The Supreme Court of South Carolina

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N O T I C E

In the Matter of John Michael Bosnak, Petitioner

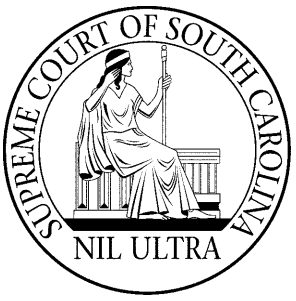
Petitioner was definitely suspended from the practice of law on April 19, 2017, for one (1) year. *In the Matter of John Michael Bosnak,* 419 S.C. 520, 799 S.E.2d 306 (2017). Petitioner has now filed a petition seeking to be reinstated.

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
September 27, 2019



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
October 2, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Scott Ledford, Employee, Petitioner,

v.

Department of Public Safety, Employer, and State Accident Fund, Carrier, Respondents.

Appellate Case No. 2018-001677

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Workers' Compensation Commission

Opinion No. 27920
Heard April 18, 2019 – Filed October 2, 2019

REVERSED, VACATED, AND REMANDED

James K. Holmes, of The Steinberg Law Firm, LLP, of Charleston, and E. Hood Temple, of Hatfield Temple, LLP, of Florence, both for Petitioner.

John Gabriel Coggiola and Sarah C. Sutusky, of Willson Jones Carter & Baxley, P.A., of Columbia, for Respondents.

PER CURIAM: We granted Scott Ledford's petition for a writ of certiorari to review the Court of Appeals' decision in *Ledford v. Department of Public Safety*, Op. No. 2018-UP-280 (S.C. Ct. App. filed June 27, 2018). We reverse the decision of the Court of Appeals, vacate the orders of Commissioner Susan Barden and the Workers' Compensation Commission Appellate Panel ("Appellate Panel"), and remand for a new hearing before a single commissioner.

Scott Ledford is a former lance corporal with the South Carolina Highway Patrol. While employed as a highway patrolman, Ledford was injured in two separate work-related accidents. In July 2010, Ledford sustained injuries to his spine after being tasered during a training exercise. Ledford settled the 2010 claim with Respondents. In March 2012, Ledford was involved in a motorcycle accident while attempting to pursue a motorist.

Following the second accident, Ledford filed two separate claims for workers' compensation benefits. One claim alleged injuries to his right leg and lower back stemming from the 2012 motorcycle accident. The other claim related to Ledford's 2010 Taser accident and alleged a change of condition for the worse. The claims were eventually consolidated, and the parties appeared before Commissioner Andrea Roche. Commissioner Roche declined to find Ledford suffered a change of condition; however, she found Ledford was entitled to medical benefits for injuries to his right leg and aggravated pre-existing conditions in his neck and lower back due to the motorcycle accident. Neither party appealed Commissioner Roche's order.

In January 2014, Respondents filed a Form 21 requesting to stop payment of temporary compensation, a permanency determination, and credit for payments made after Ledford reached maximum medical improvement ("MMI"). Commissioner Barden held a hearing on Respondents' Form 21 in August 2014.

Following the hearing—but prior to the issuance of a final order—Ledford filed a motion to recuse Commissioner Barden. According to Ledford's motion, Commissioner Barden requested a phone conference with the parties a month after the hearing. During this conference, Commissioner Barden allegedly threatened criminal proceedings against Ledford if the case was not settled; indicated that she engaged in her own investigation and made findings based on undisclosed materials

outside the record; suggested Ledford used "creative accounting" in his tax returns;[1] and questioned Ledford's credibility regarding his claims of neck pain. Ledford contended any one of these grounds was sufficient to warrant recusal.

In support of his motion to recuse, Ledford submitted an affidavit from his accountant stating Ledford's tax returns were prepared in accordance with Generally Accepted Accounting Principles. Ledford also submitted an affidavit and memorandum from his attorney, E. Hood Temple, who participated in the call with Commissioner Barden and prepared the memorandum immediately afterwards to document what had transpired.

In Temple's affidavit, he alleged Commissioner Barden stated "while [Ledford] may be a former member of the South Carolina Highway Patrol ACE Team, he was not a member of the 'Truth Team.'" Temple further claimed Commissioner Barden indicated that she "did not believe anything [Ledford] said except his name and age." Temple also alleged Commissioner Barden stated that she realized the State Accident Fund would likely make a minimal offer due to the conference call, and she would have an ongoing duty to report Ledford to the Attorney General for prosecution unless Ledford accepted the Fund's offer. According to Temple, the State Accident Fund made a minimal settlement offer following the phone conference.

Commissioner Barden denied the troubling statements in Temple's affidavit. Commissioner Barden labeled the affidavit as containing "false statement[s] of fact and a frivolous allegation[,]" and maintained that she "did not manifest bias or prejudice against [Ledford], but simply informed the parties of the inconsistencies" in his testimony and of her duty to report any suspicions of false statements and misrepresentations. Commissioner Barden denied the motion to recuse.

Commissioner Barden proceeded to rule on the merits of the claim, determining that Ledford was entitled to 0% permanent impairment to his spine, and that Respondents were not liable for any additional medical treatment following the date of MMI other than physical therapy and injections. In her order, Commissioner

[1] Ledford owned and operated a landscaping business to supplement his income as a highway patrolman. Respondents submitted Ledford's 2012 and 2013 tax returns as an exhibit in the underlying workers' compensation proceeding.

Barden impugned Ledford's credibility regarding his ability to work, the extent of his injuries, and his earnings from and participation in his landscaping business.

Ledford appealed Commissioner Barden's rulings to the Appellate Panel, which affirmed in part and reversed in part. Notably, the Appellate Panel reversed Commissioner Barden's finding regarding permanency and determined Ledford sustained 15% additional permanent partial disability to his back and was entitled to 45 weeks of compensation. The Appellate Panel also reversed Commissioner Barden's decision regarding when Respondents were entitled to stop paying temporary compensation. However, the Appellate Panel adopted most of Commissioner Barden's factual findings, including those questioning Ledford's credibility.

The Court of Appeals affirmed the Appellate Panel and held: (1) Commissioner Barden was not required to recuse herself; (2) substantial evidence supported the Appellate Panel's decision to reverse Commissioner Barden's permanency determination; and (3) substantial evidence supported the Appellate Panel's findings that Ledford was not credible and his landscaping business remained lucrative following the injury. *Ledford v. Dep't of Pub. Safety*, Op. No. 2018-UP-280 (S.C. Ct. App. filed June 27, 2018).

We hold the Court of Appeals erred in finding Commissioner Barden was not required to recuse herself. There was evidence in the record—including Temple's affidavit—to support Ledford's contention that Commissioner Barden threatened criminal proceedings unless the case settled. Given the serious allegations lodged against Commissioner Barden, coupled with Commissioner Barden's adamant denial of threatening Ledford with criminal prosecution unless he accepted the Fund's settlement offer, we questioned Respondent's counsel, Sarah C. Sutusky, at oral argument. Ms. Sutusky was a party to the conference call that underlies the recusal motion, and she corroborated the contents of Temple's affidavit.[2]

We are deeply concerned by Commissioner Barden's conduct in this matter. We first address her comments during the phone conference, especially those regarding a "duty" to report Ledford for criminal prosecution. Commissioner Barden's remarks essentially left Ledford with two equally undesirable options: (1) move forward with his claim and risk being referred for criminal prosecution; or

[2] We commend Ms. Sutusky for her candor and professionalism.

(2) settle the case and forfeit his right to have his claim adjudicated, and concomitantly Commissioner Barden would ignore her purported "duty" to report Ledford for criminal prosecution.[3] Even if Commissioner Barden's statements were not intended as bona fide threats, they were indisputably coercive. *See* Commentary to Section 3B(8), Code of Judicial Conduct (CJC), Rule 501, SCACR ("A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.").[4]

Our Code of Judicial Conduct states: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Section 3E, CJC, Rule 501, SCACR. In our view, Commissioner Barden's behavior in this case would undoubtedly lead one to reasonably question her impartiality. Therefore, she should have recused herself.[5] Commissioner Barden's conduct was quite simply unacceptable and offensive to the ideals of a fair and impartial judiciary.

This Court fully recognizes and supports the role that judges, particularly trial court judges, have in facilitating the resolution of cases. Once a case is assigned to a judge or the trial is underway, the parties (through counsel) will often confer with the judge on a host of matters involving the case. Those discussions may solicit the judge's input on resolving the case; judges who accept the invitation to engage in such discussions may necessarily convey a preliminary view of the merits of a claim or defense, which may indirectly include an assessment of a party's or a witness's

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[3] It is interesting that Commissioner Barden presented Ledford with one choice involving a referral to the Attorney General's office and a second choice involving no such referral. Even assuming a duty to report Ledford for false statements or misrepresentations properly arose, the obligation would be absolute. Commissioner Barden's duty would not simply go away in the event of a settlement.

[4] Workers' compensation commissioners "are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules." S.C. Code Ann. § 42-3-250(A) (2015).

[5] We find the recusal issue dispositive; therefore, we need not address the remaining issues in the Court of Appeals' decision. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

credibility. This role of a trial court is both accepted and, quite frankly, invited. Nothing in our decision today should be construed to discourage this practice. We are addressing the discrete situation where a trial court judge (a workers' compensation commissioner) threatened criminal prosecution against a party if that party did not settle the case.

Ledford's counsel provided an opportunity for Commissioner Barden to right her wrong by moving for recusal. Instead of stepping aside, Commissioner Barden became more abusive and strident in both her ruling on the recusal motion and her final order. Commissioner Barden's false affidavit is appalling, and it compounds the initial error.

Accordingly, we reverse the decision of the Court of Appeals, vacate the orders of Commissioner Barden and the Appellate Panel, and remand for a new hearing before a single commissioner.[6]

REVERSED, VACATED, AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

[6] Ledford specifically requested this relief in his brief. Additionally, in response to pointed questioning by the Court during oral argument, Ledford insisted that he desired this remedy.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Korey Lamar Love, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-002233

ON WRIT OF CERTIORARI

Appeal from Greenville County
Daniel Dewitt Hall, Circuit Court Judge

Opinion No. 27921
Submitted May 15, 2019 – Filed October 2, 2019

REVERSED AND REMANDED

E. Charles Grose Jr., of Grose Law Firm, of Greenwood, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Lindsey Ann McCallister, both of Columbia, for Respondent.

JUSTICE JAMES: In this post-conviction relief (PCR) matter, Korey Lamar Love moved at the outset of his PCR hearing to amend his application for relief to add four additional grounds of ineffective assistance of counsel. This appeal centers

upon only one of those additional grounds, specifically that trial counsel was ineffective for failing to object to a portion of the State's closing argument. The State objected to the amendments, and the PCR court denied Love's motion to amend, finding the State would be unfairly prejudiced by allowing Love to amend his PCR application upon such short notice. We granted Love a writ of certiorari to address whether the PCR court erred by not allowing him to amend his application to add the ground concerning the State's closing argument. We reverse the PCR court's denial of Love's motion to amend to add that one ground, and we remand this matter to the PCR court and instruct the PCR court to consider the merits of this additional ground.

FACTUAL AND PROCEDURAL HISTORY

On January 27, 2007, at approximately 1:30 a.m., Isaac Bass (Victim) completed his shift at the Greenville Wendy's on Pleasantburg Drive and exited the restaurant through the self-locking back door. Victim was immediately confronted by an armed assailant, who attempted to rob Victim. Victim called for help, and a struggle ensued. Victim broke free from the assailant and attempted to run away; however, the assailant shot Victim in the neck. The assailant and a cohort fled the scene. Victim got to his feet, walked around the side of the Wendy's, and banged on the drive-thru window. Because he was shot in the neck, Victim was unable to call for help. Victim made his way towards the street and flagged down a passing vehicle. The driver saw Victim on the side of the road and observed two men sprinting away from the Wendy's. The driver stopped to provide Victim assistance; however, Victim did not survive.

Because there was no physical evidence linking the case to any suspect, the case went unsolved for a few years. In 2010, Detective Collis Flavell was assigned to the case. Detective Flavell informed Victim's parents he was working the case, and the community soon became involved in raising reward money and asking people to come forward with information. As a result of these efforts, Detective Flavell received a tip suggesting law enforcement investigate certain members of the Love family.

Following an investigation, Korey Love was arrested and indicted for murder, attempted armed robbery, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under the age of eighteen. At trial, the State's case was built upon the testimony of several people who explained

Love's involvement in Victim's murder. During the State's closing argument, the State told the jury:

> This is your opportunity to do justice in this case under the oath that you have taken. You can be instruments of justice for [Victim]. His death was not the final chapter of his life, this trial is the final chapter of his life.

Trial counsel did not object to this comment. The jury found Love guilty as indicted. The trial court sentenced Love to concurrent prison terms of fifty years for murder, twenty years for attempted armed robbery, five years for possession of a weapon during the commission of a violent crime, and five years for possession of a pistol by a person under the age of eighteen. The court of appeals dismissed Love's direct appeal following *Anders*[1] briefing. *State v. Love*, Op. No. 2014-UP-177 (S.C. Ct. App. filed Apr. 23, 2014).

Love filed an application for PCR on April 8, 2015, claiming ineffective assistance of both trial and appellate counsel. A PCR hearing was held on February 17, 2016. As the hearing commenced, Love moved to amend his application to add four additional grounds of ineffective assistance of counsel. The following exchange took place:

> **Love:** I have an amended application that I would like to hand up. It adds some matters that were on the record but not included in the original application.
>
> **The State:** Your Honor, we would object to that. Again, this case has been scheduled for more than a month. I was handed the amendments this morning.
>
> **Love:** I've marked this as Applicant's Exhibit Number 4, at least as a proffer, and I move to be allowed to amend under the liberal rules of . . . civil procedure that allow amendments, even amendments during and after the trial in a civil case.

[1] *See Anders v. California*, 386 U.S. 738 (1967).

PCR Court: [Assistant Attorney General], have you seen the amended application?

The State: About 20 minutes ago for the first time. Yes, Your Honor. I mean, there's no reason this couldn't have been emailed to me at any point prior to this morning. I mean, this is not a surprise. The roster goes out a month in advance. [PCR counsel] and I discussed before I put the roster out the fact that this case would be held in February. This is not a surprise to anybody.

The fact that I'm being hit with affidavits and phantom letters and amendments the day of the hearing, if I did this to opposing counsel, there would be hell to pay. I do not believe that we should be made to go forward on amendments that clearly could have been filed prior to this morning, Your Honor.

PCR Court: Yeah. I'm not going to allow -- I'm not going to allow the amended application to be considered for purposes of today when here, at the moment of trial, the moment of hearing -- or 20 minutes prior is when the [Assistant] Attorney General just received that and has not had an opportunity to respond. And so I'm not going to allow the amended application to be part of this hearing. All right. What's next?

Love: That's it. I just would -- at the time I would proffer testimony or proffer parts of the record that relate to the amendment so I can appeal that ruling, Your Honor.

PCR Court: All right. I'll leave that in your court.

Because the PCR court denied Love's motion to amend, the testimony primarily focused on the original grounds of ineffective assistance of counsel and not those contained in the amended application. As part of the proffer noted in the above exchange, Love questioned trial counsel about his failure to object to an alleged Golden Rule argument made during the State's closing:

> Now, in that same paragraph that we're looking at, the [State] makes a statement about this is your opportunity to do justice in this case under the oath that you've taken. You can be an instrument of justice for [Victim]. His death was not the final chapter of his life. This trial is the final chapter of his life. You didn't object to that statement, did you?

Trial counsel agreed he did not object to this portion of the State's closing argument. There was no other discussion of this issue during the hearing. At the close of his case-in-chief, Love moved to amend his application to conform to the evidence presented during the hearing. The PCR court denied the motion. Love renewed his motion to amend after the State rested, and the PCR court again denied the motion.

The PCR court denied Love's application for relief in a written order. Of course, the order did not address the merits of the issues Love raised in his amended application, but as to the proposed amendments, the order provided, "[Love] requested to amend the PCR application. [The PCR court] denied the motion, finding the late amendment did not provide adequate notice to opposing counsel." The PCR court also denied Love's motion to conform the pleadings to the evidence presented at the end of the hearing. Love filed a Rule 59(e), SCRCP motion requesting the PCR court to reconsider its denial of relief and to consider the merits of his amended grounds. The PCR court denied the motion. We granted Love's petition for a writ of certiorari to consider the single issue of whether the PCR court erred in refusing to allow the proposed amendment concerning the State's closing argument. We denied the petition as to Love's eight other issues.

DISCUSSION

"On review of a PCR court's resolution of procedural questions arising under the [Uniform] Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard." *Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017). The procedures for applying for PCR are outlined in the Uniform Post-Conviction Procedure Act (the PCR Act). *See* S.C. Code Ann. §§ 17-27-10 to -160 (2014). "An application for relief filed pursuant to [the PCR Act] must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45(A) (2014). "All grounds for relief available to an applicant under

[the PCR Act] must be raised in his original, supplemental or amended application." S.C. Code Ann. § 17-27-90 (2014). Because applicants are traditionally entitled to only one "bite at the apple," it is imperative that applicants raise all known issues in their original, supplemental, or amended applications. "At any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application or any pleading or motion . . . ." S.C. Code Ann. § 17-27-70(a) (2014).

The South Carolina Rules of Civil Procedure apply in a PCR action to the extent the rules do not conflict with the PCR Act. *See* Rule 71.1(a), SCRCP. Rule 15(a), SCRCP, provides, "A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(b) provides in part, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In such an instance, the trial court may allow pleadings to be amended upon proper motion. Rule 15(b) also provides that "[i]f evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

"[A trial] court is to freely grant leave to amend when justice requires and there is no prejudice to any other party." *Harvey v. Strickland*, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998). Essentially, "[a] trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion." *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019).

In *Mangal v. State*, the applicant prepared and filed his original PCR application without the assistance of counsel. 421 S.C. 85, 89, 805 S.E.2d 568, 570 (2017). The applicant was appointed counsel and subsequently retained a different attorney who represented him at his PCR hearing. *Id.* at 90, 805 S.E.2d at 570. No written amendment to the applicant's original application was made. *Id.* During the hearing, PCR counsel asked trial counsel why he failed to object to "improper

bolstering" testimony given at trial by one of the State's witnesses—an issue that was not contained in the PCR application—and the State briefly cross-examined trial counsel on the issue. *Id.* at 90, 805 S.E.2d at 571. At the end of the hearing, the applicant argued trial counsel was ineffective in several respects not mentioned in the PCR application, including his failure to object to the allegedly improper bolstering. *Id.* The PCR court denied the applicant relief without addressing the improper bolstering issue. *Id.*

We held the PCR court acted within its discretion in refusing to address the improper bolstering issue. *Id.* at 92, 805 S.E.2d at 571. We explained: (1) the written application contained no indication of a claim based on improper bolstering and no amendment was filed; (2) PCR counsel began the hearing without mentioning additional claims would be presented; (3) even when questioning trial counsel as to why he did not object to the testimony, PCR counsel did not inform the PCR court he would make a claim for ineffective assistance based on trial counsel's failure to make an objection; and (4) the claim was never made with specificity. *Id.* at 92-93, 805 S.E.2d at 571-72. We highlighted the fact that the State had no notice the applicant intended to pursue the claim until the end of the hearing—after all of the evidence had been presented. *Id.* at 95, 805 S.E.2d at 573. Recognizing the importance of the Sixth Amendment's guarantee of effective assistance of counsel, we noted:

> [T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

Id. at 99-100, 805 S.E.2d at 575-76 (footnote omitted).

Here, the PCR court summarily concluded the State would be prejudiced by Love's four proposed amendments because the State received notice of the additional

grounds only twenty minutes before the hearing began. The timing of an applicant's motion to amend an application is indeed relevant to a consideration of the resulting prejudice such an amendment would cause the State under Rule 15. However, in order to properly exercise its discretion under Rule 15, the PCR court should have separately considered the substance of each proposed amendment and any prejudice that would result to the State if the amendment were allowed. On the issue of prejudice, the State argued to the PCR court: (1) the case had been set for hearing for over a month; (2) PCR counsel could have emailed the State the amendment "at any point prior to this morning"; (3) if the State had done this to PCR counsel, "there would be hell to pay"; and (4) the State should not be required to go forward on amendments that could have been filed "prior to this morning." As noted, the PCR court denied the motion to amend because it was made too late and the State "has not had [the] opportunity to respond." Similarly, in its written order, the PCR court noted the State had not been given adequate notice of the amendments.

We have noted in several cases that "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application." *See Mangal*, 421 S.C. at 100, 805 S.E.2d at 576; *Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016); *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). We have also encouraged PCR courts to find ways to address the merits of "substantial issues" within the flexibility of the Rules of Civil Procedure prior to an applicant suffering procedural default. *See Mangal*, 421 S.C. at 99-100, 805 S.E.2d at 575-76. A separate examination of both the substance of each proposed amendment and potential prejudice is particularly appropriate in a PCR proceeding. *See id.* at 99, 805 S.E.2d at 575 (providing "the Sixth Amendment guarantee of effective assistance of counsel is a 'bedrock principle in our justice system'" (quoting *Martinez v. Ryan*, 566 U.S. 1, 12 (2012))); *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (recognizing "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial"); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'").

Many PCR grounds are complex and require extensive preparation on the part of the State and the applicant. The prejudice of allowing an amendment that includes a complex issue very shortly before the commencement of a hearing may be apparent. However, some PCR grounds are not at all complex, and the State's defense to such claims may be straightforward, even if the ground is one advanced by the applicant in an amendment close to the time of the hearing. When analyzing

the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record. The PCR court should consider the relevant circumstances separately as to each proposed amendment, and after doing so, the PCR court can properly rule on the motion to amend.

Here, the claim Love sought to add centered upon one passage in the trial transcript, specifically the solicitor's statement to the jury that "[y]ou can be instruments of justice for [Victim]. His death was not the final chapter of his life, this trial is the final chapter of his life." Certainly, the State is well-acquainted with claims asserted by applicants in PCR cases that solicitors' comments (opening statements, closing arguments, or otherwise) violate the Golden Rule or are otherwise improper. The issue advanced by Love in this attempted amendment was hardly complex and would have required little regrouping on the part of the State to defend against it. Little to no prejudice would result to the State if this amendment were granted; indeed, the State's arguments against the proposed amendment were simply that the amendment was filed too late and that there would "be hell to pay" if the State had done the same thing. Neither of these arguments articulate the infliction of prejudice upon the State; therefore, there was no "valid reason for denying the motion." *See Skydive*, 426 S.C. at 182, 826 S.E.2d at 588.

In its brief, the State asserts it would have been prejudiced had the amendment been allowed because the solicitor who made the allegedly offending argument was out of state on medical leave and therefore unavailable to testify at the PCR hearing. We note the State did not cite this circumstance at the hearing as an example of the prejudice it would suffer if the amendment were allowed; even if this circumstance had been so asserted, we conclude that in this case, the unavailability of the solicitor is irrelevant to the consideration of whether trial counsel was ineffective for not objecting to the argument. The solicitor made the supposedly improper comments, and trial counsel did not object; testimony from the solicitor on the point would have added nothing probative to the proceeding.

The dissent submits the Golden Rule issue was tried by consent because Love, without objection from the State, introduced evidence of the solicitor's argument when presenting his case to the PCR court; thus, the dissent contends, the PCR court should have granted Love's motion to amend the pleadings to conform to the

evidence pursuant to Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Ordinarily, the introduction of evidence in this manner might convince us the issue was tried by implied consent of the State. However, in this case, when the PCR court denied Love's motion to amend at the outset of the PCR hearing, the PCR court granted Love's request to proffer evidence in support of the grounds set forth in the proposed amended application. Love made this request in an effort to preserve certain issues for appeal; therefore, evidence on the Golden Rule issue was not presented by Love "by express or implied consent," but rather was presented in the form of a proffer.

We hold the PCR court erred in refusing to allow Love to amend his application to include this particular ground for relief. We remand to the PCR court with instructions to receive evidence and argument and consider this ground on the merits. The dissent posits a remand is not necessary because it believes the solicitor's argument was neither violative of due process nor prejudicial to Love, when considered in the context of the entirety of the solicitor's closing argument. The PCR court, not this Court, should make the initial factual and legal findings on Love's claim for relief. Our decision to remand this issue to the PCR court is purely procedural and should in no way be construed as a suggestion to the PCR court as to how it should rule on the merits.

CONCLUSION

The PCR court first erred in summarily denying Love's motion to amend without separately considering each proposed amendment in light of Rule 15(a), SCRCP. We further hold the PCR court erred in finding the State would be prejudiced by the granting of the amendment alleging trial counsel was ineffective for failing to object to the solicitor's comments to the jury. Therefore, we remand this matter to the PCR court for consideration of whether Love is entitled to relief on this ground.

REVERSED AND REMANDED.

BEATTY, C.J., and FEW, J., concur. KITTREDGE, J., dissenting in a separate opinion in which HEARN, J., concurs.

JUSTICE KITTREDGE: I dissent. My preferred disposition would be to dismiss the writ of certiorari as improvidently granted. Because the majority has opted for a written decision, I vote to affirm the PCR court in result.

First, I take no issue with the majority's excellent presentation of the law, or the appropriateness of a remand under normal circumstances. To be sure, Rule 15 of the South Carolina Rules of Civil Procedure provides for a liberal approach to the granting of amendments to pleadings. The reality is that this Court has gone even further in post-conviction relief (PCR) matters due to the practical realities of PCR litigation. As this Court observed in *Mangal v. State*,

> [T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. . . . We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways . . . to reach the merits of substantial issues.

421 S.C. 85, 99–100, 805 S.E.2d 568, 575–76 (2017).

Mangal recognizes the distinctive nature of PCR litigation. For the vast majority of PCR applications, the applicant is in prison. The inmate complainant begins the process by completing and filling in the blanks of a standardized application. Sometimes an attorney is thereafter retained to pursue the inmate's PCR claim, but in most cases, counsel is appointed. Meaningful access to the imprisoned PCR applicant is difficult. The helter-skelter docketing of PCR matters for trial places further constraints on the normal attorney-client relationship. The net result of these factors has the effect of counsel typically making a last-minute motion to clean up the applicant's *pro se* PCR application. A PCR court will generally grant motions to amend the *pro se* complaint. If, however, the proposed amendment is complicated (factually or legally) and would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.

Here, the majority correctly recognizes the issue raised by Petitioner's proposed amendment was simple and straightforward. In addition, evidence was presented without objection at the PCR hearing on the challenged portion of the State's closing argument. Petitioner then "move[d] that the application be amended to conform to [the] evidence per the rules of civil procedure." As the majority

concludes, it was error not to permit the amendment challenging the State's closing argument as a Golden Rule violation. The error was compounded when the court likewise denied the motion to conform the pleadings to the evidence.

However, I respectfully disagree that a remand is warranted here. Not only is the issue underlying the denied amendment straightforward, its resolution is also straightforward. As a matter of law, the challenged portion of the State's closing argument does not constitute a Golden Rule argument. Following the multi-day trial, the State made a lengthy closing argument, from which Petitioner claimed three sentences were a Golden Rule violation warranting a new trial. In its entirety, the challenged portion of the closing argument reads:

> This is your opportunity to do justice in this case under the oath you have taken. You can be instruments of justice for Isaac Bass. His death was not the final chapter of his life, this trial is the final chapter of his life.

Petitioner devotes much of his brief to the merits of his Golden Rule argument. After presenting a full argument accompanied by many case citations, the primary relief requested by Petitioner is for a merits-based ruling granting post-conviction relief and remanding to the Court of General Sessions for a new trial. Only "in the alternative" does Petitioner request a remand to the PCR court for additional consideration of the issue.

Under these circumstances, I would accept Petitioner's invitation to resolve this appeal on the merits and thus avoid a needless remand. The solicitor's comment to the jury neither amounted to a denial of due process nor was prejudicial, especially in the context of the entirety of the closing argument. Petitioner's Golden Rule argument is similar to the argument addressed in *State v. Rice*, in which the court of appeals found no Golden Rule violation where the solicitor "asked the jury to give the victim's wife peace and the victim justice." *State v. Rice*, 375 S.C. 302, 333, 336, 652 S.E.2d 409, 424, 426 (Ct. App. 2007), *overruled on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011). As in *Rice*, the solicitor's closing argument in this case "did not call for the jurors to put themselves in the victim's place and did not rise to the level of a Golden Rule argument." *Id*. at 336, 652 S.E.2d at 426. Accordingly, I would find counsel was not deficient in failing to object.

Because there was no Golden Rule violation, I would affirm the PCR court in result. I respectfully dissent.

HEARN, J., concurs.

The Supreme Court of South Carolina

In the Matter of Louis S. Moore, Respondent.

Appellate Case Nos. 2019-001615 & 2019-001616

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR. The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has not filed a return to the petition.

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court. However, pursuant to Rule 17(d), RLDE, Rule 413, SCACR, Respondent may apply to this Court for reconsideration of the order.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Mr. Lumpkin may make disbursements from Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

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

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
September 27, 2019

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Charleston County. Effective October 21, 2019,[1] all filings in all common pleas cases commenced or pending in Charleston County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Abbeville	Aiken	Allendale	Anderson
Bamberg	Barnwell	Beaufort	Berkeley
Calhoun	Cherokee	Chester	Chesterfield
Clarendon	Colleton	Darlington	Dillon
Dorchester	Edgefield	Fairfield	Florence
Georgetown	Greenville	Greenwood	Hampton
Horry	Jasper	Kershaw	Lancaster
Laurens	Lee	Lexington	Marion
Marlboro	McCormick	Newberry	Oconee
Orangeburg	Pickens	Richland	Saluda
Spartanburg	Sumter	Union	Williamsburg

[1] Pursuant to an August 28, 2019 Order, E-Filing was originally scheduled to begin in Charleston on September 18, 2019. However, after a mandatory evacuation and the closure of county offices in Charleston County based on Hurricane Dorian, the August 28th Order was rescinded on September 9, 2019.

York **Charleston-Effective Monday, October 21, 2019**

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
September 30, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nationwide Insurance Company of America,
Respondent,

v.

Kristina Knight, individually and as Personal Representative of the Estate of Daniel P. Knight,
Appellant.

Appellate Case No. 2017-001348

Appeal From Greenville County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5685
Heard June 4, 2019 – Filed October 2, 2019

AFFIRMED

Edwin L. Turnage, of Harris & Graves, PA, of Greenville, for Appellant.

Wesley Brian Sawyer and Adam J. Neil, both of Murphy & Grantland, PA, of Columbia, for Respondent.

MCDONALD, J.: In this declaratory judgment action to determine whether underinsured motorist (UIM) coverage exists under an automobile insurance policy, Kristina Knight (Knight), individually and as personal representative of the estate of Daniel Knight (Decedent), appeals the circuit court's order granting

summary judgment to Nationwide Insurance Company of America (Nationwide). Knight argues South Carolina's excluded driver statute, section 38-77-340 of the South Carolina Code (2015), and public policy considerations prohibit an insurer from excluding a resident relative from uninsured motorist (UM) or underinsured motorist (UIM) coverage, even when the policyholder has executed an endorsement intentionally excluding the resident relative from "all coverages in [the] policy." We affirm the circuit court's order granting summary judgment.

Facts and Procedural History

On May 22, 2014, Knight applied for a Nationwide automobile insurance policy (the Policy) and completed an endorsement (Excluded Driver Endorsement) listing Decedent as an individual excluded from coverage under the Policy.[1] The Excluded Driver Endorsement states, "With this endorsement, all coverages in your policy are not in effect while Danny Knight is operating any motor vehicle." Knight signed this page, on which she also checked the box confirming "the excluded person has obtained insurance or other security to operate motor vehicles."

On December 4, 2015, Nationwide issued the Policy to Knight, who was then engaged to Decedent. The Policy insured a 1996 Ford Ranger and was effective from December 4, 2015, through June 4, 2016. Decedent and Knight married later in December 2015.

On February 2, 2016, a vehicle struck and killed Decedent while he was riding his motorcycle. Decedent's estate collected from the at-fault driver's liability coverage, Decedent's motorcycle policy, and Decedent's UIM coverage from his own automobile policy. Knight subsequently made a claim with Nationwide, seeking to stack her Policy's UIM limits with the other coverages. It is undisputed that the damages here exceed the coverage limits of the Policy.

Nationwide filed a declaratory judgment action seeking a declaration "that it is not required to provide any coverage, including but not limited to underinsured motorist coverage," for any claim "made on account of the February 2, 2016 accident." Knight answered and counterclaimed for breach of contract.

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[1] The title "Voiding Auto Insurance While Named Person is Operating Car" appears at the top of the Excluded Driver Endorsement.

Nationwide moved for summary judgment; Knight filed a cross motion for summary judgment, arguing Nationwide's "insurance policy and [Excluded Driver] endorsement violate the public policy of the State of South Carolina." The circuit court heard the motions on May 22, 2017, and subsequently granted Nationwide's motion for summary judgment.

Standard of Review

"Because declaratory judgment actions are neither legal nor equitable, the standard of review depends on the nature of the underlying issues." *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct. App. 2004). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Williams v. Gov't Employees Ins. Co. (GEICO)*, 409 S.C. 586, 593, 762 S.E.2d 705, 709 (2014) (quoting *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 610, 730 S.E.2d 862, 864 (2012)).

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP." *Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 538, 753 S.E.2d 437, 439 (Ct. App. 2013) (quoting *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 177, 700 S.E.2d 283, 286 (Ct. App. 2010)). "Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id*. (citing Rule 56(c), SCRCP).

Law and Analysis

"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). "As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition." *Williams*, 409 S.C. at 598, 762 S.E.2d at 712. "Public policy considerations include not only what is expressed in state law, such as the constitution and statutes, and decisions of the courts, but also a determination

whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare." *Id.* at 599, 762 S.E.2d at 712.

"[S]tatutes relating to an insurance contract are generally part of the contract as a matter of law. To the extent a policy conflicts with an applicable statute, the statute prevails." *Lincoln Gen. Ins.*, 406 S.C. at 539, 753 S.E.2d at 439–40 (citation omitted). "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005). "A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." *Id.* at 232, 612 S.E.2d at 724.

South Carolina's excluded driver statute, § 38-77-340, provides:

> Notwithstanding the definition of "insured" in Section 38-77-30, the insurer and any named insured must, by the terms of a written amendatory endorsement, the form of which has been approved by the director or his designee, agree that coverage under such a policy of liability insurance shall not apply while the motor vehicle is being operated by a natural person designated by name. The agreement, when signed by the named insured, is binding upon every insured to whom the policy applies and any substitution or renewal of it. However, no natural person may be excluded unless the named insured declares in the agreement that (1) the driver's license of the excluded person has been turned in to the Department of Motor Vehicles or (2) an appropriate policy of liability insurance or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

S.C. Code Ann. § 38-77-340 (2015). "The purpose of this section is to 'alleviate the problem often faced by the owner of a family policy, who . . . has a relatively safe driving record but is forced to pay higher premiums because another member of the family . . . is by definition also included in the policy coverage.'" *Lincoln*

Gen. Ins., 406 S.C. at 541, 753 S.E.2d at 441 (alterations in original) (quoting *Lovette v. U.S. Fid. & Guar. Co.*, 274 S.C. 597, 600, 266 S.E.2d 782, 783 (1980)).

> An automobile insurance company, in setting its rates, bases those rates at least in part on the probabilities involving the insured and the vehicle(s) he is insuring. Where, as here, the vehicle is not insured by the company from whom coverage is sought, the carrier cannot accurately calculate its risks. It is one thing to insure against "unknowable" risks, such as the chance that one will be injured by an underinsured at-fault driver while a passenger in another's vehicle, or as a pedestrian; it is an entirely different calculus where a company's insured owns and operates a motor vehicle, *especially a motorcycle*, not insured by the carrier making its risk assessments.

Burgess v. Nationwide Mut. Ins. Co., 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007) (emphasis added).

Knight argues the plain language of § 38-77-340 contemplates an exclusion from liability coverage only and the application of the excluded driver endorsement to UIM coverage violates South Carolina's "strong, remedial public policy requiring insurance companies who write automobile insurance in this State to provide portable [uninsured] and [underinsured motorist] coverages to insureds and their families." However, as the circuit court aptly noted, "UIM coverage is not mandatory in South Carolina." *See e.g.*, S.C. Code § 38-77-160 (2015) (requiring that automobile insurance "carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute."). UIM coverage is sold as optional "additional coverage" with a motor vehicle liability policy; thus, certain definitions provided within Title 38, "Insurance," and Title 56, "Motor Vehicles," are helpful to our analysis.

While Title 38 does not define "policy of liability insurance" (as referenced in § 38-77-340), Title 56's Motor Vehicle Financial Responsibility Act (MVFRA)[2] defines a "motor vehicle liability policy" as

> (5) An owner's or operator's policy of liability insurance that fulfills all the requirements of Sections 38-77-140 through 38-77-230, certified as provided [in Title 56] and issued, except as otherwise provided by Section 56-9-560, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person or persons named therein as insured, and any other person, as insured, using the vehicle described therein with the express or implied permission of the named insured, and subject to the following special conditions:
>
> . . .
>
> (d) Additional coverage permitted: Any policy which grants the coverage required by a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and the excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants this excess or additional coverage, the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this article.[3]

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[2] §§ 56-9-10 to -630 of the South Carolina Code (2018).

[3] Our court has referenced this definition in explaining that "so long as the mandatory minimum coverage limits are met, an insurer may provide reasonable limitations on optional coverage." *Nationwide Mut. Fire Ins. Co. v. Walls*, Op. No. 5653 (S.C. Ct. App. filed June 5, 2019) (Shearouse Adv. Sh. No. 23 at 15).

S.C. Code Ann. § 56-9-20(5) (2018). Section 38-77-160, referenced in the MVFRA definition, addresses the UIM coverage that may be purchased as "Additional coverage" with the purchase of a motor vehicle liability policy. Although Title 38 does not define "motor vehicle liability policy," section 38-77-30(1) (2015) defines "Automobile insurance" as

> automobile bodily injury and property damage liability insurance, including medical payments and uninsured motorist coverage, and automobile physical damage insurance such as automobile comprehensive physical damage, collision, fire, theft, combined additional coverage, and similar automobile physical damage insurance and economic loss benefits as provided by this chapter written of offered by automobile insurers. An automobile insurance policy includes a motor vehicle policy as defined in item (7)[4] of Section 56-9-20 and any nonowner automobile insurance policy which covers an individual private passenger automobile not owned by the insured, a family member of the insured, or a resident of the same household as the insured.

S.C. Code Ann. § 38-77-30(1) (2015). Section 38-77-30(10.5) defines a "Policy of automobile insurance" or "policy" as

> a policy or contract for bodily injury or property damage liability insurance issued or delivered in this State covering liability arising from the ownership, maintenance, or use of any motor vehicle, insuring as the named insured one individual or husband and wife who are residents of the same household . . . .

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[4] "Presumably, the South Carolina General Assembly intended to amend this section reference to read "item (5)." In the 1991 Code, item 7 defines motor vehicle liability policy." *Goldston*, 358 S.C. at 177 n.4, 594 S.E.2d at 522 n.4. However, in the 2018 Code, item 5 defines "motor vehicle liability policy" while item 7 defines "nonresident operating privilege."

Finally, section 38-77-30(15) defines "Underinsured motor vehicle" as "a motor vehicle as defined in [this section] as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in Section 38-77-140 [providing minimum limits] and the amount of the insurance or bond is less than the amount of the insureds' damage." "UIM coverage is entirely voluntary, and permits insureds, at their option, to purchase insurance coverage for situations where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages." *Burgess*, 373 S.C. at 42, 644 S.E.2d at 43.

We find that to interpret § 38-77-340 to allow for the intentional exclusion of a resident relative from liability coverage, but not UIM coverage offered as optional, "additional coverage" in conjunction with the same liability policy, would impose a forced construction of the statute not intended by the General Assembly. *See Jones*, 364 S.C. at 231, 612 S.E.2d at 724 ("The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction."). In enacting § 38-77-340, the Legislature empowered consumers to choose to limit their coverage—and corresponding premium—within applicable statutory constraints. In exercising this option, Knight likely paid a lesser premium—serving the purpose the Legislature sought to achieve through § 38-77-340. *See Lincoln Gen. Ins.*, 406 S.C. at 541, 753 S.E.2d at 441 ("The purpose of [section 38-77-340] is to 'alleviate the problem often faced by the owner of a family policy, who . . . has a relatively safe driving record but is forced to pay higher premiums because another member of the family . . . is by definition also included in the policy coverage.'" (alteration in original) (quoting *Lovette*, 274 S.C. at 600, 266 S.E.2d at 783).

Accordingly, we find the Excluded Driver endorsement validly excluded Decedent from the UIM coverage Knight now seeks to stack. *See Lincoln Gen. Ins.*, 406 S.C. at 547, 753 S.E.2d at 444 (finding "the named driver endorsement statute '*is not inhibited by*' the MVFRA's public policy because it constitutes separately approved public policy. While the MVFRA protects the public, the named driver endorsement statute 'protects, in limited situations, the right of the parties to make their own contract.'" (citation omitted))

We affirm the circuit court's grant of summary judgment.

AFFIRMED.

LOCKEMY, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cortland James Eggleston and Rebecca McCutcheon, Appellants,

v.

United Parcel Service, Inc., Rick Fogle, and John Doe, Defendants,

of which United Parcel Service Inc. is the Respondent.

Appellate Case No. 2016-000984

Appeal From Orangeburg County
Maite Murphy, Circuit Court Judge

Opinion No. 5686
Heard November 5, 2018 – Filed October 2, 2019

AFFIRMED

Shane Morris Burroughs, of Lanier & Burroughs, LLC, of Orangeburg; Kathleen Chewning Barnes, of Barnes Law Firm, LLC, of Hampton; and Justin Tyler Bamberg, of Bamberg Legal, LLC, of Bamberg, for Appellants.

George Troy Thames, of Willson Jones Carter & Baxley, P.A., of Mt. Pleasant; and Ryan R. Corkery, of Philadelphia, Pennsylvania, for Respondent.

HUFF, J.: Cortland James Eggleston appeals the trial court's dismissal of his action against United Parcel Service (UPS) for personal injuries he suffered after UPS failed to timely deliver thyroid medication. His wife, Rebecca McCutcheon, appeals the trial court's dismissal of her loss of consortium action. Eggleston and McCutcheon (collectively, Appellants) assert the trial court erred in holding their claims were preempted by federal law. We affirm.

FACTS/PROCEDURAL HISTORY

As a veteran, Eggleston received treatment for his thyroid condition from the Veterans Administration (VA) hospital in Charleston. On numerous occasions in the past, UPS delivered shipments of medications from the VA hospital to Eggleston at his rural Eutawville address. On April 11, 2013, Eggleston was expecting a delivery of thyroid medication from the VA Hospital by UPS, but the medication failed to arrive. The VA Hospital communicated with UPS between April 11, 2013, and April 15, 2013, in an attempt to rectify the situation. After confirming Eggleston's address, a pharmacist with the VA accessed UPS's records and discovered the package was being held because a correct street name was needed. The pharmacist called UPS and spoke with a representative who contacted the local driver, Rick Fogle, and instructed him to contact Eggleston and make the delivery that date. The pharmacist also sent a partial refill of the medication by overnight delivery as Appellants had declined to acquire a partial supply from a local pharmacy due to transportation and financial issues.

Appellants also contacted UPS, which informed them Eggleston's address did not exist or could not be located, despite UPS's previous delivery of medications to the address. Eggleston's condition worsened into a thyroid storm, causing seizures, congestive heart failure, extremely elevated blood pressure, hospitalization, and surgical intervention. UPS finally delivered the medication thirteen days after it had been shipped.

Eggleston brought an action against UPS and Fogle for negligence and negligent entrustment. McCutcheon brought a similar action for loss of consortium. UPS moved to dismiss both actions asserting the state law claims were preempted by the the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C.A. § 14501(c)(1) (West 2016). The trial court granted the motions to dismiss in separate orders. Appellants filed motions to alter or amend, which the trial court denied. This appeal, which consolidated Appellants' actions, followed.

STANDARD OF REVIEW

The issue of whether a federal statute preempts state law is a question of law. *Weston v. Kim's Dollar Store*, 385 S.C. 520, 526, 684 S.E.2d 769, 772 (Ct. App. 2009). The appellate court "may make its own ruling on a question of law without deferring to the circuit court." *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 446, 748 S.E.2d 221, 224 (2013); *see also Mims Amusement Co. v. S.C. Law Enf't Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 346 (2005) (stating the appellate court may decide a novel question of law "based on its assessment of which answer and reasoning best comport with the law and public policies of this state and the [c]ourt's sense of law, justice, and right.").

LAW/ANALYSIS

I. Application of the FAAAA

Appellants argue the trial court erred in finding their claims were preempted by the FAAAA. We disagree.

"The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is 'without effect.'"[1] *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). "'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Id.* (quoting *Cipollone*, 505 U.S. at 516). "To discern Congress'[s] intent we examine the explicit statutory language and the structure and purpose of the statute." *Id.* (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990)).

In an attempt to improve the airline industry through "maximum reliance on competitive market forces," Congress enacted the Airline Deregulation Act (ADA), which included a preemption provision to "ensure that the States would not undo

[1] The Supremacy Clause provides federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI.

federal deregulation with regulation of their own."[2] *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 36-38 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

Following similar deregulation of the trucking industry, Congress sought to preempt state trucking regulation with the FAAAA, which prohibits states from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C.A. § 14501(c)(1). As the preemption provision of the FAAAA tracks that of the ADA, the courts' interpretations of the scope of ADA preemption also apply to FAAAA preemption cases. *Rowe*, 552 U.S. at 370.

The Supreme Court found the statutory term "related to" "express[ed] a broad pre-emptive purpose." *Morales*, 504 U.S. at 383. Accordingly, "'state enforcement actions *having a connection with or reference to*' carrier 'rates, routes, or services' are pre-empted." *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384). "[S]uch pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect.'" *Id.* (quoting *Morales*, 504 U.S. at 386). However, the FAAAA "does not pre-empt state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Id.* at 375 (quoting *Morales*, 504 U.S. at 390). The Supreme Court cautioned, "[T]he breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013).

Furthermore, the Supreme Court held the inclusion of the phrase "with respect to the transportation of property" in the FAAAA's preemption provision, which is not in the ADA's similar provision, "massively limits the scope of preemption" ordered by the FAAAA. *Id.* at 261 (quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting). "[F]or purposes of FAAAA preemption, it is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" *Id.* The term transportation includes services

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[2] This provision states, "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C.A. § 41713(b) (West 2016).

related to the movement of property, which involves "arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, [and] unpacking" of property. 49 U.S.C.A. § 13102(23) (West 2016).

State common law rules fall within FAAAA preemption. *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 281 (2014). "The regulatory bite of tort law is powerful and direct. '[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Tobin v. Fed. Express. Corp.*, 775 F.3d 448, 456 (1st Cir. 2014) (alteration in original) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). "[A] state law tort action against a carrier, where the subject matter of the action is related to the carrier's prices, routes, or services, is a state enforcement action having a connection with or reference to a price, route, or service of any . . . carrier . . . , for purposes of the FAAAA." *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997). "To determine whether a claim has a connection with, or reference to [a carrier's] prices, routes, or services, we must look at the facts underlying the specific claim." *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998).

"[When] a plaintiff invokes traditional elements of tort law and the issue of preemption arises, 'the courts almost uniformly have resolved against federal preemption.'" *Jimenez-Ruiz v. Spirit Airlines, Inc.*, 794 F. Supp. 2d 344, 348 (D.P.R. 2011) (quoting *Dudley v. Bus. Exp., Inc.*, 882 F. Supp. 199, 206 (D.N.H. 1994)). The United States Court of Appeals for the Ninth Circuit explained, "Congress did not intend to preempt passengers' run-of-the-mill personal injury claims." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998), *opinion amended on denial of reh'g*, 169 F.3d 594 (9th Cir. 1999).[3] "[T]he proper inquiry is whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation." *Taj Mahal*

[3] In *Charas*, the Ninth Circuit considered four consolidated cases that involved: (1) A passenger hit by a flight attendant pushing a beverage cart; (2) A passenger hit by luggage falling out of the overhead bin after the plane landed; (3) A passenger who tripped over a piece of luggage allegedly left in the aisle by a flight attendant; and (4) A passenger who did not receive the assistance she requested and fell down a stairway while exiting the plane. *Id.* at 1261-62.

Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 194 (3d Cir. 1998). "When state law does not have a regulatory effect, it is 'too tenuous, remote, or peripheral' to be preempted." *Id.* (citing *Morales*, 504 U.S. at 390); *see Kuehne v. United Parcel Serv., Inc.*, 868 N.E.2d 870, 872, 877-78 (Ind. Ct. App. 2007) (concluding homeowner's tort claim arising from fall over package left on front step was not preempted by the FAAAA); *Huertas v. United Parcel Serv., Inc.*, 974 N.Y.S.2d 758, 762 (N.Y. Sup. Ct. 2013) (holding the claim of a plaintiff who tripped over packages was not preempted because "the manner in which a delivery person stacked packages . . . is not related to a 'service' governed by the ADA or the FAAAA.").

While some tort actions do not "give rise to the type of patchwork state regulations that the ADA [and FAAAA were] intended to dissolve," *Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 96 (1st Cir. 2013), others may be "sufficiently connected to[a] carrier's service *with respect to the transportation of property* to warrant preemption." *Dan's City Used Cars*, 569 U.S. at 255. In *Bower*, the United States Court of Appeals for the First Circuit held a father's negligence claims against an airline for allowing a mother to take their minor children to Cairo in violation of a court order was preempted. 731 F.3d at 88. It explained,

> [S]tandard common law duties of care have little effect on an airline['s] day-to-day operations. Accordingly, the ADA offers little reason to treat a passenger who slips and falls while deplaning differently than one who slips and falls in a restaurant. Were we to hold that EgyptAir violated its common law tort duty in this case, however, we would be imposing a fundamentally new set of obligations on airlines under the rubric of "duty of care." These would include heightened and qualitatively different procedures for the booking and boarding of certain passengers on certain flights. To defeat Congressional intent to preempt, a mere reference to a duty of care will not suffice. It is the nature and extent of that duty which alters the analysis.

Bower, 731 F.3d at 96 (citations and footnote omitted); *see Smith*, 134 F.3d at 259 (holding intentional tort claims were preempted to the extent the claims were

premised on the airline's refusal to permit the plaintiff to board his flight because "boarding procedures are a service rendered by an airline").

In *Tobin*, the plaintiff sued Federal Express Corporation (Fed-Ex) for invasion of privacy, intentional and negligent infliction of emotional distress, and negligence alleging she and her daughter suffered from various symptoms caused by fear and anxiety arising from Fed-Ex mislabeling and misdelivering a package, which contained marijuana, to the plaintiff's address.[4] 775 F.3d at 449-50. Observing plaintiff's claims involved FedEx's package handling, address verification, and delivery procedures, which were "necessary appurtenances of the contract of carriage," the United States Court of Appeals for the First Circuit found the claims implicated a service. *Id.* at 454.

It rejected the plaintiff's contention tortious conduct could never be a service, explaining: "While tortiously undertaken conduct may not itself be a service that would be bargained for or anticipated by a consumer, the relevant inquiry is whether enforcement of the plaintiff's claims would impose some obligation on an airline-defendant with respect to conduct that, when properly undertaken, is a service." *Id.* The court explained enforcement of plaintiff's claims would contravene Congress's intent to avoid "a patchwork of state service-determining laws, rules, and regulations." *Id.* at 455 (quoting *Rowe*, 552 U.S. at 373). It elaborated:

> For the plaintiff to prevail on her common-law claims, she would have to prove either that FedEx's procedures were inadequate or that those procedures, though adequate, were carried out carelessly by FedEx's employees. In the former circumstance, a finding that FedEx's procedures were inadequate would have the significant effect of requiring new and enhanced procedures for labeling, verification, and delivery of

[4] The plaintiff and her daughter contacted law enforcement and an officer warned them he was worried the intended recipient would come looking for the package. *Tobin*, 775 F.3d at 450. Later, "a man came to the plaintiff's door asking whether the plaintiff had received a package. The visitor's car was parked in the plaintiff's driveway with two men seated inside. Terrified, the plaintiff slammed the door shut and again contacted the police." *Id.*

> packages (FedEx's main business). That effect would not be tenuous, remote, or peripheral.

Id. at 455 (citations omitted).

Thus it found, "By using state common law as a blunt instrument to prescribe protocols for package labeling, verification, and delivery, the claims presented here would regulate how FedEx operates its core business." *Id.* at 456. Affirming the dismissal of the plaintiff's claims, the court ruled, "[When] the duty of care alleged drills into the core of a[] carrier's services and liability for a breach of that duty could [affect] fundamental changes in the carrier's current or future service offerings, the plaintiff's claims are preempted . . . . *Id.*

We find the First Circuit's reasoning in *Tobin* persuasive. Appellants' claims are not "run of the mill" personal injury claims. Their allegations include UPS was negligent in failing to properly deliver the medication, in failing to properly and accurately locate Appellants, in failing to maintain proper policies and procedures for delivering parcels, and in failing to properly hire, train, supervise and oversee personnel. These allegations clearly go to the heart of the delivery service UPS offers. As the First Circuit found, "A damages award could result in fundamental changes to [UPS's] services—much more so than a damages award for a driving mishap or a slip-and-fall." *Id.* at 456. Such an award could result in "requiring new and enhanced procedures for . . . delivery of packages," which, like FedEx, is UPS's main business. *Id.* at 455. This effect would not be "tenuous, remote, or peripheral." *Rowe*, 552 U.S. at 375. Accordingly, we hold the trial court did not err in finding Appellants' claims were preempted by the FAAAA.

II. Household Goods Exemption

Appellants argue their claims fall within the "household goods" exemption to preemption. We disagree.

The FAAAA provides the act "does not apply to the intrastate transportation of household goods . . . ." 49 U.S.C.A. § 14501(c)(2)(B) (West 2016). The definition of household goods provides as follows:

> The term "household goods[,]"[] as used in connection with transportation, means personal effects and property

> used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is—
>
> (A) arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or
>
> (B) arranged and paid for by another party.

49 U.S.C.A. § 13102(1) (West 2016).

Although this definition seems broad, Congress clarified a narrower meaning applied to the term as follows: "The provisions of title 49, United States Code, and this subtitle (including any amendments made by this subtitle), that relate to the transportation of household goods a*pply only to a household goods motor carrier* (as defined in section 13102 of title 49, United States Code)." Pub. L. No. 109-59 § 4202(c), 119 Stat. 1752 (2005)[5] (emphasis added). A household goods motor carrier is defined as follows:

> (A) In general.—The term "household goods motor carrier" means a motor carrier that, in the ordinary course of its business of providing transportation of household goods, offers some or all of the following additional services:

[5] Although this amendment is not codified, the provision is fully binding law. *See Patten v. United States*, 116 F.3d 1029, 1033 n.3 (4th Cir. 1997) ("A piece of legislation becomes law when it is passed by Congress and signed by the President. Therefore, even though the [piece of legislation] was not codified, it was enacted, and it has the force of law.").

> (i) Binding and nonbinding estimates.
>
> (ii) Inventorying.
>
> (iii) Protective packing and unpacking of individual items at personal residences.
>
> (iv) Loading and unloading at personal residences.
>
> (B) Inclusion.—The term includes any person that is considered to be a household goods motor carrier under regulations, determinations, and decisions of the Federal Motor Carrier Safety Administration that are in effect on the date of enactment of the Household Goods Mover Oversight Enforcement and Reform Act of 2005.
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> (C) Limited service exclusion.—The term does not include a motor carrier when the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier).

49 U.S.C.A. § 13102 (12) (West 2016).

Upholding the United States District Court for the District of Puerto Rico's reliance on the Interstate Commerce Commission's prior interpretations of the phrase, the First Circuit concluded, "[T]he transportation of household goods generally refers to the services of moving companies." *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14 (1st Cir. 2004). The court rejected the argument this definition was too narrow, explaining "the enjoined scheme impermissibly affected UPS's prices, routes, and services in part because it required UPS to identify the contents of the packages (a deviation from standard procedures used for deliveries elsewhere in the United States) . . . ." *Id.* It agreed with the district court that "[f]orcing carriers to give special handling to all packages containing goods used in a home . . . would resurrect the unwieldy patchwork of state laws that Congress intended to eliminate through the [FAAAA]." *Id.* (omission in original) (quoting *United Parcel Serv., Inc. v. Flores-Galarza*, 275 F. Supp. 2d 155, 161 (D.P.R. 2003)). Thus, it noted an

exception granting states regulatory authority over any packages containing household goods "would swallow the rule of preemption." *Id.*

We find UPS is not a household goods motor carrier. Thus, its delivery of medication did not constitute the transportation of household goods according to the statutory definition. Accordingly, the Appellants' claims did not fall within the household goods exemption to FAAAA preemption.

CONCLUSION

We hold the trial court did not err in ruling the FAAAA preempted Appellants' claims. Accordingly, the orders dismissing their claims are

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.