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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
In the Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2020-000249

Government Employees Insurance Company,..Respondent,

v.

Barbara P. Jackson, as Personal Representative
for the Estate of Vincent A. Jackson,..Appellant.

INITIAL REPLY BRIEF OF APPELLANT BARBARA P. JACKSON, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF VINCENT A. JACKSON

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ARGUMENTS IN REPLY

Respondent GEICO's brief largely is a misdirection of Appellant the Jackson Estate's arguments, coupled with truncated and misleading citations to the record, in an attempt to make this appeal into something it is not. The Jackson Estate will use this reply to refocus the Court on the issues and evidence that are presently before it, rather than responding to each and every argument which already has been fully addressed in the Jackson Estate's opening brief. To that end, the Jackson Estate expressly reaffirms, adopts, and incorporates all arguments made in its opening brief. Thus, even if an argument made in the Jackson Estate's initial brief is not restated or reargued herein, the Jackson Estate nevertheless specifically reserves and does not waive any such argument or position previously advanced. Therefore, for the reasons set forth therein and below, this Court should reverse and remand for a new trial.

I. The Jackson Estate's expert, Dr. Pitner, should have been allowed to testify about the psychology underlying Vincent Jackson's behavior which would have assisted the jury in determining whether he was a resident of his parents' home.

GEICO's argument regarding the expert witness exclusion issue misconstrues the trial court's order. A careful examination of the record reveals that one and only one finding was made by the trial court on the three requirements for expert testimony: whether the testimony would be helpful to the jury. In an apparent effort to misdirect this Court's attention, GEICO devotes just two paragraphs of its brief trying to defend the "unhelpful" finding, which is understandable since it is contrary to modern authority relating to the admission and use of human behavior analysis in South Carolina courts. GEICO then devotes nearly six pages to issues which were not ruled on by the trial court. As to these issues, it is well that the trial court did not make the findings suggested by GEICO, as it would have been an abuse of discretion to find that a tenured professor with advanced degrees in social work and psychology did not possess more information about human

behavior than the average juror or that such an expert could not opine based on his knowledge, training, and experience.

The trial court's wholesale exclusion of Dr. Pitner deprived the Jackson Estate of a fair trial and was undeniably prejudicial and an abuse of discretion. Reversal and a new trial is needed.

A. The trial court did not exclude Dr. Pitner on the basis of his qualifications or the reliability of his opinions.

Contrary to Respondent GEICO's contentions, the trial court's exclusion of the Jackson Estate's expert was based on one and only finding: that "this testimony is [not] needed by the jury." This statement was made in the Court's written order dated May 28, 2019 Order at p. 2,[1] and further elucidated from the bench following the proffer of Dr. Pitner's testimony:

> THE COURT: Let me just add one thing here, I made my ruling earlier about this, but I want to read something into the record about -- further why I excluded this.
>
> "If scientific, technical, or other specialized knowledge…" -- and this is what you all had given to me. You've heard it before. Read it. "...will assist the trier of fact to understand the evidence, or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion. In determining whether to not admit expert testimony, the trial court must make three inquiries."
>
> And there are three. The second and third are divided -- or connected by the conjunction "and" not "or", which I read means all three have to exist together, not just one of the three or two of the three.
>
> The first one, "Whether the evidence will assist the trier of fact." **That is where I made my ruling yesterday. That's what I based it on.**
>
> It goes on further to say, "Expert testimony may be used to help the jury to determine a fact at issue in cases where the matter falls outside the realm of ordinary lay knowledge. The determination of whether the subject matter after proposed

[1]The relevant portion of the May 28, 2019 ruling reads as follows in its entirety:

> PLAINTIFF'S MOTION TO EXCLUDE TESTIMONY OF DR. PITNER: I grant this motion. The issue is residence and I simply do not see where this testimony is needed by the jury. I adopt the arguments of Mr. Murphy.

(R. p.) (May 28, 2019 Order).

> expert's testimony is outside the realm of lay knowledge is a determination left solely to the trial judge." **And I have found yesterday, and I stand by my ruling again, that the issue, the sole issue, to my opinion, a rather simple issue of whether or not residency is at one place or the other is solely within the knowledge and experience of this jury.**

(R. pp.) (Tr. 318-19 (emphasis added).) Other than noting that all three must be present, the Court made no mention whatsoever of either of the other two elements required for expert witness testimony (the expert's qualifications or the reliability of the opinion) in either his written opinion or his oral ruling. Notwithstanding the limited nature of the trial court's stated ruling, GEICO attempted to broaden it as follows:

> MR. MURPHY: . . . . Just [one] last thing, you, yesterday, indicated you adopted the arguments we made related [to] all three elements. Do you stand by those as well?
>
> THE COURT: Yes, sir, I do. What I said a while ago was to, I guess, elucidate better what I tried to say yesterday.

(R. p.) (Tr. 320.) Ignoring the trial court's express statement that its ruling was based on "[t]he first one, '[w]hether the evidence will assist the trier of fact,'" GEICO cites to this brief exchange, in support of its argument that the trial court actually made findings on the other expert testimony issues. (GEICO Br. at 3.)

This simply is not true. Although the May 28, 2019 written ruling stated that the court "adopt[ed] the arguments of Mr. Murphy," the only finding made by the court related to the necessity of the expert testimony. No reference was made to any other argument made by GEICO. Moreover, the court's oral ruling merely "elucidated" its single original finding. Thus, there is no support in the record that the trial court found either that Dr. Pitner was unqualified to provide an expert opinion or that his opinion was unreliable. But even if one could conclude that the trial court ruled that Dr. Pitner was either unqualified to provide expert opinion or that his opinion was

unreliable, it is clear that such rulings would be in direct contravention of South Carolina law, would be error, and would require reversal and a new trial.

B. Dr. Pitner was a highly qualified expert in the field of human development.

To bolster its narrative, GEICO misdirects Dr. Pitner's qualifications and expertise in the area of emerging adulthood—an established area of psychology supported by literally thousands of publications (**(R. p.)** (Dr. Pitner Dep. at 27-28))—into the non-existent field of "young adult residency." (GEICO Br. at 9.) GEICO's effort to recast Dr. Pitner's area of expertise is one of necessity for GEICO, for when the record and Dr. Pitner's expertise are viewed through the proper lens the only conclusion that can be reached is that Dr. Pitner is not merely sufficiently qualified, but rather is eminently qualified.

South Carolina law is clear that the requisite level of expertise for expert qualification is that the proffered expert have acquired by reason of study or experience such knowledge and skill in a profession or science such that the expert is better qualified than the jury to form an opinion on the particular subject of the testimony. *See Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997). There is no requirement that the expert be a specialist in the particular branch of the field; indeed, the trial court abuses its discretion if it attempts to impose such a standard. *See Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 735, S.E.2d 650 (2012) (trial court abused discretion in refusing to qualify experienced neonatologist who kept current on literature and saw SIDS cases in her practice as SIDS expert even though she stated she would not consider herself a SIDS expert); *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004) (trial court erred in refusing to qualify a medical doctor as an expert in biomechanics where the doctor had training in biomechanics, had been qualified as a biomechanics expert in other states, and had some educational background in biomechanics); *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995) (trial court erred in failing to qualify a plastic surgeon as an expert in the field of family

practice where the plastic surgeon served as a professor who provided instruction to family practitioner residents and where family practitioners referred their patients to him for diagnosis).

Here, Dr. Pitner, a graduate of a highly rated program in social work and psychology and a tenured professor at our State's flagship university, was far more knowledgeable than the average juror about the stages and patterns of human behavior and their interaction with the social environment, which is a technical area requiring advanced study and is part of the professional training required for state certification in social work and psychology. In addition to knowledge gained on this subject from his extensive education, Dr. Pitner has taught classes covering that subject and reviewed relevant literature prior to forming his opinions. This evidence renders Dr. Pitner qualified under Rule 702, and any additional evidence presented by GEICO merely goes to the weight and not the admissibility of his opinions.

But on that point, the Jackson Estate is compelled to represent to this Court that GEICO's argument that Dr. Pitner lacks sufficient qualifications rests on selected, incomplete, and misleading quotations from the record. For example, GEICO quoted part of an exchange from the proffer of Dr. Pitner's opinions wherein Dr. Pitner testified that he has not personally researched emerging adulthood. (GEICO Br. at 10 (quoting **(R. p.)** (Tr. 314)).) In that exchange, Dr. Pitner started to explain "I have done research –" but was cut off by GEICO's counsel (which the trial court allowed). **(R. p.)** (Tr. 314.) On the next page of the transcript, he was asked directly "are you trained in the area of emerging adulthood" and he explained, in part, that he does not "have to have a ***research study*** on emerging adulthood when I know that the people in my study are the ones that fall into that category and I'm looking at decision-making" but nevertheless "***my research*** has focused on the age group of emerging adulthood" and "***my research***, in particular, it has definitely focused on that group." **(R. p.)** (Tr. 315-316 (emphasis added).)

GEICO similarly contends that "[t]he extent of his research for this case was to review information provided by Appellant's counsel and go on the 'University of South Carolina's website, just to look at psych info.'" (GEICO Br. at 10 (quoting **(R. p.)** (Dr. Pitner Dep. at 27-28.) GEICO's implication is that Dr. Pitner merely performed a cursory internet search. The full exchange puts that rest:

> Q. I know we talked about factual research. Have you done any sort of academic or more professional research in connection with this file?
>
> A. So I mean, I just looked at to see what was the state of the area of emerging adulthood. And so I just did -- I went on our University of South Carolina's website, just to look at psych info. And that's where there was just an explosion of whenever it starts to get into the thousands, then for me it becomes excessive. But I wanted to get a feel for, you know, other people's work. 'Cause mine, even though I deal with the same age group, mine becomes very specific on certain things.
>
> Q. Sure.
>
> A. And I saw, just looking at it, that there just had been a complete explosion of research in this area.
>
> Q. Are there any particular studies or papers that you're relying upon to formulate any of your opinions in this case?
>
> A. No. No. And it's really because the patterns are still the same for emerging adulthood.

(R. p.) (Pitner Dep. at 27-28.) Far from being the cursory internet search that GEICO suggested, Dr. Pitner located thousands of sources and reviewed enough to confirm that "the patterns are still the same for emerging adulthood" based on his prior knowledge and research.

GEICO's attempts to denigrate his achievements and qualifications (including its boorish refusal to recognize either his educational achievements or current professional standing by referring to him as "Mr." rather than either Dr. or Professor) cannot undercut these qualifications.[2]

[2] The simple fact that the University of South Carolina recognizes Dr. Pitner's degrees and academic work and employs him as a professor in its College of Social Work, where he teaches

It is simply irrelevant that Dr. Pitner's dissertation research involved a different topic (although it involved working with a similar age group) or that he may have fortified his knowledge by conducting additional research into the precise area as part of his preparation for testifying. Of course, the trial court's exclusion of Dr. Pitner's testimony was not based on any purported lack of qualifications, but had it been, such a finding would have been an abuse of discretion requiring reversal.

C. Human development experts can apply their knowledge to everyday experience without special showings of reliability.

GEICO next contends that Dr. Pitner's opinions are not reliable. This argument fails for several reasons.

First, the reliability factor is not even relevant for testimony of this type. Nearly thirty years ago, our Supreme Court held that human behavior experts are not held to this standard. In *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991), the trial court refused to allow the testimony of a psychologist regarding eyewitness identification on the grounds that it had not been established as recognized area of expertise accepted within the scientific community. The Supreme Court held this was an abuse of discretion: "[w]here the witness is a qualified psychologist who simply explains how certain aspects of every day experience shown by the record can affect human perception and memory, . . . we see no reason to require a greater foundation." *Id.* at 142, 406 S.E.2d at 371-72. The same approach was followed more recently in

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students at both the undergraduate and graduate levels is more than sufficient evidence to validate his credentials and credibility notwithstanding GEICO's unfair attempts to diminish Dr. Pitner in the eyes of this Court. This Court can take judicial notice that since the May 2019 trial of this case Dr. Pitner has been elevated to the position of Interim Dean of the College of Social Work. *See* Ronald Pitner, Ph.D., ACSW – College of Social Work, https://sc.edu/study/colleges_schools/socialwork/faculty-staff/pitner_ronald.php (last visited Feb. 11, 2021); *see also Masters v. Rodgers Dev. Group*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (1984) ("[O]riginal judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.").

Graves, in which the Supreme Court again found a trial court committed an error of law in requiring medical testimony to meet a "scientific" standard; doctors who merely apply their knowledge to an everyday experience requires no further foundation. 401 S.C. at 78, 4735 S.E.2d at 658. This is precisely what Dr. Pitner did in his proffered testimony—reviewing Vincent Jackson's actions in light of his developmental stage and providing insight based on Dr. Pitner's knowledge and experience into Vincent's degree of independence from his parents and childhood home. This is entirely proper under the standards applicable to psychological or medical experts.

Second, and assuming reliability is a pertinent factor here, GEICO seeks to import the analytical framework for scientific testimony to these non-scientific opinions. GEICO recognizes that Dr. Pitner's opinions are not "scientific" as that term is used with respect to Rule 702. (GEICO Br. at 10.) Yet GEICO's reliability analysis mirrors that for scientific evidence. *Compare State v. Jones*, 273 S.C. 723, 731-32, 259 S.E.2d 120, 124-25 (1979)[3] (determining admissibility of scientific opinion testimony depends on degree to which the trier of fact must accept "scientific hypotheses not capable of proof or disproof in the courtroom," and the expert's reliance on "untested methods, unproven hypotheses, intuition or revelation" instead of "scientifically and professionally established techniques"), *with* GEICO Br. at 11 (arguing that Dr. Pitner "admitted there are not any recognized tests," he "did not apply any standard, field-recognized methodology" or "recognized standards or tests," and he did not do a "formal study") The factors for reliability of scientific testimony do not apply to non-scientific testimony, such as that offered by Dr. Pitner. *Graves*, 401 S.C. at 74-75, 735 S.E.2d at 655-56. Applying them here, as GEICO asks this Court to do, would constitute an error of law.

[3] The South Carolina Supreme Court confirmed that *Jones* governs the admissibility of scientific expert testimony. *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999).

Third, Dr. Pitner's opinions are reliable. Reliability of non-scientific testimony "must be evaluated on an ad hoc basis." *Id.* at 75, 735 S.E.2d at 656. Dr. Pitner applied his own expertise and experience, supplemented by an extensive literature review, to all of the deposition testimony taken in the case, all of the documents admitted into evidence, and the trial testimony of the Jacksons and Jessica Wilson. **(R. pp.)** (Tr. 299-302.) GEICO points to no evidence Dr. Pitner ignored or did not account for in his thorough review and analysis. While GEICO is entitled to disagree with Dr. Pitner's opinions, its disagreement is not the test for admissibility. Dr. Pitner applied his expertise to the facts at hand, and there was not a "particular stud[y] or paper[]" on which he relied because "the patterns are still the same for emerging adulthood."[4] **(R. p.)** (Dr. Pitner Dep. at 28.) Dr. Pitner did everything the law requires of a non-scientific expert.

GEICO's reliance on *Graves* to suggest that "[Dr.] Pitner did not review the depositions other than those of Vincent Jackson's mother, father, and his son's mother and grandmother, all of whom may have had a monetary stake in the outcome of the case" and "[Dr.] Pitner failed to provide any objective criteria for why Jackson could not have been a resident of his own apartment" is misplaced. (GEICO Br. at 12-13.) As noted above, GEICO does not point to any pertinent evidence Dr. Pitner ignored, such as deposition testimony from other witnesses who contradict the Jackson Estate's witnesses or any documents. This is because there is no such contrary evidence; Dr. Pitner considered the record as whole.

[4] GEICO cites Dr. Pitner's deposition to make the unremarkable observation that emerging adulthood is a "generalized trend among a large swath of the population and not true with respect to all individuals." (GEICO Br. at 11.) Dr. Pitner correctly explained in his very next breath that this is true generally for human behavior. **(R. pp.)** (Dr. Pitner Dep. at 36-37.) With respect to schizophrenia, for example, "everyone that has schizophrenia doesn't get every single thing that we know. The pattern of their behavior fits the category." **(R. p.)** (Dr. Pitner Dep. at 37.) Once again, this Court must review the full context of GEICO's record citations to ensure salient points are not lost or misconstrued.

Graves concerned an entirely inapposite set of facts and type of expert testimony than are at issue here. There, the plaintiffs' computer experts attempted to opine that a neonatal heartrate and breathing monitor was defective because its software was "spaghetti code" that caused the signal for an alarm to sound to get lost *en route*, resulting in a pre-term baby's death. *Graves*, 401 S.C. at 70, 735 S.E.2d at 653. The experts used a "reasoning to the best inference" methodology, where they started with all possible explanations for the alarm not sounding and used the process of elimination to leave a software error as the cause. *Id.* at 70-72, 735 S.E.2d at 653-54. However, the experts failed to properly account for (and one was not even aware of) substantial evidence that the alarm did, in fact, sound. They simply concluded it did not because the plaintiffs said they did not hear the alarm. *Id.* at 76-77, 735 S.E.2d at 656-57. In the narrow context of the "reasoning to the best inference" methodology in a product defect case, the Supreme Court held that an expert "must provide a reasonable, objective explanation for the rejection of possible alternative causes." *Id.* at 76, 735 S.E.2d at 656. Such indicia of reliability were clearly lacking in *Graves*. But the *Graves* Court's discussion on this limited issue simply is of no moment to Dr. Pitner's opinions which do not employ the "reasoning to the best inference" methodology. Moreover, the entire premise of Dr. Pitner's opinion was a detailed and reasoned explanation for contrary evidence of residency at Brown Street—not a "bald[] marginaliz[ation]" of it. (*See* GEICO Br. at 13.)

Again, the trial court's exclusion of Dr. Pitner's testimony was not based on any purported lack of reliability, but had it been, such a finding would have been an error of law requiring reversal.

D. Dr. Pitner's insight into human development should have been admitted because it would have been helpful to the jury in understanding the contradictions in Vincent Jackson's behavior.

The sole argument GEICO advances in support of the single issue the trial court ruled on concerning Dr. Pitner is that "[r]esidency is not a subject beyond the ordinary knowledge of the jury such that they need expert testimony to assist them." (GEICO Br. at 8.) Contrary to GEICO's assertions, Dr. Pitner was not offered to opine about residence *per se*. The subject matter of his testimony would have been emerging adulthood and how the behavioral characteristics of that developmental stage that can affect a determination of residency. Furthermore, and underscoring the need for Dr. Pitner's opinions on the specific facts of this case, the determination of residency is dependent on the relationships of the parties involved and on their intent. *See State Farm Fire & Cas. Co. v. Breazell*, 324 S.C. 228, 232, 478 S.E.2d 831, 833 (1996); *Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 338, 157 S.E.2d 633, 635 (1967).

As such, in making its residency determination the jury was asked to evaluate human behavior, a subject about which Dr. Pitner has extensive training and about which he has taught and evaluated professionally—and about which the ordinary juror does not have knowledge.[5] While GEICO cites a list of residency cases which did not involve expert testimony, they only demonstrate that expert testimony was either not offered in those cases or deemed necessary *on those facts*. There is no support for GEICO's contention here that expert testimony about human behavior is never admissible in a residency case, particularly in cases such as this which involve conflicting actions taken during a young man's (who is the father of a disabled child) transition into independence. As was explained at length in the Jackson Estate's opening brief, Dr. Pitner has expertise in developmental stages and the interaction of those stages with the social environment, including independence of emerging adults like Vincent Jackson. This case therefore is similar to, and controlled by, other cases in which expert testimony should have been admitted when offered to explain and place in context the seemingly inexplicable human behavior of parties.

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[5] As noted in the Jackson Estate's opening brief, the mere fact that a jury may have some knowledge on a particular issue does not preclude the admission of expert testimony on it. (Jackson Estate Br. at 16.)

For example, in *State v. Grubbs*, 353 S.C. 374, 380-81, 577 S.E.2d. 493, 496-97 (Ct. App. 2003), the exclusion of expert testimony regarding human behavior was reversible error, where such testimony would have assisted the jury "in evaluating [the defendant's] state of mind" at the relevant time. In that case, the defendant gave multiple different accounts of the shooting, including denying recognizing her assailant, even though he was her boyfriend of many years. The proffered expert, a psychologist, would have testified that the defendant's denial of recognizing her boyfriend was part of the battered spouse syndrome, because she could not defend herself unless she believed he was a stranger. Exclusion of this testimony was reversible error because "[w]ithout the expert's testimony, the jury had no way of putting the differing versions of [the defendant's] statements into context." *Id*. at 381, 577 S.E.2d at 497. Here, as in *Grubbs*, Vincent's behavior was conflicting: he leased an apartment but still spent much time and relied heavily on the support of his parents, the named insureds. Dr. Pitner's proposed testimony would have supplied specialized knowledge that would have assisted the jury in understanding the inconsistent and contradictory nature of Vincent's actions and thus aided them in determining the ultimate fact at issue in this case: where Vincent resided on the date of his death. *See* Rule 702, SCRE.

II. The trial court erred in failing to provide a complete instruction to the jury.

GEICO's argument regarding the instruction taken from *Breazell* is simply inapposite. The Jackson Estate does not question the correctness of this instruction, but only its adequacy standing alone. The *Smith v. Auto-Owners Ins. Co.* case, cited by GEICO (GEICO Br. at 16), does not and cannot stand for the proposition that no additional instructions are necessary in a jury trial, as that case was decided by the court sitting without a jury. 377 S.C. 512, 514, 660 S.E.2d 271, 272 (Ct. App. 2008). Judges are familiar with the rules of evidence and the fact-finding process; jurors, who are, by definition, lay people are not. "[A] trial judge has a duty to give a requested instruction

that correctly states the law applicable to the issues ***and evidence***." *Ross v. Paddy,* 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000) (emphasis added). "Moreover, when general instructions to the jury are insufficient to enable the jury to ***understand fully*** the law of the case and issues involved, a refusal to give a requested charge is reversible error." *Id.* (emphasis added).

Here, the additional instruction requested by the Jackson Estate[6] would have assisted the jury in determining how to apply the test which they were given and the necessity of viewing the "facts and circumstances of [the] case in totality" when making a proper determination of residency. *See Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 66, 586 S.E.2d 865, 873 (Ct. App. 2003) (emphasis added). The refusal to give such instructions left the jury with an incorrect impression that residency is a cut-and-dried inquiry in which facts not fitting neatly into the categories mentioned in the *Breazell* test could be discounted or even disregarded, instead of an intensely fact-based one which is dependent upon the unique facts and circumstances of each case. An erroneous instruction that goes to the heart of the case is prejudicial and requires reversal. *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 416-17, 734 S.E.2d 641, 643-44 (2012) (instruction that used the wrong standard of care was prejudicial error in medical malpractice case); *Campbell v. Robinson*, 398 S.C.12, 24-25, 726 S.E.2d 221, 288 (Ct. App. 2012) (reversal required based on erroneous instruction giving incorrect standard to determine ownership of engagement ring based on the party "at fault" in the breakup).

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[6] The additional instructions timely requested by the Jackson Estate read as follows:

"Reside in the household" has no absolute or precise meaning and whether a person is a resident depends heavily on the facts of each situation. If doubt exists, the term "resident' must be understood in its broadest and most inclusive sense for the benefit of the insureds.

You must consider the person's actual residence and not his mere legal residence.

(R. pp.) (Tr. 424-26; Pl.'s Req. Charge, No. 7).

III. GEICO's misuse of the federal employment records created undue prejudice requiring their exclusion.

The admission of the federal employment records with their references to "penalty of perjury" was error because not only were these forms subject to misuse, but they were actually and actively misused by GEICO in its argument to the jury. GEICO deliberately chose to introduce these federal forms and only these forms from a myriad of forms completed by Vincent Jackson for his employer in order to misuse them. GEICO's sponsoring witness testified that the purpose of the forms was to assure citizenship or immigration status (as to the I-9 form – GEICO's Ex. 13) **(R. pp.)** (Tr. 209, 215) or tax withholding (as to IRS Form W-4 – GEICO's Ex. 8) **(R. pp.)** (Tr. 210-11). Despite this testimony and without any evidence that Vincent Jackson had any understanding to the contrary, GEICO nonetheless expressly and improperly invited the jury to place undue weight on these federal employment forms because of their "under penalty of perjury" admonitions. **(R. p.)** (Tr. 455). This is precisely the danger of unfair prejudice that Rule 403, SCRE, is designed to protect against: "an undue tendency to suggest a decision on an improper basis." *State v. Owens,* 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

The only excuse that GEICO gives for this improper use is that the documents are "merely cumulative." (GEICO Br. at 23). However, this argument is backward – because the address information on these documents was contained in others prepared at the same time the ***only*** reason for GEICO to introduce the federal forms was the improper one relating to the "penalty of perjury" admonition. The admission of these forms, when combined with the improper and unsupported argument was more prejudicial than probative because there was no correlation between the "penalty of perjury" admonition and the address information. This was error, which requires

reversal and a new trial. *See Kennedy v. Griffin*, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004).

CONCLUSION

For all of the reasons set forth in the Jackson Estate's Initial Brief and as stated herein, the trial court here committed numerous errors which require reversal and remand for a new trial. This Court must reject GEICO's attempts to distract from the issues on appeal by arguing points that were not ruled upon below and by relying on incomplete refences to the record. Respectfully, the matter is simple. The trial court's errors in (1) excluding Dr. Pitner on the basis that his opinions on emerging adulthood would not be helpful to the jury, (2) refusing to give a complete instruction to the jury on the law of residency which did not elevate the Jackson Estate's burden, (3) admitting Vincent Jackson's Form I-9 and Form W-4, which GEICO explicitly used to improperly argue that Vincent made certain statements under oath, and (4) not admitting into the evidence the very insurance contact that governed the residency question presented to the jury, each compel the grant of a new trial. This Court therefore should reverse and remand.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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February 11, 2021
Columbia, South Carolina

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Feb 11 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
In the Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2020-000249

Government Employees Insurance Company,..Respondent,

v.

Barbara P. Jackson, as Personal Representative
for the Estate of Vincent A. Jackson,..Appellant.

PROOF OF SERVICE

This is to certify that the undersigned counsel, an attorney with the law firm of Willoughby & Hoefer, P.A., has caused to be served this day one (1) copy of **Appellant's Initial Reply Brief**, one (1) copy of **Appellant's Supplemental Designation of Matter to be Included in the Record on Appeal**, and one (1) copy of a **Notice of Appearance of Counsel** pursuant to section (g)(3) of the South Carolina Supreme Court's Amended Order dated May 29, 2020 via electronic mail at the email address as stated in the Attorney Information System and as set forth below to the following:

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February 11, 2021
Columbia, South Carolina

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February 11, 2021

RECEIVED
Feb 11 2021
SC Court of Appeals

VIA ELECTRONIC FILING
The Honorable Jenny Abbott Kitchings
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RE: *Government Employees Insurance Company. Respondent, v. Barbara P. Jackson, as Personal Representative for the Estate of Vincent A. Jackson, Appellant.* Appellate Case No. 2020-000249

Dear Ms. Kitchings:

Attached for electronic filing in accordance with Supreme Court Order 2020-05-29-02, part (c)(6), and pursuant to Rules 208 and 209, SCACR, is Appellant Barbara P. Jackson, as Personal Representative for the Estate of Vincent A. Jackson's Initial Reply Brief and Supplemental Designation of Matter.

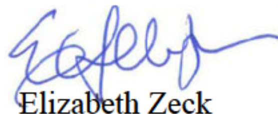
Also attached for electronic filing is a Notice of Appearance of Counsel.

As permitted by Order 2020-05-29-02, part (c)(6), the attached electronic filings are being made via email, and as permitted by the Court, no other copies, whether paper or electronic, are being provided.

By copy of this letter, we are serving Respondent via email as permitted by Order 2020-05-29-02 part (g)(3) and enclose a proof of service to that effect. If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



Elizabeth Zeck

EZ/lla
Attachments

cc: John Robert Murphy, Esquire
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