only negligence chargeable to the [indemnitee] . . . was the negligence of the [indemnitor-independent contractor] itself," for the application of the negligence bar to indemnification under the circumstances would not further the purpose of the negligence rule barring indemnification).

We find that barring indemnification in this case would not serve the deterrent purpose of the negligence rule. The nature of CERCLA liability is fundamentally not a fault-based determination. *See United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988) ("The traditional elements of tort culpability . . . simply are absent from [CERCLA]. The plain language . . . extends liability to owners of waste facilities regardless of their degree of participation in the subsequent

disposal of hazardous waste."). Of course, relative fault does factor into the ultimate liability calculus in the form of CERCLA's contribution provision. *See* 42 U.S.C. § 9613(f) (2006) (authorizing one potentially responsible party to sue another for equitable contribution). Contribution, however, is merely a way to equitably apportion costs *after* liability has been established. Application of the negligence rule would not serve to deter liability in the first instance because CERCLA liability is not premised on identifying particularized harm caused by certain parties, but instead is imposed upon classes of parties based on their status, typically as owners of the contaminated premises. *Nurad, Inc. v. William E. Hooper & Sons*, 966 F.2d 837, 841 (4th Cir. 1992).

Moreover, the indemnification agreement was limited to any liability attributable to Ross up to the date of the 1966 closing—there was no prospective, post-1966 closing liability for which Ross could be responsible under the indemnification provision. The agreement did not permit indemnification from Ross for any liability (by way of negligence, strict liability or otherwise) after the 1966 closing. We similarly observe that PCS seeks to enforce the indemnification provision in strict accordance with its terms by limiting its claim to fees and costs associated with Ross's CERCLA liability incurred because of its ownership and operation of the Site prior to the 1966 closing.[4] Enforcing the indemnification provision under these circumstances in no manner runs afoul of the negligence rule; we would enforce the agreement.

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[4] Because PCS does not seek to recover its fees and costs associated with CERCLA liability attributed to contamination occurring after the 1966 closing, PCS is not seeking "contractual indemnification for costs and expenses resulting in part from its own strict liability acts," as the certified question suggests. We acknowledge the record before us may be incomplete. If, based on the current record, we have misapprehended the scope of PCS's indemnification claim against Ross, we invite a rehearing petition to specifically identify where in the record PCS seeks indemnification from Ross for any acts or omissions of Ross occurring after the 1966 closing date. The 1966 indemnification agreement, to be sure, does not allow for indemnification for any acts or omissions by Ross occurring after the 1966 closing date. Such result is a function of the clear terms of the indemnification agreement, not an expansion of the negligence rule.

B.

Such a finding comports with our longstanding regard for parties' freedom to contract. *See Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[P]eople should be free to contract as they choose."). While the freedom to contract is not without limitation, "[s]trong policy considerations . . . generally permit business owners to allocate risk amongst themselves as they see fit." *Constable v. Northglenn, LLC*, 248 P.3d 714, 718 (Colo. 2011) (citations omitted). An indemnity agreement is an ideal method for businesses to allocate costs and expenses that may arise in future litigation. Indeed, the parties to the 1966 agreement were sophisticated business entities that engaged in an arms-length purchase agreement and chose to include an indemnity provision in the contract. We find no basis to invoke the negligence rule to trump the plain language of the indemnity agreement.[5]

III.

Because the deterrent purpose underlying the negligence rule would not be served by its application under these circumstances, we find that the negligence rule does not bar indemnification in the underlying CERCLA action. We answer the certified question, "no."

CERTIFIED QUESTION ANSWERED.

TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice Eugene C. Griffith, Jr., concur.

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[5] We note the narrow reach of today's holding. Our holding is limited to determining that the negligence rule—which would operate as a bar to enforcement of the indemnification provision—does not preclude contractual indemnification under the facts of this CERCLA action. We make no finding regarding how PCS's indemnification claim should be resolved, for such a finding is reserved to the district court. And finally, we do not permanently close the door on the possibility that in a different context there may a sound basis for applying the negligence rule outside of the traditional parameters of a negligence action.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Edward Weik, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2007-060700

ON WRIT OF CERTIORARI

Appeal from Dorchester County
Perry M. Buckner, Post-Conviction Relief Judge

Opinion No. 27421
Heard February 19, 2014 – Filed July 23, 2014

REVERSED AND REMANDED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for the Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the denial of John Edward Weik's (Weik or Petitioner) application for capital post-conviction

relief (PCR). Weik argues the PCR court erred in denying relief on a number of grounds. We reach only the challenge concerning the complete lack of social history mitigation evidence in the sentencing phase. Because of the lack of social history mitigation evidence, we are constrained to reverse and remand for a new sentencing hearing.

I.

Weik was convicted of murdering his former girlfriend following an argument over the couple's child. Weik confessed to the shooting and cooperated with law enforcement. There was never any dispute regarding guilt.

During the sentencing phase, the State proceeded on two aggravating circumstances—burglary and torture.[1] Regarding Weik's mental status, the defense relied on three mental health experts, who all of whom testified that Weik suffers from paranoid schizophrenia, including auditory and visual hallucinations, suicidal ideations, and paranoid delusions.[2] The defense, however, failed to present readily available evidence concerning Weik's chaotic upbringing and dysfunctional family. It is the absence of the social history mitigation evidence that compels us, under controlling United States Supreme Court precedents, to grant Weik a new sentencing hearing.

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[1] Burglary was asserted because the shooting occurred on the victim's property, and torture was predicated on the multiple shots the victim sustained.

[2] In his statement to police, Weik stated that he heard voices in his head just before the shooting, felt as if some physical force kept him from leaving the victim's home, and as he shot the victim, he watched it "from above and the side" as if his actions were being played "on a monitor." Specifically, Weik believes he is being targeted by federal investigative agencies and that employees of the CIA and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) drive by his home multiple times each day in vehicles equipped with computers that monitor his whereabouts and track his activity. Weik is also suspicious of the Masons and was adamant that he assist counsel in selecting the jury to ensure there were no CIA agents or Masons selected to serve on his jury. Weik also quietly chanted passages from the Bible throughout his trial, "so the voices [in his head] would not bother [him]."

A.

Pre-trial interviews conducted with Weik's relatives, coworkers, and other acquaintances revealed Weik's childhood was traumatic, filled with emotional and physical abuse at the hands of his psychotic father, Russell Weik. Indeed, one mitigation specialist with forty years of investigative experience described Weik's family as the most dysfunctional family she had ever encountered.

Despite the wealth of social mitigating information defense investigators discovered about Weik's troubled background, during the penalty phase of the trial, defense counsel called only one witness, Weik's youngest sister, Amy, to testify very briefly about Petitioner's abusive upbringing. This part of Amy's testimony comprises three pages out of a multi-thousand page record. This limited and general testimony offered nothing in terms of specifics, as Weik's childhood was described as merely "rough." When Amy was asked to be "more specific" about Weik, she replied, "the abuse that we suffered, all of us." Cursory and nonspecific reference was made to Weik's father's "military flashbacks." Amy concluded her scant testimony as to Weik's upbringing and childhood by stating that our "father was always paranoid, abusive, I don't know. Something was wrong with him and I don't know exactly what it was."

No other family members or coworkers were called to testify on Weik's behalf during the sentencing phase.[3]

The State countered with expert testimony from two mental health experts who both testified Weik did not have schizophrenia, but rather, he suffered from schizotypal personality disorder. The State's forensic psychologist also testified that Weik: (1) was the product of an "intact" family; (2) developed normally; (3) did not experience any childhood behavioral problems; (4) quit high school in eleventh grade; (5) had an average IQ; and (6) did not suffer from any alcohol or drug abuse issues.

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[3] During the *guilt* phase, defense counsel called Petitioner's mother. However, her testimony regarding Weik's upbringing occurred during an in camera hearing and was never heard by the jury. Several other members of Weik's family were present at trial and willing to testify but were never called by defense counsel.

At the conclusion of the sentencing hearing, the jury recommended a sentence of death, which the trial court imposed. Weik's conviction and sentence were affirmed on direct appeal. *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002).

B.

Thereafter, Weik filed a PCR application claiming, among other things, that trial counsel were ineffective for failing to present mitigation evidence relating to his family and social history that was available at the time of his trial. The testimony elicited during the PCR hearing revealed trial counsel's troubling inattention towards preparing for the mitigation phase of trial, despite Petitioner's admission of guilt from the outset of the case.

After the State served notice of intent to seek the death penalty, attorneys Percy Beauford[4] and Marva Ann Hardee-Thomas[5] were appointed to represent Weik in July of 1998. However, it was not until March 1999—a mere eleven weeks prior to trial—that counsel hired investigator Patti Rickborn[6] to begin a mitigation investigation. Rickborn testified that she met with Beauford and Hardee-Thomas

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[4] While Beauford was an experienced criminal lawyer, he had never previously represented a client facing the death penalty or attended any seminars or continuing legal education courses dedicated to capital defense. However, Beauford testified that he did consult briefly with two experienced, local attorneys prior to trial.

[5] Hardee-Thomas is currently suspended from the practice of law. *See In re Marva Ann Hardee-Thomas*, 391 S.C. 451, 706 S.E.2d 507 (2011) (citing Rules 1.1 (Competence), 1.3 (Diligence), 1.15 (Safekeeping Property), 8.4(a) (Misconduct), 8.4(d) (Conduct involving dishonesty), and 8.4(e) (Conduct prejudicial to the administration of justice)). Hardee-Thomas's disciplinary history also includes a Letter of Caution without a finding of misconduct and an Admonition citing Rules 1.1 (Competence), 1.3 (Diligence), and 1.4 (Communication). At the time of Petitioner's trial, Hardee-Thomas, a contract public defender, had approximately four years of felony trial experience and claimed to have been "third chair" in one previous death penalty case.

[6] Rickborn has been a mitigation specialist since 1985, and at the time of Weik's trial, she had worked on approximately twenty capital cases.

only once, and during that one meeting, it was "absolutely clear" that Hardee-Thomas was to be her contact person. According to Rickborn, she made repeated requests for Hardee-Thomas to provide her investigative leads, names and contact information for the defense mental health experts, and assistance in obtaining a court order for Weik's father's military mental health records; however, despite Rickborn's persistence, Hardee-Thomas gave only evasive replies, promising to respond in the future, or failed to acknowledge Rickborn's requests altogether.

Despite receiving virtually no guidance from defense counsel, Rickborn, an experienced mitigation specialist, began the investigation and was able to provide Hardee-Thomas with a potential witness list for the penalty phase, which included contact information for Weik's parents, siblings, and other family members, a list of places from which to obtain records, as well as detailed investigative interviews with Weik's family members that revealed pervasive mental health issues throughout the Weik family and that Weik endured severe emotional, psychological, and physical abuse during his childhood. Rickborn provided all of this information to Hardee-Thomas but received no response. [7]

Approximately six or seven weeks after being hired, an exasperated Rickborn resigned from the defense team. In her resignation letter, [8] Rickborn explained she

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[7] At the PCR hearing, Petitioner produced a number of letters from Rickborn to counsel indicating she needed additional information from counsel. In her letters to Hardee-Thomas, Rickborn also suggested counsel take certain follow-up steps and emphasized the importance of family witnesses to provide information about Weik's childhood and social history due to the lack of corroborating medical and school records. Rickborn testified that she provided such direction because Hardee-Thomas "didn't seem to know what to do with the information I was giving her." Likewise, Jeff Bloom, who was retained by counsel as a jury consultant one week prior to trial, testified at the PCR hearing that it was clear from his interaction with counsel that they were "in way over their heads" and did not understand the mitigation evidence they had or how to use it.

[8] In her final letter, Rickborn stated:

> I have been working on this case six to seven weeks. During this time I have asked that certain steps be taken by you as attorneys to assist me with preparing the best defense possible for [Weik] should his

case reach the penalty phase.

I have asked that you try to obtain a court order for the client's medical records. Since it was so late in the case when I became involved I felt this would expedite [the] collection of medical records. It would also have allowed me to cover a wide area of medical facilities to try to be sure that we had all records of the client's treatment for the head injuries that he reported. Since I did not receive that I obtained Dorchester County subpoenas and spent a great deal of time trying to obtain any records that may exist for the client.

I have asked that you try to obtain a court order for medical and psychiatric records for Russell Weik, the client's father. Since these records would be maintained by the Veteran's Hospital, part of the United States Military, I knew that we could not get a copy of these records without a court order. These records could have been important to establish the condition of Russell Weik and substantiate the client's siblings['] stories. Even if we presented a court order to obtain those records today we would probably not get these records until the trial is underway.

. . . .

I have documented the memos that I have mailed and faxed to Ms. Hardee-Thomas. I have never gotten a satisfactory response. I was sending these things to Ms. Hardee-Thomas because Mr. Beauford told me, in her presence, that she would be handling the "paperwork" on this case. When I have been able to speak with Ms. Hardee-Thomas on the phone she is always in a rush and hangs up before I can discuss the case with her.

I have found reports of emotional, psychological and physical abuse in the client's family. I have prepared reports and forwarded them to the doctors. I have supplied you with a potential witness list. Most of them have been contacted.

. . . .

was no longer willing to assist counsel with Petitioner's case because counsel failed to provide her with investigative leads, repeatedly failed to answer her direct questions or otherwise cooperate with her, and failed to provide her a copy of an order approving payment for her services.[9] In her PCR testimony, Rickborn stated she was "completely frustrated" because "I was getting no response from them. I mean, as far as I was concerned, I wasn't working with anybody. There was nobody to work with."

About a week later, counsel contacted a different mitigation investigator, Scott Parker, to complete the investigation Rickborn had begun. Due to the incomplete status of the investigation, Parker requested two months' additional time to prepare, and as a result the defense team moved for a continuance.

During the pre-trial hearing on the continuance motion, Beauford explained that Rickborn left the defense team and requested that the trial be continued for a period of two weeks to allow a substitute investigator time to obtain certain medical records.[10] Beauford was not candid with the trial judge about the true reason for Rickborn's departure, opting to invoke "communication problems" as the reason for her departure. When the trial judge directly asked counsel to explain why Rickborn quit, counsel stated, "I would think communication problems is a broad area we could use on the record."

The trial judge then stated:

> At this time I do not know if I need to resign from this case because I do not know if an order was ever approved by the judge for me to work on this case. In fact, I took myself off another case to work on this case. I will not be able to assist you further with this case.

[9] PCR evidence revealed defense counsel never requested an order approving payment for Rickborn's services, and Rickborn was never paid for the work she performed on Weik's case.

[10] Specifically, Beauford cited the need to obtain Petitioner's father's military psychiatric records—some of the very documents Rickborn requested that Hardee-Thomas assist her in procuring months earlier.

> If she's got a good reason to leave, I need to know it really on the record. In other words, if it's prejudicial to your client that she has jumped ship on you at the last second, you had to get somebody else, then I need to know what it is and I need to know what specifically your new fellow is going to do, how much time he needs, what it is he needs to do so I can say, all right, this is how it's going to be or isn't.

Despite this lifeline from the judge, counsel did not budge and reiterated, "basically, it was a matter of I guess communication in a sense. And I don't know what happened there. I mean basically she felt the communication wasn't the way she wanted it to be, so she decided not to be a part of the team, in short." Counsel failed to disclose Rickborn's resignation letter, or otherwise reveal the true reasons for Rickborn's departure. Not knowing counsel's complete lack of preparation regarding Weik's social history, the trial judge denied the motion for a continuance but offered to issue an order or make telephone calls to expedite the process of obtaining the records.

Thereafter, Parker conducted interviews with Weik's mother and father, brother Chris, sister Maggie, and brother-in-law Bill in an effort to uncover mitigating evidence for use at trial. Parker testified that he provided all of his interview reports to Beauford within two days of conducting each interview, but counsel never asked to meet with him to discuss or review any of the reports or instructed Parker to take any follow-up steps.[11] Parker testified that he was willing to offer counsel suggestions on how to integrate the information he discovered into the mitigation phase of trial, but counsel never asked him about any of the interviews he conducted or information he discovered, either before or during trial.

In short, some mitigating evidence of Weik's social history was developed and available to trial counsel for the sentencing phase. There is no evidence in the

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[11] The record does not reflect that Parker was provided with any of the information Rickborn gathered in order to aid his investigation, despite the fact that Rickborn had previously interviewed almost all of the witnesses with whom Parker spoke. Likewise, it does not appear that Parker was provided any information gathered by Bobby Minter, a fact investigator retained to assist counsel with the guilt phase of the trial, who had interviewed several of Petitioner's former coworkers, acquaintances, and relatives and provided counsel with a detailed list of those potential witnesses before Parker was retained.

record to suggest trial counsel made any effort to obtain and review this mitigation evidence. What is clear is that the jury heard from only Petitioner's sister Amy, whose testimony revealed virtually nothing about Weik's abusive upbringing.[12]

[12] Further, Amy testified at PCR that she met with trial counsel only one time about two weeks before Petitioner's trial regarding her testimony at trial; however, Amy stated counsel never asked her about her knowledge of Weik's childhood background or social history and that she and counsel never discussed the questions she would be asked prior to her taking the stand. Amy stated that, on the morning she was to testify, she told Beauford she felt like she had had a "nervous breakdown" due to some harassing phone calls she allegedly received from the Solicitor the night before, but Beauford did not respond or inquire about her emotional state/ability to testify effectively on the day of the trial.

During the PCR hearing, Beauford was questioned:

> Q: Since you didn't have an opportunity to know what [Amy] had said in the report or the interview that she gave to Ms. Rickborn, you didn't know what questions to ask to get that information out to the jury, did you?
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> A: I didn't know specifically, but I think I asked the open-ended questions that could have allowed it—maybe not—she didn't follow up and I didn't follow up, not knowing what the information was that I needed to get out to the jury.
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> Q. That's my point. I mean, if you had available to you, a report Ms. Rickborn had of her interview with Amy Weik, there was a lot more information [Amy] knew about. Isn't that correct?
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> A. I don't know what the report says, but possibly, it could have, yes.

II.

A.

At the PCR hearing, Weik presented the extensive mitigating evidence that was discovered before trial by defense investigators and available to counsel at the time of trial. Unlike the evidence presented during Weik's trial, which left the jury knowing no details about his social history, this extensive evidence shed light on his extremely dysfunctional, unstable, and abusive childhood.

Weik lived his entire life with his parents in a house that was filthy, had fallen into disrepair,[13] and did not have running water for a period of several years. Weik's father Russell Weik (Russell) compulsively hoarded things (particularly military-related items such as guns, knives, swords, and other weapons and munitions) such that the inside and outside of the home were piled high with junk and debris, leaving only narrow passages for getting around. By all accounts, Russell would "go crazy and start breaking up things" if anyone attempted to straighten any of the clutter.

Chris Weik, Petitioner's younger brother, stated he and his siblings lived in one bedroom. He described his family as "very poor." Chris described his home as very old and lacking air conditioning and running water for a period of time. Chris testified other children frequently teased him and his siblings about being so poor and that he and Petitioner would get "beat up, hit with rocks, [and] throwed in the dirt" by other children. Chris testified Petitioner's learning disability was apparent from a very early age and that Petitioner attended special education classes. Chris explained that Petitioner was born with a very large head, and that his family made fun of him for it, even nicknaming him "Eggy" due to his "egg head." Chris testified Petitioner did not drop out of school, but was expelled after he fought another student who teased him for being "slow."

[13] Parker initially could not locate the family home due to the dense overgrowth of vines and shrubbery which "completely engulf the structure and obscure it from view," even though it sits just a few feet from the road.

Chris also testified about growing up in a household with their father, Russell. Chris stated his father experienced daily Vietnam flashbacks, and he would get out his gun, load it, sharpen his bayonet, and put on his Army helmet and pack. Chris claimed his father told them he executed over two thousand people in Vietnam, and he taught them how to kill people by "crushing the windpipe" and "snatching the heart." Chris indicated that when their father took them camping, he would give them a forty-five caliber semiautomatic pistol and tell them to stand guard against the Viet Cong. Chris stated his father brought home bags of concrete, weapons, C-rations, helmets, canteens, and bayonets to prepare for any future attacks and set tripwires in the yard to teach his children that life is unpredictable. Chris stated his father had a forty-four Magnum, a German Mauser, cap and ball pistols, hand grenades, dynamite, and blasting caps, all of which were handled loosely around the children. Chris claimed he and Petitioner had their own survival packs, which included bayonets and gun cleaning kits. Chris indicated Petitioner, like Russell, was fascinated with guns.

Chris testified Russell would not allow them to invite friends over because he feared they might be spies. Chris and Petitioner were also not allowed to discuss anything that happened in the house with others. Chris stated he and Petitioner had been beaten with rubber hoses, rose bush switches, a car antenna, a coax cable, and a machete. Chris testified his father beat him two to three times a month, and sometimes kicked him in the backside with steel-toed boots. Chris claimed his father would also punish his children by locking them in the sweltering hot attic, which had no air conditioning and windows that were nailed shut, for hours at a time.

Ramonda "Rae" Ferrer-Klocek, Petitioner's half-sister, stated that after her father died when she was nine years old and her mother married Russell, her home life became miserable. Rae described Russell as a harsh disciplinarian who consistently berated all of the children, particularly Petitioner, who was an easy target because he was "slow." According to Rae, Russell called Petitioner "worthless" and "stupid" and told him he would never be good for anything. Rae stated that Russell's aggression towards Petitioner became worse when Petitioner started school and struggled with his schoolwork. Rae remembered seeing Petitioner hit himself in the head with his fists and call himself stupid, like his father did.

Rae recalled a time when Petitioner was still in diapers that Russell became angry at him and struck him so hard that Petitioner came off the ground and slammed into the wall. Rae also recounted a time when Russell flew into a rage over a minor annoyance and shot the children's long-time pet. According to Rae, she and the other children "always had to walk on eggshells and be careful not to make too much noise because annoyances would set him off and trigger a fit of rage." Rae stated that her mother did not defend the children from Russell's abuse. Rae responded to the abusive environment by moving to New Hampshire.

Magdalena "Maggie" Ferrer Gunter, Petitioner's half-sister, testified that living with Russell was "hell" because he had a very violent, sometimes outrageous temper, and he would break items in her mother's house. According to Maggie, Russell kept an abnormally large quantity of firearms in the home and enjoyed "being like on a power trip, like he could control you." Maggie recalled one time when her mother had left home for a few hours, for no discernable reason, Russell made her sit at the kitchen table, forbidding her to move until her mother returned home. Maggie stated that, had she not married Bill Gunter at age eighteen and moved to Florida, she would have "gotten away somehow" because "nobody would want to stay there very long."

Maggie also testified about Petitioner's odd behaviors as a child, including that he "would laugh at things that weren't really funny to us or to the average person." Maggie also stated that Petitioner was slow learning to talk, but once he began, he was a very talkative child, speaking very quickly and rambling from thought to thought. Maggie stated that she suspected Petitioner may have had some mental health issues, but Petitioner never had a psychological evaluation because her family did not believe in taking children to doctors and could not afford medical or psychiatric care.

Bill Gunter, who served in the military with Russell and married Russell's step-daughter Maggie in 1969, testified that Russell obsessively collected guns and other weapons, including live dynamite, in the home, "for his protection" because Russell "feared the government quite a bit, he was afraid we were going to be invaded and we're going to need the guns to defend ourselves . . . against []our enemies." According to Bill, Russell did not act as a father figure towards the children, who he largely ignored, except to torment Petitioner and Chris in order to "toughen them up." In that regard, Bill stated Russell would require the boys to perform tasks like standing at attention outside at all hours of the night in their

underwear, submitting to personal inspections in the bathtub, marching around the yard, and responding to military-style commands.

Russell had an unpredictable and violent temper. Bill stated there was no way to anticipate what was going to upset Russell, and he would get very angry and beat the kids with "whatever he could get his hands on." Bill recounted that he had seen Russell use his fists to hit his sons in the chest and in the face and whip them with a flyswatter, an antenna, and his belt. Bill also confirmed that Russell claimed to have taught his children various methods to kill another person, including "a quick way of killing [someone] where they wouldn't make any sounds." Bill also testified that Russell spoke often of his participation in clandestine CIA operations both in Vietnam and stateside after the war ended. Bill understood that Russell was extremely unstable.

As to Petitioner's childhood, Bill testified that as a young child, Petitioner looked different than most children because of his enlarged head. Bill also stated that Petitioner "seemed to develop slower than the other children did at his age. He walked at a much later date, he began to talk very slowly, he didn't seem to grasp things as quickly as other children did." Bill also stated that it took Petitioner much longer than other children to be potty trained. Bill also testified that, as a young child, Petitioner appeared to do things in search of attention and praise and "he got very little of either. When he would do something good his father seemed to just take an indifferent approach to it." Bill also stated that Petitioner did not relate well to other children and "other kids seemed to tease him a lot because they could fluster him." Bill testified that, as a teenager, Petitioner had very few friends and became somewhat of a loner. Bill also stated that as Petitioner aged, he began to have difficulty concentrating, experienced dramatic personality swings and became unpredictably irritable.

By all accounts, Russell regularly suffers from "flashbacks" regarding his service in the military. In one of these events, Russell mistook his daughter Amy for "Charlie" and violently strangled the girl, who was just eight years old at the time. Amy's life was saved only by Petitioner's mother intervening and hitting Russell in the head with a frying pan, knocking him unconscious. Russell acknowledges that he was not a good father and was very abusive and violent towards his children, but maintains that he "could not help it." Russell also proudly claims that he "trained" his children in "hand-to-hand combat" and "jujitsu" and taught them "how to protect themselves."

Undeniably, Russell was the biggest influence in shaping Petitioner's childhood. It is the evidence regarding Russell's impact in particular that Petitioner claims would have affected the jury's sentencing decision. The impact of this omitted evidence can only be appreciated through a recitation of the most pertinent parts of Russell's PCR testimony.

Russell is obsessed with the military and conjures detailed fantasies about being involved in various military missions. At the PCR hearing, Russell testified that after boot camp, he was approached to be a "ghost warrior" and participate in a "little experimentation"—a joint effort among the CIA, the Marines, and the Navy.[14] Russell stated that he received military training in "[f]ire fighting, nuclear biological chemical warfare defense, and also damage control." Russell, who never served in Vietnam, testified about a time when he was purportedly serving as a colonel in the Marines and led a group of eight Navy SEALs armed with AR-15 rifles on a nighttime parachute mission outside Saigon. Russell explained:

> Q: What was the purpose of the compound [you set up in Vietnam]?
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> A: Well, it started off in December of '64 when I got over there as an observation investigation team. We were to go out and we were the observers and we were also the people who made sure what was happening was according to the Geneva [C]onvention. . . . [T]he CIA told me to act like Gomer Pyle because everybody over there watched his show and Andy of Mayberry. So I would holler golly, shazam, or something like that because I was Jim Nabors.
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> Q: You got instructions from the [CIA] to do that?
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> A: Yeah. I had two people with me. One was an African American. The other was Caucasian, and their names were Smith and Jones, and the next week Jones was Smith and Smith was Jones.

[14] Russell claims he was employed by the CIA while simultaneously serving in both the Marine Corps and the Navy. Russell stated that, while serving in the military, he was granted a Top Secret level security clearance, which he maintains to this day. To be sure, Russell is a psychotic, very disturbed individual.

. . . .

Q. Now, who paid you? Did the CIA pay you?

A. It was all in scrip. . . . They didn't want you to use American money, and that's what it was in. . . . The next question you're going to ask is whether I was being paid as an E-3 or as a Colonel.

Q. I wasn't actually, but that is a good question. Why don't you go ahead and answer it.

A. I was paid as an E-3 because one of the things they didn't want was people to find out I was getting more money than them or something like that, and . . . I had the authority. In other words, by the power invested in me by the President of the United States and the Director of the CIA, I had the power to take over any phase or any plane or anything. . . . [I] [w]alked up to the Bird Colonel and told him he was my subordinate and the CIA man said, yes, sir, you are his subordinate. He is your commanding officer, and I said by the power invested in me by the President of the United States and Director of the CIA I now accept responsibility for your base, and all that it contains.

Regarding one instance of combat during the six months he claimed to have spent in Vietnam, Russell stated:

A: When you're going to die you get desperate, and I got all the people together and I told them that I wanted to live through this, and I said at the end of the day I hope we (*portion not audible due to the witness getting very emotional*). It was quite an interesting day. . . . I went around and counted the dead and it was three thousand sixty people.

Q: Were these Vietnamese?

A: Well, there wasn't much difference at that time because you didn't know whether it was North Vietnamese or Regulars. They all dressed the same. Little black pajamas and little hats.

Russell explained that, after returning from Vietnam, he was discharged from the military but reenlisted a short time later and was stationed in Charleston. Russell explained that, after reenlisting, he woke up one morning with dizziness, shortness of breath and a headache, so he "went up there to the sick call place, and they said I was having a nervous breakdown or something another." Regarding his treatment at the Charleston Naval Hospital, Russell explained, "I was back behind echo ward in what they called the observation unit first, and the CIA said they had to write me a new history because I stuck out like a turd in a punch bowl."

Thereafter, PCR counsel confronted Russell with his military records, which do not reflect any service in Vietnam.[15] Russell explained that those military records were inaccurate and fabricated by the CIA when they "rewrote his history" and that he was instructed by CIA personnel not to discuss the matter. According to Russell, even after his military service ended, he continued to serve as an undercover operative for the CIA.

B.

At the PCR hearing, the State elicited testimony from Petitioner's trial counsel. According to Beauford, his primary role was focused on the initial phase of the trial, and Hardee-Thomas's primary role was to hire, coordinate, and assist the mental health experts and mitigation investigators in preparation for the penalty phase. Beauford stated that he relied on Hardee-Thomas to coordinate these mitigation efforts and that he was unaware Hardee-Thomas utterly failed to do those things until just before trial. When asked about the nature of Hardee-Thomas's role, Beauford stated, "I wouldn't know what her role would be if you don't take any active part within the trial." Beauford stated that, during trial, Hardee-Thomas was present, occupying space, but did not contribute anything useful or of substance during the entire case, and he felt absolutely alone in representing Petitioner.

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[15] Russell never served in Vietnam. According to official records, Russell actively served in the Navy for four years and eight months and was honorably discharged after being hospitalized for chronic schizophrenia in July 1965. These records also reveal that Russell saw no combat and his most noteworthy accomplishment during service was completing his GED in December 1961.

Beauford testified he knew at the time of trial that Petitioner's father was "very abusive." Beauford testified he met several of Petitioner's family members and was aware of Russell's belief that he worked for the CIA. Despite meeting Russell prior to trial, Beauford stated he did not realize Russell was lying about his service with the CIA in Vietnam because he "didn't know him like that." Beauford conceded Russell was somewhat eccentric, but he stated, "you never know what a person might have been involved in at any time in these covert operations. So I just left it alone." At the PCR hearing, Beauford was questioned:

> Q: So no alarms went off in your head that [Russell] might be—there may be some further problem working behind the lines?
>
> A: Well, I mean, his behavior suggested something was wrong, but, again, I could read that into being in Vietnam or exposed to some chemical or something. I did think in the conversation when he was going on maybe about Agent Orange or something like that, but I didn't take the conversation to that extent.

Not having reviewed any of the interviews from Rickborn and Parker, Beauford chose to call Amy because she was "more stable" and could convey things better than others. However, Beauford admitted he did not know about Rickborn's reports and did not review those from Parker prior to trial; thus, he did not rely on that information in determining whether to call Petitioner's mother, father, and siblings as mitigation witnesses. Beauford conceded the interviews he failed to review prior to trial constituted "significant mitigation evidence" and that it would have been important for the jury to see that Petitioner was raised in a family surrounded by mentally ill people.[16]

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[16] Both Russell and Russell's father (Petitioner's paternal grandfather) suffered "nervous breakdowns" and were hospitalized for psychiatric illness. Additionally, Petitioner's mother and all of his siblings suffered from some form of mental health issue, such as depression, or alcohol or drug abuse problems. At the PCR hearing, two mental health experts testified that, had they been provided with this information prior to trial, they would have been able to emphasize Petitioner's strong genetic predisposition to schizophrenia and impeach the State's mental health experts, who diagnosed Petitioner with schizotypal personality disorder, which is considered a less severe disorder.

Hardee-Thomas admitted she never attempted to strategize, to discuss the defense theory of either phase of the trial, or to discuss the usefulness of the information from investigators and experts with Beauford. Hardee-Thomas testified her role in Weik's case was "assisting Mr. Beauford" as the "paper person" and "silent party." Hardee-Thomas stated she was not involved in deciding which witnesses to call, developing a theory of the case, or developing a mitigation strategy. Hardee-Thomas contended that she assumed such a role because Beauford wanted it that way. She stated she did not consider assuming a leadership role in the case because Beauford had already begun working on the case at the time she was appointed.[17] Hardee-Thomas claimed she wondered why she was appointed at all given that her involvement was so limited, but she never considered raising the issue to Beauford or the trial judge because she did not think that was appropriate. When asked for an explanation, Hardee-Thomas replied, "It's my understanding that I provided Mr. Beauford with the information and he decided the trial strategy."

When asked why obtaining evidence for the penalty phase of a capital case is important, Hardee-Thomas answered, "To give some defenses if anything." When asked how the information obtained by the mitigation investigators could have been used at trial, Hardee-Thomas responded, "To help Mr. Beauford help defend [Petitioner]."

Following a lengthy hearing, the PCR judge issued an order of dismissal, denying relief and finding counsel presented all available testimony to the jury and that counsel's decision to call only Amy could not be deemed deficient. As to prejudice, the PCR judge acknowledged there may have been other family members who were willing to testify, including Chris and Bill, and agreed those witnesses may have been able to provide additional perspectives regarding Petitioner's social history. However, the PCR judge found that "there has been an inadequate showing that there were relevant omissions such that to a reasonable probability the result would have been different." Thus, the PCR judge determined the additional witnesses and evidence would have merely provided Petitioner with

[17] Beauford was initially retained by Petitioner's parents to represent Petitioner. However, after the State served its notice of intent to seek the death penalty, Petitioner's parents informed Beauford they could not afford the cost of hiring mental health experts or a mitigation investigation. Thereafter, Beauford and Hardee-Thomas were appointed to represent Petitioner.

a "fancier" mitigation case, which is insufficient to show prejudice.[18] This Court granted certiorari to review the order of the PCR court.

III.

Weik argues counsel were ineffective for failing to present substantial mitigating evidence that was available at the time of his trial. Specifically, Weik argues defense investigators conducted extensive interviews with his family members and others, who provided significant mitigating information regarding the severe abuse he endured as a child, and that counsel were ineffective for failing to present that available information to the jury. Under current law, we must agree and find counsel were deficient in failing to present this readily available mitigating evidence. We further find Weik has established prejudice, for counsel's constitutionally deficient representation undermines confidence in the outcome.

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citation omitted). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 534 (quotations and citation omitted). "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* Prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537 (citation omitted). A "reasonable probability" is less than a preponderance of the evidence but still "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693–94.

"The sentencing stage is the most critical phase of a death penalty case." *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001). "Any competent counsel knows

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[18] *See Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding that the absence of "fancier" mitigation evidence does not render the prior mitigation case constitutionally inadequate where such evidence would not have had any effect on the outcome of the trial).

the importance of thoroughly investigating and presenting mitigating evidence." *Id*. During the sentencing phase of a death penalty trial, counsel is required to investigate and present meaningful mitigating evidence absent a reasonable strategic choice not to do so. *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005) (citing *Wiggins*, 539 U.S. at 538). Important sentencing phase considerations include a defendant's "medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins*, 539 U.S. at 524 (finding testimony that defendant suffered "physical torment" and sexual abuse as a result of his alcoholic, absentee mother and subsequent foster families constituted a "powerful mitigating narrative" that counsel was ineffective for failing to present); *see Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("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 may be less culpable than defendants who have no such excuse."); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death"); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (invalidating an Ohio law that did not permit consideration of aspects of a defendant's background); *Wilson v. Sirmons*, 536 F.3d 1064, 1088 (10th Cir. 2008) (finding "there is no substitute for the information counsel can glean from the family when researching the defendant's background, as they are almost always the only people who can provide a complete narrative of the defendant's life").

Weik contends counsel were ineffective for failing to elicit meaningful mitigating evidence from Amy, Chris, Maggie, Bill, and Russell during the mitigation phase. Weik argues these witnesses would have provided substantial mitigating evidence regarding his social history and background, and particularly about his tyrannical and psychotic father. Further, Weik argues the omitted mitigation evidence was critical for impeachment and cross-examination of the State's forensic psychologist expert, who largely painted a picture of Weik's childhood as normal.

The PCR judge erred in finding counsel presented all available mitigation evidence to the jury. Though counsel introduced *psychological* testimony regarding Petitioner's mental illness, counsel failed to present even a skeletal version of Petitioner's *social history* even though there was abundant social history evidence available to them.

Despite counsel's delay in beginning the mitigation investigation, defense investigators were nevertheless able to uncover substantial mitigating information about Petitioner's social history and provided counsel with written reports detailing that information. Yet, counsel simply failed to present any of this mitigating evidence to the jury; rather, the mitigation presentation consisted solely of Amy's extremely limited testimony, which was general, vague, and offered no detail or insight into the degree of abuse Weik suffered as a child. Thus, the jury remained unaware of the severity and pervasiveness of the physical and psychological abuse Weik faced and the full extent of his father's mental illness. The fact that the jury never heard this mitigating evidence can be attributed only to counsel's failure to review the investigators' reports they possessed in their own case files to become aware of the wealth of information that had been uncovered.

The PCR court further erred in finding counsel's failure to present this mitigating evidence was the product of a strategic decision. "'Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.'" *Council v. State*, 380 S.C. 159, 175, 670 S.E.2d 356, 364 (2008) (alteration omitted) (quoting *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.'" *Id.* (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). Here, Beauford did not interview, or even review the investigators' interviews of, Weik's family members. Thus, Beauford did not rely upon or even review the wealth of social history information he possessed before trial in determining whether to subpoena Weik's family members to testify during the mitigation phase. Likewise, Hardee-Thomas reviewed nothing and emphatically disclaimed responsibility for making any strategic choices in Petitioner's case.[19] Thus, we cannot conclude that counsel made any reasoned, strategic choices regarding which witnesses would testify—there simply was no mitigation strategy regarding Petitioner's social history.

We find the decision to call only Amy to testify in mitigation resulted from counsel's inattention, not reasoned strategic judgment. *See Wood v. Allen*, 558 U.S. 290, 304 (2010) (emphasizing the distinction between the issue of whether counsel made a strategic decision in the first place and the issue of whether a

[19] The representation by Hardee-Thomas is especially troubling, for she simply washed her hands of the case, leaving the entire representation to Beauford.

strategic decision is a reasonable exercise of professional judgment under *Strickland*); *Wiggins*, 539 U.S. at 526–27 (finding the state court's invocation of the "strategic decision" doctrine to justify counsel's failure to pursue mitigating evidence "resembles more a post hoc rationalization of counsel's conduct than an accurate description of [counsel's] deliberations prior to sentencing").

Indeed, counsel did not undertake a strategic decision to omit the mitigation evidence identified above; counsel simply did not read the investigators' reports and therefore did not know such evidence was available. Decisions made in ignorance of relevant, available information cannot be characterized as strategic. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 39–40 (2009) (finding counsel's failure to "even take the first step of interviewing witnesses or requesting records" did not reflect reasonable professional judgment); *Johnson v. Bagley*, 544 F.3d 592, 605 (6th Cir. 2008) (finding the failure to present substantial mitigating evidence regarding capital defendant's "remarkably traumatic childhood" was the result of counsel's "bungling or sheer laziness" and not a reasoned strategic decision warranting deference); *Haliym v. Mitchell*, 492 F.3d 680, 716 (6th Cir. 2007) (finding where a capital defendant "had everything to gain and nothing to lose" by introducing certain mitigating evidence during the penalty phase, there was "no rational trial strategy that would justify the failure of [] counsel to investigate and present [such] evidence" (citations and quotations omitted)); *Anderson v. Sirmons*, 476 F.3d 1131, 1145–46 (10th Cir. 2007) (finding where counsel's decision not to present readily available evidence in mitigation was made in ignorance of relevant facts, such a decision could not be considered a "tactical decision"); *Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir. 2001) (finding counsel's uninformed decision not to present favorable evidence "was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated 'strategic' and [have] been especially reluctant to disturb"); *Loyd v. Whitley*, 977 F.2d 149, 159 (5th Cir. 1992) (finding where significant mitigating evidence in a capital case was not presented to the jury, "[c]ounsel 'did not *choose,* strategically or otherwise, to pursue one line of defense over another. Instead, he simply abdicated his responsibility to advocate his client's cause.'" (quoting *Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985))). Accordingly we find the PCR court erred in finding counsel were not deficient in this regard. Indeed, as the United States Court of Appeals for the Sixth Circuit noted:

> [M]itigation investigation . . . is literally of life and death importance, for if the mitigating evidence is insufficient, the defendant is sentenced to death. In this case, each of [the defendant]'s two attorneys thought the other was handling the investigation of mitigating evidence to be presented at the sentencing phase of the trial. As a result, virtually no mitigating evidence about [the defendant] was discovered or presented. . . . Only one witness, [the defendant]'s mother, was called on behalf of [the defendant] and she was asked very general questions about [the defendant]'s childhood. A reading of the direct examination takes approximately 90 seconds and fills less than three pages of transcript. This failure on the part of his attorneys goes beyond ineffective. It strikes closer to total incompetence. . . . This was no strategic choice not to present mitigating evidence, which would at least be defensible. Here, the attorneys utterly failed to even look for anything that would cause a jury to consider giving their client a life sentence rather than death.

O'Guinn v. Dutton, 88 F.3d 1409, 1424 (6th Cir. 1996) (en banc) (Merritt, C.J., concurring).

As to the prejudice prong of the *Strickland* analysis, we find that in reweighing the aggravating factors against the totality of available mitigating evidence, counsel's deficient representation undermined confidence in the outcome. *See Wiggins*, 539 U.S. at 536 (finding that had the jury been confronted with considerable mitigating evidence regarding the "sordid details of [Petitioner's] life history," there was "a reasonable probability that it would have returned with a different sentence"); *Lockett*, 438 U.S. at 603 ("[P]ossession of the fullest information possible concerning the defendant's life and characteristics is highly relevant—if not essential—to the selection of an appropriate sentence." (quotations, alteration, and citations omitted)).

On the whole, the testimony presented at the PCR hearing revealed graphic and detailed accounts of Petitioner's abusive and dysfunctional childhood, saturated with violence and military fantasies, which was not apparent from the scant testimony presented at trial. Moreover, this testimony would have demonstrated Petitioner's genetic predisposition to schizophrenia and helped explain his auditory and visual hallucinations at the time of the shooting. Given that Amy's testimony presented no meaningful evidence of Petitioner's social history, we reject the PCR judge's conclusion that Petitioner merely seeks a "fancier" mitigation case. *See*

Rosemond v. Catoe, 383 S.C. 320, 329, 680 S.E.2d 5, 10 (2009) (rejecting the State's argument that the petitioner merely sought a "fancier" mitigation case where no evidence of capital defendant's known mental health issues was presented at trial (quoting *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998))); *Council*, 380 S.C. at 176, 670 S.E.2d at 365 (finding counsel were ineffective for failing to present only limited mitigation testimony where "there was very strong mitigating evidence to be weighed against the aggravating circumstances presented by the State" and concluding "this evidence may well have influenced the jury's assessment of Respondent's culpability" (citing *Rompilla*, 545 U.S. at 393)).

Undoubtedly, Russell's testimony revealed he was extremely delusional and his testimony would often wander in a manner similar to the descriptions of Petitioner's behavior given by defense psychiatrists and psychologists in support of their contention that Petitioner suffers from schizophrenia. Moreover, there was very little testimony presented in mitigation to contradict the State's expert testimony that Petitioner had an average IQ, no history of drug or alcohol abuse, was the child of an "intact family," and developed normally as a child, with no behavioral problems. Given that the circumstances in aggravation were Petitioner's kicking open the victim's door immediately prior to the shooting (burglary) and physical torture (the delay between the first shot and the fatal shot due to Petitioner's gun jamming), we find there is a reasonable probability that the missing details regarding the degree of physical and emotional abuse Petitioner suffered and the full extent of Russell's mental illness and its impact on the Weik household might well have influenced the jury's determination. See *Wiggins*, 539 U.S. at 537 (finding prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance"). Accordingly, confidence in the outcome is substantially undermined, and we find Weik was prejudiced by the omission of this significant and readily available mitigating evidence. We reverse the denial of PCR on this issue and remand the case for a new sentencing hearing. [20]

[20] In light of Weik's entitlement to a new sentencing hearing, we need not address the remaining assignments of error concerning the sentencing phase. *See Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10 (holding appellate court need not reach remaining issues when addressed issues are dispositive) (citing *Hughes v. State*, 367 S.C. 389, 409, 626 S.E.2d 805, 815 (2006)).

IV.

We reverse the PCR court and hold that Weik established his entitlement to a new sentencing hearing as a result of trial counsel's failure to present available mitigating evidence regarding his social history. We remand the case for a new sentencing hearing.

REVERSED AND REMANDED.

Acting Chief Justice PLEICONES, BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shannon Ranucci, Petitioner,

v.

Corey K. Crain, Respondent.

Appellate Case No. 2012-211188

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 27422
Heard May 20, 2014 – Filed July 23, 2014

REVERSED AND REMANDED

Daryl G. Hawkins, of Law Office of Daryl G. Hawkins, L.L.C., of Columbia; John S. Nichols and Blake Alexander Hewitt, both of Bluestein Nichols Thompson & Delgado, L.L.C., of Columbia; Eric Christopher Davis, of Eric C. Davis, P.A., of West Columbia, for Petitioner.

Dennis Gary Lovell, Jr., Lee Cannon Weatherly and Michael Baxter McCall, all of Carlock Copeland & Stair, L.L.P., of Charleston, for Respondent.

Andrew A. Mathias, of Nexsen Pruet, L.L.C., of Greenville, for Amicus Curiae, South Carolina Hospital Association.

JUSTICE BEATTY: Shannon Ranucci appealed the circuit court's order dismissing her medical malpractice case for failure to contemporaneously file an expert witness affidavit with her Notice of Intent to File Suit ("NOI") pursuant to section 15-79-125 of the South Carolina Code.[1] Ranucci asserted the circuit court erred in finding the affidavit of her medical expert was not timely filed because section 15-79-125 incorporates section 15-36-100, which includes a "safe harbor" provision that extends the time for filing the affidavit.[2]

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[1] Section 15-79-125 provides, in part, as follows:

> Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, *the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100,* in a county in which venue would be proper for filing or initiating the civil action. . . . *Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations.*

S.C. Code Ann. § 15-79-125(A) (Supp. 2013) (emphasis added).

[2] Section 15-36-100 provides in relevant part:

> (B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.
>
> (C)(1) *The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days*

The Court of Appeals affirmed in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012), holding the pre-litigation filing requirement for a medical malpractice case found in section 15-79-125 incorporates only the parts of section 15-36-100 that relate to the preparation and content of an expert's affidavit. This Court granted Ranucci's petition for a writ of certiorari. We reverse the decision of the Court of Appeals and remand the case to the circuit court as we hold that section 15-79-125(A) incorporates section 15-36-100 in its entirety. Thus, Ranucci could invoke section 15-36-100(C)(1), which extended the time for filing the expert witness affidavit and tolled the applicable statute of limitations.

I. Factual / Procedural History

On June 7, 2006, Dr. Corey Crain performed a needle core breast biopsy on Ranucci. Following the procedure, Ranucci experienced pain while breathing. On June 10, 2006, an X-ray revealed that Ranucci had suffered a collapsed lung.

On June 8, 2009, Ranucci filed an NOI pursuant to section 15-79-125(A), which alleged her collapsed lung was a result of Dr. Crain's negligent execution of the biopsy. The NOI stated that "time constraints" prevented Ranucci from contemporaneously filing an affidavit of a medical expert. The NOI further stated Ranucci would either file such an affidavit within the next forty-five days pursuant to section 15-36-100(C) or her allegations of negligence would be "within the ambit of common knowledge and experience" so that Dr. Crain's conduct could be evaluated without the assistance of special learning.

> *after the filing of the complaint to supplement the pleadings with the affidavit.*
>
> . . . .
>
> (D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

S.C. Code Ann. § 15-36-100(B), (C)(1), (D) (Supp. 2013) (emphasis added).

On July 23, 2009, Ranucci filed an affidavit of Dr. Richard Boortz-Marx, a medical doctor from North Carolina who was board certified in anesthesiology and anesthesiology pain management.

Dr. Crain filed an Answer to the NOI and a motion to dismiss Ranucci's NOI on the ground the forty-five day extension for filing an expert affidavit, found in section 15-36-100(C)(1), does not apply to the filing of an NOI under section 15-79-125(A) because the statute expressly requires the expert affidavit be filed contemporaneously with the NOI. Additionally, Dr. Crain claimed Ranucci's NOI was filed outside of the statute of limitations.

After a hearing, the circuit court granted Dr. Crain's motion to dismiss, finding Ranucci did not comply with the plain language of section 15-79-125(A) because she did not file an expert affidavit contemporaneously with the NOI. However, because the NOI and affidavit did not constitute an "action," the court denied Dr. Crain's motion to dismiss on the alternative ground involving the statute of limitations.

Subsequently, Ranucci filed a motion for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Following a hearing, the circuit court denied the motion, but clarified that "S.C. Code Ann. § 15-79-125 and [§] 15-36-100 operate independently of each other, and that § 15-36-100 does not offer a procedural alternative to § 15-79-125." Ranucci appealed to the Court of Appeals.

The Court of Appeals affirmed the circuit court's order. *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012). In so ruling, the court analyzed the narrow question of "which requirements of section 15-36-100 constitute the affidavit requirements referenced by section 15-79-125(A)." *Id.* at 176, 723 S.E.2d at 246. After parsing section 15-36-100, the court determined that this statute "institutes, on the one hand, substantive requirements for the authorship and content of affidavits by expert witnesses and, on the other, procedural requirements relating to such affidavits when filed with a complaint." *Id.* However, based on its reading of the two statutes at issue, the court found that, while section 15-79-125 references and incorporates section 15-76-100, the latter statute is not incorporated in its entirety. *Id.* at 177, 723 S.E.2d at 246. Rather, the court concluded that "section 15-79-125(A) invokes only the provisions of section 15-36-100 governing the preparation and content of the affidavit." *Id.* at 176, 723 S.E.2d at 246. Specifically, the court held that although section 15-79-125(A) references section

15-36-100, it does not incorporate the forty-five day filing extension for the expert affidavit found in section 15-36-100(C)(1). *Id.* at 175, 723 S.E.2d at 246.

Based on the foregoing analysis, the court ultimately affirmed the circuit court's dismissal of Ranucci's NOI for failure to comply with the contemporaneous affidavit filing requirement of section 15-79-125. *Id.* at 175, 723 S.E.2d at 246. The court expressly rejected Ranucci's argument that the affidavit requirements of section 15-36-100 permitted her to file the affidavit late without violating section 15-79-125. *Id.* at 178, 723 S.E.2d at 247. The court explained, "The affidavit requirements invoked by section 15-79-125 govern only authorship and content" and "do not permit a potential plaintiff to file her expert witness's affidavit after she files her Notice of Intent to File Suit." *Id.* We granted Ranucci's petition for a writ of certiorari to review the decision of the Court of Appeals.

II. Discussion

A. Arguments

Ranucci concedes the individual subsections of 15-79-125 and 15-36-100 are clear when viewed in isolation. However, she asserts a reviewing court must look beyond the plain language of individual subsections in order to discern the underlying purpose of the statutes and their operational effect. Because the "statutes have a shared purpose and were intended to completely incorporate one another," Ranucci contends the Court of Appeals erred in affirming the dismissal of her pre-litigation NOI.

In support of this contention, Ranucci maintains that sections 15-79-125 and 15-36-100 operate together to establish a two-step process for the filing of medical malpractice cases. Although section 15-79-125 establishes the pre-litigation process in medical malpractice cases, Ranucci explains that section 15-36-100 "creates an orderly procedure where expert affidavits are injected into the earliest stage of a dispute." Specifically, Ranucci notes that section 15-36-100 contains "the definitions, the enforcement mechanisms, and the penalties for non-compliance" that govern all professional negligence claims, including those involving medical malpractice. Therefore, Ranucci avers section 15-79-125 cannot operate in isolation, but must incorporate all provisions of section 15-36-100, including the "safe harbor" provision of subsection (C)(1) that extends the time for filing the pre-litigation affidavit.

B. Analysis

1. Rules of Statutory Construction

Because the disposition of the instant case is dependent on our interpretation of sections 15-79-125 and 15-36-100, we reference the well-established rules of statutory construction. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

"If the statute is ambiguous . . . courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted). The statutory language must be construed in light of the intended purpose of the statute. *Id.* This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.").

2. Application of Statutory Construction Rules

Utilizing the above-outlined rules, the analysis begins with an examination of the legislative history of the statutes at issue. In 2005, the General Assembly passed Act No. 32 entitled "CIVIL REMEDIES—INSURANCE—PROFESSIONS AND OCCUPATIONS." Act No. 32, 2005 S.C. Acts 133. In prefacing Act No. 32, the General Assembly included express findings stating that the statutes within the Act constitute one subject and are intended to operate together to achieve a common purpose.

As part of this tort reform legislation, the General Assembly added section 15-36-100 "so as to establish standards for expert witnesses in *professional*

malpractice actions" and "chapter 79 to title 15 so as to define key terms, provide for mandatory mediation, and to permit binding arbitration in *medical malpractice actions*." Act No. 32, 2005 S.C. Acts 133 (emphasis added).

Based on this legislative history, we conclude the General Assembly enacted: (1) section 15-36-100 to establish the general construct regarding expert witnesses for all professional negligence cases; and (2) section 15-79-125 as a supplement to section 15-36-100 to provide for pre-litigation requirements that are unique to medical malpractice cases, including mandatory mediation. Thus, even without delving into the specific text of each statute, it is evident the General Assembly intended for sections 15-36-100 and 15-79-125 to be read *in pari materia*. *See Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.").

A review of the plain language of the statutes bolsters this interpretation as the statutes contain internal cross-references. Pursuant to section 15-79-125 a plaintiff is required, prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, to "contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, *subject to the affidavit requirements established in Section 15-36-100*, in a county in which venue would be proper for filing or initiating the civil action." S.C. Code Ann. § 15-79-125(A) (Supp. 2013) (emphasis added). Because there are no words of limitation surrounding the reference to section 15-36-100, we find it is incorporated into section 15-79-125 in its entirety.

Additionally, section 15-36-100 is applicable to all medical malpractice actions as it specifically includes and references suits against "medical doctors." *See* S.C. Code Ann. § 15-36-100(G)(7) (Supp. 2013) ("This section applies to the following professions: . . . (7) medical doctors . . . ."); *id.* § 15-36-100(B) ("Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.").

Thus, although sections 15-79-125 and 15-36-100 are distinct in their operational procedures, it is evident the General Assembly promulgated the statutes to work in concert for the common purpose of tort reform involving all professional negligence claims.

Furthermore, an absurd result is created when one fails to read the statutes *in pari materia*. As previously stated, section 15-79-125 governs the pre-litigation requirements for medical malpractice cases. Specifically, section 15-79-125, requires a plaintiff, prior to filing or initiating a medical malpractice claim, to "contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100." S.C. Code Ann. § 15-79-125(A) (Supp. 2013). Filing of the NOI tolls all applicable statutes of limitations. *Id.* Thereafter, the parties engage in discovery. *Id.* § 15-79-125(B). Within ninety days and no later than one hundred twenty days from service of the NOI, the parties must participate in a mediation conference. *Id.* § 15-79-125(C). If the mediation is unsuccessful, the plaintiff may initiate the civil action by filing a summons and complaint. *Id.* § 15-79-125(E). However, notably absent from section 15-79-125 are the specifics governing the expert witness affidavit and the remedy for a plaintiff's non-compliance.[3] Instead, these procedures may all be found in section 15-36-100.

Specifically, section 15-36-100 completes the pre-litigation process as it: (1) defines the term "expert witness" and identifies the requisite qualifications;[4] (2) identifies the content of the expert witness affidavit;[5] (3) extends the time for filing an expert witness affidavit when the statute of limitations will soon expire and authorizes a defendant to move for dismissal of a plaintiff's case for failure to file an expert witness affidavit;[6] (5) codifies the common knowledge exception;[7] (6)

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[3] Although section 15-79-125(D) states that "[t]he circuit court has jurisdiction to enforce the provisions of this section," it provides no specific remedy or procedure.

[4] S.C. Code Ann. § 15-36-100(A)(1)-(3) (Supp. 2013).

[5] *Id.* § 15-36-100(B).

[6] *Id.* § 15-36-100(C)(1), (D).

[7] *Id.* § 15-36-100(C)(2) ("The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving

outlines the procedure for addressing allegedly defective affidavits;[8] and (7) authorizes the trial court to dismiss a plaintiff's case for non-compliance.[9]

Therefore, without incorporating all provisions of section 15-36-100 into section 15-79-125, a plaintiff with a medical malpractice claim is: (1) deprived of the forty-five day "grace period" for filing the affidavit, which is afforded in all other professional negligence cases; and (2) may only invoke the common knowledge exception at the pleading stage and not the pre-litigation stage. Moreover, by only applying selective provisions of section 15-36-100 to the pre-litigation stage of a medical malpractice case, there is no mechanism for a defendant to challenge the sufficiency of a plaintiff's pre-litigation affidavit or a remedy for a plaintiff's non-compliance with the pre-litigation requirements as section 15-79-125 is silent on these issues. Furthermore, a plaintiff would be required to file two expert witness affidavits, i.e., one affidavit with the pre-litigation NOI pursuant to section 15-79-125(A) and another affidavit with the Complaint pursuant to section 15-36-100(B).

Based on the foregoing, we expressly hold that section 15-79-125(A)'s reference to the "affidavit requirements established in Section 15-36-100" constitutes an adoption of all provisions of section 15-36-100.

3. Interpretation May Be Reconciled with *Grier* and *Ross*

Our holding is consistent with this Court's recent decisions in *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012) and *Ross v. Waccamaw Community Hospital*, 404 S.C. 56, 744 S.E.2d 547 (2013). Although there is language in *Grier* and *Ross* stating that sections 15-79-125 and 15-36-100 are unambiguous and must be strictly construed, the Court's analysis in those cases is not as narrow as characterized by Dr. Crain.

In *Grier*, which was decided four months after *Ranucci*, Willie James Fee died while in the care of AMISUB of South Carolina, Inc., d/b/a Piedmont Medical Center ("Piedmont"). *Grier*, 397 S.C. at 534, 725 S.E.2d at 695. Prior to bringing

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subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.").

[8] *Id.* § 15-36-100(E).

[9] *Id.* § 15-36-100(F).

a wrongful death and survival action against Piedmont stemming from medical malpractice allegedly committed while it was treating Fee, the personal representative filed an NOI as required by section 15-79-125(A). *Id.* Her claims contended that Piedmont's failure to monitor and treat Fee for bedsores and sepsis contributed to his death. *Id.* In conjunction with the NOI, the personal representative contemporaneously filed an affidavit from a nurse with experience treating bedsores and their complications. *Id.*

Piedmont filed a motion to dismiss on the ground the nurse was not qualified to render an opinion as to the cause of death, which meant the affidavit did not contain a competent causation opinion. *Id.* at 535, 725 S.E.2d at 695. The circuit court agreed and granted Piedmont's motion to dismiss. *Id.* Despite being given thirty days to submit a qualifying affidavit, the personal representative failed to do so and the court dismissed her claim. *Id.*

On appeal, this Court considered the question of whether "the pre-suit affidavit a plaintiff statutorily is required to file before bringing a medical malpractice claim must contain an expert opinion on proximate cause." *Id.* at 535, 725 S.E.2d at 695. In answering this question, Justice Hearn, writing for the Court, outlined the applicable provisions of sections 15-79-125(A) and 15-36-100. *Id.* at 536-37, 725 S.E.2d at 695-96. Having found the terms of the statutes to be clear and unambiguous, the Court strictly construed the statutes and concluded "section 15-79-125(A) simply requires the contemporaneous filing of both the notice and the affidavit." *Id.* at 539, 725 S.E.2d at 697.

The Court went on to explain, "While this statute supplies several requirements for the notice, it does not speak at all to what is required for the affidavit beyond stating that it is 'subject to the affidavit requirements established in Section 15-36-100.' " *Id.* (quoting section 15-79-125(A)). The Court noted that section 15-79-125(A) "imposes no content requirements for the expert affidavit and specifically delegates that task to section 15-36-100." *Id.* The Court ultimately held "the expert affidavit required by sections 15-36-100 and 15-79-125 does not need to contain an opinion as to proximate cause." *Id.* at 540, 725 S.E.2d at 698.

Accordingly, the Court reversed the circuit court's order and remanded for further proceedings. *Id.* at 540-41, 725 S.E.2d at 698. The Court emphasized that its decision did not limit a plaintiff's burden to come forward with expert testimony to support the merits of his claims, if necessary, later in the process. *Id.* at 541, 725 S.E.2d at 698. Instead, the Court noted that it "merely [held] that sections 15-

36-100 and 15-79-125 do not require an expert opinion as to causation to be contained within the pre-filing affidavit." *Id.*

Approximately one year after *Grier*, we issued our decision in *Ross*. In *Ross*, the Court addressed the penalties for failure to comply with the pre-litigation mediation requirement of section 15-79-125. *Ross*, 404 S.C. at 56, 744 S.E.2d at 547. Justice Kittredge, writing for the Court, rejected the argument that noncompliance mandated a penalty of dismissal for lack of subject matter jurisdiction. *Id.* at 63, 744 S.E.2d at 551. In so ruling, the Court reasoned that the mediation time period set forth in section 15-79-125 was not intended to place limitations on the circuit court's subject matter jurisdiction. *Id.* Instead, the Court held that "failing to comply with the 120-day statutory time period is a non-jurisdictional procedural defect." *Id.* at 64, 744 S.E.2d at 551. The Court further found "the circuit court retains discretion to permit the mediation process to continue beyond the 120-day time period and may consider principles of estoppel and waiver to excuse non-compliance." *Id.* The Court clarified that the 120-day time period for mediation was not meaningless and could result in dismissal. *Id.*

The Court, however, emphasized that a dismissal is "a function of the court's discretion based on the facts and circumstances, and not as a mandated one-size-fits-all result." *Id.* The Court explained that "the Legislature enacted section 15-79-125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims." *Id.* at 63, 744 S.E.2d at 550. Consequently, the Court expressly declined to "construe section 15-79-125 as a trap for plaintiffs with potentially meritorious claims." *Id.*

As evident from our decisions in *Grier* and *Ross*, this Court has sought to interpret sections 15-79-125 and 15-36-100 in a manner that effectuates the intent of the General Assembly to establish a unique two-step procedure that filters frivolous claims but permits the filing of potentially meritorious claims. Because the pre-litigation filtering process is not meant as an impassable boundary that denies a claimant access to the courts, we have attempted to "avoid dismissal of cases on technical grounds and to allow adjudication on the merits." *Ross*, 404 S.C. at 65, 744 S.E.2d at 551 (quoting *Schulz v Nienhuis*, 448 N.W.2d 655, 658 (Wisc. 1989)). Accordingly, we believe a decision to reverse the Court of Appeals in the instant case is consistent with our holdings in *Grier* and *Ross* because the inclusion of all provisions in section 15-36-100 into section 15-79-125 gives credence to the pre-litigation procedure but avoids the creation of "a trap for plaintiffs with potentially meritorious claims." *Id.* at 63, 744 S.E.2d at 550.

4. Viability of Ranucci's Case

Even if the Court incorporates section 15-36-100 in its entirety into section 15-79-125 and accepts Ranucci's expert witness affidavit as timely, Dr. Crain asserts the circuit court's order should nevertheless be affirmed. In support of this assertion, Dr. Crain raises the following additional sustaining grounds[10]: (1) the NOI was filed outside of the three-year statute of limitations because it was filed on June 8, 2009, which was three years and one day after the biopsy was performed on June 7, 2006;[11] (2) the expert witness affidavit is deficient as Dr. Richard Boortz-Marx, who is certified as an anesthesiologist, is not qualified to render an opinion regarding the surgical procedure at issue; (3) the affidavit, which asserts that Dr. Crain failed to obtain informed consent from Ranucci, does not support the allegation regarding the negligent execution of the biopsy; and (4) Ranucci failed to comply with the NOI statute as the parties did not engage in mandatory pre-suit mediation within the requisite 120-day time period.

We reject each of Dr. Crain's additional sustaining grounds. Initially, we disagree with any assertion that the applicable statute of limitations began to run on the day the biopsy was performed. We find Ranucci was put on notice that she had a claim against Dr. Crain on June 10, 2006 when an X-ray revealed that she had suffered a collapsed lung. *See Dunbar v. Carlson*, 341 S.C. 261, 266, 533 S.E.2d 913, 915-16 (Ct. App. 2000) ("The three-year statute of limitations begins to run when the facts and circumstances of the injury would put a person of common

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

[11] *See* S.C. Code Ann. § 15-3-545(A) (2005) ("In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.").

knowledge and experience on notice that some right of hers has been invaded or that some claim against a party might exist."). Thus, having found the NOI and expert witness affidavit satisfied the pre-litigation requirements of section 15-79-125(A), Ranucci's lawsuit remains viable as the statute of limitations has been tolled during the pendency of this appeal.

As to Dr. Crain's assertions regarding defects in the authorship and content of Dr. Boortz-Marx's affidavit, we find this is not an appropriate ground to affirm the circuit court's order because the affidavit is facially sufficient given it is sworn and identifies a potentially meritorious medical malpractice claim. Moreover, there is no factual basis in the record to challenge either the expert's qualifications or the content of the affidavit. *Cf. Poch v. Bayshore Concrete Prods./S.C., Inc.*, 405 S.C. 359, 378 n.13, 747 S.E.2d 757, 767 n.13 (2013) (declining to reject affidavit presented as proof of workers' compensation insurance as there was "no basis for which to reject the affidavit as it is by its very nature a sworn statement intended as documentary evidence in a legal proceeding"). Thus, we conclude that any challenge to the alleged deficiencies would have to be made by Dr. Crain filing the appropriate motion to dismiss in circuit court pursuant to section 15-36-100(E).

Finally, we find the failure to conduct mediation is not fatal to Ranucci's case as the circuit court issued its order on September 23, 2009, which was 107 days after she filed her NOI on June 8, 2009. Had the case proceeded, the parties could have engaged in mediation before the 120-day deadline. Ranucci should not be penalized for failing to conduct mediation after her NOI was dismissed.

III. Conclusion

As we interpret the statutes at issue in the context of the legislative history, we conclude the General Assembly sought to promote tort reform by creating a more efficient process in resolving all professional negligence cases by enacting section 15-36-100. Because medical malpractice cases are generally the most complex professional negligence cases, the General Assembly created a unique pre-litigation period of discovery and mandatory mediation via section 15-79-125 in order to "provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims." *Ross*, 404 S.C. at 63, 744 S.E.2d at 550. Even though the General Assembly created a distinct two-step procedure for medical malpractice cases, the first step of the procedure cannot operate unless all provisions of section 15-36-100 are utilized. Thus, section 15-

36-100 must be incorporated in its entirety into section 15-79-125 as such a reading harmonizes the statutes and effectuates the purpose of the statutes.

Having found that section 15-79-125 incorporates section 15-36-100 in its entirety, we hold that Ranucci should have been permitted to invoke section 15-36-100(C)(1), which extended the time for filing the expert witness affidavit and tolled the applicable statute of limitations under section 15-79-125(A). Accordingly, we reverse the decision of the Court of Appeals and remand the case to the circuit court for the parties to resume the proceedings by conducting mediation as mandated by section 15-79-125.

REVERSED AND REMANDED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. While I do not agree completely with the Court of Appeals, I do agree that S.C. Code Ann. § 15-79-125(A) (Supp. 2013) requires a potential medical malpractice plaintiff to file an expert witness affidavit contemporaneously with her Notice of Intent to File Suit (NOI). I first explain my construction of § 15-79-125, the medical malpractice pre-litigation statute and of S.C. Code Ann. § 15-36-100 (Supp. 2013), the professional negligence complaint statute. I then explain why I do not agree with the majority's reading of these two statutes.

A. Statutory Construction

As the Court of Appeals correctly stated, the medical malpractice pre-litigation statute, § 15-79-125, and the professional negligence complaint statute, § 15-36-100, operate "in distinct time frames. . . . ." *Ranucci v. Crain*, 397 S.C. 168, 176, 723 S.E.2d 242, 247 (Ct. App. 2012). The medical malpractice statute requires the contemporaneous filing of a pre-complaint pre-litigation expert witness affidavit along with the NOI. § 15-79-125(A). The filing and service of these two documents, along with limited discovery and mandatory mediation, are prerequisites to "filing or initiating a civil action [alleging] medical malpractice. . . ." § 15-79-125. The professional negligence complaint statute, § 15-36-100, on the other hand, is concerned with the expert affidavit that must, in most circumstances, accompany a complaint alleging professional negligence. There is no inherent conflict in the independent operation of these two statutes, one of which requires that a specific type of professional negligence claim go through a pre-complaint pre-litigation process.

The medical malpractice pre-litigation statute and the professional negligence complaint statute reference each other and thus we must interpret them in tandem. The medical malpractice pre-litigation statute provides the expert affidavit accompanying the NOI is "subject to the affidavit requirements established in Section 15-36-100," the professional negligence complaint statute. I would hold this reference in § 15-79-125(A) incorporates only the provisions of § 15-36-100(A) which define "expert" for purposes of the professional negligence complaint affidavit requirement. My conclusion that only subsection (A) of § 15-36-100 is relevant to § 15-79-125's medical malpractice pre-litigation affidavit requirement is confirmed by § 15-36-100(B).[12] Subsection (B), which requires that

[12] The Court of Appeals would import some but not all of (B) into § 15-79-125. This is where I part ways with that court's decision. Further, my analysis requires a

a professional negligence complaint be accompanied by an expert affidavit, begins "Except as provided in Section 15-79-125. . . ." In my opinion, this exception of the medical malpractice pre-litigation statute from § 15-36-100(B)'s contemporaneous complaint/affidavit requirement must be read to mean that medical malpractice complaints in cases that have been processed in accordance with § 15-75-125 are not subject to the expert witness affidavit requirements of the professional negligence complaint statute. I would find the legislature exempted these medical malpractice complaints from the expert witness affidavit requirement in § 15-36-100(B) because such an affidavit has already been provided at the NOI stage, and because the parties have already narrowed the issues through the pre-litigation process required by § 15-75-125.

Under my reading of § 15-36-100(B), there is no requirement that medical malpractice complaints be accompanied by an expert affidavit. It follows, then, that the grace period found in § 15-36-100(C)(1) and the common knowledge exception of § 15-36-100(C)(2), which by their own terms apply only to "the contemporaneous [complaint and expert affidavit] filing requirements of § 15-36-100(B)," are irrelevant in a medical malpractice case. I therefore agree with the Court of Appeals that since Ranucci did not file an expert affidavit along with her NOI, her NOI was properly dismissed.

B. The Majority's Reasoning

The majority advances four reasons to support its conclusion that the provisions of § 15-36-100 must be incorporated wholesale into § 15-79-125. As explained below, I do not find any of the reasons support the majority's interpretation of the two statutes. I note at the outset that the majority does not undertake to explain its understanding of the "Except as provided in § 15-79-125" language that begins § 15-36-100(B), language that is critical to my construction of the two statutes.

The majority first asserts that without the wholesale incorporation of the professional negligence complaint statute into the medical malpractice pre-litigation statute, a medical malpractice plaintiff is deprived of the forty-five day grace period found in § 15-36-100(C)(1). The purpose of this grace period is to toll the statute of limitations when a professional negligence plaintiff files her complaint within ten days of the running of the statute in order to allow her time to

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modification of our decision in *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012) which applied subsection B to the pre-litigation affidavit.

procure an expert affidavit. The majority fails to acknowledge that in a medical malpractice case the statute is tolled much earlier, that is, when the NOI and expert witness affidavit are filed under the medical malpractice pre-litigation statute which states the contemporaneous filing of these two documents "tolls all applicable statutes of limitations." § 15-79-125(A). Moreover, under § 15-36-100(C)(1), the forty-five day grace period does not commence until "the filing of the complaint," an event which cannot occur in a medical malpractice action until after the NOI and its affidavit have been filed, discovery materials exchanged, and mediation attempted. *See* § 15-79-125(E). I do not agree that the lack of a "grace period" in the medical malpractice pre-litigation statute, which contains its own tolling provision, mandates that we implant this separate, more limited tolling provision from the professional negligence complaint statute. Further, under my reading of § 15-36-100(B) the medical malpractice plaintiff is exempt from the requirement that her complaint be accompanied by an expert witness affidavit, and therefore she will never have need of the grace period found in §15-36-100 (C)(1).

The majority next expresses concern that unless we hold that § 15-36-100(C)(2) is incorporated into § 15-79-125, a medical malpractice plaintiff need always produce an expert witness affidavit at the NOI stage, even if her claim otherwise falls within the common knowledge exception. I do not understand why the requirement that an expert affidavit accompany every medical malpractice NOI, even where the subject matter is within a layperson's common knowledge, leads to the conclusion that the pre-litigation statute must be read to include the same exception as found in the complaint affidavit statute. I am not aware of any rule that prohibits the legislature from imposing an expert affidavit requirement as a threshold matter in a medical malpractice situation even if at trial no expert testimony will be required. Moreover, the majority does not explain how § 15-36-100(C)(2), which allows a plaintiff to invoke the common knowledge exception if her "pleaded specification of negligence" meets the criteria, can be applied where there is only a NOI, but no pleading. *See* Rule 7(a), SCRCP (pleadings do not include NOI).

As a third reason to incorporate all of § 15-36-100 into § 15-79-125 the majority asserts that absent such incorporation, there is no mechanism for a defendant to challenge the plaintiff's compliance with the medical malpractice pre-litigation statute. I disagree, and need only point to the present matter before the Court as proof. The provision allowing the present pre-litigation challenge is § 15-79-125(D), which states "The circuit court has jurisdiction to enforce the provisions of this section." Under this subsection of the medical malpractice pre-litigation statute, for example, a court could require a plaintiff to file her standard

interrogatories under § 15-79-125(A), or compel either party to comply with a subpoena issued pursuant to § 15-79-125(B). Under the majority's view, however, if a medical malpractice plaintiff failed to file the pre-litigation affidavit required by § 15-79-125(A), filed a non-compliant one, or refused to participate in discovery, then the defendant would be powerless to do anything until the plaintiff filed her complaint, since it is only at that juncture that the sanctions in the professional negligence complaint statute can be invoked. *See* §15-36-100 (C)(1), (E), (F). Requiring a defendant to wait until litigation has commenced to compel the medical malpractice complainant to comply with § 15-79-125 negates the entire **pre-litigation** scheme created by that statute. Moreover, the majority's decision to incorporate the remedial portions of § 15-36-100, all of which address only the plaintiff's obligations when commencing her suit, ignores the fact that under the medical malpractice pre-litigation statute obligations are placed on both the plaintiff and the defendant. If the majority is correct, and the exclusive remedies for failure to comply with the medical malpractice pre-litigation statute are those found in § 15-36-100(C)(1), (E), and (F), then the medical malpractice plaintiff is without any remedy should her defendant fail to meet its obligations under § 15-79-125.

Finally, the majority explains that unless we incorporate all of § 15-36-100 into § 15-79-125, "a plaintiff would be required to file two expert witness affidavits, i.e., one with the pre-litigation NOI pursuant to § 15-79-125(A) and another affidavit with the complaint pursuant to Section 15-36-100(B)." As explained above, I believe the first clause of § 15-36-100(B), "Except as provided in Section 15-79-125," relieves a medical malpractice plaintiff from filing an expert affidavit along with her complaint. Even if the medical malpractice plaintiff were required to file an expert witness affidavit at two separate points in the litigation, I do not agree that such a seemingly unnecessary step requires that we construe the statutes as would the majority.

I respectfully dissent and would affirm the decision of the Court of Appeals as modified.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vicki L. Wilkinson, Appellant,

v.

East Cooper Community Hospital, Inc., d/b/a East Cooper Regional Medical Center, Carolina Plastic Surgery Institute, P.A., and Thomas X. Hahm, M.D., Respondents.

Appellate Case No. 2012-213464

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27423
Heard May 20, 2014 – Filed July 23, 2014

REVERSED AND REMANDED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, L.L.C., of Columbia, and Daniel Nathan Hughey, of Hughey Law Firm, L.L.C., of Mt. Pleasant, for Appellant.

Robert H. Hood, James Bernard Hood, Harry Cooper Wilson, III, and Deborah Harrison Sheffield, all of Hood Law Firm, L.L.C., of Charleston; Daniel Simmons McQueeney, Jr., Kathleen Fowler Monoc, and Lindsay Kathryn Smith-Yancey, all of Pratt-Thomas Walker, P.A., of Charleston, for Respondents.

Andrew A. Mathias, of Nexsen Pruet, L.L.C., of Greenville, for Amicus Curiae, South Carolina Hospital Association.

JUSTICE BEATTY: In this medical malpractice case, Vicki Wilkinson appeals the circuit court's order dismissing her civil action with prejudice based on the motions filed by East Cooper Community Hospital, Inc. ("East Cooper"), Carolina Aesthetic Plastic Surgery Institute, P.A. ("Carolina Aesthetic Plastic Surgery"), and Dr. Thomas Hahm (collectively "Respondents"). Wilkinson asserts the court erred in finding: (1) the statute of limitations was not tolled because she failed to file an expert witness affidavit contemporaneously with her Notice of Intent to File Suit ("NOI") pursuant to section 15-79-125 of the South Carolina Code;[1] and (2) she failed to file her Complaint within the applicable statute of limitations given she did not contemporaneously file an expert witness affidavit with the Complaint or within forty-five days thereafter in accordance with section 15-36-100(C).[2]

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[1] Section 15-79-125 provides, in part, as follows:

> Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, *the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100*, in a county in which venue would be proper for filing or initiating the civil action. . . . *Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations*.

S.C. Code Ann. § 15-79-125(A) (Supp. 2013) (emphasis added).

[2] Section 15-36-100 provides in relevant part:

> (B) *Except as provided in Section 15-79-125*, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), *the plaintiff must file as part of the complaint an affidavit of an expert witness* which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

This appeal requires the Court to review the decision of the Court of Appeals in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012) ("*Ranucci I*"), which held the pre-litigation filing requirement for a medical malpractice case found in section 15-79-125 incorporates only the parts of section 15-36-100 that relate to the preparation and content of an expert's affidavit. Recently, we reversed *Ranucci I*, holding that section 15-79-125(A) incorporates section 15-36-100 in its entirety. *Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) ("*Ranucci II*"). Therefore, we hold that Wilkinson could invoke section 15-36-

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> (C)(1) *The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit.*
>
> . . . .
>
> (D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.
>
> . . . .
>
> (F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

S.C. Code Ann. § 15-36-100(B), (C)(1), (D), (F) (Supp. 2013) (emphasis added).

100(C)(1), which extended the time for filing the expert witness affidavit with her NOI and tolled the applicable statute of limitations. However, because the analysis in *Ranucci II* was confined to the dismissal of the pre-litigation NOI, it is not dispositive since the instant case involves the next procedural step in medical malpractice litigation. Specifically, we must analyze whether Wilkinson's failure to file an expert witness affidavit with her Complaint warranted the dismissal of her civil action. We hold the circuit court erred in dismissing Wilkinson's civil action as the expert affidavit filed with the NOI satisfied the statutory requirements of section 15-36-100 and, thus, it was not necessary to file a second expert affidavit in the same civil action. Accordingly, we reverse the circuit court's order and remand the case for further proceedings.

I. Factual / Procedural History

On September 4, 2008, Wilkinson was admitted to East Cooper to undergo reconstructive breast surgery performed by Dr. Hahm. Following the surgery, Wilkinson experienced complications throughout 2008 that required additional medical procedures.

On September 1, 2011, Wilkinson filed an NOI pursuant to section 15-79-125 against Respondents and several other defendants, which was designated as Case No. 2011-CP-10-6306.[3] Because the statute of limitations was due to expire within a short period of time, Wilkinson did not include an expert witness affidavit with the NOI, but stated that she would file one at a later date. On October 5, 2011, Wilkinson filed the affidavit of Dr. John D. Newkirk, a board certified plastic surgeon.

On January 25, 2012, five days after an unsuccessful attempt at pre-litigation mediation, Wilkinson filed a Complaint against the defendants named in the NOI, which was designated as Case No. 2012-CP-10-0558. Wilkinson did not file an expert affidavit with the Complaint nor did she reference the NOI or otherwise explain why she did not file an expert affidavit with the Complaint.

[3] In addition to Respondents, Wilkinson named Tenet Healthcare Corp. ("THC") and Tenet Healthsystem Medical, Inc. ("THMI") as defendants. On April 18, 2012, Wilkinson entered into a consent order with THC and THMI to dismiss the case as to them without prejudice. Thus, THC and THMI are not parties to this appeal.

Respondents separately answered and moved to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the ground the statute of limitations had expired. Citing *Ranucci I*, East Cooper asserted the NOI did not toll the three-year statute of limitations[4] because Wilkinson failed to contemporaneously file an expert affidavit with the NOI pursuant to section 15-79-125. Therefore, East Cooper argued that Wilkinson's Complaint, which was filed four months after the expiration of the statute of limitations, should be dismissed. Alternatively, even if the statute of limitations did not expire on September 4, 2011, East Cooper claimed Wilkinson's failure to file an expert affidavit with her Complaint or within forty-five days thereafter violated section 15-36-100 and warranted dismissal. In a separate memorandum in support of their motion to dismiss, Respondents Carolina Aesthetic Plastic Surgery and Dr. Hahm reiterated the arguments raised by East Cooper.

Wilkinson filed a memorandum in opposition to Respondents' motions. Because Respondents engaged in pre-litigation mediation and did not move to dismiss the NOI during the pre-litigation proceedings, Wilkinson maintained Respondents waived any argument regarding her NOI and the expiration of the statute of limitations. Additionally, Wilkinson asserted the failure to file an expert affidavit with her Complaint did not warrant dismissal as Respondents were already in possession of the previously filed affidavit of Dr. Newkirk.

After a hearing, the circuit court granted Respondents' motions to dismiss with prejudice. Based on *Ranucci I*, the court found that Wilkinson: (1) failed to file an expert affidavit contemporaneously with her NOI as required by section 15-79-125 and, thus, the statute of limitations was not tolled; and (2) failed to file an expert affidavit contemporaneously with her Complaint or within forty-five days thereafter as required by section 15-36-100. The court rejected Wilkinson's contention that Respondents' participation in statutorily mandated pre-litigation mediation waived their right to challenge the NOI. The court also found the exception codified in section 15-36-100(C)(1), which extends the time for filing an expert affidavit with the Complaint, was inapplicable because Wilkinson did not provide any explanation as to why the expert affidavit was not filed and, in any

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[4] *See* S.C. Code Ann. § 15-3-545(A) (2005) (providing that a medical malpractice case "must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section").

event, failed to file an expert affidavit within forty-five days of filing her Complaint.

Following the circuit court's denial of her motion for reconsideration, Wilkinson appealed to the Court of Appeals. This Court granted Wilkinson's motion to certify the appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Standard of Review

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (internal quotations omitted). The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

III. Discussion

A. Arguments

Initially, Wilkinson challenges the propriety of *Ranucci I* and urges this Court to reverse the decision of the Court of Appeals.[5] If the Court reverses *Ranucci I*, Wilkinson claims her NOI tolled the statute of limitations and, therefore, neither the NOI nor the Complaint should have been dismissed as untimely. However, even if her Complaint is deemed deficient based on her failure to contemporaneously file an expert affidavit, she contends any deficiency did not mandate dismissal. Rather, she asserts any dismissal under section 15-36-100(C)(1) is permissive given the statute states that a plaintiff's Complaint is "*subject to* dismissal for failure to state a claim." (Emphasis added.) Because dismissal is not statutorily mandated, Wilkinson claims the appropriate remedy

[5] East Cooper asserts Wilkinson failed to preserve this issue for appellate review because she did not raise it to the circuit court. This assertion is without merit. Because the circuit court was bound to follow *Ranucci I*, it would have been futile for Wilkinson to challenge the propriety of *Ranucci I* as the circuit court had no authority to alter the decision of the Court of Appeals.

would be for her to be given an opportunity to cure any defect as the Court permitted a plaintiff to file an amended Complaint after the expiration of the statute of limitations in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006).[6]

Alternatively, Wilkinson maintains her Complaint was not deficient as it stated facts sufficient to support a cause of action and Respondents were already in possession of the expert affidavit that was filed with the NOI. Thus, because Respondents were not prejudiced by the alleged deficiency, Wilkinson claims dismissal was not the appropriate sanction.

B. Application of *Ranucci II* as to the Sufficiency of the NOI

Recently, this Court reversed *Ranucci I*. *Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) ("*Ranucci II*"). In so ruling, we held that section 15-79-125(A) incorporates section 15-36-100 in its entirety. Thus, we ruled that a medical malpractice claimant may invoke section 15-36-100(C)(1), which permits the claimant to file an expert witness affidavit within forty-five days after filing the NOI. *Id.*

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[6] In support of this proposition, Wilkinson relies on *Spence*, wherein this Court found that when a Complaint is dismissed under Rule 12(b)(6), "the dismissal generally is without prejudice" and "[t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint." *Spence*, 368 S.C. at 129, 628 S.E.2d at 881. The Court explained:

> When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. *When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint*. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.

Id. at 130, 628 S.E.2d at 881-82 (emphasis added).

In the instant case, Wilkinson filed the NOI on September 1, 2011 in compliance with section 15-79-125(A). S.C. Code Ann. § 15-79-125(A) (Supp. 2013). Because the statute of limitations was due to expire within a short period of time, Wilkinson did not include an expert witness affidavit with the NOI, but stated that she would file one at a later date. Pursuant to section 15-36-100(C)(1), Wilkinson had an additional forty-five days to supplement her NOI with an expert affidavit. *Id.* § 15-36-100(C)(1). Wilkinson acted within the statutorily designated time period as she filed the affidavit of Dr. Newkirk on October 5, 2011. As a result, Wilkinson's properly filed NOI tolled "all applicable statutes of limitations" pursuant to section 15-79-125(A). Accordingly, the circuit court erred in finding that Wilkinson's NOI was not sufficient to toll the statute of limitations.

After the NOI was properly filed, the parties strictly adhered to the pre-litigation procedures outlined in section 15-79-125. Specifically, the parties engaged in discovery and participated in mediation within the statutorily mandated 120-day time period. *Id.* § 15-79-125(B) ("After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure."); *id.* § 15-79-125(C) ("Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause.").

Following the failed mediation attempt on January 20, 2012, Wilkinson initiated her civil action by filing a timely summons and complaint on January 25, 2012, as required by section 15-79-125(E). *Id.* § 15-79-125(E) ("If the matter cannot be resolved through mediation, *the plaintiff may initiate the civil action by filing a summons and complaint* pursuant to the South Carolina Rules of Civil Procedure. The action must be filed: (1) *within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end*; or (2) prior to expiration of the statute of limitations, *whichever is later*." (emphasis added)). Consequently, Wilkinson complied with the pre-litigation requirements and timely initiated her civil action.

C. Dismissal of Civil Action with Prejudice

Having found that Wilkinson timely initiated her civil action, the question becomes whether the Complaint was sufficient to comply with the requirements of section 15-36-100 as Wilkinson never supplemented this pleading with an expert affidavit.

As a threshold matter, we disagree with any contention that the clerk of court's assignment of separate Common Pleas case numbers to the NOI and the Complaint converted Wilkinson's medical malpractice case into two civil cases that required two expert affidavits. The assignment of a different case number to the pre-litigation pleadings and the litigation pleadings is of no consequence because they both comprise a single medical malpractice claim. *See Fisher v. Pelstring*, 817 F. Supp. 2d 791, 807 n.8 (D.S.C. 2011) (analyzing procedures for initiating medical malpractice claims and stating "[s]ection 15-79-125 also does not include any language indicating that the case number under which a Notice of Intent is served on a defendant must be the same as the case number assigned to the complaint served on that defendant if a civil action is ultimately initiated"). Consequently, clerks of court should be mindful to assign and maintain a single case number for medical malpractice cases.

Once Wilkinson initiated the civil action, the proceedings continued to be governed by section 15-36-100. Significantly, section 15-36-100(B) states:

> *Except as provided in Section 15-79-125*, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), *the plaintiff must file as part of the complaint an affidavit of an expert witness* which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

S.C. Code Ann. § 15-36-100(B) (Supp. 2013) (emphasis added). As we interpret this provision, the plain language of the first sentence expressly exempts a medical malpractice claimant from filing a second expert affidavit as one has already been filed with the NOI pursuant to section 15-79-125.

Such a construction harmonizes the two statutes and is consistent with the intent of the legislature to create a unique pre-litigation period of discovery and mandatory mediation via section 15-79-125 in order to filter out frivolous claims at the earliest stage in medical malpractice cases. However, this procedure does not create two separate cases. Rather, the plaintiff must properly initiate the claim with the NOI and attempt to resolve the case within a short timeframe. If the parties fail to resolve the case through mediation, the case almost immediately progresses as a customary professional negligence action. Thus, to require a second expert affidavit at the litigation stage in the proceeding leads to an absurd result as the plaintiff's claim has not changed during the pre-litigation proceedings. This conclusion, however, does not obviate the need for a plaintiff to offer additional expert testimony as it may be necessary to withstand a defendant's motion for summary judgment or to support the claim at trial.[7]

Finally, such an interpretation is consistent with the Court's decisions to permit medical malpractice cases to proceed on the merits rather than to affirm unwarranted dismissals based on technical noncompliance with the medical malpractice statutes. *See Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013) (concluding that failure to timely complete the pre-litigation mediation process as required by section 15-79-125 does not divest the trial court of subject matter jurisdiction or mandate dismissal); *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012) (holding that the pre-litigation expert affidavit, which is filed pursuant to section 15-79-125, must specify at least one negligent act or omission and the factual basis for each claim, but does not need to include an opinion as to proximate cause and, therefore, medical malpractice claimant's case could proceed as the pre-litigation affidavit was sufficient).

Based on the foregoing, we hold the circuit court erred in granting Respondents' motions to dismiss as Wilkinson's Complaint was timely and sufficient to properly initiate a civil action for medical malpractice. In view of our decision, it is unnecessary to address Wilkinson's remaining argument that she

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[7] Although East Cooper references decisions from other jurisdictions to support the contention that a second affidavit is required, its reliance on these cases is misplaced as the underlying state statutes are distinctly different from our state's medical malpractice statutes. Moreover, our research did not reveal any state statutes that were identical to those in this state. Thus, even though cases from other jurisdictions involving medical malpractice may provide guidance as to policy or theory, the text of the underlying statutes is not similar enough to be dispositive in the instant case.

should be permitted to supplement her Complaint with an expert affidavit based on *Spence*. *See Futch v McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

IV. Conclusion

Having reversed *Ranucci I*, we hold Wilkinson could invoke section 15-36-100(C)(1), which extended the time for filing the expert witness affidavit with her NOI and tolled the statute of limitations. As a result, Wilkinson timely filed her Complaint. Moreover, Wilkinson was not required to file a second expert witness affidavit in order to properly initiate her civil action because the affidavit filed with her NOI was sufficient for statutory compliance. Accordingly, we reverse the decision of the circuit court and remand the case for further proceedings.

REVERSED AND REMANDED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. Appellant failed to file an expert witness affidavit contemporaneously with her Notice of Intent to File Suit as mandated by S.C. Code Ann. § 15-79-125(A) (Supp. 2013). I would therefore affirm the circuit court's decision. *See Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) (Pleicones, J., dissenting).

The Supreme Court of South Carolina

In re: Proposed Amendment to Rule 408(a)(2), SCACR.

Appellate Case No. 2014-001119

ORDER

The South Carolina Bar has proposed amending Rule 408(a)(2) of the South Carolina Appellate Court Rules to include instruction in stress management as an additional option to the requirement that members of the South Carolina Bar who are not exempt receive instruction once every three years in substance abuse or mental health issues.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 408(a)(2), SCACR, as requested by the South Carolina Bar. Paragraph (A) of the rule is also amended to include the stress management option for specialists certified pursuant to the rule.

This amendment shall become effective immediately. A copy of the amended rule is attached.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
July 23, 2014

(2) **Continuing Legal Education Requirements for Members of the South Carolina Bar**. Except as provided below, all members of the South Carolina Bar shall be required to attend at least fourteen (14) hours of approved CLE courses each reporting year. At least two (2) of the fourteen (14) hours required annually shall be devoted to legal ethics/professional responsibility (LEPR). At least once every three (3) reporting years, the member must complete one (1) hour of LEPR devoted exclusively to instruction in substance abuse, mental health issues or stress management and the legal profession. The following members of the South Carolina Bar shall be exempt from these requirements:

(A) specialists certified pursuant to this Rule who satisfy the CLE requirements of their specialty; provided, however, that at least two (2) hours of the CLE credits completed by certified specialists shall be devoted to LEPR. At least once every three (3) reporting years, the member must complete one (1) hour of LEPR devoted exclusively to instruction in substance abuse, mental health issues or stress management and the legal profession.

(B) members who are at least sixty (60) years old and have been admitted to practice law for thirty (30) or more years, and who apply to the Commission for this exemption. Further, any exemptions granted prior to June 23, 1994, shall remain in effect. Provided, however, that if a member who receives an exemption or is entitled to an exemption under this provision is suspended for a definite period of more than six (6) months under Rule 413, SCACR, this exemption shall not apply or be granted during the suspension period;

(C) inactive members, military members, and retired members.

(D) judicial members who are subject to the CLE requirements of Rule 504, SCACR.

(E) members who are federal judges or federal administrative law judges.

(F) limited members licensed under Rule 415, SCACR (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program).

The Supreme Court of South Carolina

Re: Adoption of Rule 426, SCACR: Provision of Legal Services Following Determination of Major Disaster

Appellate Case No. 2014-000106

ORDER

The Commission on Lawyer Conduct requested that this Court adopt the American Bar Association's Model Court Rule on the Provision of Legal Services Following Determination of Major Disaster, with minor changes. The Commission also sought to amend Comment 14 to Rule 5.5 of the Rules of Professional Conduct to add a reference to Rule 426. By Order dated April 16, 2014, the Court published the proposed rule and proposed amendment to Rule 5.5 and requested written comments from the public. The Court has received no written comments.

Pursuant to Article V, § 4 of the South Carolina Constitution, we adopt Rule 426, South Carolina Appellate Court Rules, and amend Rule 5.5 of the Rules of Professional Conduct, as set forth in the attachment to this Order. The amendment is effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
July 23, 2014

Rule 426, SCACR, is adopted and reads as follows:

RULE 426
PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

(a) Determination of Existence of Major Disaster. Solely for purposes of this Rule, the Supreme Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

> **(1)** this jurisdiction and whether the emergency caused by the major disaster affects the entirety or only a part of this jurisdiction, or
>
> **(2)** another jurisdiction, but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) Temporary Practice in this Jurisdiction Following Major Disaster. Following the determination of an emergency affecting the justice system in this jurisdiction pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of pro bono services and the assistance of lawyers from outside of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended, or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a pro bono basis without compensation, expectation of compensation, or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, pro bono program, or legal services program or through such organization(s) specifically designated by the Supreme Court.

(c) Temporary Practice in this Jurisdiction Following Major Disaster in Another Jurisdiction. Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred,

suspended, or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) Duration of Authority for Temporary Practice. The authority to practice law in this jurisdiction granted by paragraph (b) of this Rule shall end when the Supreme Court determines that the conditions caused by the major disaster in this jurisdiction have ended except that a lawyer then representing clients in this jurisdiction pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation. The lawyer shall not thereafter accept new clients. The authority to practice law in this jurisdiction granted by paragraph (c) of this Rule shall end 60 days after the Supreme Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) Court Appearances. The authority granted by this Rule does not include appearances in court except:

> **(1)** pursuant to Rule 404 and, if such authority is granted, any fees for such admission shall be waived; or
>
> **(2)** if the Supreme Court, in any determination made under paragraph (a), grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included, any *pro hac vice* admission fees shall be waived.

(f) Disciplinary Authority and Registration Requirement. Lawyers providing legal services in this jurisdiction pursuant to paragraphs (b) or (c) are subject to the Supreme Court's disciplinary authority and the Rules of Professional Conduct of this jurisdiction as provided in Rule 8.5 of the Rules of Professional Conduct. Lawyers providing legal services in this jurisdiction under paragraphs (b) or (c) shall, within 30 days from the commencement of the provision of legal services, file a registration statement with the Clerk of the Supreme Court. The registration statement shall be in a form prescribed by the Supreme Court. Any lawyer who provides legal services pursuant to this Rule shall not be considered to be engaged in the unlawful practice of law in this jurisdiction.

(g) Notification to Clients. Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, of any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

Comment 14 to Rule 5.5, RPC, Rule 407, SCACR, is amended to provide as follows:

[14] Paragraph (c)(3) requires that the services arise out of or be reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work for the client might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issue involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. Lawyers not otherwise authorized to practice law in this jurisdiction desiring to provide pro bono legal services on a temporary basis in this jurisdiction following a major disaster should consult Rule 426, SCACR (Provision of Legal Services Following Determination of Major Disaster).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Demetrius Mack, Respondent,

v.

Leon Lott, in his Official Capacity as Sheriff of Richland County, Appellant.

Appellate Case No. 2012-212277

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5248
Heard April 7, 2014 – Filed July 23, 2014

REMANDED

Robert David Garfield and Andrew F. Lindemann, Davidson & Lindemann, PA, both of Columbia, for Appellant.

Joshua Snow Kendrick and Christopher Shannon Leonard, Kendrick & Leonard, P.C., both of Columbia, and Neal Michael Lourie, Lourie Law Firm, LLC, of Columbia, for Respondent.

FEW, C.J.: The Richland County Sheriff's Department arrested Demetrius Mack—a licensed private security officer—for simple assault after Mack chased, apprehended, and handcuffed McKenzie Williamson for trespassing at the business

where Mack was working. Mack brought suit for false imprisonment against Leon Lott, in his official capacity as Sheriff of Richland County. After a bench trial, the court awarded Mack $7,500 in actual damages, finding the Sheriff lacked probable cause to arrest Mack. We remand for more detailed factual findings as required under Rule 52(a) of the South Carolina Rules of Civil Procedure.

I. Facts and Procedural History

On December 6, 2008, Mack worked as a licensed security officer for D.T.H. Protective Services, which provided security to Club Essence, a nightclub on Weir Avenue in Columbia.

That evening, Williamson attempted several times to enter the club without paying the required cover charge. The fourth time Williamson attempted to enter, Mack approached him, and Williamson "took off" running away from the club. Mack chased Williamson and eventually arrested him. At some point during the chase and arrest, Williamson was injured.

Senior Corporal James Gore of the Richland County Sheriff's Department witnessed the incident while making an unrelated narcotics arrest approximately 200 yards from Mack and Williamson. After Gore observed Williamson's injuries, he arrested Mack for simple assault. Gore testified he arrested Mack "because he chased [Williamson] into the road and tackled him." Gore explained, "I knew for a fact that [Mack] had no jurisdiction in that roadway, being a private security guard." He later testified, however, "I gave Mr. Williamson the option if he wanted to press charges. And he told me 'yes.' And that was the only reason I took [Mack]."

Mack filed suit for false imprisonment. At trial, Gore testified that sometime between 2:00 and 3:00 a.m. he observed

> one guy running out of the [club] parking lot with another guy chasing him. The second guy caught up to him, tackled him in the road by the waist and landed in the road in front of a car. And then after that I could see what appeared to be motions of somebody being handcuffed.

Mack then testified as to how Williamson incurred his injuries:

> I noticed [Williamson] looking back at me to see if I was still coming at him, he looked up top and saw the county car up there. That is when he tried to cut—wanted to cut between the two cars and go through the yard. But the gravel hit his feet and his shoe went one way and he went the other way and went face-first into that car . . . halfway under it. [He] fell between those two cars and he fell face-first under that car, in the people's yard.

II. Probable Cause

To establish a claim for false imprisonment, the plaintiff must prove three elements: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful. *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 473, 710 S.E.2d 67, 73 (2011); *Gist v. Berkeley Cnty. Sheriff's Dep't.*, 336 S.C. 611, 618-19, 521 S.E.2d 163, 167 (Ct. App. 1999). "The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest." *Law v. S.C. Dep't. of Corrs.*, 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2006). "'Probable cause to arrest depends upon whether . . . the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information [were] sufficient to warrant a prudent man in believing that the suspect had committed . . . an offense.'" *Robinson v. State*, 407 S.C. 169, 190 n.11, 754 S.E.2d 862, 873 n.11 (2014) (quoting *Adams v. Williams*, 407 U.S. 143, 148, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612, 618 (1972)).

The Sheriff contends Gore had probable cause to arrest Mack, and therefore, the trial court erred in awarding Mack damages for false imprisonment. Because Mack was a licensed security officer working at Club Essence, Mack had authority to arrest Williamson so long as the arrest occurred on the property where the club was located. *See* S.C. Code Ann. § 40-18-110 (2011) (providing "[a] person who is . . . licensed . . . and who is hired or employed to provide security services on specific property is granted the authority and arrest power given to sheriff's deputies" but "only on the property on which he is employed"). If Mack arrested Williamson on Club Essence property, any assault Mack committed during the arrest was lawful. However, if Williamson was in the roadway when Mack

arrested him, Mack acted without legal authority to make the arrest and would be guilty of assault. Therefore, Gore had probable cause to arrest Mack if Gore reasonably believed Mack arrested Williamson in the road—not on Club Essence property. To state the factual issue in terms of the elements of false imprisonment, Mack was required to prove as a matter of fact that Gore did not reasonably believe Mack arrested Williamson in the road. Rule 52(a), SCRCP, required the trial court to "find the facts specially" as to whether Mack met his burden of proving that element.

Although the trial court correctly recited the definition of probable cause, it did not make the factual finding necessary to support its ruling that Gore lacked probable cause. The only factual findings the trial court made regarding the non-existence of probable cause are conclusory—"a realistic assessment of the evidence in this case doesn't show that a crime had been committed by [Mack] on December 8, 2008 at the time of his arrest" and "[Senior Corporal Gore] did not have probable cause to arrest [Mack] for simple assault on December 8, 2008." These findings do not address the primary factual issue in the case—whether Gore reasonably believed Mack was off Club Essence property at the time he arrested Williamson. Thus, the trial court failed to provide a clear factual basis for its conclusion that no probable cause existed. *See In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002) ("The absence of factual findings makes our task of reviewing the court order impossible because the reasons underlying the decision [are] left to speculation." (alteration in original) (internal quotation marks and citations omitted)).

Because the trial court's findings of fact are insufficient under Rule 52(a), we remand for more detailed findings as to whether Mack met his burden of proving Gore did not have probable cause to arrest him.

REMANDED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael D. Williams, Appellant.

Appellate Case No. 2012-212501

Appeal From Fairfield County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5249
Heard June 3, 2014 – Filed July 23, 2014

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mary Shannon Williams, both of Columbia, for Respondent.

KONDUROS, J.: Michael D. Williams was convicted of two counts of first-degree criminal sexual conduct (CSC) with a minor and five counts of committing a lewd act upon a child. The trial court sentenced him concurrently to twenty-five years' imprisonment for CSC and fifteen years' imprisonment for lewd act upon a child. Williams appeals his convictions and sentence, arguing the trial

court erred in excluding evidence the stepbrother of one of the victims sexually abused her. We affirm.

FACTS

At trial, Susan Rowles (Mother) testified two of her children, Victim One and Victim Two (collectively, Victims), started attending daycare in 2003 at Williams's home.[1] Mother stated she developed a friendship with Williams and his wife. According to Mother, Victims left Williams's daycare "[i]n late 2005 or 2006" for financial reasons, but Victim Two returned to Williams's daycare in 2006. Mother also stated Victim One did not return to Williams's daycare, but she occasionally visited Williams's home. According to Mother, in 2008, Victim Two told her she had been inappropriately touched at Williams's daycare. Mother stated she contacted her ex-husband (Father) about the allegation but did not ask Victims further questions about the incident.

Mother testified that in October 2008, Victim Two attended the South Carolina Department of Mental Health Assessment and Resource Center (ARC)[2] in Columbia for a forensic interview. According to Mother, Victim One did not receive an ARC interview. Mother testified she took Victim Two to the ARC interview and completed an intake form prior to the interview. According to Mother, she answered all of the questions on the form truthfully. Mother testified she checked no to the question: "'Has there ever been a child abuse investigation involving this child or the family before[?]'" She also testified there had not been a prior investigation on Victim 2.

Williams's counsel asked to approach, and the trial court held a bench conference.[3] Thereafter, trial counsel placed on the record his arguments and the trial court's ruling on the ARC intake form, which the trial court apparently made at the time of a bench conference during Mother's testimony. Trial counsel argued:

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[1] At the time of trial, Victim One was seventeen years old and Victim Two was eleven years old.

[2] According to its website, "[t]he ARC is a non-profit child abuse evaluation and treatment center." *About ARC,* S.C. Dep't of Mental Health, http://www.state.sc.us/dmh/arc/about.html (last visited June 24, 2014).

[3] This bench conference was not included in the record on appeal.

> Judge, this is a document that is used when someone goes for an ARC interview and [Mother] was the reporter, filled it out in her own handwriting. On question number five it says, "Has there ever been a child abuse investigation involving this child or family before? If yes describe," and [Mother] answered no. My intent at that time was to go ahead and impeach her about the events that we discussed yesterday that actually are not on the record yet . . . .

Trial counsel then explained that in April 2004, DSS reported to the Fairfield County Sheriff's Department that Victims' stepbrother (Stepbrother) "admitted to requiring or forcing [Victim One] to have oral sex with him over a period of time." According to trial counsel, the sheriff's department investigated the incident and, after discussing it with the family, the family decided to "handle the matter internally." Trial counsel asserted "that conduct is very relevant in this case because [Victim One] at the age of eight or nine was exposed . . . to sexual abuse." Counsel argued the evidence was admissible

> to show that a child at the age of eight or nine goes through incredible psychosexual changes, psychological changes[,] which could affect her in her development and would have an impact on this case. Also it shows that she would have a source of knowledge about sexual activity independent completely of whatever she alleges . . . Williams did. . . . [W]hat I'm seeking to do now is use that information for impeachment purposes since the document was not answered truthfully because there was, in fact, an investigation involving the family before.

The State replied that it did not dispute the facts of Stepbrother's abuse as stated by trial counsel. The trial court then noted it had previously sustained the State's objection to trial counsel's request to impeach Mother with the evidence of Stepbrother's abuse, finding the evidence

> was not relevant at least at this time, that it would be a collateral impeachment, that [Mother] did answer the question by saying that how she had answered -- how she

> had answered that questionnaire, and I think that whether or not it was truthful or not has not been shown to be relevant at this stage. That was the ruling at the [sidebar] and it continues to be the ruling on the record.

Victim Two testified Williams touched her inappropriately on several occasions, beginning when she was four years old. One incident occurred when she was sitting on Williams's lap while he was sitting in a chair playing on the computer. Victim Two stated Williams touched her on top of her "private part." Another incident occurred in Williams's bedroom when Victim Two and another girl were lying on a bed with Williams watching television. According to Victim Two, Williams put his hand down her pants and touched the top of her private part. Victim Two further provided that on another occasion, Williams was wearing "short orange shorts" and "his thing fell out of [his] pants and [she] saw it." Finally, Victim Two described an incident when Williams

> told [her] to get down on [her] knees and [she] was beside him on [her] knees on the floor and he was in the chair and he was wearing those short orange shorts and [his penis] fell out and he told [her] to stick it back into his shorts, but after that there was like this stuff that came out [of his penis].

Victim Two explained she first reported Williams's abuse in 2008 when Victim One asked her if Williams had ever touched her, and she told her he had. According to Victim Two, Victim One then reported the abuse to Mother. On cross-examination, Victim Two testified she never discussed the abuse with Victim One until 2008. Victim Two further stated Williams touched her "inside [her] private part" five times.

Victim One testified Williams also sexually abused her. According to Victim One, Williams touched her inappropriately "[m]ore than one time." Victim One explained one incident occurred in Williams's pool; Williams "was just kind of holding [her] a little bit and then he put his finger down [her] bikini, then he put his finger inside [her]." Victim One further explained Williams put his finger inside her vagina on at least two other occasions.

On cross-examination, Victim One stated her abuse occurred from 2003 to 2006. Victim One admitted she did not disclose the abuse when Victim Two returned to Williams's daycare in 2006. Victim One further admitted she did not reveal Williams digitally penetrated her in her initial statement to police. According to Victim One, she finally disclosed the abuse in September 2008. Victim One testified Shanay Moore, an abuse and neglect investigator with DSS, interviewed her about the incidents. According to Victim One, she told Moore that Williams touched her vagina at least five times from the age of eight or nine years old. Victim One, however, admitted she did not tell Moore that Williams digitally penetrated her in the swimming pool. According to Victim One, she told Moore that on another occasion Williams put his finger inside her vagina "for over an hour."

Moore testified she investigated Williams's daycare in 2008 in response to an allegation. According to Moore, Williams denied touching Victim Two inappropriately, but he admitted he "tickled and pinched [Victims] on the inside of their thigh area for fun." Moore took a statement from Victim One.

On cross-examination, Moore stated Victim One told her Williams rubbed her vagina in a swimming pool. Moore further stated Victim One told her Williams once inserted his finger into her vagina for one hour while she was asleep. Moore indicated she was familiar with the ARC intake form. Moore testified it was important for DSS to know about prior familial abuse during an investigation. The State objected, arguing trial counsel was attempting to elicit evidence about the prior abuse by Stepbrother and this evidence was irrelevant. The trial court allowed trial counsel to question Moore outside the jury's presence.

Moore testified in camera getting a history of sexual abuse inside the family was important because it helped DSS determine if the allegations of abuse were true. Moore also explained Father disclosed Stepbrother's abuse to DSS. The trial court sustained the State's objection to testimony about whether familial abuse history was important, finding the evidence irrelevant and "[more] prejudicial than probative."

Heather Smith, a forensic evaluator, testified she conducted an interview with Victim Two in October 2008 at the ARC. Smith explained the purpose of a forensic interview "is for fact finding" to gather information for law enforcement and DSS to conduct their investigation. Smith testified in camera it was important

to know whether a victim had a history of abuse, so she can question the victim about the prior abuse in the forensic interview. Smith explained that at the time she interviewed Victim Two, she was unaware Victim One was sexually abused by Stepbrother in 2004. Smith further stated had she known about Stepbrother's prior sexual abuse, she would have "most likely" asked Victim Two whether she witnessed the abuse. Likewise, Smith stated she would have possibly asked Victim Two if she had discussed Stepbrother's abuse with Victim One. Smith, however, explained she asked Victim Two whether she had been abused by anyone other than Williams, and she stated she had not. Moreover, Smith testified that even if she were aware of Stepbrother's abuse, she would not have asked "specifically whether [Victim Two] had been touched by a specific person," but would have kept her questions general and "open-ended" to get a narrative from the child. Smith, however, admitted she was unable to inquire as to Stepbrother's abuse because she did not have that information at the time of her interview. When asked whether Victim Two indicated the source of her sexual knowledge, Smith replied, "[Victim Two] was very consistent with it all had to do with one person. She did not have other people that she named or described do things to her, it all centered around one person."

Thereafter, trial counsel renewed his request to introduce evidence regarding Stepbrother's prior abuse and Mother's failure to disclose the abuse on the ARC intake form. Trial counsel argued the evidence "would have been important for . . . Smith because . . . she would have developed questions about whether [Victim Two] ever observed anything in 2003 [and] 2004, whether [Stepbrother had] ever done anything to her, and whether or not there had been any discussions about that kind of sexual activity." Trial counsel further argued Stepbrother's sexual abuse occurred during the same time the allegations against Williams occurred. Trial counsel offered to stipulate to evidence a report was made in 2004, was investigated, and was determined to be accurate. Trial counsel stated he did not intend to go into "the gory details . . . just the event itself."

The State argued the evidence was not relevant because Smith stated she did not ask leading questions during her interview; therefore, the evidence would not have come out during the interview because Child Two denied being assaulted by anyone other than Williams. The State also argued Williams was offering the evidence as a "back door way" around the Rape Shield Statute.[4] Furthermore, the

[4] S.C. Code Ann. § 16-3-659.1 (2003).

State asserted the jury could confuse the issues because the abuse happened to Victim One, yet Smith's interview concerned Victim Two. Trial counsel responded he did not intend to use the evidence to "impugn" Victim One's chastity; rather, he intended to use it "for impeachment purposes, or to show source of knowledge."

The trial court ruled the evidence was inadmissible. It found the evidence was barred by the Rape Shield Statute and the prejudicial effect of the evidence outweighed the probative value. Thereafter, the jury convicted Williams of two counts of first-degree CSC with a minor and five counts of committing a lewd act upon a child. The trial court sentenced him concurrently to twenty-five years' imprisonment for each count of CSC and fifteen years' imprisonment for each count of lewd act upon a child. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." *Id.* (internal quotation marks omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* (internal quotation marks omitted).

LAW/ANALYSIS

I. Prior Sexual Knowledge

Williams argues the trial court erred in excluding evidence of Stepbrother's prior sexual abuse of Victim One. Relying on *State v. Grovenstein*,[5] Williams contends the evidence was admissible to show an independent source of Victim Two's

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[5] 340 S.C. 210, 219, 530 S.E.2d 406, 411 (Ct. App. 2000) (holding "evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct").

sexual knowledge and the danger of unfair prejudice from the evidence did not outweigh its probative value. We disagree.

"Evidence which is not relevant is not admissible." Rule 402, SCRE. Relevant evidence is defined as "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. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"A trial [court]'s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct. App. 2008) (internal quotation marks omitted). "A trial [court]'s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." *Id.* at 339, 665 S.E.2d at 207 (internal quotation marks omitted). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Id.* (internal quotation marks omitted).

Under the Rape Shield Statute,

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions [for CSC;] however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

S.C. Code Ann. § 16-3-659.1(1) (2003). However, "'the Rape Shield Statute d[oes] not bar evidence of a victim's sexual conduct if the evidence [i]s offered for a purpose other than to attack the victim's morality.'" *State v. Grovenstein*, 340 S.C. 210, 216, 530 S.E.2d 406, 409 (Ct. App. 2000) (quoting *State v. Lang*, 304 S.C. 300, 301, 403 S.E.2d 677, 678 (Ct. App. 1991)).

In *Grovenstein*, the defendant appealed his convictions of CSC, arguing the trial court erred in excluding evidence the victims were previously accused of sexual misconduct similar to the conduct the victims alleged against the defendant. 340 S.C. at 213, 530 S.E.2d at 408. At trial, the victims testified the defendant anally penetrated them with his penis and with rolled-up paper. *Id.* The defendant attempted to offer evidence that before the victims met the defendant, they were accused of inserting objects into a young girl's vagina and rectum. *Id.* The defendant argued the evidence was admissible to impeach the victims and to demonstrate the victims had knowledge of sexual matters of this nature. *Id.* at 214, 530 S.E.2d at 408. The State moved to exclude the evidence pursuant to the Rape Shield Statute. *Id.* The trial court ruled the evidence inadmissible, finding it irrelevant, more prejudicial than probative, and an improper attack on the victims' character. *Id.*

On appeal, the issue before this court was "whether the prior sexual experiences of a child victim are admissible despite the Rape Shield Statute to prove a source of the victim's sexual knowledge other than the alleged experiences with the defendant." *Id.* at 216, 530 S.E.2d at 409. This court held "evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct." *Id.* at 219, 530 S.E.2d at 411.

However, our court cautioned "the admission of this type of evidence is still subject to a determination" under Rule 403, SCRE, as to "whether the prejudicial effect of the evidence outweighs its probative value." *Id.* We noted the evidence the victims were accused of, inserting objects into a young girl's vagina and rectum prior to meeting the defendant, should have been admitted because it provided an alternate explanation of how the victims would be familiar with the sexual conduct they alleged the defendant committed. *Id.* at 220, 530 S.E.2d at 412. Furthermore, our court noted that because the State emphasized in its closing argument the inference that the victims' sexual knowledge was based on their experience with

the defendant, and because the defendant maintained the allegations were untrue, it was critical for the defendant to show the victims possessed the knowledge necessary to fabricate the allegations. *Id.* Likewise, the court found this evidence "was even more significant" because "the case depended primarily on a credibility determination between [the defendants] and the victims." *Id.* The court also found the danger of unfair prejudice did not outweigh the probative value of the evidence. *Id.* Initially, this court noted "this [wa]s not a typical case in which a child victim would have to recount in detail incidents where he was subjected to sexual abuse"; rather it "involve[d] allegations that the victims had previously been the perpetrators of sexual abuse on a young girl." *Id.* at 220-21, 530 S.E.2d at 412. Despite the potential the allegations could impugn the victim's character, this court found the trial court could eliminate this effect with an instruction limiting the evidence's admissibility for the sole purpose of establishing an alternate explanation for the victim's sexual knowledge. *Id.* at 221, 530 S.E.2d at 412.

We find the present case distinguishable from *Grovenstein*. Unlike *Grovenstein*, the evidence Williams sought to admit did not provide an alternate explanation as to how Victims were familiar with the sexual conduct they alleged Williams committed because the allegations against Williams were not similar to Stepbrother's prior sexual abuse of Victim One. Williams was accused of digitally penetrating Victims; whereas, Stepbrother allegedly forced Victim One to perform oral sex. Unlike the situation in *Grovenstein* in which the sexual abuse the defendant sought to admit was nearly identical to the allegations against the defendant, the fact that Victim One was previously forced to perform oral sex would not show a source of Victim One's ability to testify about the defendant's acts of digital penetration. Moreover, Williams's argument the evidence would have "raised the possibility that [Victim Two] learned about sexual activity either from [Victim One] or even Stepbrother," is speculative because no testimony was presented at trial Victim Two knew about Victim One's abuse by Stepbrother. Furthermore, Smith testified Victim Two told her she had not been sexually abused by anyone other than Williams, and that Victim Two's sexual knowledge resulted from her experiences with one person. Thus, the probative value of the evidence of Stepbrother's abuse was very low. Admittedly, the danger of unfair prejudice from the evidence is lower than the evidence in *Grovenstein* because the evidence does not accuse Victims of committing a sexual act on another. Nevertheless, the evidence could have confused the issues at trial or misled the jury as to the sexual misconduct in question. Specifically, the jury could have become confused by the fact that Stepbrother's prior sexual abuse was against Victim One, yet Williams

intended to use the information to show Victim Two's interview was flawed and as a source of Victim Two's sexual knowledge. Considering the low probative value of the evidence, we do not find exceptional circumstances that warrant reversal of the trial court's finding the prejudicial value of the evidence substantially outweighed its probative value. *See* Rule 403, SCRE (noting "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"); *Lyles*, 379 S.C. at 338, 665 S.E.2d at 207 (stating "[a] trial [court]'s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances'" (internal quotation marks omitted)); *id.* at 339, 665 S.E.2d at 207 ("A trial [court]'s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." (internal quotation marks omitted)).

II. Collateral Impeachment

Additionally, Williams asserts the evidence of Stepbrother's abuse of Victim One was admissible to impeach Mother's testimony that she answered all the questions on the ARC intake form truthfully, thus, demonstrating Mother lied on the intake form and testified falsely at trial. Williams maintains the evidence was not collateral because "[it] was not offered solely on the issue of credibility but concerned a central point of the case: the [Victims]' sexual knowledge and the integrity of the investigation." We disagree.

"When a witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness." *State v. Beckham*, 334 S.C. 302, 321, 513 S.E.2d 606, 615 (1999). Whether a matter is collateral to the issues involved is determined by the answer to this question:

> Would the cross-examining party be entitled to prove the fact as a part of, and as tending to establish, his case? If he would be allowed to do so, the matter is not collateral; but, if he would not be allowed to do so, it is collateral. Collateral matters, in this sense, are such as afford no reasonable inference as to the principal matter in dispute.

State v. Brock, 130 S.C. 252, 254-55, 126 S.E. 28, 29 (1925) (internal quotation marks omitted).

"[T]he sole object of the rule against impeachment on collateral matters is to prevent confusion of issue and unfair surprise." *State v. Williams*, 263 S.C. 290, 302, 210 S.E.2d 298, 304 (1974). "[T]he cross-examining party is concluded by the answer which a witness gives to a question concerning a collateral matter, and no contradiction will be allowed even for the purpose of impeaching a witness." *Id.* (internal quotation marks omitted). Because of the difficulty in deciding what matters are collateral, "considerable latitude and discretion should be allowed the trial [court] in determining the admissibility of impeaching testimony." *Id.*

In *State v. DuBose*, the defendant was charged with manufacturing marijuana. 288 S.C. 226, 229, 341 S.E.2d 785, 787 (1986). On cross-examination, the State was allowed to question the defendant concerning an alleged conversation with a former next-door neighbor. *Id.* at 230, 341 S.E.2d at 787. The defendant specifically denied telling the neighbor he had grown marijuana. *Id.* Thereafter, the State called the neighbor as a reply witness to testify that eleven years before trial, "[The defendant] said . . . he was growing marijuana out on his farm and that he would not be caught." *Id.* at 230-31, 341 S.E.2d at 788. The defendant objected to this line of questioning, arguing it inquired into matters collateral to the State's case in chief, but the trial court overruled the objection. *Id.* at 231, 341 S.E.2d at 788. The supreme court found the reply testimony inadmissible because it pertained to a collateral matter. *Id.* In finding the evidence was collateral, the supreme court noted the evidence the State sought to introduce was a prior inconsistent statement made by the defendant eleven years before trial, which could not have been presented by the State in its case in chief because it concerned a prior bad act that did not fit under a *Lyle*[6] exception. *Id.*

We find the trial court did not abuse its discretion in refusing to allow Williams to impeach Mother's testimony with evidence of Stepbrother's abuse of Victim One. *See State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (stating "[t]he admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion"); *Williams*, 263 S.C. at 302, 210 S.E.2d at 304 (recognizing

[6]*State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

"considerable latitude and discretion should be allowed the trial [court] in determining the admissibility of impeaching testimony"). Here, Williams sought to impeach Mother's testimony that she answered all the questions on the ARC intake form truthfully. According to Williams, the evidence of Stepbrother's abuse of Victim One was admissible "for impeachment purposes since the [intake form] was not answered truthfully because there was, in fact, an investigation involving the family before." This argument is without merit because Williams's attempted impeachment concerned evidence collateral to the material issues at trial. *See Beckham*, 334 S.C. at 321, 513 S.E.2d at 615 (stating "[w]hen a witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness").

The case at bar is similar to *Dubose*, in which the supreme court found reply testimony was collateral because it would have been inadmissible in the State's case in chief. *See Dubose*, 288 S.C. at 231, 341 S.E.2d at 788. As previously stated, the trial court did not err in excluding evidence of Stepbrother's prior abuse because it did not provide an alternate source of Victim One's knowledge of the sexual acts in question. Thus, the evidence of Stepbrother's abuse of Victim One was collateral because it would have been inadmissible in Williams's case in chief. Stated differently, Stepbrother's abuse of Victim One was not directly relevant to the ultimate issue in the trial—Williams's guilt or innocence—therefore, Williams was not allowed to introduce extrinsic evidence to impeach Mother's testimony regarding her answers to the ARC intake form. *See State v. Mizell*, 332 S.C. 273, 274, 282-83, 285, 504 S.E.2d 338, 339, 343-45 (Ct. App. 1998) (finding in prosecution for CSC with a minor, reply testimony of a social worker that the defendant's wife, who was the victim's mother, had cancelled several appointments with DSS to see the victim, was collateral and was therefore inadmissible to impeach the wife because the wife's failure to meet scheduled visits was not directly relevant to the issue of the defendant's guilt or innocence of the crimes charged). Because evidence of Victim One's prior abuse by Stepbrother was collateral to the material issue at trial, the trial court did not err in refusing to allow Williams to introduce contradictory evidence to impeach Mother.

CONCLUSION

Based on the foregoing, the trial court did not abuse its discretion in excluding the evidence regarding Stepbrother's sexual abuse of Victim One. Accordingly, the trial court is

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Precision Walls, Inc., Appellant,

v.

Liberty Mutual Fire Insurance Co., Respondent.

Appellate Case No. 2013-000787

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5250
Heard May 13, 2014 – Filed July 23, 2014

AFFIRMED

Charles H. McDonald, of Robinson, McFadden & Moore, P.C., of Columbia, for Appellant.

Steven W. Ouzts, of Turner, Padget, Graham, & Laney, P.A., of Columbia, for Respondent.

SHORT, J.: In this declaratory judgment action seeking a determination of coverage under an insurance policy, Precision Walls, Inc. (Precision) appeals the trial court's order, which found no coverage and granted judgment in favor of Liberty Mutual Fire Insurance Co. (Liberty Mutual). Precision argues the court erred in: (1) declining to find "property damage" under the policy; (2) declining to find an "occurrence" under the policy; (3) broadly construing one of the policy's

exclusions to defeat coverage; and (4) narrowly construing the policy against coverage. We affirm.

I. FACTS

Precision worked on a building project in Easley, South Carolina, as a subcontractor to the general contractor, SYS Constructors, Inc. (SYS). The contract between SYS and Precision provided the following description of the scope of work:

> Scope of work includes all material, labor, equipment[,] and supervision of the following: all light guage (sic) metal framing of walls, roof trusses and decking, building insulation, densglass on exterior, taped & sealed blue board insulation on exterior, [and] installation of door frames. . . . Exterior insulation to be sealed so as to prevent air infiltration.

The contract also provided the following warranty:

> The Subcontractor expressly warrants that all materials, work[,] and equipment incorporated in the Work shall conform to the specifications, drawings, samples[,] and other descriptions set forth in the Subcontract and the Contract Documents and will be of good materials and workmanship and free from defect and warrants that all materials and equipment are both merchantable and fit for the purposes for which they are intended to be used under the Contract Documents. . . . Upon receipt of written notice from Contractor or Owner of any breach of warranty during the applicable warranty period, Subcontractor shall correct the affected work and all costs incurred as the result of breach of warranty shall be borne by Subcontractor. Should Subcontractor fail to make the necessary correction promptly, Contractor may perform or cause to be performed the necessary work at Subcontractor's expense.

Precision used Seam & Seal tape manufactured by Berry Plastics to tape and seal the joints of the blue board insulation on the building. After Precision installed the insulation, Pride Masonry began constructing a brick veneer exterior wall. Prior to the completion of the brick wall, SYS observed the tape used to seal the joints was losing adhesion and coming loose.

After numerous emails and meetings, on February 12, 2010, SYS directed Precision by letter to comply with its contract to provide sealed joints. SYS required the masonry subcontractor to remove the portion of the brick wall then in place and build a new one once Precision removed the existing tape and sealed the joints with new tape. By change order, SYS deducted $97,500, the cost of tearing down and rebuilding the brick veneer, from Precision's contract.

Precision was covered under a commercial general liability (CGL) policy issued by Liberty Mutual (the Policy). The insuring provision of the Policy provided coverage for "those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies." The Policy defined "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property." The Policy applied to "'property damage' only if . . . [t]he . . . 'property damage' is caused by an 'occurrence . . . .'" The Policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Finally, the Policy provided an exclusion for "property damage" to "any property that must be restored, repaired[,] or replaced because 'your work' was incorrectly performed on it." The term "your work" was defined in the Policy as follows:

> 22. "Your Work":
> a. Means:
> (1) Work or operations performed by you or on your behalf; and
> (2) Materials, parts[,] or equipment furnished in connection with such work or operations.

Precision sought coverage under the Policy, which Liberty Mutual denied. Precision filed this declaratory judgment action.

The trial court found the only loss claimed by Precision was the liability it incurred when SYS tore down and reconstructed the otherwise undamaged brick veneer wall for the remedial purpose of bringing Precision's own work into compliance with its contract with SYS. The court found the loss claimed by Precision was not "property damage" as defined by the Policy. The trial court also found the loss resulted from Precision's nonconforming work, and the costs of faulty workmanship and repairing defective work were not an "occurrence" under the Policy. Finally, the court found "[e]ven if the losses . . . were found to be within" the Policy, they were excluded under the "your work" exclusion. Thus, the court found the Policy provided no coverage for Precision's claim. This appeal followed.

II. ISSUES ON APPEAL

1. Did the circuit court err in finding the facts of this case did not establish the existence of "property damage" under the policy?

2. Did the circuit court err in failing to find an "occurrence" under the policy?

3. Did the circuit court err in broadly construing one of the policy's exclusions to defeat coverage?

4. Did the circuit court err in narrowly construing the policy against coverage?

III. STANDARD OF REVIEW

"The standard of review in a declaratory action is determined by the underlying issues." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012). If the dispute is an action to determine whether coverage exists under an insurance policy, the action is one at law. *Id.* In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

IV. LAW/ANALYSIS

1. "Your Work" Exclusion

Precision argues the trial court erred in finding the "your work" exclusion applied to bar coverage. Assuming without deciding that there was "property damage" caused by an "occurrence," we find the "your work" exclusion barred coverage.

"The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009). The exclusions must be independently read and applied. *Id.*

The trial court found "[e]ven if the losses claimed by Precision Walls were found to be within the terms of the insuring agreement, there would be no coverage because the losses are excluded" by the "your work" exclusion. The trial court relied on a "virtually identical" exclusion in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), *overruled on other grounds by Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 45, 717 S.E.2d 589, 591 (2011).

In *Golden Hills*, the United States Fourth Circuit Court of Appeals certified coverage questions to our supreme court. *Id.* at 561, 561 S.E.2d at 356. Homeowners alleged defective stucco caused moisture damage to their properly constructed substrate and framing. *Id.* at 562, 561 S.E.2d at 356. The general contractor was insured under a CGL policy with coverage for "property damage" caused by an "occurrence." *Id.* at 563, 561 S.E.2d at 357. The parties stipulated to "property damage" caused by an "occurrence." *Id.* at 563–64, 561 S.E.2d at 357. However, one of the certified questions in *Golden Hills* considered whether the "your work" exclusion applied. *Id.* at 565, 561 S.E.2d at 358.

Homeowners maintained the exclusion should be interpreted as excluding only repairs to the stucco, which was incorrectly installed, arguing repairs to other property (the substrate and substructure) should not be excluded. *Id.* at 566, 561 S.E.2d at 358–59. The court disagreed, finding the "your work" exclusion applied given the purpose of CGL policies, which is to cover risks of liability but not to

insure normal, frequent, or predictable consequences of doing business. *See id.* at 566–67, 561 S.E.2d at 358–59 (providing the "your work" exclusion excluded coverage not only for (1) "property damage" to defective work caused by that defective work but also for (2) "property damage" to non-defective work caused by the defective work).

The "your work" exclusion in *Walde v. Association Insurance Co.*, 401 S.C. 431, 445–46, 737 S.E.2d 631, 638–39 (Ct. App. 2012), *petition for cert. filed*, (S.C. Apr. 12, 2013), was also similar to the exclusion in this case. In *Walde*, the property owners, the Waldes, began construction of a barn and paddock for their horses. *Id.* at 435, 737 S.E.2d at 633. The structure included an apartment. *Id.* at 436, 737 S.E.2d at 633. The Waldes' builder assured the Waldes he obtained the proper variance from the Aiken Board of Zoning Appeals (the Board). *Id.* After the builder completed 80% of the building, the building inspector notified the builder that the barn did not comply with the variance requirement and was not a special exception. *Id.* The Board required the Waldes to remove the apartment from the structure. *Id.* at 436, 737 S.E.2d at 634. After the partial demolition of the structure, the Waldes filed claims against the builder. *Id.* at 437, 737 S.E.2d at 634. Association Insurance Company (AIC) insured the builder under a CGL policy. *Id.* at 438, 737 S.E.2d at 634. This court found that although the Waldes "successfully raised the possibility of 'property damage' caused by an 'occurrence'" under the policy, the exclusion barred coverage for the Waldes' economic losses and loss of use of the barn due to the builder's negligence in the permitting process. *Id.* at 447–48, 737 S.E.2d at 639.

More recently, the supreme court, in a divided opinion, found a "your work" exclusion applied in *Bennett & Bennett Construction, Inc. v. Auto Owners Insurance Co.*, 405 S.C. 1, 747 S.E.2d 426 (2013). In *Bennett*, a homeowner hired a contractor to remove stucco cladding from her home and replace it with decorative brick. 405 S.C. at 3, 747 S.E.2d at 427. The contractor hired a brick installer to install the brick and instructed the subcontractor not to pressure wash or acid wash the brick. *Id.* The brick installer hired a brick cleaner to clean the brick. *Id.* The brick cleaner damaged the brick by using a pressure washer and acid solution. *Id.* After the brick installer refused the general contractor's request to remove and replace the brick, the general contractor replaced the brick at its own expense. *Id.* The general contractor filed an action against the brick installer for breach of contract and obtained a default judgment. *Id.* at 3–4, 747 S.E.2d at 427.

The general contractor next sought a declaratory judgment under the brick installer's CGL policy for coverage for the damages. *Id.* at 4, 747 S.E.2d at 427.

Our supreme court first found exclusion j(5) applied, which barred coverage for "'property damage' to [t]hat particular part of real property on which you or any contractors or subcontractors . . . are performing operations, if the 'property damage' arises out of those operations. . . ." *Id.* at 5, 747 S.E.2d at 428. The supreme court found the damages arose out of the operations performed by the insured or its subcontractor (here, the second subcontractor). *Id.* at 7, 747 S.E.2d at 429. Thus, the court found exclusion j(5) "unambiguously exclude[d] coverage when the insured's subcontractor damages the work product while performing operations, regardless of whether 'your work' is complete under the policy . . . ." *Id.*

"Although unnecessary to [its] analysis[,]" the supreme court also found exclusion n, a "your work" exclusion, applied to defeat coverage. *Id.* at 7–8, 747 S.E.2d at 429. Exclusion n applied to damages for any loss or expense incurred to repair or replace "your work" if such work was withdrawn from use due to a known or suspected defect. *Id.* at 8, 747 S.E.2d at 429. The court found the brick face was replaced because of a deficiency or inadequacy; thus, coverage was barred under exclusion n. *Id.* at 8, 747 S.E.2d at 430. The court concluded, "As we have repeatedly explained, a CGL policy does not insure the insured's work itself but consequential risks that stem from the insured's work." *Id.*

We find the "your work" exclusion applies in this case. The exclusion applies to property that must be restored, repaired, or replaced. The exclusion specifically includes materials furnished in connection with such work. Here, the contract between SYS and Precision required Precision to "correct the affected work and all costs incurred as the result of [a] breach of warranty . . . ." We find the defective tape, and all costs associated with its replacement, fall squarely within the exclusion.

2. Construction of the Policy

Precision also argues the trial court erred in narrowly construing the policy to defeat coverage. We disagree.

"An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (citation omitted). The court must give policy language its plain, ordinary, and popular meaning. *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013). The court must construe ambiguous terms in an insurance policy liberally in favor of the insured and strictly against the insurer. *Stringer v. State Farm Mut. Auto. Ins. Co.*, 386 S.C. 188, 192, 687 S.E.2d 58, 60 (Ct. App. 2009). "[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." *Id.* (quoting *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 304, 128 S.E.2d 171, 174 (1962)). "The court cannot torture the meaning of policy language to extend coverage not intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 105 (Ct. App. 2006) (citing *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 8, 530 S.E.2d 132, 135 (Ct. App. 2000)).

We find there was no ambiguity in the policy terms at issue; thus, the trial court was not required to construe the terms in favor of Precision. Rather, the trial court appropriately construed the relevant policy terms according to their plain and ordinary meaning. We find no error in the trial court's construction of the policy.

3. Remaining Issues

Based on our disposition of Precision's challenges to the "your work" exclusion and the trial court's construction of the policy, we need not address Precision's remaining challenges to the trial court's findings regarding "property damage" and "occurrence." *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

V. CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

FEW, C.J., and GEATHERS, J., concur.