THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Roger L. Couch, Circuit Court Judge

Case No. 2008-CP-42-0835

Shannon Hutchinson, Personal Representative of the Estate of Stephen F. Ney a/k/a Steve F. Ney ..... Petitioner

v.

Liberty Life Insurance Company ..... Respondent

BRIEF OF RESPONDENT

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December 10, 2012

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A. Are Petitioner's arguments properly before this Court where none of the issues raised in Petitioner's brief meet the required criteria of having been advanced during the appeal, ruled on by the Court of Appeals, raised in the petition for rehearing, and raised in the petition for writ of certiorari?

B. In applying common law rules of insurance policy construction, did the Court of Appeals properly reject the specialized medical definition of "narcotic" advanced by Petitioner because that specialized medical definition is not representative of the plain and ordinary understanding of laypersons for whom the policy was written?

C. Do rules of statutory construction provide an additional ground for affirmance where the operative language of the policy—"under the influence of any narcotic"—is taken verbatim from the South Carolina Insurance Code, which must be construed using the plain and ordinary meaning of the exclusionary language to further legislative intent and to avoid an absurd result?

II. STATEMENT OF THE CASE

Petitioner filed this action on February 15, 2008, seeking life insurance benefits under a group accidental death insurance policy ("Policy"). App. pp. 8-9. The insured was the Petitioner's father ("Insured"), who died in a one-vehicle wreck in which his tractor-trailer rig crashed into a bridge abutment on an interstate highway in Illinois. App. pp. 42-43, ¶ 5. The investigation at the crash site revealed no evidence of braking or evasive action either on the roadway or the grass median leading up to the bridge. *Id.* Because toxicology reports were positive for the presence of methamphetamines, and because Illinois officials concluded the Insured's use of methamphetamines was a significant contributing cause of his death, Respondent denied Petitioner's claim for benefits pursuant to the Policy exclusion for death

resulting from the Insured being "under the influence of any narcotic." App. pp. 39, 60, 62. This quoted exclusionary language from the Policy is taken verbatim from a provision of the South Carolina Insurance Code addressing exclusions in individual accidental death insurance policies. S.C. CODE ANN. § 38-71-370(9).

On May 6, 2009, Petitioner moved for summary judgment on all causes of action. Petitioner's motion did not present any statement of Petitioner's legal theory, and the motion was not supported by any affidavits, exhibits, or other materials. App. p. 14. Prior to the hearing, Respondent filed a memorandum opposing summary judgment on the grounds that the motion did not comply with Rule 56, SCRCP, but acknowledging that one legal issue presented by Petitioner's motion warranted a substantive ruling by the court. That legal issue was the applicability of the narcotics exclusion to death resulting from the Insured being under the influence of methamphetamines. On this issue of policy construction, Respondent submitted various materials bearing on the ordinary and popular meaning of the word "narcotic," and also submitted directly on-point legal authority holding that the term narcotic in an insurance policy written for laypersons should be construed based on the ordinary understanding of that term by laypersons instead of by looking to the technical pharmacological properties of a particular drug as interpreted by medical professionals. App. pp. 70-82. On the issue of causation, Respondent submitted affidavits from two expert forensic toxicologists who detailed the effects of methamphetamine abuse and the documented correlation between methamphetamine abuse and driving impairment. App. pp. 41-52. These experts further opined that the Insured was under the influence of a toxic to potentially lethal level of illegal methamphetamines, which resulted in the wreck causing his death. App. p. 45, ¶¶ 9-10; pp. 50-51.[1]

[1] The concentration of methamphetamine in the insured's blood was more than 10 times the level at which impairment occurs. App. p. 45, ¶ 9.

A motion hearing was held on June 16, 2009. At the hearing, Petitioner presented a notebook of various exhibits, including an affidavit of a medical school professor opining that methamphetamines are not a narcotic. App. p. 16, l. 17-20; p. 65. After taking the matter under advisement, the trial court entered summary judgment for Respondent on her contract claim based on this medical usage of the term narcotic. App. pp. 3-7. Respondent filed and served the notice of appeal on September 18, 2009.

In a published opinion, the Court of Appeals reversed the trial court because the technical medical definition of narcotic relied upon by the trial court was not in keeping with the plain and ordinary usage of that term by laypersons. *Hutchinson v. Liberty Life Ins. Co.*, 393 S.C. 19, 709 S.E.2d 130 (Ct. App. 2011); App. pp. 139-46. Citing directly on-point case law and other secondary sources, the Court of Appeals held that a layperson would understand illegal methamphetamines to be a narcotic drug, and therefore illegal methamphetamines were within the exclusion for the Insured being under the influence of any narcotic. App. p. 146. Because its ruling on this issue was dispositive of the appeal, the Court of Appeals declined to address the additional statutory construction issue raised by Respondent. *Id.*

In her petition for rehearing, Petitioner did not assert that the Court of Appeals applied incorrect rules of contract construction in its analysis of the Policy, and Petitioner did not assert that the Court of Appeals was incorrect in its conclusion that an ordinary layperson understands the term narcotic to include illegal methamphetamines. *See* App. pp. 147-150. Instead, Petitioner raised only a single procedural issue under Rule 56, SCRCP. This issue, which was not raised in the appeal itself, asserted that "the court misapprehended the failure of [Respondent] to submit any evidence that would be admissible at trial in opposition to

[Petitioner's] Motion for Summary Judgment." App. p. 147. The petition for rehearing was denied on May 31, 2011. App. p. 152.

III. STATEMENT OF FACTS

A. Respondent denied Petitioner's claim based on the exclusion for death resulting from the Insured "being under the influence of any narcotic," which exclusionary language is taken verbatim from the South Carolina Insurance Code.

The Policy issued to Petitioner's decedent, Stephen Ney ("Insured"), contains several exclusions, including an exclusion for "injury as a result of the Insured being under the influence of any narcotic unless administered on the advice of a physician and taken in the dosage prescribed." App. p. 60. This exclusion was the basis for Respondent's denial of Petitioner's claim and its defense of this lawsuit. App. pp. 11-12, ¶ 5. The operative language at issue in this appeal—"under the influence of any narcotic"—is taken verbatim from the South Carolina Insurance Code's specification of exclusions permissible in individual accidental death policies. S.C. CODE ANN. § 38-71-370(9) (2002).

B. Illinois officials concluded the Insured's methamphetamine use was a significant contributing cause of his fatal tractor-trailer crash on an interstate highway.[2]

The Insured's occupation was that of a commercial truck driver. The Insured died on October 3, 2006, when he crashed his tractor-trailer into a bridge support on the median of a northbound Illinois interstate shortly after 9:00 p.m. The investigating trooper's report reflects that the weather was clear and the roadway was dry. There was no evidence of braking on the roadway, and the rolling tire imprints leading from the left shoulder to the final resting place of the truck indicate that the Insured did not apply the brakes after drifting off the interstate and

[2] These facts are presented to give context to the application of the exclusion for the insured being under the influence of narcotics at the time of his death. These facts are set forth in more detail in the materials reviewed and set forth by the expert witnesses discussed in Section III.C. below.

entering the center grassy median. Instead, the Insured's truck simply drifted off the road and crashed into the bridge.

There were three eye witnesses, all of whom stated there were no visible causes of the crash. Two of the eye witnesses were traveling on the opposite side of the interstate; the other was about 1/8 mile behind the Insured in the northbound lane. The witnesses all stated that no other vehicles were around the Insured's truck.

Post-mortem toxicology testing revealed the presence of methamphetamine in Insured's blood at the time of his death. App. p. 62. The official Illinois death certificate contains two sections relating to cause of death. Part one identifies "diseases, injuries, or complications that caused the death." Under this section the coroner identified "Blunt chest trauma" and "Motor vehicle crash." App. pp. 39-40. Part two identifies "other significant conditions contributing to death but not resulting in the underlying cause given in PART 1." Under this section the coroner identified "Methamphetamine use" as the only other "significant condition contributing to death."[3] *Id.* Likewise, the trooper concluded that the Insured was in violation of ILCS 5/11-501(a)(4) for driving under the influence of drugs. App. p. 48.

C. Expert testimony confirmed the Insured's death resulted from driving while under the influence of a toxic to lethal level of illegal methamphetamines.

Respondent presented affidavits of two experts, Dr. Demi Garvin and Dr. Barry Logan, both of whom are board certified by the American Board of Forensic Toxicologists in the area of forensic toxicology. Both experts reviewed crash investigation records, the autopsy records, the coroner's inquest, and the toxicology records. Dr. Logan noted that the level of methamphetamine in the Insured's system was more than 10 times the level correlating to

[3] Because the headings for Parts 1 and 2 of the death certificate are difficult to read, also included in the record is a blank death certificate form from Illinois with legible headings. App. p. 40.

impairment, and that it was also 10 times the peak level achieved in therapeutic use of the legal form of drug. App. p. 45, ¶ 9. Logan stated that "by any standard" the concentration of methamphetamine in Mr. Ney's blood was "very high" and "in the toxic to potentially lethal range." *Id.* Garvin also noted that the level of methamphetamine present in Mr. Ney's blood was "within the range of those reported in cases of methamphetamine overdose." App. p. 51.

Both experts set forth the well-documented connection between methamphetamine use and driving impairment due to symptoms ranging from initial feelings of euphoria, hallucinations, delusions, psychosis, and poor impulse control to withdrawal effects including dysphoria, extreme fatigue, and uncontrollable sleepiness, all of which affect the cognitive and psychomotor control necessary for driving. App. p. 44, ¶ 7; App. p. 50. Also relevant to the Insured's death, both experts noted the prevalence of methamphetamine use in the commercial trucking industry, where amphetamines have been found in 7% of fatal commercial truck wrecks. App. p. 44, ¶ 8 ; App. p. 50. Both noted that the type of wreck here—crashing after drifting or driving off the roadway with a lack of braking—is well documented in the scientific literature addressing the connection between methamphetamine impairment and driving. *Id.* Garvin concludes that "Mr. Ney's antemortem abuse of methamphetamine, cognitive and/or motor impairment rendered him unable to safely and effectively operate the tractor trailer which culminated in the fatal crash and catastrophic fire." App. p. 51. Similarly, Logan concludes that "it is my opinion to a high degree of medical certainty, that Mr. Ney was under the influence of methamphetamine when he was driving his truck on October 3, 2006, and when he drove his truck off the highway, onto the median and struck a bridge support, resulting in his death." App. p. 45, ¶ 10.

IV. ARGUMENT

A. PETITIONER'S APPEAL IS NOT PROPERLY BEFORE THIS COURT BECAUSE NONE OF THE ISSUES RAISED BY PETITIONER MEET THE REQUIRED CRITERIA OF HAVING BEEN ADVANCED DURING THE APPEAL, RULED ON BY THE COURT OF APPEALS, RAISED IN THE PETITION FOR REHEARING, AND RAISED IN THE PETITION FOR WRIT OF CERTIORARI.

Respondent is aware that the members of this Court have recently expressed divergent views on error preservation. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Petitioner's appeal, however, presents none of the nuanced preservation issues that were susceptible of the differing interpretations in *Lewis*, and equally important, Petitioner was not deprived of the opportunity to raise any issue before the Court of Appeals. Instead, the present appeal only involves Petitioner's failure to meet the additional requirements for a second, discretionary review by this Court on writ of certiorari. These requirements are dictated by the express language of Rule 242(d)(2), SCACR, as well as the opinions of this Court that have never been called into question. Respondent respectfully submits that these well-established rules of error preservation require the dismissal of this appeal.

1. The procedural requirements for discretionary review on writ of certiorari are clear, unequivocal, and mandatory.

In order to ask this Court to review an issue on writ of certiorari, the party seeking review must meet familiar requirements for error preservation. The most fundamental of these requirements is that the party asserting the issue on certiorari must have actually raised the issue to the Court of Appeals in the appeal briefs that led to the ruling by the Court of Appeals. Rule 242(d)(2), SCACR (limiting review to issues that were raised in the appeal *and* in the petition for rehearing); *e.g.*, *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001) (holding that South Carolina appellate courts cannot address arguments raised for first time in petition for

rehearing). After the Court of Appeals issues its opinion, the second requirement is that the party desiring review by this Court must raise the issue to the Court of Appeals in the petition for rehearing, and in the event that an issue raised in the appeal was not ruled on by the Court of Appeals, the party's petition for rehearing must request the Court of Appeals to consider the issue. *E.g.*, *Kleckley v. N.W. Natl. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (citing *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993), for its holding that an issue is not preserved for appeal where the Court of Appeals did not address the issue and petitioner did not petition for rehearing for the court to consider it). The final requirement is that the issue must be set forth as a question in the petition for writ of certiorari. *Sloan v. Dept. of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (noting that issue is procedurally barred where it is not raised in the petition for rehearing and the petition for writ of certiorari). In the present case, none of the issues raised by Petitioner meet these straightforward, well-established criteria.

2. The petition for rehearing raised only a single issue that was not asserted in the appeal itself.

That no issued raised by Petitioner is preserved for review by this Court is conclusively illustrated by the petition for rehearing, which is the essential bridge between the issues raised in the appeal briefs submitted to the Court of Appeals and the questions asserted in the petition for writ of certiorari submitted to this Court. Petitioner raised only a single procedural issue in her petition for rehearing—"the court misapprehended the failure of [Respondent] to submit any evidence that would be admissible at trial in opposition to [Petitioner's] Motion for Summary Judgment." App. p. 147. In the three paragraph memorandum that accompanied the petition, Petitioner recited the legal standard under Rule 56, and she argued that Respondent had not met the required standard because "[t]here is no admissible evidence in the record to support this Court's finding as to what a layperson would consider a narcotic drug." App. p. 150.

This argument, however, was not in any manner raised in Petitioner's brief to the Court of Appeals. On the contrary, the words "admissible," "Rule 56," and "summary judgment" did not appear anywhere in Petitioner's brief. Likewise, the legal standard for opposing summary judgment under Rule 56 was neither recited nor relied upon in any of Petitioner's arguments in the appeal. Finally, the word "evidence" did not appear in the body of any argument in the brief, and otherwise only appeared in three headings directed to the separate issue of legislative intent that the Court of Appeals specifically declined to address. Having never raised the standard for opposing summary judgment under Rule 56 as an issue during the appeal, and having elected to make this the only issue asserted in the petition for rehearing, Petitioner's right to seek discretionary review by this Court should have ended with the filing of the petition for rehearing.

3. Application of error preservation requirements to individual issues raised in Petitioner's Brief.

As set forth above, Petitioner raised only a single, discrete issue of summary judgment procedure in her petition for rehearing. Petitioner's petition for writ of certiorari added two additional questions for review, and Petitioner's most recent brief more than doubled this number such that there are now seven separate issues raised in Petitioner's brief. While the preceding section demonstrates at a macro level that none of these issues are preserved, the paragraphs below will set forth the individual procedural history for each of these seven issues and the specific authority relating to lack of preservation for review by this Court.

Petitioner's first issue concerns construction of an insurance policy. This issue was raised in the appeal and in the petition for writ of certiorari, but was not in any manner raised in the petition for rehearing. As such, this issue is not a proper question for review under Rule 242(d)(2), SCACR (limiting review to issues that were raised in the appeal *and* in the petition for rehearing).

Petitioner's second issue concerns the procedural standard for opposing summary judgment under Rule 56, SCRCP. This issue was raised in the petition for rehearing and petition for writ of certiorari, but was not raised in the appeal. As such, this issue is not a proper question under Rule 242(d)(2). *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001) (holding that Court cannot address arguments raised for first time in petition for rehearing).

Petitioner's third issue is a challenge to the standard of insurance policy construction applied by the Court of Appeals. This issue was raised in some respects in the appeal and the petition for writ of certiorari, but was not in any manner raised in the petition for rehearing. This issue is not a proper question for review under Rule 242(d)(2), SCACR.

Petitioner's fourth issue is a challenge to a legislative intent argument raised by Respondent in the appeal. This issue was not raised in the petition for rehearing or the petition for writ of certiorari, and hence is not preserved under Rule 242(d)(2), SCACR. *Sloan v. Dept. of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (noting that issue is procedurally barred where it is not raised in the petitions for rehearing and certiorari). Also, the Court of Appeals specifically declined to address this issue raised by Respondent because it had fully disposed of the appeal on other grounds, and Petitioner did not request a ruling in the petition for rehearing. As such, these issues of legislative intent are not preserved for appeal. *Kleckley v. N.W. Natl. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (citing *Camp v. Springs Mtg. Corp.* for its holding that an issue is not preserved for appeal where the Court of Appeals did not address the issue and petitioner did not petition for rehearing for the court to consider it).

Petitioner's fifth issue is a challenge to the case law relied upon by the Court of Appeals. This issue was addressed in some respects in the appeal, but was not in any manner raised in the

petition for rehearing or the petition for writ of certiorari. As such, this issue is not a proper question for review under Rule 242(d)(2), SCACR; *Sloan*, 365 S.C. at 307, 618 S.E. 2d at 880.

Petitioner's sixth issue is addressed to evidence of legislative intent in the form of the language of the statute itself. This issue was addressed in some respects in the appeal, but was not in any manner raised in the petition for rehearing and was not included within the separate legislative intent argument advanced in the petition for writ of certiorari. Rule 242(d)(2), SCACR; *Sloan*, 365 S.C. at 307, 618 S.E.2d at 880. Even if considered a subsidiary of the separate legislative intent argument raised in the petition for writ of certiorari, this issue would still be barred because the Court of Appeals specifically declined to address any of the statutory construction and legislative intent issues raised by the parties in the appeal, and Petitioner did not request a ruling in the petition for rehearing. *Kleckley*, 338 S.C. at 138, 526 S.E.2d at 221.

Petitioner's seventh issue is a separate legislative intent argument based on other code sections which use the term narcotic. This issue was addressed in some respects in the appeal and the petition for writ of certiorari, but was not in any manner advanced in the petition for rehearing. Rule 242(d)(2), SCACR. Also, as set forth above, the Court of Appeals specifically declined to address the statutory construction and legislative intent issues, and Petitioner did not request a ruling in the petition for rehearing. *Kleckley*, 338 S.C. at 138, 526 S.E.2d at 221..

B. THE COURT OF APPEALS PROPERLY APPLIED COMMON LAW RULES OF INSURANCE POLICY CONSTRUCTION.

Petitioner's argument with respect the Court of Appeals' application of the common law rules of insurance policy construction intertwines a procedural challenge under Rule 56 with a three-pronged challenge to the Court of Appeals' substantive analysis: (1) the court applied the wrong standard; (2) the court applied the wrong standard incorrectly by adopting the interpretation urged by Respondent; and (3) even if the standard was correct and Respondent's

argument reasonable, the Court of Appeals should have still ruled for Petitioner based on the affidavit of Petitioner's expert pharmacologist. Petitioner's arguments are contrary to the decisions of this Court and the courts applying those decisions.

1. Petitioner's arguments with reference to Rule 56 are based on a mischaracterization of Respondent's opposition to Petitioner's summary judgment motion.

After the Court of Appeals issued its opinion, Petitioner raised for the first time a new argument that Petitioner should have prevailed because Respondent failed to meet its burden under Rule 56. Specifically, Petitioner asserted that Respondent failed to submit any evidence that would be admissible at trial in opposition to Petitioner's motion for summary judgment.

In advancing this argument, Petitioner ignored the nature of Respondent's opposition to her summary judgment motion, which was a two-pronged response based on a question of contract construction for the court and a factual issue of causation for the jury. As to the first issue of contract construction, Respondent opposed the motion for summary judgment on the grounds that Petitioner's contention that the exclusionary language "under the influence of any narcotic" did not apply to illegal methamphetamines was legally incorrect because the plain and ordinary usage of the term "narcotic" by laypersons was not defined by its scientific or technical usage in the field of medicine. In support of this argument, Respondent cited case law and various secondary sources demonstrating the ordinary and popular usage of narcotic as understood by laypersons, which includes illegal methamphetamines. As to the factual issue of causation, Respondent submitted expert reports demonstrating the causal connection between the insured's methamphetamine impairment and his death. Petitioner's argument as to the lack of admissible evidence is addressed solely to the first issue of contract construction.

The factual background necessary to support Respondent's legal arguments as to the contract language was undisputed—the policy was issued to a layperson, and nothing in the context of the policy indicated that its terms were intended to be afforded a technical or scientific meaning. Against this undisputed factual background, Respondent relied upon on-point case law as well as additional secondary authorities addressing the plain and ordinary meaning of the term narcotic. Contrary to the suggestion by Petitioner, reliance upon these authorities, which are discussed in detail below, was a proper response to Petitioner's summary judgment motion as it related to the construction of an insurance policy issued to laypersons.

2. The Court of Appeals correctly held that traditional rules of insurance policy construction require the undefined word narcotic to be given its ordinary and usual meaning as understood by an ordinary person.

South Carolina's appellate courts have consistently recognized that the words used in an insurance policy cannot be strained either to defeat coverage that was intended or to extend coverage that was never intended. *E.g.*, *Diamond State Ins. Co. v. Homestead Ind.*, 318 S.C. 231, 456 S.E.2d 912 (1995); *Torrington Co. v. Aetna Cas. and Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975). Instead, words in the policy must be given their plain, ordinary, and popular meaning. *E.g., Diamond State*, 318 S.C. at 236, 456 S.E.2d at 915.

Even more specific to the circumstances of this case, it is the ordinary meaning as understood *by an ordinary person* that controls: "In the absence of a prescribed definition in the policy, the term should be defined according to the ordinary and usual understanding of the term's significance to the ordinary person." *USAA Property and Cas. Ins. Co. v. Rowland*, 312 S.C. 536, 539, 435 S.E.2d 879, 881-882 (Ct. App. 1993) (citing *Green v. United Ins. Co. of Am.*, 254 S.C. 202, 174 S.E.2d 400 (1970)); *Sunex Intl. v. Travelers Indem. Co. of Ill.*, 185 F.Supp.2d 614 (D.S.C. 2001) (applying South Carolina law); *State Farm Fire & Cas. Co. v. Barrett*, 340

S.C. 1, 530 S.E.2d 132 (Ct. App. 2000) (holding that undefined terms should be given their plain, ordinary, and popular meaning); *Fryar v. Currin*, 280 S.C. 241, 312 S.E.2d 16 (Ct. App. 1984) ("[L]anguage contained in a contract must be given its ordinary meaning, except with technical language or where the context requires another denotation.").

3. The ordinary definition of narcotic is not limited to opiates or downers, but extends to other drugs such as cocaine, crack, and methamphetamines.

As pointed out by the Court of Appeals, *The New Oxford American Dictionary* defines narcotic as follows: "**narcotic** ▶ a drug or other substance affecting mood or behavior and sold for nonmedical purposes, esp. an illegal one. ■ *Medicine* a drug that relieves pain and induces drowsiness, stupor, or insensibility." *The New Oxford Am. Dictionary*, Oxford Univ. Press (2d ed. 2005) (pronunciation omitted) ("*Oxford Am. Dictionary*"); App. p. 73. The *Oxford Am. Dictionary's* usage guide explains that the first definition following the symbol "▶" is the "core sense" of the word "narcotic," which is the typical usage of this word by Americans:

> Core meanings represent typical, central uses of the word in question in modern standard English, as established by research on analysis of American and World English through corpora (language databanks) and citation databases. **The core meaning is the one that represents the most literal sense that the word has in ordinary modern American usage.** This is not necessarily the same as the oldest meaning because word meanings change over time. Nor is it necessarily the most frequent meaning, because figurative senses are sometimes the most frequent. **It is the meaning accepted by native speakers as the one that is most established as literal and central.**

Id., "Introduction" pp. xiiv-xiv (emphasis added); App. pp. 71-72. By contrast, the symbol ■ followed by the italicized "*Medicine*" presents a specialized "subsense" of narcotic, indicating usage in a particular setting, in this case the specialized field of medicine. *Id.*[4]

[4] The Oxford University Press released the third edition of the *Oxford American Dictionary* during the pendency of this appeal. The definition of narcotic, as well as quoted language from the Introduction, did not change.

The broader scope of this typical, ordinary meaning of narcotic compared to the specialized medical definition is well documented. *www.wikipedia.com*, "Narcotic;" App. p. 78 ("Use of the word 'narcotic' to refer to any illegal or unlawfully possessed drug including marijuana and cocaine is common worldwide, although these substances are not considered narcotics in a medical context."). Notably, the United Nations drug policy-making body is the Commission on Narcotic Drugs even though many of the drugs under its authority are not officially classified as narcotics using medical protocols and schedules. *Id.*

That the ordinary American usage of the word narcotic includes methamphetamines is also well documented. For instance, the drug information website *www.narcoticsnews.com* has as its stated purpose "[b]ringing you the news about Cocaine, Marijuana, Heroin, Methamphetamine, Ecstasy and other dangerous drugs." *www.narcoticsnews.com*; App. p. 76. Similarly, less than a month after this lawsuit was filed, the Associated Press ran an article detailing cuts in drug enforcement funding related to methamphetamines under the following headline and lead paragraph:

> **Officials fear meth surge**
>
> KANSAS CITY, Mo. — A common fear is sweeping through the Midwest's drug-enforcement community: that ***methamphetamine, the narcotic scourge that has wounded middle America as no drug ever before***, is about to surge again because of extreme federal slashes in police funding.

www.heraldbulletin.com (March 5, 2008 9:50 a.m.) (emphasis added); App. p. 74. Each of these examples from publications directed to ordinary people is consistent with the typical and "ordinary modern American usage" of narcotic. *Oxford Am. Dictionary*, "Introduction" pp. xiiv-xiv; App. pp. 71-72.

Applying this mainstream ordinary understanding of the word narcotic to the exclusion in an accidental death insurance policy makes imminent sense as ordinary people understand that

illegal drug use—including abuse of prescription drugs—is dangerous and increases the risk of death. An insurance company insuring against accidental death has no more intention of providing coverage for death resulting from driving under the influence of illegal drugs such as methamphetamines than it has of providing coverage for death resulting from drunk driving. Both are unreasonably dangerous and illegal activities, and both are excluded. Policy at 2; App. p. 60.

As detailed by the Court of Appeals, this ordinary understanding of the word narcotic has been applied in the insurance context under circumstances which are directly applicable here. In *Jane Doe v. Gen. Am. Life Ins. Co.*, 815 F.Supp. 1281 (E.D.Mo. 1993), the court confronted the question of whether cocaine was included within an exclusion triggered by "injury or sickness arising out of the use of a) narcotics; b) hallucinogens; c) barbiturates; d) marijuana; e) amphetamines; or similar drugs or substances," unless the drug or substance was prescribed by a doctor and taken in the amount prescribed. *Id.* at 1283. Because the policy did not specifically reference cocaine, the court found the policy was ambiguous on this point, but the court held this ambiguity could be "readily resolved" by examining the language of the exclusion from the perspective of an ordinary person as opposed to a medical expert:

> "[i]t would be improper and unfair to allow experts to define terms that were specifically written for and targeted toward laypersons ... the terms should be accorded their ordinary, and not specialized, meanings." Consequently, ***this Court need not be concerned with cocaine's "pharmacological" similarities or dissimilarities with narcotics, hallucinogens, barbiturates, marijuana, or amphetamines. What the Court must be concerned with is what the ordinary person understands cocaine to be and how that understanding relates to the clause in question.***
>
> Cocaine is a drug that is illegal to buy, sell, or possess in this country. In legal terms, it is referred to as a "controlled substance". The drug categories listed in the exclusion clause are all broad categories of drugs commonly considered to contain specific drugs that are illegal to buy, sell, or possess. However, the exclusion clause does recognize that within these categories are some specific

> drugs that although may be considered to be a "controlled substance" still can be legally prescribed. ***Of all the categories, "narcotics" is the broadest category since the term narcotic has come to have a generic meaning for drugs considered to be illegal. . . . This Court finds that cocaine is commonly understood by laymen to be a narcotic that is not used for medicinal purposes. As such, this Court finds that plaintiff's treatment for cocaine abuse falls within the exclusionary language of the Local 88 health plan.***

Id. at 1285 (emphasis added, internal citation omitted).

The highlighted portions of the court's analysis in *Jane Doe* are directly analogous to the applicable rules of policy interpretation under South Carolina law—"the term should be defined according to the ordinary and usual understanding of the term's significance to the ordinary person." *USAA Property and Cas.*, 312 S.C. at 539, 435 S.E.2d at 881-82. The Court of Appeals committed no error in applying this on point authority to this case.

4. The Court of Appeals correctly rejected the technical medical definition of narcotic urged by Petitioner.

As she did in the Court of Appeals, Petitioner urges this Court to adopt the specialized definition of narcotic as used in the field of medicine, which would not include methamphetamine. Such technical definitions, however, have been routinely rejected by this Court and others applying South Carolina law to construe insurance policies issued to laypersons. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 638, 594 S.E.2d 455, 458 (2004) (noting that according a term in an insurance policy "a narrow, technical meaning . . . goes against South Carolina precedent which holds that this Court must give policy language its plain, ordinary, and popular meaning."); *Sunex*, 185 F.Supp.2d at 621 (rejecting plaintiff's interpretation of "infringement of title" to refer to a formal property right where ordinary person would understand it to mean the title of a work or a name).

The wisdom of the Court of Appeals' refusal to adopt this technical meaning is demonstrated by considering equivalent language in a different context—a health insurance

policy covering rehabilitation for addiction to alcohol or narcotics. Under the rule in *Helena Chem. Co. v. Allianz Underwriters*, 357 S.C. 631, 594 S.E.2d 455 (2004), and other decisions of this Court insisting upon ordinary as opposed to technical meanings, Respondent respectfully submits this Court would not accept an argument that an insured addicted to illegal methamphetamines, crack, or cocaine is not entitled to coverage because he was not addicted to heroin or other opiates. Such an argument would be straining the language of the policy to avoid coverage, and as this Court has stated numerous times, policy language cannot be strained to avoid coverage just as it cannot be strained to create coverage. *E.g.*, *Diamond State Ins. Co.*, 318 S.C. 231, 456 S.E.2d 912; *Torrington*, 264 S.C. 636, 216 S.E.2d 547 (1975).

C. RULES OF STATUTORY CONSTRUCTION PROVIDE AN ADDITIONAL GROUND FOR AFFIRMANCE WHERE THE OPERATIVE LANGUAGE OF THE POLICY—"UNDER THE INFLUENCE OF ANY NARCOTIC"—IS TAKEN VERBATIM FROM THE SOUTH CAROLINA INSURANCE CODE.

Both parties raised issues of legislative intent and statutory construction to the Court of Appeals. For its part, Respondent argued that the same plain and ordinary meaning of narcotics as understood by laypersons should control the construction of the phrase "under the influence of any narcotic" which is derived verbatim from the Insurance Code. As such, whether viewed in terms of traditional contract construction principles or rules of statutory construction, Respondent argued that the result would be the same.

In its opinion, the Court of Appeals expressly declined to address these statutory construction issues because its ruling under the traditional common law rules of contract construction was dispositive of the appeal. App. p. 146. Petitioner did not request a ruling on these issues in her petition for rehearing to the Court of Appeals, and accordingly, these issues are procedurally barred as a ground for reversal. *Kleckley*, 338 S.C. 131, 526 S.E.2d 218. However, while Petitioner's arguments are procedurally barred, the South Carolina Rules of

Appellate Procedure specifically authorize this Court to affirm the Court of Appeals based on consideration of these issues appearing in the record. Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (setting forth the differing preservation rules applicable to winning and losing parties, and holding that "[a]n appellate court may not, of course, *reverse* for any reason appearing in the record.").

1. The operative exclusionary language was taken verbatim from exclusionary language adopted by the Legislature in the South Carolina Insurance Code.

The exclusion in the insured's policy states as follows: "A benefit will not be payable under this Certificate if your Accidental Death results directly or indirectly from: . . . (h) ***injury as a result of the Insured being under the influence of any narcotic*** unless administered on the advice of a physician and taken in the dosage prescribed." The operative language concerning narcotics in this exclusion was taken directly from S.C. CODE ANN. § 38-71-370, which includes permissible exclusions for individual accidental death policies:

> **INTOXICANTS AND NARCOTICS:** The company is not liable for ***any loss resulting from the insured being*** drunk or ***under the influence of any narcotic*** unless taken on the advice of a physician.

S.C. CODE ANN. § 38-71-370(9) (emphasis added). This language in the South Carolina Insurance Code is part of model simplified language promulgated by the National Association of Insurance Commissioners ("NAIC"), of which South Carolina is a member. Model 185, "NAIC Uniform Individual Accident and Sickness Policy Provision Law in Simplified Language;" App. p. 53; *also*, Model 180, "NAIC Uniform Individual Accident and Sickness Policy Provision Law." As set forth in the preface to NAIC Model 185, the simplified provisions are "intended to be a uniform 'safe harbor' for companies relying upon them." *Id.*

The exclusionary language from the NAIC Model Acts has been widely adopted. The specific language directed to injury resulting from an insured "being under the influence of any narcotic" is currently part of the required, standard, and/or optional policy provisions set forth in the insurance codes regulating accident, health, life, and disability insurance in at least 33 states.[5] While the Insured's certificate is considered group accidental death coverage, there is no separate provision of the South Carolina Insurance Code relating to exclusions for group accidental death. As such, insurers issuing individual certificates under a group accidental death policy rely, in part, upon the "safe harbor" of the exclusionary language approved by the Legislature for individual accidental death policies because this language is already approved for use.

2. Exclusionary language adopted by the Legislature should be construed by determining legislative intent, not by construing the language for or against the parties to the contract.

Because the operative exclusionary language "under the influence of any narcotic" is taken directly from the simplified language adopted by the Legislature for use in an accidental death insurance policy, the analysis of that statutory language should be guided by familiar rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the

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[5] ALA. CODE § 27-19-26 (2009), ALASKA STAT. ANN. § 21.51.260 (2009), ARIZ. REV. STAT. ANN. § 20-1368 (2009), ARK. CODE ANN. § 23-85-126 (2009), CAL. INS. CODE § 10369.12 (2009), DEL. CODE ANN. tit. 18, § 3325 (2009), FLA. STAT. ANN. § 627.629 (2009), GA. CODE ANN. §33-29-4 (2009), HAW. REV. STAT. ANN. §431:10A-106 (2009), IDAHO CODE ANN. § 41-2127 (2009), IOWA CODE ANN. § 514A.3 (2009), KAN. STAT. ANN. § 40-2203 (2009), KY. REV. STAT. ANN. § 304.17-290 (2009), LA. REV. STAT. ANN § 22:213 (2009), MISS. CODE ANN. § 83-9-5 (2009), MO. ANN. STAT. § 376.777 (2009), MONT. CODE ANN. § 33-22-231 (2009), NEB. REV. STAT § 44-710.04 (2009), N.J. STAT. ANN. § 17B:26-27 (2009), N.Y. INS. LAW § 3216 (2009), N.C. GEN. STAT. ANN. § 58-51-16 (2009), OKLA. STAT. ANN. tit. 36 § 4405 (2009), PA. CONS. STAT. ANN. 40 § 753 (2009), P.R. LAWS ANN. tit. 26, § 1628 (2009), R.I. GEN. LAWS ANN. §27-18-4 (2009), S.C. CODE ANN. § 38-71-370 (2009), TENN. CODE ANN. §56-26-109 (2009), TEX. INS. CODE ANN. § 1201.227 (2009), V.I. CODE ANN. tit. 22, § 878 (2008), VA. CODE ANN. § 38.2-3504 (2009), W.VA. CODE ANN. § 33-15-5 (2009), WYO. STAT. ANN. § 26-18-126 (2009); 2009 N.D. LAWS H.B. 1204 (effective August 1, 2009).

one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 549-550, 619 S.E.2d 1, 3 (Ct. App. 2005) (internal citations omitted). "[W]ords must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Moon v. City of Greer*, 348 S.C. 184, 188, 558 S.E.2d 527, 529 (Ct. App. 2002). In seeking to determine legislative intent, courts will "reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

These rules are not altered by the fact that Respondent made superficial changes to the statutory language. In this regard, S.C. CODE ANN. § 38-71-370 expressly permits insurers to use different wording that is approved by the Director, and Respondent's adaptation of S.C. CODE ANN. § 38-71-370(9) did include such changes in the presentation of the statutory language. *Compare* Policy at p. 2, App. p. 60, to S.C. CODE ANN. § 38-71-370(9). Respondent separated the combined intoxication and drug use portions of the statutory language into subparts, and Respondent included non-substantive changes to the words surrounding the operative phrase "under the influence of any narcotic." *Id.* For example, the introductory phrase "any loss resulting from the insured being" was changed to "injury as a result of the insured being . . ." *Id.* These approved variations from the statute did not in any manner alter the intent or effect of the statutory language. Even more to the point of this appeal, the operative phrase "under the

influence of any narcotic," which was the only phrase under consideration by the lower courts, was not changed in any respect.

3. An undefined term in an insurance statute is not construed based upon specialized technical definitions or criminal statutes that are contrary to the popular meaning of the word.

Medicine is a technical and precise discipline, and it is not surprising that the terminology used by medical professionals includes nuanced, technical distinctions that are not part of ordinary language or the understanding of laypersons. Equally so, criminal statutes and controlled substances acts classify the vast array of drugs into any number of categories based on fine distinctions that are tailored to defining different crimes, enhancing sentences, imposing regulations, and addressing other legal issues that have no application to the day to day existence or understanding of ordinary laypersons. Yet these medical definitions and criminal statutes are exactly what Petitioner is asking this Court to rely upon in construing the phrase "under the influence of any narcotic" as found in an insurance code provision setting forth language to be included in an ordinary insurance policy written for lay persons. This approach by Petitioner is contrary to the applicable rule of statutory construction that "[w]ords must be given their plain and ordinary meaning without resorting to subtle or forced construction" and to the rule of insurance policy construction that terms in an insurance policy "should be defined according to the ordinary and usual understanding of the term's significance to the ordinary person." *Moon v. City of Greer*, 348 S.C. 184, 188, 558 S.E.2d 527, 529 (Ct. App. 2002).

It is not surprising that Petitioner's approach has been universally rejected by commentators and courts applying rules of construction analogous to those required in South Carolina. For instance, Appleman's *Insurance Law and Practice* states:

§ 7384. Controlling Force of Terms Used in Policy

> An insurance contract is to be construed according to the sense or meaning of the words which are used in the contract....
>
> ... Ordinarily, nice distinctions and refinements are not favored. ***It is not a dictionary definition which is desired, nor the technical, philosophical, or scientific meanings of the terms, nor a restricted meaning acquired in legal usage. It is, rather, the meaning which would be attached by an ordinary person of average understanding if purchasing insurance.*** An insurance policy should be read as a layman would read it and not as it might be analyzed by an attorney or insurance expert.

Appleman, *Insurance Law and Practice*, Rev.Vol. 13, §§ 7383, 7384, pp. 30-103 (1976) (emphasis added) (as quoted in *Liggans RV Center v. John Deere Ins. Co.*, 575 So.2d 567, 571 (Ala. 1991) (also noting that "[w]hile definitions under the criminal law are some authority and can serve as a guide to interpretation, such definitions are not controlling for the purposes of construing the language found in an insurance policy.")). *Couch on Insurance* is to the same effect:

> The ordinary legal and literal meaning of the words will be given effect where it is possible to do so without destroying the substantial purpose and effect of the contract. Neither the literal nor technical meaning, however, will prevail where it appears unreasonable from the standpoint of arriving at the real intent of the parties as expressed in the contract. ***Technical constructions are not favored, and a literal meaning should not be allowed to do violence to common sense or produce a result which is absurd, unusual, and extraordinary, or against public policy.***

Russ & Segalla, *Couch on Insurance* § 22:39 "Words Given Ordinary and Popular Meaning—Literal and Technical Meaning" (3ded. 2009) (emphasis added).

4. Specific to S.C. CODE ANN. § 38-71-370(9), giving the word narcotic its popular and ordinary meaning is also required to avoid the absurd result that the South Carolina Legislature intended to give preferential insurance treatment for death resulting from abuse of drugs such as cocaine, crack, and methamphetamines.

Construing S.C. CODE ANN. § 38-71-370(9) based on the ordinary meaning of narcotic as understood by laypersons is not only warranted by the standards set forth above, but is required to avoid an absurd result that would flow from applying the specialized medical definition of narcotic urged by Petitioner.

In the initial paragraph preceding the specific provisions for inclusion in accidental death policies, S.C. CODE ANN. § 38-71-370 provides that "the insurer may, at its option, use in lieu of these provisions a corresponding provision of different wording approved by the director or his designee ***which is not less favorable in any respect to the insured*** or the beneficiary." S.C. CODE ANN. § 38-71-370 (emphasis added). From the highlighted language it necessarily follows that insurers may not expand the scope of the statutory exclusions because such an expansion would be less favorable to the insured. Combining this context with Petitioner's argument would require this Court to reach the extraordinary conclusion that: (1) in adopting S.C. CODE ANN. § 38-71-370, the Legislature only condoned the exclusion of insurance benefits when death results of the insured being under the influence of illegally used opiates or downers; and (2) the Legislature affirmatively prohibited the exclusion of benefits where the insured's death results from the insured being under the influence of other illegal and/or dangerous drugs such as cocaine, crack, or methamphetamines. The conclusion that the Legislature intended to give such preferential life insurance treatment for insureds who abuse crack and methamphetamines as compared to those who abuse opiates is an absurd result that must be rejected because it could not have been intended by the Legislature. *E.g. Unisun,* 339 S.C. at 368, 529 S.E.2d at 283.

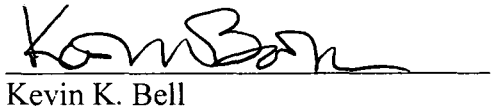
Respondent respectfully submits that this Court's construction of the simplified statutory language in S.C. CODE ANN. § 38-71-370(9) should be with reference to ordinary and usual understanding of narcotic as understood by ordinary persons, and not with respect to medical definitions and criminal statutes urged by Petitioner that do not bear on accident insurance.

V. CONCLUSION

Under the South Carolina Rules of Appellate Procedure and this Court's jurisprudence, each of the issues raised by Petitioner is procedurally barred because Petitioner failed to meet the basic criteria required to preserve issues for a second, discretionary review by this Court.

Petitioner's appeal fares no better on the merits. The Insured died in a fiery crash as a direct and proximate result of operating a tractor trailer on an interstate highway while under the influence of a toxic to lethal level of illegal methamphetamines. Whether viewed in terms of common law contract construction or the additional framework of legislative intent, Petitioner's suggested construction of the phrase "under the influence of any narcotic" as being inapplicable to the Insured's death is a strained, self-serving construction that cannot be reconciled with South Carolina law requiring a plain and ordinary meaning of those words as understood by laypersons. Having applied the correct standards and having committed no error its analysis, the Court of Appeals should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Roger L. Couch, Circuit Court Judge

Case No. 2008-CP-42-0835

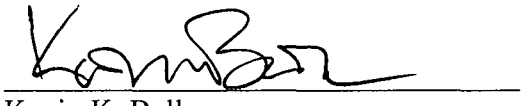
Shannon Hutchinson, Personal Representative of the Estate of
Stephen F. Ney, a/k/a Steve F. Ney, ... Petitioner,

v.

Liberty Life Insurance Company, ...Respondent.

Proof of Service of Brief of Respondent

I certify that I served on Petitioner, the Brief of Respondent on December 10, 2012, by depositing a copy of the same in the United States Mail, postage pre-paid, addressed to her counsel of record, Kenneth C. Anthony, Jr., Post Office Box 3565, Spartanburg, South Carolina, 29304.



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December 10, 2012

Via Hand Delivery

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29211

Re: Hutchinson, Shannon v. Liberty Life Insurance Company
Case Tracking No. 2011-194466

Dear Mr. Shearouse:

Enclosed for filing are the original and sixteen copies of the Brief of Respondent, and the original and sixteen copies of the Proof of Service. I would appreciate you filing the originals and fifteen copies and returning the sixteenth copy, clocked-in, with our courier.

Sincerely,

ROBINSON, MCFADDEN & MOORE, P.C.

Kevin K. Bell

KKB/

Enclosures

cc: Kenneth C. Anthony, Jr., Esq.