The Supreme Court of South Carolina

In the Matter of
Richard G. Lawrence, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Lawrence and the interests of Mr. Lawrence's clients.

IT IS ORDERED that Stephen Gordon Dey, Esquire, is hereby appointed to assume responsibility for Mr. Lawrence's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Dukes may have maintained. Mr. Dey shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Lawrence's clients and may make disbursements from Mr. Lawrence's trust, escrow, and/or operating account(s) as 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 Richard

G. Lawrence, Esquire, shall serve as notice to the bank or other financial institution that Stephen Gordon Dey, 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 Stephen Gordon Dey, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Lawrence's mail and the authority to direct that Mr. Lawrence's mail be delivered to Mr. Dey's office.

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

Columbia, South Carolina
December 10, 2007

The Supreme Court of South Carolina

In the Matter of
Russell Paul Reach, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Reach and the interests of Mr. Reach's clients.

IT IS ORDERED that Charles G. Hofstra, Esquire, is hereby appointed to assume responsibility for Mr. Reach's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Reach may have maintained. Mr. Hofstra shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Reach's clients and may make disbursements from Mr. Reach's trust, escrow, and/or operating account(s) as 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 Russell Paul Reach, Esquire, shall serve as notice to the bank or other financial

institution that Charles G. Hofstra, 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 Charles G. Hofstra, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Reach's mail and the authority to direct that Mr. Reach's mail be delivered to Mr. Hofstra's office.

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

Columbia, South Carolina

December 10, 2007

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 DONALD LOREN SMITH, PETITIONER

On December 5, 2005, Petitioner was indefinitely suspended from the practice of law. In the Matter of Smith, 366 S.C. 524, 623 S.E.2d 94 (2005). He has now filed a petition to be reinstated.

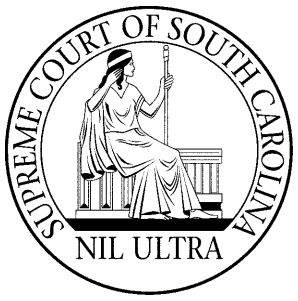
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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

These comments should be received no later than February 18, 2008.

Columbia, South Carolina

December 18, 2007



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43

December 31, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Rorey Jamar Johnson, Respondent.

ON WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26406
Heard November 14, 2007 – Filed December 17, 2007

VACATED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Robert M. Ariail, of Greenville, for Petitioner.

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, and Clay Allen, of Spartanburg, for Respondent.

JUSTICE PLEICONES: The State appealed a trial court order granting a new trial based upon testimony regarding a polygraph test. The Court of Appeals affirmed. State v. Johnson, 363 S.C. 184, 610 S.E.2d 305 (Ct. App. 2005). We granted the State's petition for certiorari and now vacate the Court of Appeals' decision.

FACTS

Rorey Jamar Johnson (Johnson) was charged with the murder of Gregory W. Whitaker (Whitaker). Crystal Marion, Alton Henderson, and Michael Jones, Jr. were allegedly with Johnson when the murder occurred, and all three testified at trial for the State.

Crystal Marion was the first witness to testify at trial. When asked whether the third and final statement she gave to the police was the whole truth, Marion answered:

> Well, the second statement was the truth as well,
> but, therefore, they kind of made me feel like I
> was lying because I didn't pass the polygraph test.
> And the second one...

At that point, defense counsel moved for a mistrial, which the trial judge denied. The judge instructed the jury to disregard the reference to the polygraph.

The jury found Johnson guilty of murder. The trial court granted Johnson's motion for a new trial based upon Marion's reference to the polygraph. The State appealed, and the Court of Appeals affirmed.

ISSUES

I. Does the State have a right to appeal an order granting a new trial when no error of law exists?

II. If the State has a right to appeal, did the Court of Appeals err in affirming the trial court's order granting a new trial based upon testimony concerning polygraph test results?

ANALYSIS

Johnson contends that the State had no right to appeal in this case. We agree.

The State may only appeal a new trial order if, in granting it, the trial judge committed an error of law. State v. DesChamps, 126 S.C. 416, 120 S.E. 491 (1923). An error of law exists where a trial judge directed a verdict of acquittal after a jury verdict of guilty when there was evidence to support the jury verdict. State v. Dasher, 278 S.C. 395, 297 S.E.2d 414 (1982). When determining whether an error of law exists, and therefore whether the State has a right to an appeal, it is necessary to consider the merits of the case.

A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion. State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). The general rule is that no mention of a polygraph test should be placed before the jury. It is thus incumbent upon the trial judge to ensure that should such a reference be made, no improper inference be drawn therefrom. State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979).

The trial judge found that Marion's statement about a polygraph test prejudiced Johnson. Because the case against Johnson essentially consisted of witness testimony, the credibility of each witness was crucial to the verdict. Marion's statement created an inference that bolstered the credibility of the State's witnesses. The jury could have believed that the State made each witness pass a polygraph test before

they were able to testify at trial as part of their individual plea bargains. The trial judge did not abuse his discretion by granting a new trial.

We find that there is no error of law because the trial judge did not abuse his discretion. Absent an error of law, the State had no right to appeal the new trial order. See State v. DesChamps, supra.

CONCLUSION

We vacate the Court of Appeals' opinion and dismiss the State's appeal. The Court of Appeals' opinion is

VACATED.

TOAL, C.J., MOORE, WALLER, JJ., and Acting Justice Dorothy Mobley Jones, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

J. Samuel Coakley, individually and as Trustee of a Special Needs Trust for Christian Coakley, Respondent,

v.

Horace Mann Insurance Co., Scott Andrew Mitchell, Christopher N. Mitchell and Claudia Dee Dee Mitchell, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 26407
Heard October 31, 2007 – Filed December 17, 2007

REVERSED

Phillip E. Reeves and Jennifer D. Eubanks, both of Gallivan, White & Boyd, PA, of Greenville, for Petitioners.

Benjamin C. Harrison, Max Thomas Hyde, Jr., and
Jeremy A. Dantin, all of Harrison, White, Smith & Coggins, PC,
of Spartanburg, for Respondent.

PER CURIAM: Respondent Samuel Coakley, individually and as trustee of a special needs trust for his son Christian Coakley (Coakley), sought a declaratory judgment to determine the existence and amount of excess automobile liability coverage. The circuit court found excess automobile liability coverage existed and awarded Coakley $350,000 in excess insurance benefits from the named insured's policies. The Court of Appeals affirmed. Coakley v. Horace Mann Ins. Co., 363 S.C. 147, 609 S.E.2d 537 (Ct. App. 2005). We granted Horace Mann's and the Mitchell's petition for certiorari and now reverse.

FACTS

On August 19, 1994, Coakley was a passenger in a car being driven by Scott Mitchell (Scott). Scott drove the vehicle off the road and collided with a tree. As a result of the one-car accident, Coakley is a permanent quadriplegic.

The automobile driven by Scott in the accident, a 1984 Mazda RX-7, was owned by Scott's older brother, Christopher Mitchell (Christopher). At the time of the accident, Christopher was a student at Clemson University, lived in an apartment in Clemson during the school year, and was the primary user of the Mazda RX-7. Scott was a high school student and lived with his and Christopher's mother, Claudia "Dee Dee" Mitchell (Dee Dee). At the time of the accident, Christopher was away on a trip and left the car at his mother's house, and Scott had permission to use the car.

Horace Mann insured Christopher's Mazda RX-7, and Dee Dee was the named insured.[1] Horace Mann tendered the full liability limit of $50,000 to Coakley from this policy. In addition, Dee Dee maintained policies on three other vehicles; two of these policies carried liability limits of $50,000, and another policy had a liability limit of $250,000. All policies purchased by Dee Dee extended liability protection for the operation of non-owned cars.

As part of the settlement of the policy limits for the Mazda RX-7, the trust and Horace Mann entered into a covenant not to execute. Pursuant to the covenant, Horace Mann tendered the $50,000 limit from the policy covering the Mazda RX-7 and allowed the trust to bring a declaratory judgment action to determine the applicability of Dee Dee's three additional policies. In exchange, the trust agreed that its recovery, if any, would be limited to $350,000, which was the combined total of the three policies.

The trust then instituted this declaratory judgment action alleging that the three additional policies provided excess automobile liability coverage for the Mazda RX-7. The trust claimed that the Mazda RX-7 was a non-owned vehicle because Christopher owned the car and was not a relative as defined in the policies.

The parties agreed to transfer the case to a non-jury docket and then agreed to submit the case to a circuit court judge with memoranda of authority, copies of the policies in dispute, and the deposition testimony of Dee Dee, Christopher, and Scott Mitchell. The circuit court then issued an order finding excess liability coverage was available to Coakley under all three policies, resulting in the recovery of $350,000.

ISSUES

I. Did the Court of Appeals err in holding that Christopher Mitchell was not a dependent of Dee Dee Mitchell, thereby triggering excess liability coverage?

[1] Scott, as a resident relative of Dee Dee, was an insured under all four policies issued to Dee Dee.

II. If excess liability coverage is applicable, did the Court of Appeals err in failing to apply policy provisions that purport to limit the amount of excess coverage available to Coakley?

ANALYSIS

Horace Mann argues that the Mazda RX-7 owned by Christopher does not qualify as a non-owned vehicle under Dee Dee's policies, thus excess liability coverage is not available for Coakley.[2] We agree.

A declaratory judgment action is neither legal nor equitable, and it is determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). 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. Est. of Revis v. Revis, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997). In an action at law, on appeal of a case tried without a jury, we may not disturb the trial judge's findings of fact unless those findings are "wholly unsupported by the evidence or unless it clearly appears the findings are controlled by an error of law." Cohen's Drywall Co. v. Sea Spray Homes, LLC, 374 S.C. 195, 198, 648 S.E.2d 598, 600-601 (2007).

Under each policy, Scott has excess liability insurance coverage for non-owned cars. The provision in each policy reads:

COVERAGE FOR USE OF OTHER CARS

> Bodily injury and property damage liability coverages extend to the use, by an insured, of… a

[2] Horace Mann acknowledges that if the Mazda RX-7 is a non-owned car as defined in the policies, then Scott, the at-fault driver, would have excess liability coverage under each of the three remaining policies issued to Dee Dee.

> non-owned car while being used with the permission of the driver.[3]

A non-owned car is defined in the policies as a private passenger car or utility vehicle not: (1) owned by; (2) registered in the name of; or (3) furnished or available for the regular or frequent use of the insured or the insured's relatives. Dee Dee, the named insured, did not have the title or registration to the Mazda RX-7 in her name, nor was the Mazda RX-7 available for her regular or frequent use. Horace Mann claims that Christopher is one of Dee Dee's relatives, which would preclude the Mazda RX-7 from qualifying as a non-owned vehicle.

A relative is defined in the Horace Mann policies as "a person related to you by blood, marriage or adoption who lives with you. It includes your unmarried and dependent child who is away at school." At the time of the accident, Christopher was not married and did not live with his mother while he was away at Clemson. The issue becomes whether Christopher was a dependent of Dee Dee.

The circuit court determined that Christopher was not dependent on his mother and the Court of Appeals affirmed. Although Christopher stated he did not receive money from his mother[4] and that his father would give him a lump sum of money per semester for tuition, books, rent, and living expenses, this type of financial assistance to a college student is not the *sine qua non* of dependency. In other words, the issue of Christopher's dependency is not solely a question of who paid the majority of his school expenses.

The fact that Christopher's father may have provided the bulk of Christopher's financial support at Clemson does not mean that Christopher was not also dependent upon his mother. Dee Dee claimed Christopher as a

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[3] A separate policy provision states, "If a…non-owned car…has other vehicle liability coverage on it, then this coverage is excess."

[4] However, Dee Dee testified in her deposition that she gave Christopher spending money, grocery money, gas money, and paid for Christopher's auto repairs.

dependent on her income tax returns, albeit pursuant to a court order, and she and Christopher's father shared costs for Christopher's medical expenses. In addition, Dee Dee paid for Christopher's car taxes and insurance. Other evidence of Christopher's dependency includes Dee Dee's co-signing on the lease for Christopher's apartment at Clemson and the fact that Dee Dee maintained a bedroom at her house[5] to which Christopher often returned on weekends.

Accordingly, the crucial factual finding that Christopher was not a dependent of Dee Dee is wholly unsupported by the evidence. As a result, Christopher is a relative of Dee Dee under the Horace Mann policy, the Mazda RX-7 does not constitute a non-owned vehicle, and excess liability coverage is not available to Coakley.

CONCLUSION

We reverse the Court of Appeals' holding that Coakley was entitled to excess liability coverage because it was predicated on the finding that Christopher Mitchell was not a dependent of Dee Dee Mitchell. In light of our holding, it is not necessary to determine whether the Horace Mann policy limited the amount of excess coverage available to Coakley. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issue when determination of prior issue is dispositive). The Court of Appeals' opinion is

REVERSED.

TOAL, C.J., MOORE, WALLER, PLEICONES, JJ., and Acting Justice Edward B. Cottingham, concur.

[5] Dee Dee's address also was the address Christopher used on his driver's license and for his voter registration.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bobby Wayne Stone, Appellant.

Appeal from Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 26408
Heard November 14, 2007 – Filed December 20, 2007

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia, and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

CHIEF JUSTICE TOAL: This is an appeal from a capital sentencing proceeding. The jury sentenced Appellant Bobby Wayne Stone to death, and Appellant argues that testimony from the victim's widow impermissibly injected an arbitrary factor into the jury's deliberations. Appellant did not raise this issue at trial, and the issue is therefore not preserved for review. For this reason, we express no opinion on the merits, and we affirm the trial court's decision.

FACTUAL/PROCEDURAL BACKGROUND

This case arises out of the shooting death of a Sumter County Sheriff's Deputy. According to Appellant, he began the day leading up to the fatal encounter by purchasing some alcohol and two firearms. Appellant spent the remainder of the day wandering in the woods near what would become the crime scene, shooting the firearms and becoming increasingly intoxicated. Towards the end of the day, Appellant attempted to visit the home of an acquaintance near the woods.

The acquaintance asked Appellant to leave her property, and the acquaintance later reported the incident to the police. After hearing banging on a door to her home and gunshots outside her house, the acquaintance phoned the police again. The victim was the first officer to respond to the call, and the evidence at trial established that Appellant was on the acquaintance's porch near a side door when the victim arrived at the scene. The occupants of the home directed the victim towards the porch as the source of the disturbances, and as the victim neared the side porch, he sustained two fatal gunshot wounds. While the State alleged that Appellant shot the victim intentionally, Appellant claimed that he was startled when the victim turned a corner outside the home and yelled "Halt!" or "Hold it!" and that the gun fired accidentally.

A jury convicted Appellant of murder and sentenced him to death. On appeal, this Court affirmed Appellant's convictions but reversed his death sentence. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 544 (2002) (remanding for a new sentencing proceeding based on the improper exclusion of a juror from the penalty phase, the failure to charge the statutory mitigator addressing the

defendant's impairment or mentality at the time of the crime, and the failure to instruct the jury that a life sentence meant life imprisonment without the possibility of parole). This Court remanded the case to the trial court to conduct a second sentencing proceeding. *Id*.

On remand, the State called several members of the victim's family and former co-workers as witnesses. The record reveals that the primary purpose of these witnesses' testimonies was to describe the impact of the victim's death on these individuals and on the community. One such witness was the victim's widow, and in response to a question regarding "significant events in her life" since the murder, the victim's widow testified that she had attempted suicide after learning that this Court had reversed Appellant's initial death sentence and that there would be another sentencing proceeding in this case. At the conclusion of the second sentencing proceeding, the jury sentenced Appellant to death.

This appeal followed, and Appellant raises the following issue for review:

> Did the victim's widow's testimony regarding her suicide attempt impermissibly inject an arbitrary factor into the jury's deliberations?

LAW/ANALYSIS

Appellant argues that the victim's widow's testimony regarding her suicide attempt impermissibly injected an arbitrary factor into the jury's deliberations. We disagree.

Appellant's argument is not preserved for review. At trial, Appellant objected as the victim's widow began to describe her suicide attempt. The record reveals that Appellant based his objection on causation grounds, arguing that the testimony implied that the cause of the suicide attempt was not the victim's murder, but the financial pressures the victim's widow was experiencing and the fact that Appellant would have another sentencing proceeding. In allowing the testimony, the trial court held that the victim's

widow had attributed the facts relayed in the testimony to her relationship with the victim, and that the testimony was therefore relevant and admissible.

Appellant's argument before this Court goes along quite different lines. Appellant now argues that the victim's widow's testimony improperly invited the jury to speculate about the finality of its decision on the appropriate punishment and improperly invited the jury to consider how its decision might impact the victim's widow's future health. Thus, while Appellant's argument below focused on what caused the victim's widow to attempt suicide – meaning, what caused the testimony to be relevant – Appellant's argument on appeal abandons the issue of relevance and addresses only the effect this testimony may have had on the jury. Because Appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Appellant alleges that his argument on appeal is simply an augmentation of his objection at trial, but a thoughtful examination reveals that this is not so. Primarily, Appellant's objection at trial was based on relevance, and that issue has been abandoned here. Second, whether the suicide attempt by the victim's spouse minimized the jury's sense of responsibility (by suggesting that the jury's ultimate decision would be subject to review by a higher court) or maximized the jury's sense of responsibility (by implying that imposing a life sentence might lead the victim's widow to attempt suicide again), these considerations are wholly independent of the relevance argument presented below. If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.[1]

[1] It is important to note that in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), we held that South Carolina's strict error preservation rules are no less applicable in death penalty cases.

For these reasons, we hold that Appellant's argument is not preserved for review.

CONCLUSION

For the foregoing reasons, we affirm Appellant's sentence. Our review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005) (holding that the death penalty was warranted where defendant killed a law enforcement officer while the officer was performing his official duties); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999) (same); *and State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991) (same).

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mario B. Curiel, Respondent,

v.

Environmental Management Services (MS), Employer, Reliance National Insurance Company, and S.C. Property & Casualty Insurance Guaranty Association, Carrier, Appellants.

Appeal from Charleston County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 26409
Heard October 30, 2007 – Filed December 20, 2007

AFFIRMED IN PART; REVERSED IN PART

J. Hubert Wood, III, and Jason A. Williams, both of Wood, Porter & Warder, L.L.C., of Charleston, for appellants Environmental Management Services and Reliance National Insurance.

Darryl D. Smalls, of Nelson, Mullins, Riley & Scarborough, L.L.P., of Columbia, for

appellant S.C. Property and Casualty Insurance Guaranty Association.

J. Kevin Holmes, of The Steinberg Law Firm, of Charleston, for respondent.

JUSTICE MOORE: This appeal is from the circuit court's order regarding temporary total workers' compensation benefits and a permanent impairment rating. We affirm in part and reverse in part.

FACTS

Respondent Curiel (Claimant) filed this claim for workers' compensation benefits after he was struck in the right eye on April 12, 2000, while doing demolition work for his employer, appellant Environmental Management Services (Employer). Claimant suffered a detached retina in his right eye. Employer's compensation carrier, Reliance National Insurance Company, is insolvent, and appellant S.C. Property & Casualty Insurance Guaranty Association (Fund) is responsible for benefits.

The single commissioner found Claimant had a compensable injury to his right eye and awarded permanent benefits based on a 60% loss of use. The commissioner denied temporary total benefits. Claimant, Employer, and Fund all appealed. The Commission's Appellate Panel (hereinafter "the Commission") adopted the findings of the single commissioner but found Claimant suffered only a 41.5% loss of use of his right eye rather than 60%. Again, all parties appealed.

The circuit court found Claimant should have been awarded temporary total benefits, and the award of permanent benefits should have taken into consideration the combined effect of the injury to Claimant's right eye and the pre-existing loss of vision in his left eye. The circuit court remanded to the Commission to determine benefits accordingly. Employer and Fund appeal.

ISSUES

1. Does federal law preempt entitlement under our Worker's Compensation Act?

2. Is there substantial evidence to support the commissioner's findings regarding maximum medical improvement and temporary total benefits?

3. Did the circuit court err in remanding for the Commission to consider a pre-existing impairment to Claimant's left eye?

4. Is the Fund liable for this claim?

DISCUSSION

1. Preemption under federal law

Claimant is a Mexican national and is admittedly an illegal alien worker. He used fraudulent documents to misrepresent his legal status when applying for the job with Employer in 1997. Under S.C. Code Ann. § 42-1-130 (Supp. 2006), for purposes of workers' compensation, "employee" is defined as:

> Every person engaged in an employment . . . **including aliens** and also including minors, **whether lawfully or unlawfully employed.**

(emphasis added). The single commissioner, the Commission, and the circuit court all found Claimant was entitled to benefits under the Workers' Compensation Act.

Employer contends Claimant is not entitled to benefits because federal law preempts state law regarding the payment of benefits to an illegal alien worker. Employer cites the federal Immigration Reform and Control Act of 1986 (IRCA) which prohibits the hiring of unauthorized aliens or the tendering of fraudulent documents to obtain

employment. 8 U.S.C. §§ 1324a & c. Although IRCA contains no specific provision forbidding workers' compensation benefits to illegal alien workers, Employer argues that the policy of IRCA prohibiting the hiring of illegal aliens conflicts with, and therefore preempts, state law allowing such payments.

North Carolina, which has the same statutory language as § 42-1-130 regarding alien employees, has addressed this precise issue and ruled that IRCA does not preempt an award of workers' compensation benefits under state law. Ruiz v. Belk Masonry Co., 559 S.E.2d 249 (N.C. App. 2002). We find the analysis in Ruiz persuasive. The Ruiz court noted a Congressional report on IRCA stating "[i]t is not the intention of the Committee that the employer sanctions provisions of [IRCA] be used to undermine or diminish in any way labor protections in existing law. . . ." *Id.* at 678. IRCA does not expressly preclude an illegal alien from being considered an employee for workers' compensation benefits, and Ruiz concluded there is no indication preemption was intended. *Id.* Other state courts have ruled the same way. *See, e.g.*, Safeharbor Employer Servs. I, Inc. v. Cinto Velazquez, 860 So.2d 984 (Fla. App. 2003); Earth First Grading & Builders Ins. Group/Ass'n Servs, Inc, v. Gutierrez, 606 S.E.2d 332 (Ga. App. 2004); Design Kitchen and Baths v. Lagos, 882 A.2d 817 (Md. 2005); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003).

Further, allowing benefits to injured illegal alien workers does not conflict with the IRCA's policy against hiring them. To the contrary, *dis*allowing benefits would mean unscrupulous employers could hire undocumented workers without the burden of insuring them, a consequence that would encourage rather than discourage the hiring of illegal workers.

We find IRCA does not preempt state law and Claimant is not precluded from benefits under our Workers' Compensation Act.

2. Maximum medical improvement and temporary total disability

Employer contends it was error for the circuit court to reverse the commissioner's findings regarding maximum medical improvement and temporary total benefits. We agree.

The single commissioner found Claimant reached maximum medical improvement on October 3, 2002. This is the date of a letter from one of Claimant's treating physicians, Dr. Farr, indicating Claimant's "eye condition is stable at this point." Dr. Farr treated Claimant's eye pressure which was unacceptably high following the retinal detachment injury. Dr. Farr indicated Claimant's eye pressure was controlled with eye drops; he further noted that Claimant should see a low vision specialist to evaluate him for glasses.

On appeal, the circuit court found Claimant could not have reached maximum medical improvement on October 3, 2002, in light of Dr. Farr's recommendation that Claimant's vision could further improve with low vision care. Further, the court found that even if Claimant reached maximum medical improvement on October 3, 2002, as found by the commissioner, Claimant should have been awarded temporary total benefits from the date he was terminated until that date. The circuit court remanded for the commissioner to determine the proper award for temporary total benefits.

Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006). Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits.

The term "maximum medical improvement" means a person has reached such a plateau that, in the physician's opinion, no further

medical care or treatment will lessen the period of impairment. Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct. App. 2006); Lee v. Harborside Café, 350 S.C. 74, 81, 564 S.E.2d 354, 358 (Ct. App. 2002); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 581, 514 S.E.2d 593, 596 (Ct. App. 1999). Maximum medical improvement is a factual determination by the Commission. Hall, *supra.* Factual determinations by the Commission must be upheld on review unless unsupported by substantial evidence. Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000).

Here, the commissioner found Claimant had reached maximum medical improvement based on Dr. Farr's assessment that his eye condition was stable as of October 3, 2002. The fact that Claimant's sight could have been improved with corrective lenses does not impact his impairment rating. Evidence that loss of vision might be reduced by the use of corrective lenses is not to be considered in determining impairment to vision for purposes of workers' compensation benefits. Dykes v. Daniel Constr. Co., 262 S.C. 98, 106, 202 S.E.2d 646, 650 (1974); *see also* S.C. Reg. 67-1105A ("Loss of vision is based on reading without corrective lenses."). The commissioner's finding regarding the date of maximum medical improvement is therefore supported by the record and the circuit court erred in reversing this finding.

Further, the circuit court held in the alternative that if Claimant did reach maximum medical improvement on October 3, 2002, he should have received temporary total benefits from the date of his termination until that date.

Claimant was terminated from his job on January 21, 2002, more than two years after his accident. He testified he was fired when Employer learned Claimant's vision was worse than it seemed. Claimant stated that he pretended to see better than he actually could in order to keep his job. Employer's president testified:

> A. [Claimant] was told until he got his vision corrected he couldn't work. He came in the office one day and acted

like he was drunk, and I, you know, asked him, and he said he couldn't see. . . .

Q. So he was, I guess – are we saying was he terminated, or is it that if his vision is corrected, he's got a job?

A. Yeah, I wouldn't have any problem hiring him back if his vision is corrected.

Claimant's termination form indicates he would be considered for rehiring but "need[s] to have his eyes fixed before rehire."

The commissioner concluded Claimant was not entitled to temporary total benefits because Claimant had exaggerated the degree of his vision loss. The commissioner found:

> Had the Claimant been honest with his physicians concerning the sight in his right eye, a corrective lens could have been provided, and the Claimant could have worked.

The record supports the commissioner's finding that Claimant's failure to cooperate with his physicians resulted in his uncorrected vision and resulting inability to work. Dr. Farr testified he suspected Claimant was exaggerating his vision loss and that it was difficult to assess Claimant's actual vision. Claimant's vision in his right eye was evaluated by Dr. Morse at 20/80 after the date of maximum medical improvement. Tests performed by Dr. Morse indicated that Claimant's earlier assessment at 20/300 to 20/400 was inaccurate and that Claimant was not fully cooperating in the vision testing. Dr. Farr explained that a patient's vision cannot be corrected without accurate feedback from the patient. This evidence supports the commissioner's conclusion that Claimant's failure to cooperate was the cause of his uncorrected vision.

In conclusion, the commissioner's findings regarding maximum medical improvement and temporary total disability are supported by the record and should not have been reversed by the circuit court.

3. Pre-existing loss of vision in left eye

The commissioner concluded Claimant had suffered an impairment of 60% to his right eye. The Commission reduced this award to 41.5% which is the impairment rating for an uncorrected vision of 20/80, the assessment given by Dr. Morse. *See* S.C. Reg. 67-1105C. The circuit court found the Commission should have considered the impaired vision in Claimant's left eye in determining an impairment rating. Employer contends this was error.

Claimant testified that before the injury to his right eye on April 12, 2000, he had a work-related injury to his left eye and he can see only light and dark from that eye. All of the medical evidence corroborates that Claimant has little or no vision in his left eye and there is physical evidence of an old injury to that eye.

Under the Workers' Compensation Act, an injured claimant is entitled to compensation and medical benefits for disability arising from a permanent physical impairment in combination with a pre-existing impairment if the combined effect results in a substantially greater disability. Ellison v. Frigidaire Home Prods., 371 S.C. 159, 638 S.E.2d 664 (2006) (applying S.C. Code Ann. § 42-9-400 (1985 & Supp. 2005)). The Commission erred as a matter of law in failing to consider Claimant's pre-existing impairment in his left eye in combination with the injury to his right eye in determining his impairment rating. The circuit court properly reversed and remanded on this issue.

5. Claimant's residency

In addition to the issues raised by Employer, the Fund contends it is not liable for Claimant's claim because Claimant is not a South Carolina resident. Under S.C. Code Ann. § 38-31-20(8) (Supp. 2006), the Fund is obligated to cover a claim if "the claimant or insured is a resident of this State at the time of the insured event. . . ."

The Fund contends Claimant does not qualify as a resident because his address on file with Employer is a Salisbury, North Carolina address, and in any event he is not a legal resident given his status as an illegal alien. Claimant testified he moved to Charleston in 1997 when he began working for Employer and has physically resided there since that time. There is nothing in the record indicating Claimant was actually living in Salisbury at the time of his accident.

Moreover, § 38-31-20(8) provides a claim is covered by the Fund if the claimant *or the insured* is a South Carolina resident.[1] There is no allegation that Employer, who is the insured party, does not qualify as a resident.

CONCLUSION

We affirm the circuit court's order remanding to the Commission to determine disability based on the combined effect of Claimant's vision impairment in both eyes and reverse the circuit court's order remanding for an award of temporary total benefits. Employer's remaining issue is without merit and we dispose of it pursuant to Rule 220(b), SCACR. *See* Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973) (false representation regarding an employee's *physical* condition).

AFFIRMED IN PART; REVERSED IN PART.

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

[1]If the insured in not an individual, residence is determined by the location of the principal place of business.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Chandler Coggeshall and Susan Coggeshall, individually, and as Guardians for their Minor Child Lawton Coggeshall, Of whom Chandler Coggeshall and Susan Coggeshall are, Appellants,

v.

Reproductive Endocrine Associates of Charlotte, Jack L. Crain, M.D., and Edward E. Moore, M.D., d/b/a Carolina Center for Fertility and Endocrinology, Respondents.

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26410
Heard September 19, 2007 – Filed December 20, 2007

AFFIRMED

Thomas A. Pendarvis, of Pendarvis Law Offices, P.C., of Beaufort; and A. Camden

Lewis and Ariail E. King, both of Lewis & Babcock, L.L.P., of Columbia, for appellants.

Samuel W. Outten, of Womble, Carlyle, Sandridge & Ride, of Greenville, Sara R. Lincoln, of Womble Carlyle Sandridge & Rice, of Charlotte, North Carolina; and Julius W. McKay, II, of McKay, Cauthen, Settana & Stubley, P.A., of Columbia, for respondent.

JUSTICE MOORE: Appellants ("the Coggeshalls"), residents of Richland County, commenced this action for damages resulting from medical care provided by respondent (REACH), a fertility clinic located in Charlotte, North Carolina. The trial judge dismissed the complaint for lack of personal jurisdiction under Rule 12(b)(2), SCRCP. We affirm.

FACTS

As alleged in their complaint, in November 2000 the Coggeshalls consulted respondent Dr. Crain at REACH regarding in vitro fertilization (IVF). In preparation for IVF, Dr. Crain referred Susan Coggeshall to respondent Dr. Moore in Columbia for pre-implantation testing and monitoring. The Coggeshalls subsequently signed a contract with REACH for IVF services. After embryo implantation, Susan became pregnant. At fourteen weeks gestation, amniocentesis revealed a chromosomal abnormality identified as Down Syndrome. In a subsequent telephone conversation, Dr. Crain advised the Coggeshalls to have pre-implantation genetic testing if they wanted to use IVF in the future. This was the first time the Coggeshall were made aware that such testing was available.

The Coggeshalls' child was born with Down Syndrome. The Coggeshalls then brought this action against REACH, Dr. Crain, and Dr. Moore for failure to inform them of pre-implantation genetic

testing. Their complaint alleges they will suffer "substantial financial expenses" in caring for a child with Down Syndrome.

In lieu of answering the complaint, the North Carolina defendants, REACH and Dr. Crain, moved to dismiss for lack of personal jurisdiction; Dr. Moore moved to dismiss for failure to state a claim under South Carolina law. The trial judge granted both motions. The Coggeshalls appeal the dismissal of their complaint against REACH and Dr. Crain.

ISSUES

1. Is there "general jurisdiction" under § 36-2-802?

2. Is there "specific jurisdiction" under § 36-2-803?

DISCUSSION

A. Background and procedure

Personal jurisdiction is exercised as "general jurisdiction" or "specific jurisdiction." General jurisdiction is the State's right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant's contacts with the forum, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15 (1985); general jurisdiction is determined under S.C. Code Ann. § 36-2-802 (2003). Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum; specific jurisdiction is determined under S.C. Code Ann. § 36-2-803 (2003). Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 611 S.E.2d 505 (2005). The exercise of personal jurisdiction under either statute must comport with due process requirements and must not offend traditional notions of fair play and substantial justice. *Id.* Due process requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state. Hanson v. Denckla, 357 U.S. 235 (1958).

At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction. *Id.* When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction. Graham v. Lloyd's of London, 296 S.C. 249, 251 n. 1, 371 S.E.2d 801, 802 n. 1 (Ct. App. 1988). The decision of the trial court will be affirmed unless unsupported by the evidence or influenced by an error of law. Cockrell, *supra.*

B. General jurisdiction under § 36-2-802

The trial judge ruled that jurisdiction was not proper under S.C. Code Ann. § 36-2-802 (2003) which provides in pertinent part:

> **§ 36-2-802. Personal jurisdiction based upon enduring relationship**
>
> A court may exercise personal jurisdiction over a person . . . doing business . . . [in] this State as to any cause of action.

The Coggeshalls contend REACH's activities in South Carolina constitute "doing business" in the state and therefore jurisdiction is proper. They point to REACH's answers to interrogatories which indicate the following:

> - REACH performed services for nearly three thousand South Carolina residents between 2000 and 2004 and sent bills to South Carolina;
>
> - REACH earned over $2 million from South Carolina patients during that period which represents less than 1% of REACH's income;
>
> - REACH received referrals from at least twelve South Carolina healthcare providers;

- REACH is a member of the IntegraMed Network of Infertility which has one member in South Carolina;

- REACH has referred South Carolina patients to two other medical practices in South Carolina, in addition to Dr. Moore, for the patients' convenience;

- Of 55 the vendors with whom REACH does business, five are located in South Carolina.

There is no universal formula for determining what constitutes "doing business" to subject a foreign entity to personal jurisdiction; the question must be resolved on the facts of each case. Troy H. Cribb & Sons, Inc. v. Cliffstar Corp., 273 S.C. 623, 258 S.E.2d 108 (1979). As the title of § 36-2-802 indicates, general jurisdiction is based upon "an enduring relationship" with the State. An enduring relationship is indicated by contacts that are substantial, continuous, and systematic. Cockrell, 363 S.C. at 495, 611 S.E.2d at 510 (*citing* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Internat'l Shoe Co. v. Washington, 326 U.S. 310 (1945)).

In this instance, REACH and Dr. Crain do not have contacts with South Carolina that are substantial, continuous, and systematic to justify the exercise of personal jurisdiction. Neither Dr. Crain nor any of the REACH physicians is licensed to practice medicine in South Carolina; all of the medical care they rendered was rendered in North Carolina. Medical services differ from other types of commercial activity because of the very personal nature of the service rendered. Hume v. Durwood Med. Clinic, Inc., 282 S.C. 236, 318 S.E.2d 119 (Ct. App. 1984), *cert. dismissed*, 285 S.C. 377, 329 S.E.2d 443 (1985), *cert. denied*, 474 U.S. 848 (1985); *accord* Wolf v. Richmond County Hosp. Auth., 745 F.2d 904 (4th Cir. 1984). As several courts have noted:

> When one seeks out services which are personal in nature, such as those rendered by attorneys, physicians, dentists, hospitals or accountants, and travels to the locality where

> he knows the services will actually be rendered, he must realize that the services are not directed to impact on any particular place, but are directed to the needy person himself. . . . [I]t would be fundamentally unfair to permit a suit in whatever distant jurisdiction the patient may carry the consequences of his treatment. . . .

Gelineau v. New York Univ. Hosp., 375 F. Supp. 661, 667 (D.N.J. 1974).

Because medical care is of such a personal nature, jurisdiction over an out-of-state physician is generally not exercised absent other circumstances indicating a purposeful availment of the forum state's market. *See* Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972); Soares v. Roberts, 417 F. Supp. 304 (D.R.I. 1976); Woodward v. Keenan, 261 N.W.2d 80 (Mich. App. 1977); S.R. v. City of Fairmont, 280 S.E.2d 712 (W.Va. App. 1981); s*ee generally* Annot. 25 A.L.R.4th 706 (1983). Here, we find no such purposeful availment.

Although REACH has served a fair number of South Carolina patients, REACH does not target its advertising to South Carolina residents nor does it systematically search out patients here. REACH maintains a website accessible by South Carolina residents but it is simply an informational website that allows prospective patients to email for information. This type of "passive" website does not direct business activities to a particular forum. *See* Holland America Line, Inc. v. Wartsila North Amer., Inc., 485 F.3d 450 (9th Cir. 2007); Jennings v. AC Hydraulic A/S, 383 F.3d 546 (10th Cir. 2004) (distinguishing between interactive and passive websites for purposes of personal jurisdiction); *see also* McBee v. Delica Co., 417 F.3d 107 (1st Cir. 2005) (noting that given omnipresence of internet websites, allowing personal jurisdiction to be premised on such a contact alone would eviscerate limits on state's jurisdiction).

We decline to hold that REACH or Dr. Crain is doing business in South Carolina based on their unsolicited patient contacts or tangential business dealings with vendors here. We therefore conclude the trial

judge properly refused to exercise personal jurisdiction under § 36-2-802.[1]

C. Specific jurisdiction under §36-2-803

The Coggeshalls contend REACH and Dr. Crain are subject to specific personal jurisdiction under S.C. Code Ann. § 36-2-803 (2003) which provides in pertinent part:

> **§ 36-2-803. Personal jurisdiction based on conduct.**
>
> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> (1) transacting any business in this State;
>
> . . .
>
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course

[1] The Coggeshalls also contend the trial judge erred in failing to find Dr. Moore, a South Carolina physician practicing in Columbia, acted as the agent of REACH and Dr. Crain, and therefore personal jurisdiction was appropriate. This argument is not preserved for review. The trial judge's order regarding REACH and Dr. Crain makes no finding regarding any alleged agency relationship between Dr. Moore and REACH. Although the Coggeshalls' brief refers to a motion to amend which may have raised this issue, the motion itself is not included in the record and the trial judge's order on the motion to amend is simply a summary denial. There is nothing in the record indicating the issue of agency was ever considered or ruled upon by the trial judge. Accordingly, it is not preserved for review. Madison ex rel. Bryant v. Babcock Center, 371 S.C. 123, 638 S.E.2d 650 (2006).

> of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
>
> . . .
>
> (7) entry into a contract to be performed in whole or in part by either party in this State; . . .
>
> (B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

As noted in subsection (B), jurisdiction under this section is limited to a cause of action arising from a specific activity within this State. Under subsection (A)(1), "transacting any business," the business activities of REACH and Dr. Crain that occurred in South Carolina, which included billing patients and doing business with vendors, did not give rise to the alleged tort in this case. This subsection does not apply.

Regarding subsection (A)(4), "causing tortious injury," the tortious injury did not occur in South Carolina but in North Carolina where the medical treatment was rendered. We concur with the substantial number of cases finding that the tortious injury occurs in the forum where the medical treatment was given and not where the patient resides. *See* Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972) (medical treatment is personal service and tort occurred where service rendered for purposes of personal jurisdiction); Lemke v. St. Margaret Hosp., 552 F. Supp. 883 (N.D. Ill. 1982); Glover v. Wagner, 462 F. Supp. 308 (D. Neb. 1978); Gelineau v. New York Univ. Hosp., 375 F. Supp. 661 (D. N.J. 1974); Simmons v. State, 670 P.2d 1372 (Mont. 1983); Brocail v. Anderson, 132 S.W.3d 552 (Tex. App. 2004).

Finally, regarding subsection (A)(7), "entry into a contract," the Coggeshalls' payment on the contract in South Carolina is the only part of the contract performed here and this alone is not sufficient to justify the exercise of personal jurisdiction over REACH and Dr. Crain. Further, the contract in this case provides that North Carolina law

applies to any claim arising from the agreement. Although not controlling, a choice of law provision is relevant in deciding whether to exercise personal jurisdiction. Springmasters, Inc. v. D&M Mfg., 303 S.C. 528, 402 S.E.2d 192 (Ct. App. 1991) (*citing* Burger King Corp., *supra*). The choice of North Carolina law in the agreement indicates REACH did not intend to avail itself of the benefits and protections of South Carolina law by entering a contract with a South Carolina resident. Burger King Corp., 471 U.S. at 482 (purposeful availment is touchstone of due process for personal jurisdiction).

In conclusion, we hold the trial judge did not err in declining to exercise specific personal jurisdiction under § 36-2-803.

AFFIRMED.

WALLER, J., and Acting Justice E. C. Burnett, III, concur. TOAL, C.J., concurring in result in a separate opinion in which BEATTY, J., concurs.

CHIEF JUSTICE TOAL: Although I concur in the result reached by the majority, I respectfully disagree with the analysis and conclusion regarding personal jurisdiction.

The determination of whether a court may exercise personal jurisdiction over a non-resident defendant involves a two-step analysis. *White v. Stephens*, 300 S.C. 241, 245, 387 S.E.2d 260, 262 (1990). First, in order for the courts to have statutory authority to exercise jurisdiction, the nonresident defendant's conduct must meet the requirements of South Carolina's long-arm statute.[2] *Id.* In relevant part, South Carolina courts may exercise personal jurisdiction over a person who transacts business in this State or who enters into a contract to be performed in whole or in part in this State. S.C. Code Ann. § 36-2-803(1) and (7) (2003). In my view, REACH transacted business in the State by contacting Dr. Moore and arranging for part of the IVF procedure to be performed in Columbia. Likewise, since Dr. Moore's services were a necessary part of the IVF procedure, I believe REACH consequently entered into a contract with the Coggeshalls which was performed in part in this State. For these reasons, I disagree with the majority's jurisdictional analysis, and I would hold that South Carolina may exercise personal jurisdiction over REACH pursuant to our long-arm statute.

The second step in the analysis is whether the exercise of personal jurisdiction comports with the requirements of due process. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491-92, 611 S.E.2d 505, 508 (2005). In my opinion, exercising personal jurisdiction over REACH in this case would not violate due process. REACH purposefully sought out Dr. Moore in Columbia to perform services that were integral to the IVF procedure. Additionally, REACH admits

[2] Additionally, a court may exercise personal jurisdiction as to any cause of action over a person based upon an "enduring relationship" with the State pursuant to S.C. Code Ann. § 36-2-802 (2003). Although, in my view, South Carolina may arguably exercise personal jurisdiction under this statute as well, any analysis of this issue is unnecessary given that the long-arm statute is applicable.

it has treated thousands of South Carolinians over the past eight years, which is mostly likely a result of its office location in Charlotte, adjacent to the South Carolina/North Carolina border. *See Cockrell*, 363 at 485, 491-92, 611 at 508 (2005) (noting that due process requires minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice and such that the defendant could reasonably anticipate being haled into court there). I disagree with the majority's analysis in distinguishing between defendants that render medical services and all other defendants. By asserting this distinction, the majority suggests that courts should apply profession-specific standards under which to measure due process requirements, thereby effectively making a policy decision. In my view, such policy decisions are better left to the legislature.

Despite finding personal jurisdiction, however, I would affirm the trial court's dismissal. In my opinion, the Coggeshalls do not allege an injury entitling them to relief. Specifically, the Coggeshalls contend they will suffer substantial financial expenses in caring for their child; however, the Coggeshalls do not allege that the failure to administer the pre-implantation testing caused their child's condition. *David v. McLeod Regional Medical Center*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006) (holding that a plaintiff in a medical malpractice case must show that the defendants' negligence was the proximate cause of the alleged injuries and damages). Therefore, despite their argument to the contrary, the Coggeshalls are essentially seeking damages directly resulting from their child being born. I see no actual difference between this claim and a claim for wrongful life, a claim which we have explicitly rejected. *See Willis v. Wu*, 362 S.C. 146, 171, 607 S.E.2d 63, 71 (2004).

For these reasons, I would hold that although a South Carolina court may exercise personal jurisdiction over REACH, the Coggeshalls failed to present an injury to which they are entitled to relief.

BEATTY, J., concurs

The Supreme Court of South Carolina

In the Matter of William Glenn Rogers, Jr., Respondent.

ORDER

Respondent was suspended on December 10, 2007, for a period of sixty (60) days, retroactive to August 17, 2007. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

December 12, 2007

The Supreme Court of South Carolina

In the Matter of Eduardo K. Curry, Respondent.

ORDER

Respondent was suspended on June 11, 2007, for a period of six (6) months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

December 12, 2007

The Supreme Court of South Carolina

In the Matter of John L. Drennan, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension.

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

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

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Joseph S. Schmutz, 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 Joseph S. Schmutz, 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. Schmutz's office.

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

IT IS SO ORDERED.

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

Columbia, South Carolina
December 19, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kim Parrish, **Appellant,**

v.

Earl Allison, **Respondent.**

Appeal from Laurens County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4322
Heard November 14, 2007 – Filed December 19, 2007

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

J. Michael Turner, Sr., and Matthew P. Turner, of Laurens, for Appellant.

Frank L. Eppes and L. Lee Plumblee, of Greenville, for Respondent.

ANDERSON, J.: In this defamation action, Kim Parrish (Parrish) sued Earl Allison (Allison) for statements alleged to be slander per se. The trial court denied Parrish's motions for directed verdict and judgment

notwithstanding the verdict. The jury returned a verdict for Allison. We affirm in part, reverse in part, and remand.

FACTUAL / PROCEDURAL BACKGROUND

Appellant Parrish is the great-niece of Allison. Over the years, family disagreements have resulted in numerous insinuations and incidents by both sides. Frequently at issue was the family land which has been divided over time between Allison, Parrish, and others. The events leading to this defamation action arose when Parrish began efforts to have the county close a portion of road where her land is located. At a Laurens County Council (the Council) meeting, Parrish appeared and voiced her concerns regarding the safety of the road. Allison expressed his opposition at a subsequent council meeting where he made the statements at issue. Specifically, Allison said Parrish had (a) "conned his mother [Parrish's great-grandmother] into signing her land over to [Parrish]," and (b) "conned [his mother] out of her insurance money."

Prior to the meetings, Parrish visited Allison at his home to discuss her intentions to ask the county to close the road. Although Allison initially told Parrish he was neutral, he later decided to oppose the closing. Allison's change in position was sparked by an article he read in the local newspaper. It reported that Parrish, at the first meeting, told the Council a man fell off a golf cart and was run over on the road. Allison knew this incident never happened. However, Parrish's testimony revealed her nephew fell off a go-cart in another locale and was run over leaving him with a lengthy recovery. The record established that the newspaper had misquoted Parrish. At trial, Parrish said she told the Council of her nephew's ordeal to illuminate the devastation of "freak accidents."

At the inception of the second county council meeting, an announcement was made clarifying the newspaper had reported incorrectly. Allison, advanced in years and hard of hearing, was present but testified repeatedly he did not hear the correction. He proceeded to make his statements believing Parrish had told a lie and the Council would rely on a fabrication in deciding whether to close the road. Allison made the following

statements about Parrish: "She lied about different things . . . . [S]he lied about a man getting ran over."

> I don't know why she is driving this so hard with lies to get it accomplished. [T]he point about the man getting run over on Allison Road is an absolute lie. This is the most outrageous thing I have ever heard. This should have been kicked out the first time she came in here with this big tale. We have had trouble with this woman ever since she has been living in Hickory Tavern. The things that she has done and gotten by with . . . . she got by with cutting Tony Lollis water line and blocking the road off. I want to tell you how kind-hearted she is. My mother lived to be an old, old woman. She conned her into signing the whole place . . . house, land and furniture, two insurance policies. She did not show up at the funeral. She did not show up at the Mortuary and paid not one penny towards the funeral. The two insurance policies were for her funeral. She is a dangerous woman. (Emphasis supplied).

Allison does not deny making the statements though testimony is inconsistent as to whether he used "conned" to imply "stole" or "persuaded." In a deposition, Allison insisted on the truth of his statements and answered the questions of Parrish's attorney as follows:

Q: You wanted her to be known as a liar in the community?

A: Right.

Q: You wanted her to be known as someone who stole land from your mother?

A: Right. Exactly right.

But on direct examination by Parrish's attorney, Allison testified:

Q: Now, Mr. Allison, when you appeared before the Laurens County Council you could have spoken against the closing of Allison Road without personally attacking Kim Parrish, couldn't you?

A: Say I could have?

Q: Yes, sir.

A: Well, I wanted to get the point across, I wanted her character revealed and I wanted to let the county council know what we were dealing with.

Q: You turned this into a personal attack on Kim Parrish?

A: No, no, no. I have no personal attack on Kim. I am glad to see Kim progress, the way they are progressing. I don't hate my own, I don't mean to hate you and I don't know what you are up to. I hate—

Q: Well, I am sorry if you feel like I am up to something, I am just here asking questions. What I want to know is the truth about this matter and this. You could have spoken against the closing of the road without calling Kim Parrish a liar, couldn't?

A: Well, I thought it would be best to reveal her character and let the county council know that the road shouldn't be closed on that statement, that a man was run over.

. . .

Q: Well, lets [sic] talk about what you did say, okay?

A: Alright.

Q: Alright, we know you called her a liar, correct?

A: Did I call her a liar?

Q: Yes, sir.

A: Well, I didn't mean to damage her character. All I meant was to get it across to the county council that we were dealing with an unreliable person, in the newspaper.

Q: Now, you also, I believe, said that she conned your mother into signing the whole place over to her, didn't you?

A: I believe I did say that.

Q: And her insurance money too, didn't you?

A: And you know what my basis for—

Q: What I am saying, and insurance money too, correct?

A: Right, right.

Q: And you said both of those things to county council, didn't you?

A: Yes.

Q: And that didn't have a thing to do with closing Allison Road?

A: No, but it was bringing out the character, bringing out the character.

Q: Did it have anything to do with closing Allison Road?

A: Yes, it did. That helped keep the road open in my opinion.

Q: Okay. So, your personal attack upon her of telling those things was for the purpose of trying to keep the road open to discredit her, is that right?

A: I was trying to keep the road open, that is right.

Q: And trying to discredit Kim Parrish?

A: I wasn't trying to discredit her or anything. I was just bringing out the straight facts.

Q: Just bringing out the straight facts?

A: Right.

Q: And you wanted the county council—

A: To believe that she was an unreliable person.

Q: And you wanted the county council and all of those persons in attendance and whoever may hear this, whether it be on TV or otherwise to believe that she was a person who stole your mother's land, didn't you?

A: I didn't say she stole it.

Q: That was what you wanted, didn't you, isn't that what you wanted?

A: No, that is not what I wanted, no.

On direct examination by his own attorney, Allison further explained the circumstances behind his statements.

Q: And then you went on to say [at the county council meeting], you used the word, con?

A: Right.

Q: Her out of real estate and insurance proceeds. What were you saying there in your mind's eye?

A: My view on this is that. I believe in all my heart that Mary Ellen, my sister and Kim, they were working together. And they had convinced my mother that she should sign that deed to my sister which she did, she signed the deed, her mind wasn't right at all when she signed it. But she signed everything she had to my sister, I didn't find this out until my mother died. And before my mother died my sister signed everything over to Kim Parrish.

Q: And what--?

A: And with all the children and grandchildren I don't see why, there was 41 of us and the one person she picked out was Kim. But that was working between my sister and Kim.

Q: Now, what type of force did they bring to bear on your mother do you think, how did they do that?

A: What did they do now?

Q: How did they do that?

A: How did they do what?

Q: Did they persuade your mother?

A: Oh yes, they persuaded my mother, no doubt about that.

The trial court denied Parrish's motion for directed verdict at the close of Allison's case. Prior to jury instructions, Parrish renewed her objection that Allison had not pled the affirmative defense of truth. The trial court ruled "I certainly think that reading the answer in a liberal manner, even though it is an affirmative defense I think that it was affirmatively stated that they were going to plead that." The trial court charged the jury: "The defendant must prove by a greater weight of the preponderance of the evidence that the statement was substantially true or true in substance. A statement is not defamatory if it is essentially true." The jury returned a

verdict in Allison's favor. The trial court denied Parrish's motions for a new trial or judgment not withstanding the verdict.

ISSUES

1. Did the trial judge err in denying motions for directed verdict and judgment notwithstanding the verdict because the statements of the respondent constituted slander per se?

2. Did the trial judge err in allowing Allison to present truth as a defense and in charging the jury on truth when truth was not pled as an affirmative defense?

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by a jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's finding." Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 464, 629 S.E.2d 653, 663 (2006); Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). "When ruling on a motion for summary judgment or directed verdict in a defamation action, the court must review the evidence using the same substantive evidentiary standard of proof the jury is required to use in a particular case." Erickson, 368 S.C. at 464, 629 S.E.2d at 663; George v. Fabri, 345 S.C. 440, 451-54, 548 S.E.2d 868, 874-75 (2001). An appellate court reviews the granting of such a motion using the same standard. Erickson, 368 S.C. at 464, 629 S.E.2d at 663.

"In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." Steinke v. South Carolina Dep't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); accord Hurd v. Williamsburg County, 363 S.C. 421, 611 S.E.2d 488 (2005); Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579

S.E.2d 616, 618 (2003); Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005); Lingard v. Carolina By-Products, 361 S.C. 442, 446, 605 S.E.2d 545, 547 (Ct. App. 2004). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-77, 514 S.E.2d 126, 130 (1999); Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 860 (Ct. App. 2001). However, if the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003); Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005).

When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006); Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002); Pond Place Partners v. Poole, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002). The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 842 (Ct. App. 1997).

LAW / ANALYSIS

Parrish contends the trial judge erred in denying her motions for directed verdict and judgment notwithstanding the verdict because Allison's statements constituted slander per se. Following our supreme court's directive in Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 502 (1998), we will analyze this slander action in two parts. A statement is (1) either defamatory per se or defamatory per quod, and (2) actionable per se or not actionable per se. See also Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319, n.1 (Ct. App. 2001).

I. Defamatory Per Se or Defamatory Per Quod

The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff. Holtzscheiter, 332 S.C. at 508, 506 S.E.2d at 502; Murrray v. Holnam, 344 S.C. 129, 138, 542 S.E.2d 743, 748 (Ct. App. 2001). Defamatory communications take two forms: libel and slander. Holtzscheiter, 332 S.C. at 508, 506 S.E.2d at 502. Libel is the publication of defamatory material by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed word. Id. at 517, 506 S.E.2d at 505 (Toal, J., concurring); Restatement (Second) of Torts, § 568 (1977). Slander is a spoken defamation. Id. at 508, 506 S.E.2d at 501; see also Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999).

To recover for defamation, the plaintiff must establish by a preponderance of the evidence, that there was (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged communication; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication. Holtzscheiter, 332 S.C. at 518, 506 S.E.2d at 506 (Toal, J., concurring); Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

"A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him." Holtzscheiter, 332 S.C. at 530, 506 S.E.2d at 513 (Toal, J., concurring). With this first element of defamation, the trial court must initially determine if the communication is reasonably capable of conveying a defamatory meaning. Id. at 530, 506 S.E.2d at 513; White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997). If the defamatory meaning of a message or statement is obvious on the face of the statement, the statement is defamatory per se. Holtzscheiter, 332 S.C. at 508-09, 506 S.E.2d at 501. "If the defamatory meaning is not clear unless the hearer knows the facts or circumstances not contained in the statement itself, then the statement is defamatory per quod. In cases involving defamation

per quod, the plaintiff must introduce facts extrinsic to the statement itself in order to prove a defamatory meaning." Id.

"If the question is one on which reasonable minds might differ, then it is for the jury to determine which of the two permissible views they will take." Id. at 530, 506 S.E.2d at 512 (Toal, J., concurring). Some statements are so clearly innocent or defamatory the court is justified in determining the question itself. Id. "In making the determination of whether to submit the issue to the jury, the trial court may consider not only the statement on its face, but also evidence of any extrinsic facts and circumstances." Id.

Here, after Parrish had presented her witnesses, both parties moved for and were denied motions for directed verdict. The trial judge stated, "While I think the statements may in fact be defamatory, that only establishes one element that the plaintiff would have to prove." Without committing to a finding of defamatory per se, the judge explained that whether they were actionable per se was an additional element over which conflicting testimony had created a jury issue.

II. Actionable Per Se or Not Actionable Per Se

In addition to being defamatory per se or per quod, "[a] separate issue is whether the statement is 'actionable per se' or not. This issue is one of pleading and proof, and is always a question of law for the court." Holtzscheiter, 332 S.C. at 510, 506 S.E.2d at 502; Capps v. Watts, 271 S.C. 276, 246 S.E.2d 606 (1978). If the defamation is actionable per se, the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages. If the defamation is not actionable per se, then the plaintiff must plead and prove common law actual malice and special damages. Holtzscheiter, 332 S.C. at 510, 506 S.E.2d at 502.

When assessing the question of actionable per se or not actionable per se, an important distinction is drawn between the defamation in the form of libel and in the form of slander. With libel, "if the trial judge can legally presume, because of the nature of the statement, that the plaintiff's reputation was hurt as a consequence of its publication, then the libel is actionable per se." Id. at 510, 506 S.E.2d at 502. In contrariety, "slander is actionable per

se only if it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Id. at 511, 506 S.E.2d at 502. "In all other cases—namely, when slander does not fall into the above-named categories-special damages must be established." Id. at 526, 506 S.E.2d at 510 (Toal, J., concurring).

In the case sub judice, Parrish argues the statements charge her with a crime of moral turpitude. She avers the allegations made by Allison are unambiguous and not susceptible of innocent construction. We found no case in South Carolina that specifically addressed the nature of the word "con." However, dictionary definitions include swindle, manipulate, persuade, and cajole. See, e.g., Merriam Webster's Collegiate Dictionary (10th ed. 1993). A few cases from other jurisdictions considered this term and held "con" can have an innocent meaning. See Quinn v. Jewel Food Stores, Inc., 658 N.E.2d 1225 (Ill. App. Ct. 1995) (finding terms including "con artist" as contained in plaintiff's employee evaluation form capable of innocent meaning); Rizzuto v. The Nexxus Products Co., 641 F. Supp. 473 (S.D.N.Y. 1986) (in context of trade journal advertisement, phrases including "don't be conned" are mere rhetorical hyperbole rather than accusation of criminal conduct and use of word "conned" was an expression of opinion not giving rise to action for libel).

South Carolina law allows contemplation of the context and circumstances under which words are spoken when determining if the words have a defamatory meaning or are actionable per se. The resolution of conflicting meanings is reserved for the jury. In Smith v. Smith, 194 S.C. 247, 9 S.E.2d 584, 589 (1940), our supreme court instructed:

> If words are susceptible of two meanings, one imputing a crime, and the other innocence, the latter is not to be adopted, and the other rejected, as a matter of course. In such a case, it must be left to the jury to decide in what sense defendant used them. Their conclusion must be formed from the whole of the circumstances attending the publication, including the sense in which the witnesses understood the words.

Id. at 257, 72 S.E.2d at 589 (quoting Jenkins v. Southern Ry. Co., 130 S.C. 180, 183, 125 S.E. 912, 913 (1924)); see also Sandifer v. Electrolux Corp., 172 F.2d 548 (1949); Jones v. Garner, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968) ("[A]ll of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have."); Leevy v. North Carolina Mut. Life Ins. Co., 184 S.C. 111, __, 191 S.E.2d 811, 814 (1937); Turner v. Montgomery Ward & Co., 165 S.C. 253, 261, 163 S.E. 796, 798-99 (1932) ("[T]he evidence adduced by the plaintiff in the case at bar required the submission to the jury of the question whether the language used by [the defendant] charged the plaintiff with the commission of such crime."); Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) (rejecting defendant's argument that if context is considered then statement cannot, as a matter of law, be actionable per se; affirming submission to jury issue of whether defendant stating plaintiff acting like a "house n****r" in his position as vice-principal actionable per se); Wardlaw v. Peck, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984) ("How the words were to be understood in the circumstances in which they were uttered was a question for the jury, not the court, to decide.").

When denying both parties' directed verdict motions made at the end of the plaintiff's case, the judge stated:

> I think there has been conflicting testimony as to whether or not those statements taken in their entirety, interpreting those based upon the circumstances would be slander per se. While the, I think the meaning of the word, conned, is certainly a common term that anyone could define and that is what constitutes the defamation. Whether or not that is in fact computing that she was, or has committed a crime of moral turpitude would be something that the jury would have to consider in light of all the statements and the acts and circumstances.

The parties again moved for directed verdicts after the close of the defendant's case, and the judge reiterated:

> I think there is a jury question that exist [sic] as to whether or not the statements made were slanderous per se, whether or not the statements reasonably may be understood to charge the plaintiff with the crime of larceny or breach of trust or some other offense. I think it is something that the jury will have to determine based on the totality of the statements and the circumstances under which they were made. So, I am going to allow it to go the jury for that consideration.

After the jury returned a verdict for Allison, Parrish moved for judgment notwithstanding the verdict. The judge denied the motion and said:

> As to the slander per se, I think there was evidence that required the jury to make a determination as to whether the words spoken would of put the person who heard it in, to know what was being charged was a crime of moral turpitude and that became a jury issue which they ultimately decided.

Parrish posits the holdings of Lily v. Belk's Dep't Store, 178 S.C. 278, 182 S.E. 889 (1935) and Herring v. Lawrence Warehouse Co., 222 S.C. 226, 72 S.E.2d 453 (1952), demand the reversal of the trial court. In Lily, the plaintiff left a department store after making a purchase but was stopped by a store clerk. He told her he wanted to see what she had put in the bags, and he searched the bags in the presence of people on the street. A jury found for the plaintiff in her subsequent slander action. On appeal, the defendant alleged the trial court erred in denying his motion for a nonsuit based on the ground that the testimony neither supported an action for slander because the language did not charge the plaintiff with a crime, nor did it did become actionable by virtue of the circumstances.

The court held a charge of a crime need not be express but, with verbal slander, words are to be given their ordinary and popular meaning. And when words are susceptible of an innocent meaning and one imputing a crime, the jury must decide in what sense they were used. Id. at 282, 182 S.E. at 891. The court instructed "where the words used are not actionable in themselves, they require the pleading of an innuendo to explain or determine their defamatory nature, and in such case are said to be [not actionable per

se]." Id.[1] Applying Lily to the case at bar, we hold Allison's statements carried sufficient possibility of defamation to support an action, but whether they equated to the charge of a crime was properly submitted to the jury.

Parrish cites Herring v. Lawrence Warehouse Co., 222 S.C. 226, 72 S.E.2d 453 (1952), to assert "con" must be actionable per se if calling an employee "short" was so held. In Herring, an auditor accused the plaintiff, a warehouse manager, of being "short" on equipment entrusted to his care. The plaintiff was immediately fired. Our supreme court held the statement was unambiguous and actionable per se. The holding was not based solely on the language, but the scale was tipped by the court's evaluation of the circumstances. "When considered in connection with the fact that appellant was immediately discharged and the keys of the warehouse demanded, it is clear that appellant was charged with the commission of a crime." Id. at 235, 552 S.E.2d at 455. The reaction of the hearers led the court to hold the statement unquestionably charged a crime. Parrish has not shown equivalent evidence upon which a similar finding may be based.

We hold the trial judge did not err in denying Parrish's motions for directed verdict and judgment notwithstanding the verdict. Viewing the evidence in the light most favorable to Allison, there was evidence that the statements, though decidedly unflattering, were reasonably susceptible of a construction short of a crime of moral turpitude. Conflicting testimony over whether the statements meant Parrish persuaded Allison's mother or stole from her created a credibility issue. Accordingly, whether the statements were defamatory per se and actionable per se was a question for the jury as the finders of fact.

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[1] Innuendo is extrinsic evidence used to prove a statement's defamatory nature. 50 Am. Jur. 2d *Libel and Slander* § 137 (1995). It includes the aid of inducements, colloquialisms, and explanatory circumstances. Lily v. Belk's Dep't Store, 178 S.C. 278, 182 S.E.2d 889 (1935).

III. Truth as an Affirmative Defense to Defamation

Parrish contends the trial court erred in allowing Allison to assert the truth of his statements, even though he did not affirmatively plead it as a defense in his answer. We agree.

Under common law, a defamatory communication was presumed to be false, but truth could be asserted as an affirmative defense. See Beckham v. Sun News, 289 S.C. 28, 30, 344 S.E.2d 603, 604 (1986); see also Herring v. Lawrence Warehouse Co., 222 S.C. 226, 234, 72 S.E.2d 453, 455 (1952) (holding South Carolina jurisprudence has consistently held statements that are actionable per se are presumed false). However, the Supreme Court's holding in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69, (1986), modified the common law rule holding when a newspaper publishes speech of public concern, a private figure plaintiff cannot recover damages without showing the statements are false. If the statements are a matter of private concern, the plaintiff is not required to prove falsity. Id. Thus, truth is an affirmative defense as to which the defendant has the burden of pleading and proof, unless the statement involves a constitutional issue. See Hubbard and Felix, The South Carolina Law of Torts 468, 478 (2d. ed. 1997).

A party, in pleading to a preceding pleading, shall affirmatively set forth his defenses to the opposing party's complaint. Rule 8(c), SCRCP. Further, "[e]very defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto . . . ." Rule 12(b), SCRCP. Generally, affirmative defenses to a cause of action in any pleading must be asserted in a party's responsive pleading. Strickland v. Strickland, Op. No. 26375, (S.C. Filed August 27, 2007) (Shearouse Adv. Sh. No. 32 at 58) (citing Wright v. Craft, 372 S.C. 1, 20-21, 640 S.E.2d 486, 497 (Ct. App. 2006)). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Craft, 372 S.C. at 21, 640 S.E.2d at 497 (citing Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)).

In construing a complaint or responsive pleading, the court must review the entire pleading. See Doe ex rel. Legal Guardian v. Barnwell School Dist. 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006). "To ensure

substantial justice to the parties, the pleadings must be liberally construed." Gaskins v. S. Farm Bureau Cas. Ins. Co., 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000), aff'd as modified on other grounds, 354 S.C. 416, 581 S.E.2d 169 (2003); see Rule 8(f), SCRCP (providing that all pleadings must be construed to do substantial justice to all parties).

A defamatory communication is presumed to be false under the common law. The plaintiff does not have the burden of proving falsity. However, truth can be asserted as an affirmative defense, the burden of which is on the defendant. The trial court allowed Allison to assert the truth of his accusation in the presentation of his case. In addition, the trial court instructed the jury that "the defendant must prove by a greater weight of the preponderance of the evidence that the statement was substantially true or true in substance." The charge afforded Allison the benefit of the affirmative defense of truth without his being required to affirmatively plead it.

In response to Parrish's objection, the trial court explained Allison's answer, read liberally, "affirmatively stated that they were going to plead [truth as a defense]." Our reading of the responsive pleading as a whole mandates a different interpretation. Allison's denial of Parrish's claims was not directly based on the assertion that the communication was true, but instead focused on Allison's intention, mistake in speaking out of context, and apology. Specifically, Allison asserted:

> that he did not intend to make any false and malicious accusations against the plaintiff in any regard and can only apologize and offer the plaintiff assurances that the defendant bears no ill will against the plaintiff and regrets that any statements may have been made that anywise questions the plaintiff's integrity . . . .
>
> [T]he defendant would again allege and show that to the extent any comments were made out of context and inappropriate, those in attendance realize the circumstances of the dispute concerning the closing of the road, and the defendant does apologize for any intemperate remarks which should not have been uttered or said in any regard.

We acknowledge the rule compels reading the pleadings as a whole, liberally, and with the purpose of ensuring substantial justice to the parties. However, in this instance, even the most liberal reading fails to persuade us that Allison affirmatively asserted the defense that his statements made about Parrish were true.

CONCLUSION

We hold Allison's statements about Parrish did not constitute slander per se. We rule that Allison failed to plead truth as an affirmative defense. The trial court erred in allowing Allison to argue truth as a defense and in charging truth as a defense. Accordingly the case is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Williams, J., concurs.

Short, J., concurs in result in a separate opinion.

SHORT, J., concurs in result.

I concur with the majority that the judgment must be reversed based on the trial court's error in allowing Allison to assert truth, even though he did not affirmatively plead truth as a defense. I write separately, however, because I believe the trial court also erred in failing to direct a verdict on the issue of slander per se.

In light of the attendant circumstances, I find Allison's statements charged Parrish with the commission of a crime of moral turpitude. See Flowers v. Price, 192 S.C. 373, 378, 6 S.E.2d 750, 752 (1940) (considering extrinsic circumstances to determine if words are slanderous per se). At the meeting, Allison stated that Parrish "conned" his mother into signing over her land and "conned" her out of her insurance money. Extrinsic circumstances included Allison's intent to discredit Parrish by many references to her

alleged dishonesty including the statement that she was a liar. The words spoken are actionable if they convey to the minds of the listeners, and would naturally be understood to mean, the plaintiff has committed a crime. Id. at 377, 6 S.E.2d at 752. Any words actually or impliedly stating the plaintiff's guilt, or raising a strong suspicion of it in the minds of the hearers, are sufficient. Porter v. News & Courier Co., 237 S.C. 102, 108, 115 S.E.2d 656, 658 (1960). See Herring v. Lawrence Warehouse Co., 222 S.C. 226, 235, 72 S.E.2d 453, 455 (1952) (finding statement that an employee is "short," made during an audit and coupled with immediate firing, actionable per se).

Considering the context in which Allison's statements were made, I conclude the statement that Parrish "conned" Allison's mother out of her house and insurance money charged Parrish with the commission of a crime of moral turpitude such as obtaining property by false pretenses. See S.C. Code Ann. § 16-13-240 (2003) ("A person who by false pretense or representation . . . obtains from another person any . . . money . . . or other property . . . is guilty of a: (1) felony . . . if the value of the property is five thousand dollars or more . . . ."). Obtaining property under false pretenses is a crime of moral turpitude. State v. Moore, 128 S.C. 192, 199, 122 S.E. 672, 674 (1924); Carruth v. Brown, 415 S.E.2d 470, 471 (Ga. Ct. App. 1992). Under these circumstances, I find Allison's statements charged Parrish with the commission of a crime of moral turpitude and the trial court erred in denying Parrish's motion for a directed verdict on the issue of slander per se.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard C. Dalton, **Respondent,**

v.

State of South Carolina, **Petitioner.**

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge
Post Conviction Judge

Opinion No. 4323
Submitted December 1, 2007 – Filed December 18, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Molly R. Crum, of Columbia, for Petitioner.

Lanelle C. Durant, of Columbia, for Respondent.

ANDERSON, J.: The post-conviction relief (PCR) court granted Richard C. Dalton's (Dalton) application for relief after finding his guilty plea was involuntary due to counsel's failure to interview witnesses. This court granted the State's petition to review the PCR court's decision. We reverse.[1]

FACTUAL/PROCEDURAL BACKGROUND

Dalton was indicted for two counts of criminal sexual conduct with a minor second degree against two step-daughters, fifteen-year-old "Child A" and thirteen-year-old "Child B." Respondent was represented by appointed counsel. Concerning the charge involving Child A, Dalton pled guilty as indicted to one count of criminal sexual conduct with a minor second-degree on July 18, 2002. He waived presentment on the other charge involving Child B and pled guilty to one count of lewd act on a minor. Dalton was sentenced to: (1) twenty years for criminal sexual conduct with a minor second-degree, provided upon fifteen years the balance would be suspended with five years probation and (2) a concurrent term of fifteen years for lewd act on a minor.

At the guilty plea hearing, evidence of Dalton's guilt on the charge involving Child A was presented. The solicitor told the judge that Child A said Dalton fondled her, had sexual intercourse with her at least four times, and engaged in oral sex. The judge was informed that Child B reported Dalton fondled her and made some oral sexual contact. Dalton admitted to a Department of Social Services caseworker that he would "eat [Child A] out," but he denied having sex. Additionally, Dalton gave a statement to police confessing he did have sex with Child A. Dalton only disagreed with the length of time over which the events occurred.

Dalton's counsel at the plea hearing indicated he had explained to Dalton the charges, the possible punishment, his constitutional rights including his right to a jury trial, and his right to present the lewd act charge to a grand jury. Counsel said Dalton understood and wished to plead guilty. The plea court advised Dalton that by entering a guilty plea he would give up

[1] We decide this case without oral argument, pursuant to Rule 215, SCACR.

his constitutional rights to (1) remain silent and not be compelled to testify against himself; (2) be tried by a jury of peers or equals to which the State would be required to prove his guilt beyond a reasonable doubt; and (3) confront and cross-examine witnesses presented against him as well as his right to call witnesses in his own behalf.

Regarding the lewd act charge, the plea court explained it was not a lesser included offense of criminal sexual conduct second degree and it had not been presented to a grand jury. The court informed Dalton a grand jury could determine probable cause and a trial would follow, or the grand jury could return a no bill. The plea court asked:

> Q: Do you understand that process?
>
> …
>
> A: Yes, sir.
>
> Q: And do you still wish to give up your right of presentment of this charge to the Grand Jury.
>
> A: Yes, sir.

After assuring Dalton understood the constitutional rights that he would be giving up by pleading guilty, the colloquy continued as follows:

> Q: Understanding the nature of the charges against you and the consequences of a guilty plea, how do you plead to these charges, guilty or not guilty?
>
> A: Guilty.
>
> Q: Do you understand that, when you plead guilty, that you will waive or give up any possible defenses that you might have to these charges?
>
> A: Yes, sir.

Q: And do you also understand that, if you've given an incriminating statement in this case, that, by pleading guilty, that you will waive or give up the right to contest or challenge whether such a statement was freely and voluntarily given in accordance with your constitutional rights?

A: (Nods affirmatively.)

Q: Did you commit these offenses?

A: Yes, sir.

The plea court asked Dalton whether he understood the recommended concurrent sentences were not binding and he could be sentenced to the maximum on both charges. Dalton answered affirmatively. The court continued:

Q: You still wish to enter your plea of guilty?

A: Yes, sir.

Q: Now, Mr. Dalton, when you enter a plea of guilty—has anyone promised you anything or threatened you in order to get you to enter this plea of guilty?

A: No, sir.

Q: Are you entering this plea of your own free will and accord?

A: Yes, sir, I am.

Q: Are you satisfied with the manner in which [your counsel] has advised and represented you?

A: Yes, sir.

Q: Do you need any more time to speak with him?

A: No.

Q: You feel that he's done everything for you that he could have or should have done?

A: Well, he's – no, not really. I believe that he, he needs to bring up the fact that I know I'm guilty and I admit my fault here. But I have no criminal prior record at this, this matter. I –

Q: He's gonna be able to tell me that in a few minutes.

…

Q: What, what I'm asking you is up until—

A: He's done his, his job very well.

Q: All right. All right. So, you're completely satisfied with--?

A: Yes.

Q: --what he's done?

A: Yes, sir.

Dalton's counsel informed the plea court Dalton intended to plead guilty to spare the victims from having to testify. He explained Dalton's only prior record was limited to minor traffic offenses, and he was working and taking care of his family when charged. The judge was told that Dalton had developed a crack habit in the time leading up to the charges and this legal trouble was out of the ordinary for him. The court accepted Dalton's guilty plea, finding it was voluntarily, knowingly and intelligently made, with the advice and counsel of a competent lawyer with whom Dalton was satisfied.

Dalton failed to timely file and serve his pro se direct appeal. On November 25, 2002, he filed an application for post-conviction relief alleging ineffective assistance of counsel and involuntary pleas. An evidentiary hearing was held on May 28, 2004, and relief was granted by a written order on February 11, 2005. Dalton's petition for appeal bond was denied by the South Carolina Supreme Court, and the State filed a petition for writ of certiorari. Jurisdiction was transferred to this court on February 15, 2006.

ISSUE

Did the PCR court err in finding that counsel was ineffective for failing to interview witnesses when Dalton pled guilty?

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the PCR judge's findings. Wicker v. State, 310 S.C. 8, 11, 425 S.E.2d 25, 27 (1992); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 669, (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. A PCR applicant who pleads guilty on the advice of

counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). When alleging that his guilty plea was induced by ineffective assistance of counsel, an applicant must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985).

LAW/ANALYSIS

Dalton argued his guilty plea was involuntary due to trial counsel's failure to interview witnesses before advising him to plead guilty. In the order granting Dalton's application for relief, the PCR court agreed and annunciated in its order:

> Had applicant's trial counsel consulted with the witnesses given him by the applicant, there is reasonable probability that results of proceedings could have been different. As argued by Applicant, Trial Counsel's failure to interview any of the witnesses left this Applicant with no defense or evidence of mitigation at trial, effectively forcing him to throw himself upon the mercy of the court.
>
> The Court finds Trial Counsel's argument that it was needless to interview witnesses due to Applicant's Statement is not convincing. Applicant's Statement did not address the charges comprising the lewd act, and was less conclusive on all elements of the CSC second degree charge. Applicant's witness who testified at the PCR Hearing called into question the credibility of the complaining witness and presented facts through which impeachment might have been obtained. Her testimony also presented other aspects of the events leading to the charges in a light substantially different from that presented by the Solicitor. Trial Counsel argued that had he elicited such anticipated testimony it would have served to anger the Judge. Considering Applicant is the one who received the twenty year

> sentence, Applicant should have been afforded that decision based on counsel's informed advice after counsel had actually heard what the witnesses had to say.
>
> I find that Trial Counsel's representation fell below an objective standard of reasonableness and it is a reasonable probability that as a result the outcome of Applicant's court appearance would have been different. Trial Counsel was ineffective in failing to interview defense witnesses made known to him. Consequently, Counsel was unable to objectively evaluate Applicant's defense and intelligently advise Applicant. The negative effect of counsel's errors amounts to deficient performance which affected the outcome of the Applicant's court appearance.

The State contends that the PCR court erred in granting Dalton relief. We agree.

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Roddy v. State, 339 S.C. 29, 33-34, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." Pittman v. State, 337 S.C. 597, 625, 524 S.E.2d 623, 659 (1999).

"[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

1. Ineffective Assistance of Counsel

The PCR court granted relief based solely on counsel's failure to interview witnesses. Despite Dalton's statements to police and to DSS and his telling appointed counsel his crack habit caused him to act out of character, Dalton avers this failure forced him to plead guilty because it left him without any defense.

At the PCR hearing, Dalton maintained three witnesses could have helped his case: Faith Dalton (Faith), his ex-wife and mother of Child B; Sonya Cowart, his sister with whom he was living when charges were filed;

and Tom Scruggs, his former employer. Dalton's attorney questioned him on the support these witnesses could have provided.

> Q: And the question is, had he contacted the witnesses what would he have learned that would have helped your case?
>
> A: I don't know, I'm not my witnesses, I don't know what they know. But I know that I was going to use them as my witnesses.

Dalton gave only general statements about how the women would have supported his case and he did not discuss Scruggs. He stated Faith, the complainant on Child B's incident report, lived with Child B and knew of her "activities and veracity"; and his sister would have been a beneficial witness because she had been around him and the child and knew of the child's "activities."

Dalton's appointed counsel admitted Dalton had expressed concern over the victim's dress and manner of conduct both in his statement to police and in their conversations. From the record, it appears this discussion concerned Child A. Counsel reasoned this was inadmissible, not a defense to having sex with a person under the age of sixteen, and possibly harmful to Dalton's case. Given the substantial evidence against Dalton, counsel focused on reducing the charges which carried a possible sentence of fifty-five years. Dalton's PCR counsel only lightly addressed the witness issue when he asked appointed counsel:

> Q: And did he ever provide you with the names of potential defense witnesses?
>
> A: We talked about numerous witnesses. I looked through my file, I didn't have a list of thirty-three, but there was a lot. But the thing about his witnesses were as the witnesses testified in his statement and the victim's statement they both say they were the only ones there. He had no witnesses who were going to say, "Well, I was there and it didn't happen." All of his witnesses revolved around the fact that the girl conducted herself in what

> they felt was in an inappropriate manner, which is of no help and no use.

We do not agree with the PCR court that Dalton established ineffective assistance of his court appointed attorney. The transcript of the guilty plea clearly refutes Dalton's assertion that he believed he had a defense. At the PCR hearing, he was unable to explain how he would have benefited from these witnesses' testimony. See Jackson v. State, 329 S.C. 345, 353-54, S.E.2d 768, 772 (1998) (counsel not proven ineffective where "respondent failed to present any evidence of what counsel would have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for trial"); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."); see also Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (counsel not ineffective where witnesses' testimony at PCR hearing not favorable to applicant's alibi defense).

The plea colloquy record indicates Dalton was fully informed of his constitutional rights, understood the charges, and was cognizant of the maximum sentences he could receive. Specifically, Dalton told the plea judge he understood by pleading guilty he would be waiving any possible defenses.

2. Prejudice

The PCR court order articulated the speculative notion that had "witnesses" been interviewed, "there is a reasonable probability that results of the proceedings would be different." In our view, Dalton failed to prove he was prejudiced by the performance of his court appointed counsel.

Of the three witnesses Dalton identified as potentially helpful at the PCR hearing, only Faith testified. Faith and Dalton have four children together. When the charges were filed, their three boys lived with Dalton and were placed in foster care. At the PCR hearing, Faith Dalton testified:

Q: Do you know—did you know anything about any of the facts as far as the physical facts of what may or may not have happened?

A: No, sir.

Q: Okay. Do you have any knowledge concerning [Child B's] truthfulness?

A: Yes, sir.

Q: Well, based on your having lived with [Child B] and raised her, what is your opinion as to her truthfulness?

A: [Child B] is a very—until this day is a very dramatic person. She does not tell full truths. She can come up with a story off a limb and make you believe it. She can cry at the drop of a dime. She has done this numerous times throughout her life even as a small child. That is what has made it hard for me to believe that what [Child B] has stated against Richard Dalton, my ex-husband, is difficult to believe, not only because of her inability to be truthful but also her demeanor of how she handles situations. She is the type of child that if she don't want you to touch her she's going to let you know, she's going to do something about it. If she doesn't like what you say she's going to come to a defensive act, be it verbally or physically.

…

Q: You're saying she's not a shrink in the wall flower [sic]?

A: No, she's not.

Q: Now, things you just told me, did you tell anyone in connection with the case about those?

A: I didn't speak to anybody on Richard's behalf, I spoke to DSS case workers and that was it. That is the only people that I spoke to and they wouldn't listen to anything I had to say.

…

Q: Were you there when Mr. Dalton pled?

A: Yes, sir, I was.

Q: Did the trial judge give you an opportunity to say anything?

A: The trial judge did, yes, sir.

Q: Did you take that opportunity?

A: No, sir.

Q: Why not?

A: Because the solicitor instructed me not to say anything at the trial due to the fact that I was fighting for custody of my children, and that if I said anything on behalf of Richard Dalton that I would not regain custody of my three boys, that they would remain in foster care.

Faith further stated she could have testified to Dalton's condition when he wrote the statement. She explained that he had a drug problem and often didn't remember what he had done.[2] However, on cross-examination, Faith admitted she was not present when Dalton gave his statement nor were they living together. From her testimony, the PCR judge held she offered facts through which Child B could be impeached. He additionally found the

[2] At the PCR hearing, Dalton testified he told appointed counsel he was under the influence of cocaine when he gave his statement to the police and that he did not remember writing it.

testimony contained "other aspects of the events leading to the charges in a light substantially different from that presented by the Solicitor."

We disagree and find no probative evidence in this testimony to support the PCR judge's findings, especially with the plea on the charge involving Child A. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Faith attended Dalton's plea hearing but chose not to speak. Dalton's testimony that his sister knew of Child B's activities did nothing to carry his burden. "This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); see, e.g., Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR. Porter v. State, 368 S.C. 378, 386-87, 629 S.E.2d 353, 358 (2006) (holding no evidence showed counsel's failure to interview a potential witness would have yielded a result different from that which defendant's counsel believed at the time of the plea; defendant pled guilty in light of the complete information that was available at that time).

CONCLUSION

Although this court generally affords great deference to the PCR court's findings, in this case we conclude the record is devoid of any probative evidence to support Dalton's post-conviction relief. Accordingly, we **REVERSE** the decision of the PCR court and **REINSTATE** Dalton's guilty plea and sentences.

KITTREDGE and SHORT, JJ. concur.