THE SOUTH CAROLINA SUPREME COURT: STAYING TRUE TO THE LAW ON LIFE AND MANY OTHER ISSUES

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Over the past two decades, there has been an ever increasing awareness and sharp debate over the proper role of judges in interpreting and applying the law. That focus has been particularly relevant in recent years as there has been much controversy over federal judicial confirmation and the selection process for state-level judicial posts. Commenting on a specific court is no doubt a decidedly imperfect business; nonetheless, this paper takes on the difficult task of placing into perspective the South Carolina Supreme Court's reaction to "life issues" cases, judging not only its result but its method for reaching the result.

Before diving into the case law, it is best to explain that the term "life issues" covers a wide array of legal and policy issues that touch on the human life. For example, some of the life issues confronting our country today are destructive embryo research, cloning and even assisted suicide. Life issues may take the form of pure policy decisions or may transform into detailed and hotly debated legal conundrums. The legal issues surrounding abortion have been fundamental "life issues" debated in this country since the U.S. Supreme Court's *Roe v. Wade* decision in 1973 and had been policy issues for debate long before that decision.[2] With that background in mind, this paper addresses how the South Carolina Supreme Court has handled these fundamental life issues that have reached its docket. This paper also provides general observations on the Court's current judicial philosophy, based on a review of decisions touching on life issues and many other recent decisions that are not related to life issues.

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2 410 U.S. 113 (1973).

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I. LIFE ISSUES

Abortion

Other than a decision shortly after the U.S. Supreme Court's 1973 *Roe* decision, the South Carolina response to abortion issues has been largely legislative. At the time of the *Roe* decision, South Carolina criminalized abortion in S.C. Code § 16-83.[3] That code section provided as follows:

> Abortion or Attempted Abortion not Resulting in Death
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> Any person who shall administer to any woman with child, prescribe, procure or provide for any such woman or advise or procure any such woman to take any medicine, drug, substance or thing whatever or shall use or employ or advise the use or employment of any instrument or other means of force whatever, with intent thereby to cause or produce the miscarriage, abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the Penitentiary for a term not more than five years or by fine of not more than five thousand dollars or by such fine and imprisonment both, at the discretion of the court. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman.

Shortly after the U.S. Supreme Court's decision in Roe, the South Carolina Court faced an appeal of a conviction under the above statute in *State v. Lawrence*.[4] Dr. Kenneth Lawrence, a gynecologist, had been convicted of performing an abortion on a thirty-year-old woman who was approximately three months pregnant. The Court recognized that, even though South Carolina had "joined the trend toward liberalization of its abortion statutes by the adoption of less stringent laws,"[5] the above statute could not read to be in conformity with the U.S. Supreme Court's decision in *Roe*. The Court specifically advised that if the State aims to assert some limitation on abortion procedures, "legislation is needed."[6]

Current Title 44, Chapter 41 of the South Carolina Code provides for the regulation of abortions, providing parental consent provisions in the case of minors seeking abortions,

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3 A publication titled *South Carolina Jur., Abortion* by Thomas Causby (2006) provides is an excellent source of information on the history of South Carolina's abortion laws. Mr. Causby explains that abortion was only addressed by the common law, that common law being derived from English decisions from the 1600s. South Carolina enacted its first anti-abortion statute in 1883 by the time of the above *Lawrence* decision, the South Carolina General Assembly had substantially amended that statute to be in closer conformance to the American Law Institute's Model Penal Code, § 230.3. *Id.*; Lawrence, 261 S.C. at 21.

4 261 S.C. 18 (1973).

5 *Id.* at 21.

6 *Id.* at 22.

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licensing of abortion facilities and other regulations. Article 3 of this Chapter is the result of the "Woman's Right to Know Act" which details certain specific information that must be conveyed to the woman before she has an abortion.[7] It is worth noting that S.C. Code Ann. § 44-41-20, which covers what types of abortions are legal, is still based on the trimester model provided for in *Roe*. This statute does not appear to have been challenged based on the *Planned Parenthood v. Casey* decision or any other arguments that the trimester system is no longer legally permissible.[8]

Furthermore, S.C. Code Ann. § 44-41-75, which governs the licensing of certain abortion facilities, was challenged on constitutional grounds and upheld in federal court.[9] S.C. CODE ANN. § 44-41-75 requires that any facility in which any second trimester or five month or more first trimester abortions are performed in a month to be licensed as an abortion clinic by the Department of Health and Environmental Control.

A tangent matter- the issue of whether a "wrongful life action" may be maintained under South Carolina law, was presented to the Court in the 2004 case of *Willis v. Wu*.[10] As the Court noted from the outset of its decision that

> [a] "wrongful life" action is brought by or on behalf of the child himself. The child alleges, because of the defendant's negligence, his parents either decided to conceive him ignorant of the risk of an impairment or birth defect, or were deprived of information during gestation that would have prompted them to terminate the pregnancy. The child alleges, but for the defendant's negligence, he

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7 In general, the South Carolina "Woman's Right to Know Act" requires that certain specific information pertinent to abortions be provided to the woman seeking an abortion and, in the case of a minor, to the minor's parent, legal guardian or other specified individuals. For example, the Act provides that, with exception of medical emergencies, no abortion may be performed before the woman seeking the abortion is provided and certifies in writing that she was informed of the specific physician who will perform the abortion, the probable gestational age of the embryo or fetus at the time the abortion is to be performed and be given the opportunity to review certain written materials regarding abortion alternatives. This Act also states that no abortion may be performed sooner than one hour after the woman certifies the above to the physician or physician's agent. In the case of women who are minors, the information and certification referenced above must also be provided to "a parent of the minor, a legal guardian of the minor, a grandparent of the minor, or any person who has been standing in loco parentis to the minor for a period of not less than sixty days."

8 505 U.S. 833 (1992).

9 *See* Greenville Women's Clinic v. Bryant (*Greenville I*), 222 F.3d 157 (4th Cir. 2000); Greenville Women's Clinic v. Comm'r (*Greenville II*), 317 F.3d 357 (4th Cir. 2002). S.C. Code Ann. § 44-41-75 also directs DHEC to promulgate a system of regulations of abortion facilities to ensure, for example, that staff are properly qualified, the facility is properly maintained and sanitized, etc. *Greenville I* and *Greenville II* were challenges to the DHEC regulation promulgated in response to § 44-41-75 (S.C. Code Ann. Regs. 61-12).

10 362 S.C. 146 (2004). For examples of other state court decisions addressing the "wrongful life" action, *see* Turpin v. Sortini, 31 Cal. 3d 220 (1982); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460 (1983); Procanik by Procanik v. Cillo, 97 N.J. 339 (1984).

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> would not have been born. The birth defect or impairment occurred naturally, i.e., it was not directly caused by an act or omission of the defendant health care provider.[11]

Ms. Jennie Willis, the mother of an eight year old child born with maximal hydrocephalus brought an action on behalf of the child for "wrongful life" against her physician, Dr. Donald Wu.[12] Ms. Willis claimed that Dr. Wu failed to adequately and timely diagnose her child's condition by prenatal testing and provide her with the opportunity to decide whether to terminate the pregnancy.

In addressing this novel issue, the Court first looked at the standard law of medical malpractice but immediately recognized that this sort of legal action does not fit within the parameters of that jurisprudence given that the negligent act or omission of the health care provider did not actually cause the defective condition.

The Court rejected Ms. Willis' arguments for maintaining a wrongful life action.[13] The Court noted several serious problems with this type of an action, both from a technical legal perspective and from a social policy perspective. From a technical point of view, the Court recognized that it is quite difficult to fit this type of tort action into the "traditional duty-breach-causation-damages analysis."[14] While the Court was willing to accept for the sake of argument that Dr. Wu owed Ms. Willis' child a duty of care while in his mother's uterus and that Dr. Wu may have violated that duty of care, proximately causing the child to be born with a severe congenital defect, the Court was unable to accept that "being born with a naturally occurring defect or impairment" constitutes a legally recognizable injury.[15] The Court succinctly stated that "we find untenable Child's argument that a child who already has been born should have the chance to prove it would have been better if he had never have been born at all."[16]

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11 Willis, 362 S.C. at 162.

12 Ms. Willis' child, Thomas's condition left him incapable of taking care of himself and with "mental abilities [that] are about the same as they were at the age of a few months." Willis, 362 S.C. at 150.

13 Of note, the U. S. District Court for the District of South Carolina correctly predicted that the Court would not adopt a wrongful life action, reasoning that such an action would violate the fundamental public policy of preserving the sanctity and preciousness of human life. Phillips v. United States, 508 F.Supp. 537 (D.S.C. 1980) (cited by Willis, 362 S.C. at 155-56).

14 Willis, 362 S.C. at 154.

15 *Id.* at 162.

16 Id.

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Interestingly, the Court did note that there may come a time when scientific and technological advances as well as changes in "moral attitudes"[17] lead society to a point where we can properly assess this type of claim; however, the Court concluded that South Carolina is not there yet.

It should also be noted that the Court, in *Crosby v. Glasscock Trucking Co*., has rejected an argument that a nonviable stillborn fetus can maintain a wrongful death action.[18] The Court's conclusion in *Crosby* was largely driven by statutory interpretation given that wrongful death is a derogation of the common law and a creature of statute. The Court refused to recognize that a nonviable stillborn fetus constitutes a "person" under S.C. Code Ann. § 15-51-10. The Court was also quick to note that its decision was in line with the majority of courts on this issue.[19] Note that a case from the Court in the 1960s clarified that live birth is not a prerequisite to the filing of a wrongful death action on behalf of a deceased child; as alluded to earlier, a wrongful death action may be commenced on behalf of a stillborn, viable fetus.[20]

Protection of the Unborn from Criminal Violence

While the court has not been presented with any high profile legal issues over abortion, the crime of homicide by child abuse has been a hot button topic with regard to drug addicted pregnant mothers. The Court has received much attention from two decisions which allowed mothers to be prosecuted for homicide by child abuse premised on ingesting illegal drugs during pregnancy.[21]

In the 1997 case of *Whitner v. State*, the Court confronted the question of whether a woman who ingests cocaine during the third trimester of her pregnancy may be prosecuted for

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17 *Id.*(quoting Phillips, 508 F. Supp. 537 (D.S.C. 1980).

18 340 S.C. 626 (2000).

19 Justices Waller, Burnett and former Chief Justice Finney issued a stinging dissent from the *Crosby* decision, arguing that the arbitrary hurdle of viability should be removed and the legal theory should turn to the fundamental concept of fault based liability in the tort context. Crosby, 340 S.C. at 864.

20 Fowler v. Woodward, 244 S.C. 608, 612-13 (1964).

21 *See* Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 Alb. L. Rev. 999, 1055 (1999); Tara-Nicholle B. DeLouth, Pregnant Drug Addicts as Child Abusers: A South Carolina Ruling, 14 Berkeley Women's L. J. 96 (1999); Tara Kole and Laura Kadetsky, The Unborn Victims of Violence Act, 39 Harv. J. on Legis. 215 (2002); Elizabeth Spiezer, Recent Developments in Reproductive Health Law and the Constitutional Rights of Women: The Role of the Judiciary in Regulating Maternal Health and Safety, 41 Cal. W. L. Rev. 507 (2005); Linda C. Fentiman, The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for *Women and Children*, 84 Denv. U.L. Rev. 537 (2006).

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criminal child neglect for causing her baby to be born with crack cocaine in his/her system.[22] For background, in 1992, Cornelia Whitner pled guilty to criminal child neglect based on the fact that her child was born with cocaine metabolites in his/her system by reason of her ingesting crack cocaine during the trimester of pregnancy. Ms. Whitner was sentenced to eight years in prison. Thereafter, Ms. Whitner filed a petition for post conviction relief pleading that the circuit court that accepted her guilty plea lacked jurisdiction to accept her plea of guilty to this crime. The circuit court agreed granting her petition for post conviction relief in part, given that a circuit court lacks subject matter jurisdiction to accept a guilty plea to a nonexistent offense.

The South Carolina Supreme Court reversed the circuit court's decision, concluding that the term "child," as used in the criminal child neglect statute, extends to a "viable fetus." The Court noted that "South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges,"[23] and cited to cases in which the Court found the wrongful death statute applicable to viable fetuses.[24] The Court also looked to one of their prior cases in which the term "person" as used in the murder statute was interpreted to include viable fetuses. In the 1984 case of *State v. Horne*, the defendant was convicted of murder for stabbing his wife, who was nine months' pregnant in the neck, arms, and abdomen, ultimately causing the death of their son.[25] The *Horne* Court stated that "we do not see any rational basis for finding a viable fetus is not a 'person' in the present context.[26] Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse."[27]

The Court rejected Ms. Whitner's arguments that this use of the criminal child neglect statute was unintended by the legislature and similarly rejected her argument that a reversal would set a precedent that could lead to absurd results. She argued that if she could be convicted for criminal neglect, then a woman who smoked or drank during pregnancy could also be subject to such a neglect charge. The Court gave short shrift to this type of "absurd results" argument,

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22 328 S.C. 1 (1997).

23 *Id.* at 6.

24 *See* Hall v. Murphy, 235 S.C. 257 (1960); Fowler v. Woodward, 244 S.C. 608 (1964).

25 282 S.C. 444 (1984).

26 The Court has referred to the crime committed in the *Horne* case as "feticide". Whitner, 328 S.C. at 7.

27 Whitner, 328 S.C. at 6.

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noting that such an argument could be made whether or not the child had been born. "For example, a parent who drinks excessively could, under certain circumstances, be guilty of child neglect or endangerment even though the underlying act—consuming alcoholic beverages—is itself legal."[28] The Court turned the focus to the effects of maternal crack use during pregnancy, noting that "it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child."[29]

Ms. Whitner also argued that prosecuting her for using crack cocaine during her pregnancy amounted to a constitutional violation of her right to privacy. The Court rejected this argument, noting that "the State's interest in protecting the life and health of the viable fetus is not merely legitimate. It is compelling."[30] The Court went on to specifically explain that

> The United States Supreme Court in Casey recognized that the State possesses a profound interest in the potential life of the fetus, not only after the fetus is viable, but *throughout* the expectant mother's pregnancy []. Even more importantly, however, we do not think any fundamental right of Whitner's—or any right at all, for that matter—is implicated under the present scenario. It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.[31]

In 2003, the Court reiterated its conclusion in *Whitner* by confirming that a viable fetus is also a considered a "child" under the homicide by child abuse statute, S.C. Code Ann. § 16-3-85. In *State v. McKnight*, the Court upheld the conviction of Regina McKnight for homicide by child abuse based on the fact that her ingestion of cocaine during pregnancy caused the stillbirth of her child.[32]

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28 *Id.* at 10.

29 *Id.* The Court cited to Joseph J. Volpe, M.D., *Effect of Cocaine Use on the Fetus*, 327 New Engl. J. Med 399 (1992); Ira J. Chasnoff, M.D., et al., *Cocaine Use in Pregnancy*, 313 New Engl. J. Med. 666 (1985) in referencing maternal crack use during pregnancy.

30 Whitner, 328 S.C. at 17.

31 Id. at 18.

32 352 S.C. 635 (2003).

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Of note, Justice Moore has been an ardent critic of these two decisions, dissenting from both based on his view that the legislature had already recognized the "unique situation of a feticide by the mother," having chosen not to allow the prosecution of a pregnant woman for homicide by child abuse.[33] Justice Moore argued that the majority's conclusion violates the rule of strict interpretation for criminal statutes. On this point, his dissent noted that "[i]t is not the business of this Court to expand the application of a criminal statute to conduct not clearly within its ambit. To the contrary, we are constrained to strictly construe penal statutes in the defendant's favor."[34]

Assisted Suicide

In researching the issue of assisted suicide, there did not appear to be any decisions from the Court that directly or indirectly address this issue. However, in the recent case of *State v. Passaro*, the Court did address a point raised at oral argument by counsel for a death row litigant that his clients plea of guilty to capital murder and waiver of mitigation at the penalty phase was "little more than government-assisted suicide."[35] The Court disagreed with defense counsel in that case.

The South Carolina General Assembly has passed a statute that makes it "unlawful for a person to assist another person in committing suicide."[36] This statute covers situations where one person has knowledge that the other person intends to commit or attempt to commit suicide and intentionally provides the means for committing the suicide or participates in helping the other person to commit suicide. This statute provides the opportunity to seek specific injunctive relief against "a person who it is reasonably believed is about to violate or who is in the course of" helping another person commit suicide. The statute allows the family of the person who would commit suicide, anyone entitled to inherit from that person, the current or former health care provider of that person and certain others with the right to seek the injunction.

Cloning and Destructive Embryo Research

Neither the South Carolina Supreme Court nor the South Carolina General Assembly have addressed the issues of cloning or destructive embryo research.

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33 *Id.* at 657-658 (Moore, J., dissenting); Whitner, 328 S.C. at 21-23 (Moore, J., dissenting).

34 McKnight, 352 S.C. at 657-658 (Moore, J., dissenting) (citing State v. Blackmon, 304 S.C. 270 (1991).

35 State v. Passaro, 350 S.C. 499, 504 (2002).

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II. JUDICIAL RESTRAINT

With regard to judicial philosophy, expanding our focus beyond just cases involving life issues, the South Carolina Supreme Court appears to take a judicially conservative approach to addressing tough legal issues. First off, an initial example on how the Court reaches its conclusions is the *Whitner* decision; the Court was essentially asked to define the term "child" as that term was used in the criminal child neglect statute.[37] The Court traced back through its prior case law to confirm the inclusion of the "viable fetus" in the definition of the term "child", holding true to a prior decision that defined "child" in another context. In *Whitner* and many other decisions, a few of which are discussed below, this Court appears to follow the fundamental principle of *stare decisis* and typically avoids reaching unnecessary conclusions on issues that are not squarely before the Court.

A number of the Court's recent decisions show a consistent focus on maintaining the proper separation of powers between the judicial, the legislative and the executive branches. In *Doe v. Marion*, the Court addressed the novel issue of whether a state statute requiring physicians and psychiatrists to report certain matters to authorities provides the basis for a private cause of action for negligence *per se.*[38] The particular statute at issue in *Marion,* S.C. Code Ann. § 20-7-150, required physicians to report to proper authorities information which gives reason to believe that a child's physical and mental health has been or may be adversely affected by abuse or neglect. In *Marion*, a pediatrician had allegedly sexually abused one of his patients and it came to light that this pediatrician had received psychiatric treatment from one of the defendants as far back as 1984 for a predilection for child molestation. The patient's father, bringing an action on behalf of his minor son, sued the pediatrician's psychiatrist, among others, based on the theory that § 20-7-150 imposes civil liability on the psychiatrist for the failure to properly report the pediatrician's predilection for child molestation. The Court rejected that theory, focusing on the legislative intent behind § 20-7-510 and on the principle that a private cause of action can only be implied if the legislation was enacted for the "special benefit of a

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[36] S.C. Code Ann. § 16-3-1090.

[37] *328 S.C. at 7-9.*

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private party."[39] In a case involving the review of agency decision-making, *Consumer Advocate for South Carolina v. S.C. Public Service Commission*, the Court showed considerable deference to the South Carolina Public Service Commission's implementation of the Universal Service Fund (USF), a creature of the federal Telecommunications Act[40] and S.C. Code Ann. § 58-9-280.[41]

As for appeals in criminal cases, the Court addressed a number of significant and unique issues, appearing to consistently take the conservative line. In *State v. Pittman*, the Court allowed the South Carolina Family Court to waive jurisdiction over 12-year-old Pittman who was charged with killing his grandfather and grandmother.[42] The Court affirmed Pittman's conviction for double homicide and upheld a sentence of two concurrent terms of thirty years imprisonment. In affirming, the Court also rejected a host of other arguments, including the argument that the Eighth Amendment forbids a thirty-year prison term without parole for a 12-year-old.[43] In another criminal appeal, *State v. Lord Byron Slater*, the Court refused to affirm the South Carolina Court of Appeal's reversal of a murder and possession of a firearm conviction.[44] The Court of Appeals had concluded that the trial court committed reversible error by not charging the jury on the law of self-defense. The Supreme Court disagreed, concluding that the defendant failed to meet the specific elements required for the self-defense charge, "specifically, Slater was not without fault in bringing on the difficulty" being faced.[45]

However, in *State v. Bixby*, the Court rejected the State's effort to seek the death penalty for a charge of accessory before the fact of murder.[46] The Court reached its conclusion largely

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38 373 S.C. 390 (2007).

39 The Court also rejected the plaintiff's common law negligence theory, noting that a physician/psychiatrist is not liable under common law negligence principles for failing to report or warn about the predilection for child molestation of a patient "in the absence of a specific threat to an identifiable party." *Id.*

40 47 U.S.C. § 609.

41 373 S.C. 46 (2007).

42 373 S.C. 527 (2007).

43 Only Justice Pleicones dissented from the affirmance. Justice Pleicones would have found reversible error in the trial court's refusal to charge the jury on voluntary manslaughter and would have adopted a different rule for admissions by minors, particularly with regard to minors under the age of 14.

44 373 S.C. 66 (2007).

45 *Id.* at 70.

46 *373 S.C. 74 (2007).*

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on statutory interpretation grounds.[47] Chief Justice Toal dissented from *Bixby,* succinctly stating that "[i]n my opinion, a charge of accessory before the fact to murder implicates the death penalty under South Carolina law."[48]

In the context of civil actions, the Court appears to fall on the side of judicial restraint, particularly evidenced by their decisions in both *Hansson v. Scalise Builders of S.C.* and *Young v. S.C. Department of Disabilities and Special Needs*.[49] In *Scalise Builders*, the Court of Appeals had overturned the trial court's grant of summary judgment on plaintiff Hansson's claim of intentional infliction of emotional distress. Hansson's claim rested on allegations that "his coworkers and supervisor [] constantly derided him with callous and vulgar remarks and gestures related to homosexuality." The Supreme Court agreed with the trial court, reigning in Hansson's claim, particularly with regard to the lack of enough evidence showing that Hansson's alleged emotional distress was sufficiently "severe" to fall within the South Carolina Supreme Court's emotional distress/mental anguish jurisprudence.

In *Young*, another civil action, the Court addressed unique issues regarding apparent agency and non-delegable duty arising from a wrongful death action filed against the South Carolina Department of Disabilities and Special Needs (SCDDSN) and a local special needs board. Gloria Jean Young's son suffocated in his hospital bed, a bed that Young had complained about to an employee of the local special needs board. The trial court held, as a matter of law, that the employee of the local special needs board was also an employee of SCDDSN for the purposes of holding SCDDSN liable. The Supreme Court rejected that conclusion, concluding that statutes regarding the local boards of disabilities and special needs establish a legal separation of the two entities, and that the theories of agency and non-delegable duty could not be used to expand the liability of the SCDDSN.

In another case, *Burgess v. Nationwide Mutual Insurance Co.*, the Court showed its willingness to limit statutes by the express language contained therein rather than on some

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47 "Given the plain language of § 16-3-20 and the fact that the Legislature has not shown an intent to make one charged with accessory before the fact to murder death penalty-eligible, the trial judge properly found that respondent is not eligible for the death penalty and properly dismissed the State's notice of intent to seek the death penalty." *Id.* at 78.

48 *Id.* at 79 (Toal, J., dissenting).

49 Hansson v. Scalise Builders of S.C., 2007 W.L. 2301196, 650 S.E .2d 68 (2007) and Young v. S.C. Dep't of Disabilities and Special Needs, 2007 W.L. 2301216, 649 S.E.2d 488 (2007).

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amorphous reading that would expand the liability of private parties.[50] In *Burgess*, an insurance coverage action, the Court rejected the plaintiff's argument that S.C. Code Ann. 38-77-160 voided specific terms related to the portability of uninsured motorist coverage in an automobile insurance policy. The Court narrowly construed that statute to avoid depriving private parties of their ability to contract for insurance coverage, especially in a situation where the statute did not explicitly provide for what the plaintiff desired. In these and other appeals in civil matters, the Court appears to take a judicially conservative stance—apply statutes as they are specifically written by the legislature.

It should be noted, and it should go without saying, that no particular court can be characterized as purely "judicially conservative" or "liberal"; the various justices and judges on a court do not always fall into one category or another on every issue, and some types of cases present tough situations that may cause a court to deviate from its general course. To use a "Yogi-ism", general observations are only general; sometimes courts reach conclusions that just do not square up with their prior decisions.

The simple and general observation from this review of the South Carolina Supreme Court is that this Court takes one case at a time, appears to be conscientious about applying prior precedent, and holds true to the specific language of laws passed by the South Carolina General Assembly.

III. THE COURT

Per S.C. Const. Art. 5 § 2, the South Carolina Supreme Court is composed of a Chief Justice and four Associate Justices.[51] Unlike many other states with either an elected judiciary or an appointed judiciary, South Carolina is what could be considered a hybrid form of judicial election to its highest court; each of the justices are elected to ten-year terms by the General Assembly.[52] The terms of the justices are staggered so that not all of the justices are up for re-election by the General Assembly at any one year.

50 373 S.C. 37; 644 S.E. 2d 40 (2007).

51 *See also* S.C. Code Ann. § 14-3-10.

52 S.C. Const. art. 5, § 3; S.C. Code Ann. § 14-3-10.

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If South Carolina's judicial selection seems unique, then the story behind that selection process is, to some degree, more interesting. South Carolina is one of the few remaining states whose judges are selected by the legislature.[53] While legislative selection has survived over the years, the judicial selection process within the South Carolina General Assembly has not gone without controversy and remodeling. Prior to 1997, the General Assembly utilized a joint committee for the consideration of judicial applicants and that joint committee would review the nominees' qualifications. The General Assembly was not actively involved in the assessment of a judicial candidate's qualifications, and much criticism was made of how many of the judicial candidates elected to the judiciary were sitting or former legislators.

After criticism of this "who you know" judicial selection process, the General Assembly in 1997 passed significant reforms to this judicial selection process, one of which was to utilize a Judicial Merit Selection Commission.[54] The Commission is composed of ten individuals selected by the Speaker of the House, the Chairman of the Senate Judiciary Committee and the President Pro Tempore.[55] By statute, the individuals selected to the Commission must consist of both members of the General Assembly and members of the general public. The Commission has significant power to investigate candidates for judicial office by holding hearings and even to compel the productions of documents and witnesses.[56] The Commission nominates three judicial candidates to the full General Assembly for consideration (less than three if three candidates are not in the pool for consideration) and the General Assembly must choose one of the three candidates submitted.[57] Although the General Assembly may not consider other candidates in addition to those submitted by the Commission, the General Assembly may choose to reject all of the submitted and require the Commission to submit new candidates for the judicial office. The 1997 package also banned the General Assembly from electing sitting legislators to fill judicial offices.[58] Furthermore the General Assembly may not select former

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[53] *See* Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. Rev. 1217, 1226-27 (1998).

[54] *See* S.C. Code Ann. § 2-19-10 to 120.

[55] *Id.* at § 2-19-10.

[56] *Id.* at §§ 2-19-30, 2-19-60.

[57] *Id.* at § 2-19-80.

[58] Id. *at § 2-19-70.*

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members of the General Assembly until that member either (1) ceases to have to be a member of the General Assembly for at least one year or (2) for at least one year after the member fails to file for re-election to the General Assembly.

For the most part, the South Carolina Supreme Court is an appellate court hearing either direct appeals from the circuit courts or appeals from decisions of the South Carolina Court of Appeals by writ of certiorari. Appeals from the circuit courts involving constitutional challenges to a state statute or local ordinance are taken to the South Carolina Supreme Court directly, as well as any death penalty cases, election cases, and cases involving public bonded indebtedness. The South Carolina Supreme Court also takes direct appeals from family court and circuit court in cases where a minor seeks to have an abortion without the consent of a parent or legal guardian.[59] *S.C. Code Ann. § 14-3-330 also provides the Court the power to hear interlocutory appeals from the lower courts where appropriate.*

Member	**Appointed by/ Year**	**Term Expires**	**Miscellaneous**
Jean Hoefer Toal (Chief Justice)	1988 (Associate Justice) 2000 (Chief Justice)	2014	- Biographical information: J.D. University of South Carolina 1968; B.A. Agnes Scott College 1965; Private practice, 1968-1988; - Political/Professional Affiliations: chief advocate for South Carolina's Judicial Automation Project; member of the Richland County, South Carolina and American Bar Associations; South Carolina Women Lawyers Association; John Belton O'Neall Inn of Court. She serves on the Board of Trustees of Agnes Scott College; the Conference of Chief Justices; the Board of Directors of the National Center for State Courts. She also served in the S.C. House of Representatives. - Publications: "Fiduciary Duties of Partners and Limited Liability Company Members Under South Carolina Law: A Perspective from the Bench," 56 S.C. L. Rev. 275 (Winter 2004) (with W. Bratton Riley); "The New Role of Secret Settlements in the South Carolina Justice System," 55 S.C. L. Rev. 761 (Summer 2004)

[59] Id. *at § 44-31-34.*

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			(with W. Bratton Riley). Justice Toal is_the first female justice of the South Carolina Supreme Court; Roman Catholic.
James Moore	1991	2008	- Biographical Information: J.D. Duke University 1961; Bachelor degree Duke University 1958; Private practice, 1961 -1976; Circuit Court Judge of the Eighth Judicial Circuit, 1976- 1991. - Political/Professional Affiliations: member of the South Carolina and American Bar Associations; the American Judicature Society. He received the Outstanding Contribution to Justice award, 1996; the Honorary Doctor of Humanities Degree from Lander University, 1997. He serves as the Supreme Court liaison to the South Carolina Board of Law Examiners; the Board of Commissioners on Judicial Conduct; the Board of Commissioners on Attorney Conduct; Chairman of the Chief Justice's Commission on the Profession. He also served in the S.C. House of Representatives. - Publications: “The Chief Justice’s Commission on the Profession,” James E. Moore and Rachel Joan Beckford, South Carolina Lawyer, (March 2003). - Other: Justice Moore and his wife live in Greenwood and have two children and four grandchildren.
Costa Pleicones	2000	2016	- Biographical information: J.D. University of South Carolina, 1968; B.A. Wofford College 1965; United States Army 1968-1973; Private practice, 1973-1991; Resident Circuit Court Judge for the 5th Judicial Circuit, 1991-2000. - Political/Professional Affiliations: Justice Pleicones is admitted to practice before all South Carolina

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			Courts, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, the Court of Appeals for the Armed Services, and the United States Supreme Court. - Other: Justice Pleicones is married has two daughters and one grandchild. Justice Pleicones is Greek Orthodox.
E.C. Burnett, III	1995	2015	- Biographical information: J.D. University of South Carolina 1969; B.A. Wofford College 1964; United States Army Reserve, 1964-1966; Private practice, 1966-1974; Spartanburg County Probate Judge, 1976-1980; Clerk of Court for Spartanburg County, 1978; Seventh Judicial Circuit Family Court Judge 1980-1981; Seventh Judicial Circuit Court Judge 1981-1995. - Political/Professional Affiliations: member of the South Carolina Bar Association, Spartanburg County Bar Association and the American Bar Association. He is admitted to practice in all South Carolina Courts, the United States District Court for the District of South Carolina, the Fourth Circuit Court of Appeals and the United States Supreme Court. - Other: Justice Burnett is an Elder at Mount Calvary Presbyterian Church. He is married and has three children, and three grandchildren,
John Waller	1994	2014	- Biographical information: J.D. University of South Carolina 1963; B.A. Wofford College 1959; Private practice, 1963- 1980; Circuit Court Judge for the Twelfth Judicial Circuit, 1980-1994. - Political/Professional Affiliations: member of Mullins Rotary Club; Shriner's organization; SC House of Representatives; South Carolina

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			Senate. - Other: Justice Waller is married and has two children from the current marriage and another two from a previous marriage.

CONCLUSION

When given the relatively rare opportunity to consider a "life issues" case, the South Carolina Supreme Court generally reaches a conclusion that favors the protection of life. However, this statement runs with the caveat that all courts, from the highest federal court to the lowliest municipal court, are and should only be considered responsive "referee" entities. It is not the province of courts to decide the deep policy considerations that are often at the center of life issue arguments; that role is left to our legislatures. Or, more well put by Justice Felix Frankfurter in his concurrence in *Dennis v. United States*: "[h]istory teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."[61]

In evaluating the Court's decisions on life issues, it does appear that the Court prefers, as it arguably should, to avoid engaging in policy dilemmas on life issues. Nonetheless, as evidenced in its decisions in *Willis v. Wu, Whitner v. State,* etc., the Court will tackle life issues head on, reaching its conclusions based on prior precedent and a sound recognition of its role when it comes to the policy considerations on life issues.

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