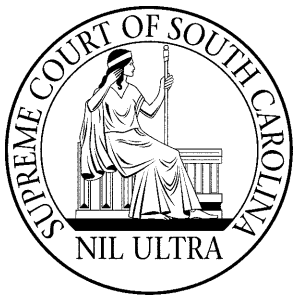

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10

March 11, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

An L. Grosshuesch, Guardian and Conservator of Eleanor A. Breedlove, and An L. Grosshuesch, Guardian and Conservator of Bernard H. Breedlove, Respondents/Appellants,

v.

Lisa Cramer, Nathan Cramer, Lawrence H. Gray, Jr., Duane Marie Gray, and Sweetgrass Land Company, LLC, Defendants,

of whom Lisa Cramer is Appellant/Respondent.

and

Ex Parte: Charles B. Macloskie, Appellant,

In Re: An L. Grosshuesch, Guardian and Conservator of Eleanor A. Breedlove, and An L. Grosshuesch, Guardian and Conservator of Bernard H. Breedlove, Respondents,

v.

Lisa Cramer, Nathan Cramer, Lawrence H. Gray, Jr., Duane Marie Gray, and Sweetgrass Land Company, LLC, Defendants.

and

An L. Grosshuesch, Guardian and Conservator of Eleanor A. Breedlove, and An L. Grosshuesch, Guardian and Conservator of Bernard H. Breedlove, Appellants,

v.

Lisa Cramer, Nathan Cramer, Lawrence H. Gray, Jr., Daune Marie Gray, and Sweetgrass Land Company, LLC, Respondents.

and

Ex Parte: Lionel S. Lofton, Appellant,

In Re: An L. Grosshuesch, Guardian and Conservator of Eleanor A. Breedlove, and An L. Grosshuesch, Guardian and Conservator of Bernard H. Breedlove, Respondents,

v.

Lisa Cramer, Nathan Cramer,
Lawrence H. Gray, Jr., Duane
Marie Gray, and Sweetgrass
Land Company, LLC, Defendants.

Appeals from Beaufort and Charleston Counties
Curtis L. Coltrane, Circuit Court Judge
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26453
Heard January 9, 2008 – Filed March 10, 2008

VACATED IN PART, REVERSED IN PART, DISMISSED IN PART

Lionel S. Lofton and V. Lynn Lofton, both of Lofton & Lofton, of Charleston, and Charles B. Macloskie, of the Macloskie Law Firm, of Beaufort, for Appellant/Respondent Lisa Cramer and for Appellants Lofton and Macloskie.

Richard S. Rosen and Andrew D. Gowdown, both of Rosen, Rosen & Hagood, of Charleston, for Respondents/Appellants.

CHIEF JUSTICE TOAL: These consolidated appeals relate to several discovery orders in a civil action. Bernard and Eleanor Breedlove initiated the underlying lawsuit seeking to set aside several transfers of assets to Lisa and Nathan Cramer on the grounds of fraud and undue influence. The parties contest several issues on appeal, but the foremost is whether the trial

court erred in imposing discovery-related sanctions on Lisa Cramer. The Cramers argue that the trial court should not have imposed sanctions, and the Breedloves argue that the trial court should have imposed more. Additionally, the Cramers' attorneys argue that the trial court erred in requiring them to produce documents and information relating to the location of assets allegedly transferred from the Breedloves, and the Breedloves argue that the trial court erred in issuing a protective order making discovery in the case confidential.

Though these issues are couched as different types of discovery disputes, they deal primarily with the Cramers' invocation of the privilege against self-incrimination found in the Fifth Amendment to the United States Constitution. Because we find that the trial court did not apply the proper standard when judging the Cramers' invocation of the Fifth Amendment, we vacate the trial court's imposition of discovery-related sanctions on Lisa Cramer. Similarly, we find that the trial court erred in ordering the Cramers' attorneys to produce documents and information which relate to their representation of the Cramers. The remaining questions on appeal, specifically, whether the trial court erred in declining to impose additional sanctions on Lisa Cramer and whether the trial court erred in issuing a protective order, are not immediately appealable and are therefore dismissed.

FACTUAL/PROCEDURAL BACKGROUND

The Breedloves are elderly individuals with substantial assets who reside in Hilton Head, South Carolina. In their complaint, the Breedloves alleged that they became acquainted with Lisa Cramer through her employment at the Breedloves' bank, and that after learning of the Breedloves' substantial wealth, the Cramers conspired to develop an enduring relationship with the Breedloves and to exploit that relationship for financial gain. The Breedloves alleged that over time, they transferred several million dollars worth of real estate and liquid assets to the Cramers. During the time of these transfers, the Breedloves were allegedly suffering from some degree of dementia related to their advanced age. The Beaufort County Probate Court appointed An L. Grosshuesch as guardian and conservator for the Breedloves after the Breedloves commenced this lawsuit.

This appeal represents the third time this Court has addressed issues arising out of this litigation. As their first step in defending the lawsuit, the Cramers requested that the trial court stay the suit pending the resolution of the criminal actions filed against them relating to these conveyances. The trial court denied this request, and we dismissed the Cramers' appeal from the denial of the stay on the grounds that the trial court's order was interlocutory, not affecting the merits, and thus, not immediately appealable.

Next, this Court addressed the trial court's denial of the Breedloves' request for a preliminary injunction. The Breedloves sought to prevent the Cramers and others acting on the Cramers' behalf from transferring or otherwise disposing of the assets at issue. In so seeking, the Breedloves filed lis pendens against the subject real estate and sought a preliminary injunction preventing the Cramers from exercising control over some of the accounts and assets in dispute. In seeking the injunction, the specific focus of the Breedloves' concern was a Merrill Lynch account which they alleged initially contained $2 million, but has been almost completely depleted. The trial court denied the Breedloves' request for an injunction, and this Court reversed. *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.E.2d 833 (2005).

The consolidated appeals now at issue deal with several orders related to discovery. Over the course of this litigation, the Breedloves sought extensive discovery relating to the amount of assets the Cramers received from the Breedloves, expenses the Cramers appeared to authorize on behalf of the Breedloves, and the present location of all assets acquired from the Breedloves. When the Breedloves received no response to their discovery requests, they sought and were granted an order compelling Lisa Cramer to respond to discovery.[1]

The Cramers again entered no substantive response to the vast amount of Breedloves' discovery, answering only that any response to discovery

[1] Counsel for Nathan Cramer did not appear at the hearing on the motion to compel. From this point on, the parties appear to have been content to litigate these discovery disputes solely from Lisa Cramer's perspective.

would be deemed a waiver of rights secured by the Fifth Amendment to the United States Constitution and by Article I, Section 12 of the South Carolina Constitution. After receiving what were in their view insufficient responses to their discovery requests, the Breedloves sought an order of contempt and sanctions as to Lisa Cramer. The trial court ordered Lisa Cramer to fully respond to discovery and held her in contempt, but imposed no sanctions. In this order, the trial court additionally prohibited the Breedloves from disseminating any information acquired in discovery to anyone not directly connected with this litigation. The purpose of this protective order, in the trial court's view, was to guard the integrity of the case and to prevent any criminal harm to the Cramers from their discovery responses. Lisa Cramer appealed from her finding of contempt, and the Breedloves cross-appealed the imposition of the protective order.

Although the Cramers' depositions followed this contempt order, the Breedloves' quest for information fared no better. Ultimately, the trial court entertained a second motion for contempt and sanctions arising out of Lisa Cramer's essentially blanket refusal to answer questions in her deposition. The trial court denied this request for contempt and sanctions, and the Breedloves appealed.

Roughly around the same time they served their initial discovery requests, the Breedloves issued subpoenas duces tecum to the Cramers' attorneys. The subpoenas requested that the attorneys produce documents evidencing any fees they had received from the Cramers, withdrawals from the $2 million Merrill Lynch account, and transfers of cash to the Cramers from the Breedloves. The trial court denied the attorneys' requests to quash the subpoenas and ultimately held the attorneys in contempt. Both attorneys appealed.

As a result of the parties' prolific appealing at each stage of litigation, the court of appeals had several appeals related to this litigation pending by early 2007. Specifically, the court of appeals had the appeal and cross-appeal relating to the order holding Lisa Cramer in contempt for her initial discovery responses; the Breedloves' appeal of the order declining to hold Lisa Cramer in contempt for her deposition conduct; and the Cramers' attorneys' appeals

from their contempt orders. This Court issued an order certifying and consolidating all of the pending appeals, and the parties present the following issues for review:

I. Did the trial court err in holding Lisa Cramer in contempt for failing to respond to discovery? (Lisa Cramer's appeal)

II. Did the trial court err in finding the Cramers' attorneys in contempt for failing to comply with the subpoenas duces tecum? (The attorneys' appeals)

III. Did the trial court err in issuing a protective order prohibiting the Breedloves from disseminating any information or discovery responses to anyone not directly connected with this litigation? (the Breedloves' cross-appeal)

IV. Did the trial court err in denying the Breedloves' second request for contempt and sanctions as to Lisa Cramer? (the Breedloves' appeal)

LAW/ANALYSIS

I. The Order of Contempt

Lisa Cramer argues that the trial court erred in holding her in contempt for failing to respond to discovery. We agree.

Both the Fifth Amendment to the United States Constitution and Article I, Section 12 of the South Carolina Constitution declare that no person shall be compelled to be a witness against himself in any criminal case. In interpreting the Fifth Amendment, the privilege against self-incrimination has been explained in practical terms as an assurance that an individual will not be compelled to produce evidence or information which may be used against him in a later criminal proceeding. *Maness v. Meyers*, 419 U.S. 449, 461 (1975). The settled law provides that the privilege extends not only to answers that would themselves support a criminal conviction, but also to

answers furnishing a link in the chain of evidence needed to prosecute an individual. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

That a party has invoked the privilege against self-incrimination, however, does not end the matter. Instead, it is well-settled that an invocation of the privilege is confined to instances where a person has reasonable cause to apprehend danger from his answer. *Id*. Indeed:

> The witness is not exonerated from answering merely because he declares that in doing so he [will] incriminate himself – his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if "it clearly appears to the court that he is mistaken."

Id. (*citing Temple v. Commonwealth*, 1880, 75 Va. 892, 899); *see also First Union Nat'l Bank v. First Citizens Bank & Trust Co. of S.C.*, 346 S.C. 462, 467, 551 S.E.2d 301, 303 (Ct. App. 2001).

The Fourth Circuit has instructed that a court judging the invocation of the privilege against self-incrimination asks first whether the information is incriminating in nature, and second, whether there is a sufficient possibility of criminal prosecution to trigger the privilege. *United States v. Sharp*, 920 F.2d 1167, 1170-71 (4th Cir. 1990). In determining whether the information is incriminating, the *Sharp* court recognized that at least two categories of potentially incriminating questions exist. First, there are questions whose incriminating nature is evident on the question's face in light of the question asked and the surrounding circumstances. *Id*. at 1170. Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof. *Id*. It is with these principles in mind that we turn to an analysis of the trial court's order holding Lisa Cramer in contempt.[2]

[2] As our recitation of the law illustrates, there is a great deal of jurisprudence interpreting the Fifth Amendment's privilege against self-incrimination and setting forth clear guideposts for judging an invocation of the privilege. The

When comparing this analytical rubric to the trial court's order of contempt, it is clear that the order does not apply the correct standard when examining Lisa Cramer's invocation of the constitutional privilege. The trial court opined that the privilege against self-incrimination was completely inapplicable in the instant case for two reasons. First, the trial court noted that the Cramers have maintained that the transfers from the Breedloves were gifts. Second, the trial court emphasized that the Cramers have unequivocally stated that they intend on testifying at their criminal trial. The Breedloves rely heavily on these justifications in their argument before this Court, but although these facts are extremely odd, they are irrelevant to constitutional privilege analysis.

Dealing first with the fact that the Cramers have maintained that the transfers from the Breedloves were gifts, the question when judging the application of the privilege against self-incrimination does not revolve around what defenses a party has asserted in a civil action, but whether there is a reasonable possibility that requiring a party to answer a certain question would provide information that could be used against the party in a criminal proceeding or would lead to the discovery of such information. *Hoffman*, 341 U.S. at 486-87; *Sharp*, 920 F.2d at 1170. The Cramers are entitled to assert that they did not engage in any criminal conduct over the course of their relationship with the Breedloves, and this entitlement applies with equal force in both this action and the pending criminal action. Just as they would not lose the protections against self-incrimination by entering a criminal plea of not-guilty, so too does their assertion in this action that these transactions were arms-length have no impact on the analysis of whether the Cramers have a reasonable fear that their answers provided in discovery might be used against them in a criminal proceeding.

The trial court's speculation about whether the Cramers would testify at their criminal trial suffers from a similarly fatal flaw. We are aware of no

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parties have not offered any arguments as to how the analysis might differ under Article 1, Section 12 of the South Carolina Constitution, so we assume in this case that the analysis under the two provisions is identical.

authority providing that a party waives the application of the privilege against self-incrimination by stating that they ultimately intend to testify at trial. Courts employ a high bar when judging the waiver of constitutional rights. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (noting that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). In this vein, we think that a pronouncement that one intends to waive a constitutional right in the future does not amount to a waiver of that right. Indeed, it stands to reason that if one says he intends to waive a right in the future, he is invoking that right in the present.[3]

What then were the circumstances available for the trial court to consider in making its decision in this case? The record reflects that the trial court possessed the following information: (1) that the Breedloves sued the Cramers seeking to set aside several transfers of assets; (2) that the Breedloves are seeking discovery as to a great deal of information, some of which deals directly with their relationship to the Cramers and their transfers of assets to the Cramers; and (3) that the Cramers have been involved in a criminal proceeding which relates to their receipt of assets from the Breedloves since before the inception of this civil action. Given this information, the second step of the privilege analysis is the easy assessment. It is clear that a criminal prosecution of the Cramers is not an event which might occur sometime in the future – it is a present reality.

The more difficult question, in our opinion, is the examination of the nature of the questions asked in this case. It is arguable, we think, that any discovery directed at transfers of assets from the Breedloves to the Cramers might be incriminating on its face. It would seem that such discovery directly seeks the information and transactions which are at the heart of the pending criminal proceeding involving the Cramers. Accordingly, it would appear probable that the Cramers could have a reasonable fear that their

[3] The case *Raffell v. United States*, 271 U.S. 494 (1926), is not to the contrary. That case deals with the entirely different question of whether inconsistent conduct with respect to the invocation of the Fifth Amendment may be used as impeachment evidence if a party takes the witness stand.

answers to questions focused on this information would ultimately be used against them in the pending criminal proceeding.

But not all of the Breedloves' focus in discovery was so directed. During discovery, the Breedloves sought information related to the Cramers' marriage, their employment history, and other areas which do not implicate the Cramers' relationship with the Breedloves or transfers of asserts over the course of that relationship. Though it is possible that the discovery of information relating to these subjects could implicate the privilege against self-incrimination, that is not the only possibility. Indeed, when judging the invocation of the privilege in response to these and similar questions, it might have been reasonable for the trial court to ask for more information in order to effectively judge whether there was a reasonable possibility that answers to these questions would provide incriminating information. Lisa Cramer offered the trial court nothing more, and for this reason, a passage in *Hoffman* seems to ring true:

> The witness here failed to give the judge any information which would allow the latter to rule intelligently on the claim of privilege for the witness simply refused to say anything and gave no facts to show why he refused to say anything.

341 U.S. at 484.

As this analysis illustrates, the fault for swaying the trial court's attention from the proper standard is shared among the parties. For while we have outlined why the reasons offered by the Breedloves do not measure up, we must also reject at least part of the Cramers' argument relating to the constitutional privilege. The Cramers have maintained that once a witness invokes the privilege against self-incrimination, that invocation is due a significant degree of deference and the court may not inquire further. Of course, the principle of deference to a witness's fear of self-incrimination is included in the recognition that a court may only require a witness to answer a question when "it clearly appears to the court that he is mistaken," and that "if the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be

established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." *Hoffman*, 341 U.S. at 486. But with these principles of deference in mind, courts have nonetheless instructed that the question of application of the privilege is one for the court, and that the guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness's claimed fear of future prosecution. *Sharp*, 920 F.2d at 1171. In this case, the Cramers correctly state that the witness's fear of self-incrimination is due some deference, but they carry this principle too far. The final word on the application of the constitutional privilege is one for the court and the court alone.[4]

As a housekeeping matter, the parties appear to have exhibited a great deal of unnecessary confusion regarding the injunction that this Court previously issued. Specifically, the parties have expressed confusion regarding a footnote in the Court's opinion which provides that "[s]ince possession of the assets is not at issue in either of the Cramer's pending legal matters, we do not view the Fifth Amendment as an impediment to the issuance of a preliminary injunction." *Grosshuesch v. Cramer*, 367 S.C. at 6 n.4, 623 S.E.2d at 835 n.4. The parties have, at times, asserted the position

[4] Though the trial court's protective order regarding discovery is the subject of a separate issue on appeal, we note that the use of protective orders has been widely rejected as a prophylactic measure which cures the compelled disclosure of incriminating information. As this Court and the federal courts have made clear, if the privilege against self-incrimination applies, the government must either be content with having no response to its inquiry, or must grant the witness immunity. *See State v. Thrift*, 312 S.C. 282, 301, 440 S.E.2d 341, 351 (1994) (interpreting S.C. Const. art. I, § 12); *Kastigar v. United States*, 406 U.S. 441 (1972) (addressing the Fifth Amendment). Although this principle is admittedly problematic in the civil context because neither a civil plaintiff nor a judge in a civil action possesses the power to grant a witness immunity, the principle simply establishes that in a civil action, a court may not compel a witness to disclose information to an adverse party *if* the court finds that the privilege against self-incrimination is properly asserted.

that this footnote represents a pronouncement from this Court on the applicability of the Fifth Amendment.

We do not understand the source of the parties' confusion. An injunction is binding upon the parties to an action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order. Rule 65(d), SCRCP. The clear import of the Court's footnote is that because the Cramers do not contest that they possess the property in dispute, there is no reason to doubt that the injunction will be effective. Any attempt to read more into the injunction relies upon verbiage that is not there.[5]

In sum, the tortured procedural history of this case illustrates that debate regarding the application of the constitutional privilege against self-incrimination has fueled nearly every dispute brought to the trial court in this case. The Cramers asked that this action be stayed largely on the basis that litigating the civil proceeding would undermine their privilege against self-incrimination, and they have reiterated this concern in their motion to stay discovery and in response to the motions to compel and for sanctions. It is equally clear, however, that the trial court did not approach the question involving the constitutional privilege against self-incrimination from the proper perspective. For this reason, we must vacate the trial court's order finding Lisa Cramer in contempt. It should not be necessary to reiterate that

[5] Furthermore, although the issue is not raised in this appeal, the parties expressed confusion in the trial court on the issue of posting a bond for the injunction. In our review of the trial court's denial of an injunction, the only issue presented was whether the trial court erred in holding that the Breedloves had an adequate remedy at law to secure the $2 million originally in the Cramers' Merrill Lynch account. We held that attachment was not an adequate remedy at law, and we remanded the matter to the trial court to proceed accordingly. The rule governing the issuance of injunctions controls whether the Breedloves are required to post a bond to secure the injunction in this case, *see* Rule 65(c), SCRCP, and the proposition that this Court somehow suspended the operation of this requirement is wholly inaccurate.

when judging the invocation of the privilege against self-incrimination, the trial court must make a question-specific inquiry, focusing on whether a question is incriminating on its face, whether the question can be shown to be incriminating through further contextual proof, and whether there is a sufficient possibility of criminal prosecution to trigger the privilege.

II. The Attorneys' Appeals

The Cramers' attorneys argue that the trial court erred in finding them in contempt for failing to comply with the Breedloves' subpoenas duces tecum. We agree.[6]

We can resolve this issue rather quickly, because the documents the Breedloves sought through the subpoenas are not properly discoverable through the Cramers' attorneys. Looking first at the court's order to Lionel Lofton, Lisa Cramer's attorney, the order requires Lofton to produce "any and all documents he has in his possession which disclose the location of any funds obtained by [Lisa Cramer] from the Breedloves," and the order further requires Lofton to disclose the amounts of any and all funds currently held in escrow or on deposit by him or his firm. This request is indistinguishable from the discovery the Breedloves sought from the Cramers, and it is clear that Lofton would only have obtained documents relating to the Cramers' finances through his status as Lisa Cramer's attorney. The Breedloves cannot discover documents through the Cramers' attorneys when the compelled disclosure by the Cramers would be protected by the privilege against self-incrimination. Thus, although the Rules of Professional Conduct provide that an attorney may disclose privileged information when ordered by the court, *see* Rule 1.6(b)(7), RPC, Rule 407, SCACR, we find the disclosure ordered here highly improper.

[6] This issue is, of course, presently appealable because the trial court held the Cramers' attorneys in contempt, and we review a trial court's imposition of discovery sanctions under an abuse of discretion standard. *See Ex parte Whetstone*, 289 S.C. 580, 581-81, 347 S.E.2d 881, 881-82 (1986); *Laney v. Hefley*, 262 S.C. 54, 58, 202 S.E.2d 12, 14 (1974).

The order directed to Charles Macloskie, Nathan Cramer's attorney, provides another illustrative point. Specifically, the order professes that the Breedloves are seeking the information described in the subpoenas "in aid of enforcing an injunction issued by [this Court]," and that "without the information, [the Breedloves] cannot locate or trace the assets that are the subject of [this Court's] injunction." This justification is completely at odds with the purpose of discovery and demonstrates a fundamental misunderstanding by the Breedloves of their obligations in connection with this Court's injunction. Discovery is, of course, the process of seeking information from an adverse party to prepare for litigation, and the discovery sought in this case relates largely to the nature of the Breedloves' relationship with the Cramers. The Cramers have refused to respond to this discovery by asserting the constitutional privilege against self-incrimination, and this Court's issuance of an injunction has no impact on this analysis.

If the privilege against self-incrimination protects the Cramers from disclosing the location of their assets to the Breedloves, that is the end of the matter. The Court's issuance of an injunction does not grant the Breedloves a license to use discovery as a tool to ensure that the injunction is being given effect. As a court order, the injunction is binding on the Cramers, their agents and attorneys, and anyone in active concert with the Cramers receiving actual notice of the injunction. Rule 65(d), SCRCP. A party who refuses to abide by an injunction entered by the court would of course be in contempt of court and subject to sanctions, and our jurisprudence clearly establishes that the proper procedure to determine whether a party should be held in contempt is to bring a summons and a rule to show cause. *See Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 267, 442 S.E.2d 611, 617 (1994). Treating the injunction as a back door to allow the discovery of otherwise non-discoverable information gives the privilege against self-incrimination an impermissibly shallow dimension.

Not to be outdone, the Cramers also misunderstand an important aspect of this Court's injunction. Specifically, the Cramers appear to overextend the privilege against self-incrimination and treat it as a limitation on what information a court may ascertain in its own right. Stated differently, the question of what information the Breedloves may not obtain in discovery is

completely separate from what information a court may require to be disclosed, *in camera* if necessary, to ensure that court orders are observed. While the appearance that the Cramers are using money they obtained from the Breedloves to pay their attorneys' fees ought to be of significant concern, and thus, the Breedloves' desire for this information is understandable, this issue should be resolved rather quickly and easily without the involvement of the civil discovery process.

For these reasons, we reverse the trial court's decision finding the Cramers' attorneys in contempt.

III. & IV. The Protective Order & The Order Denying Contempt

The Breedloves argue that the trial court erred in issuing a protective order over discovery in this case and in denying their second request for contempt and sanctions as to Lisa Cramer. Though these issues raise interesting questions, the fact remains that discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right. *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *Wallace v. Interamerican Trust Co.*, 246 S.C. 563, 568-69, 144 S.E.2d 813, 816 (1965).[7]

CONCLUSION

For the foregoing reasons, these appeals are vacated in part, reversed in part, and dismissed in part. Specifically, we vacate the trial court's order finding Lisa Cramer in contempt; we reverse the trial court's finding of

[7] We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal. *See* Rules 205 & 225, SCACR. In the instant case, the trial court's orders dealing with contempt did not run afoul of this proscription, because while the trial court's first order deals with the subject of the Cramers' initial discovery responses, the second order deals with the subject of Lisa Cramer's responses to questions in her deposition.

contempt as to the Cramers' attorneys; and we dismiss the remaining appeals as interlocutory and not immediately appealable.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Thurmond Brooker, Respondent.

Opinion No.26454
Submitted February 4, 2008 – Filed March 10, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Thurmond Brooker, of Florence, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

Respondent filed a summons and complaint on behalf of a plaintiff in a lawsuit, but performed no other work on the case thereafter.

Respondent maintains he did not represent the plaintiff, but filed the summons and complaint on the plaintiff's behalf because she was a friend. However, the plaintiff believed respondent represented her and relied upon him to follow through with the action. When the plaintiff informed respondent she was no longer interested in his services, respondent offered the plaintiff $1,300. Respondent maintains the money was offered to the plaintiff to assist her in hiring a lawyer to represent her in the lawsuit and because he felt bad that she was not satisfied with his assistance in the case.

Respondent failed to respond or otherwise communicate with ODC when ODC notified him of the disciplinary complaint filed by the plaintiff. Respondent eventually responded to ODC, after being sent a letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), and over three months after the deadline set forth in ODC's original request for a response.

Matter B

Respondent was retained to represent two minors in personal injury cases. The mother (Mother) of the minors signed retainer agreements on behalf of the minors, which stated respondent would investigate the matters to determine whether the clients could recover in the matters, but if he determined they could not, he reserved the right to withdraw from representation upon written notification to the clients. Respondent maintains he reviewed the cases and determined they were not legally sufficient for a lawsuit; therefore, he did not file a lawsuit in either case and subsequently closed his file on the cases.

Mother alleges respondent failed to keep her informed of the status of the cases and failed to respond to her requests for information for over one year. Respondent states he does not recall whether he notified Mother of his decision regarding the merits of the cases nor does he recall advising her of his decision to close his file on both cases. Respondent has provided no evidence that he notified Mother in writing of his decision in either case. Respondent's failure to notify the minors and Mother of his decision not to file suit in their cases denied them the right to make an

informed decision regarding the pursuit of their cases because the statute of limitations had expired in both cases by the time Mother learned of respondent's decision.

Matter C

ODC notified respondent, by letter dated February 12, 2007, of a complaint against him, and asked respondent to respond within fifteen days. On March 6, 2007, not having received a response, ODC sent respondent a letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting a response. Respondent failed to respond, and on May 2, 2007, ODC served respondent with a notice of full investigation requesting a written response within thirty days. Respondent's letter of response, dated June 2, 2007, was received by ODC on June 7, 2007, over three months after the deadline in ODC's original request. ODC ultimately determined the allegations in the complaint were without merit.

Law

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information); Rule 1.8(e) (a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.1(b) (a lawyer, in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority); Rule 8.4(a) (it

is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct constitutes grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael R. Batchelor, Appellant.

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26455
Heard January 22, 2008 – Filed March 10, 2008

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for respondent.

JUSTICE MOORE: Appellant Michael Batchelor was convicted of several charges stemming from an automobile collision in which his three minor sons were killed and three other minors were injured. The charges include two counts of felony driving under the influence (felony DUI) causing death, two counts of felony DUI causing great bodily injury, and one count of involuntary manslaughter.[1] We affirm.

FACTS

The facts are undisputed. Appellant's three sons—Raymond Groomes (referred to as "Ashton"), and Brandon and Drew Batchelor—lived with their mother. On July 11, 2002, they were invited along with three friends to appellant's house where appellant supplied them with alcohol. All of the boys were between the ages of thirteen and fifteen.

At some point in the afternoon, appellant and the boys left the house in appellant's pick-up truck to buy more alcohol and look for some marijuana. Appellant was driving. After veering off the side of the road, appellant decided he was too drunk to drive and he wanted Ashton to drive. Ashton, who was fifteen, did not have a driver's license or learner's permit and Ashton's friends had never seen him drive a vehicle. At appellant's insistence, Ashton took the wheel. Shortly thereafter, Ashton swerved off the side of the road and over-corrected, causing the truck to swerve into the oncoming lane and collide head-on with another vehicle. Both vehicles flipped and the truck landed upside-down with Ashton under it.

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[1]Appellant was sentenced to concurrent terms of twenty-five years and fined $25,100 for each felony DUI causing death, and two concurrent terms of fifteen years and a fine of $10,100 for felony DUI causing great bodily injury, these to run consecutive to the twenty-five-year terms. He was also convicted of three counts of unlawful conduct towards a child and given three ten-year terms and three $10,000 fines, and two counts of contributing to the delinquency of a minor for which he received two three-year terms and three $3,000 fines, all concurrent.

Ashton was dead at the scene. A toxicology report indicated Ashton's blood alcohol was .108 at the time of his death. Brandon and Drew died later at the hospital. The other boys and appellant were injured.[2] At the hospital, appellant told the investigating officers that Ashton was driving and that he had given the boys alcohol. Appellant himself smelled strongly of alcohol.

The State proceeded to trial on a theory of accomplice liability. It was undisputed that appellant was not driving at the time of the wreck. After he was found guilty, appellant expressed remorse that he had caused the death of his three children and serious injury to the other boys.

ISSUES

1. Should the indictments for felony DUI have been quashed?

2. Should a directed verdict have been granted?

DISCUSSION

1. Indictments

Appellant claims the four indictments for felony DUI should have been quashed. He contends that because the indictments charged him as a principal rather than as an accomplice, the grand jury was misled regarding the facts of the case.

The regularity of grand jury proceedings is presumed absent clear evidence to the contrary; the burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated. Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005); State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981).

Here, the fact that the indictments presented to the grand jury charged appellant as a principal for felony DUI does not prove the State misinformed the grand jury that appellant was the driver at the time of the wreck. It is

[2]The driver of the other car escaped with only minor injuries.

well-settled that an indictment charging the defendant as a principal will support a conviction based on accomplice liability. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000); State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987); State v. Cox, 258 S.C. 114, 187 S.E.2d 525 (1972); State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971); State v. Hunter, 79 S.C. 73, 60 S.E. 240 (1908). Accordingly, the State may present an indictment charging a defendant as a principal based on information of aiding and abetting the crime charged. There is no evidence the grand jury process was compromised in any way. We find no error.

2. Directed verdict

Appellant's motion for directed verdicts on the four felony DUI charges was denied. Appellant contends this was error because the indictments charged him as a principal and there is no evidence he was the driver.

As noted above, a conviction as an accomplice is valid based on an indictment as a principal. Appellant argues, however, that one who is not the driver cannot be guilty of felony DUI because, as stated in State v. Leonard, *supra*: "Vehicular crimes are unique in that there can ordinarily be only one 'driver' of the vehicle at the time the offense is committed." 292 S.C. at 136, 355 S.E.2d at 272. We find appellant's reliance on Leonard is misplaced.

In Leonard, both defendants were charged with reckless driving. The case involved a factual issue regarding which defendant was actually driving and which defendant was a passenger. We concluded the jury charge was confusing because it did not explain that only one defendant could be found guilty as the driver; the other defendant could be found guilty only on a theory of accomplice liability and accomplice liability was not adequately charged. Leonard therefore supports the conclusion that a vehicular crime is subject to accomplice liability.

Similarly, we have found other vehicular crimes subject to accomplice liability. In State v. Fair, 209 S.C. 439, 40 S.E.2d 634 (1946), the defendant was found guilty of voluntary manslaughter where he was racing another motorist and it was the other motorist who struck and killed the decedent.

We noted that where the defendants agreed to use the vehicle in this manner, "it was of no consequence which particular one was at the wheel." 40 S.E.2d at 636. In State v. Davis, 88 S.C. 229, 70 S.E. 811 (1911), we found that the occupants of a vehicle, all of whom agreed to take the vehicle without the owner's consent, were guilty of reckless driving. *See also* State v. Cox, 258 S.C. 114, 187 S.E.2d 525 (1972) (passenger/owner of vehicle could be guilty as aider and abettor for failure to stop for law enforcement).

In conclusion, we hold felony DUI is subject to accomplice liability based on a factual scenario that includes evidence of aiding and abetting as in this case. Appellant's motion for directed verdicts on the ground there was no evidence he was the driver was properly denied.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Adrian Edward Cooper, Respondent.

Opinion No. 26456
Submitted February 4, 2008 – Filed March 10, 2008

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel and Barbara M. Seymour, Assistant Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Adrian Edward Cooper, of Rock Hill, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to any sanction set forth in Rule 7(b), RLDE. Respondent requests that any suspension or disbarment be made retroactive to the date of interim suspension.[1] We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to November 13, 2007. The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension by order of this Court dated November 13, 2007. In the Matter of Cooper, 375 S.C. 486, 654 S.E.2d 269 (2007).

Facts

Divorce Matter

Respondent represented a client (Wife) in a divorce matter filed in 1999. Respondent was directed by the trial judge to draft a proposed qualified domestic relations order (QDRO) regarding the court-ordered share of Wife's draw from the retirement account of her husband (Husband). The order was signed by the judge and opposing counsel and filed in 2000. Respondent furnished a copy of the order to Husband's retirement plan administrator. The administrator notified respondent by letter that the terms of the order allowed payment to Wife only if Husband terminated his employment, but had no provision for his retirement or death. The administrator also asked respondent if the terms of the order were intended to limit Wife's payout. Respondent did not respond to the letter and took no action to correct the order.

In 2005, respondent received notice that Husband had retired. At that time, respondent amended the QDRO and submitted it to opposing counsel. When respondent did not receive the signed order back from opposing counsel, he forged the signatures of opposing counsel and the judge and filed the order with the clerk of court in April 2006. The forged order was submitted to Husband's retirement plan administrator in May 2006. Husband became aware of the order and contacted counsel. Husband's counsel contacted respondent and submitted a consent order vacating the amended QDRO. The judge issued an order finding the QDRO was a forgery and vacating it. Ultimately, a duly executed amended QDRO was filed and accepted and Wife is now receiving the benefits to which she is entitled.

Real Estate Matter

In November 2006, respondent was paid $250 to conduct a title search and prepare a deed for property a client intended to purchase from a seller residing out-of-state. The client delivered $16,500 to respondent to

hold in escrow for the seller until the deed was delivered. The deed was not delivered until June 2007 because of delays not attributable to respondent.

Between November 2006 and June 2007, respondent used portions of the funds to be held in trust for office expenses. By the time the seller delivered the deed in June 2007, respondent had misappropriated the full amount of the funds. Respondent sold property he owned to replenish the funds. He delivered a trust account check to the seller with a request that the seller not negotiate it immediately based on respondent's expectation that the proceeds of his own sale would be available in the trust account to cover the check. The seller negotiated the check upon receipt and it was returned for insufficient funds. The seller contacted respondent, who requested that the seller present the check to the bank a second time. By that time, respondent had replenished the funds in the trust account with his own money and the check to the seller was paid.

Failure to Cooperate

In response to the complaint in this matter, respondent initially denied any wrongdoing. In connection with the investigation into the allegations against respondent, ODC issued a subpoena for respondent's bank and other financial records maintained pursuant to Rule 417, SCACR, for a period of one year preceding delivery of the check written on insufficient funds. Respondent filed a motion to quash the subpoena on grounds it was overbroad and invasive. The Investigative Panel denied the motion and issued its order requiring respondent to comply with the subpoena. Respondent attempted to appeal the order. The Chair of the Commission on Lawyer Conduct issued a letter to respondent explaining that, pursuant to Rule 15(e), RLDE, Rule 413, SCACR, the order was not appealable and that he was required to comply with the subpoena immediately or face contempt charges and possibly interim suspension. Respondent did not comply with the subpoena. This Court then issued its order placing respondent on interim suspension and also issued a rule to show cause. Respondent then produced his records, which show misappropriation of the escrowed funds.

Law

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.15 (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 3.3 (a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer); Rule 4.1 (in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 8.1(b) (a lawyer, in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct constitutes grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for lawyer to violate the Rules of Professional Conduct); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice, bring the courts or legal profession into disrepute, or demonstrating an unfitness to practice law); and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state retroactive to November 13, 2007. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In re: Hospital Pricing Litigation.

Teresa Lynn King, Respondent,

v.

AnMed Health, Appellant.

David Blair and all others similarly situated, Respondents,

v.

Medical University Hospital Authority, Appellant.

Kathy and Franklin Kinard and all others similarly situated, Respondents,

v.

Medical University Hospital Authority, Appellant.

David Blair and all others similarly situated, Respondents,

v.

CareAlliance Health Services, Inc., d/b/a Roper Hospital, Inc., and Bon Secours St. Francis Xavier Hospital, Inc., Appellant.

Deborah Wilson and all others similarly situated, Respondents,

v.

CareAlliance Health Services, Inc., d/b/a Roper Hospital, Inc., and Bon Secours St. Francis Xavier Hospital, Inc., Appellant.

Greenville Hospital System, Appellant,

v.

Kellie Jean Paulson and Michael A. Paulson, Respondents.

William S. Robertson, as Personal Representative for the Estate of Mildred Driggers Robertson, Deceased, and all others similarly situated, Respondents,

v.

Greenville Hospital System, Appellant.

Joshua L. Boyd, Respondent,

v.

Self Regional Healthcare, Appellant.

Alexis Sams and all others similarly situated, Respondents,

v.

Palmetto Health Alliance d/b/a Palmetto Richland & Palmetto Baptist, Appellants.

Frances Bonetto, Respondent,

v.

Palmetto Health Alliance d/b/a Palmetto Richland & Palmetto Baptist, Appellants.

Kathy Green and all those similarly situated, Respondents,

v.

Sisters of Charity Providence Hospitals, Appellant.

Appeal from Fairfield County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26457
Heard January 10, 2008 – Filed March 10, 2008

REVERSED

Manton M. Grier and R. David Proffitt, both of Haynsworth Sinkler Boyd, of Columbia, and Ellis M. Johnson, II, H. Sam Mabry, III and Courtney C. Atkinson, all of Haynsworth Sinkler Boyd, of Greenville, for Appellant Palmetto Health Alliance d/b/a/ Palmetto Richland & Palmetto Baptist.

Marguerite S. Willis, Nikole Setzler Mergo, and Daniel C. Leonardi, all of Nexsen Pruet, of Columbia, for Appellant Sisters of Charity Providence Hospitals.

Thomas S. White and Lydia Blessing Applegate, both of Haynsworth Sinkler Boyd, of Charleston, for Appellant CareAlliance Health Services Corporation d/b/a Roper St. Francis Healthcare, Roper Hospital, Bon Secours St. Francis Hospital.

Robert L. Widener, Celeste T. Jones, Jane W. Trinkley, and Kelly M. Jolley, all of McNair Law Firm, of Columbia, for Appellant Medical University Hospital Authority.

Wm. Douglas Gray, of McNair Law Firm, of Anderson, for Appellant AnMed Health.

H. Sam Mabry, III and Charles M. Sprinkle III, both of Haynsworth Sinkler Boyd, of Greenville, for Appellant The Greenville Hospital System.

Stephen D. Baggett and Steven M. Pruitt, both of McDonald Patrick Baggett Poston & Hemphill, of Greenwood, for Appellant Self Regional Healthcare.

A. Camden Lewis, Ariail E. King, and Peter D. Protopapas, all of Lewis & Babcock, of Columbia, Richard A. Harpootlian, of Columbia, Gedney M. Howe III, of Charleston, and Robert D. Dodson, of Columbia, and Michael E. Spears, of Spartanburg, for Respondents.

ACTING CHIEF JUSTICE MOORE: In this case, Appellants appeal the circuit court's order granting partial summary judgment in favor of Respondents regarding the meaning of a statute that requires hospitals to offer certain discounts to an insurer who provides a specific type of health insurance contract. The circuit court held that Appellants violated the statute. We disagree and reverse.

FACTUAL/PROCEDURAL BACKGROUND

Respondents[1] (hereinafter "Patients") filed an action against Appellants (hereinafter "Hospitals") for failing to comply with S.C. Code Ann. § 38-71-120 (2002) (repealed by Act No. 332, § 31, 2006 S.C. Acts 2624, 2661) (hereinafter "the Discount Statute"), which provides:

> Whenever an insurer contracts with a hospital to provide full hospital service and medical care service contracts for its policy owners in the same manner as described in Chapters 13 and 14 of Title 37 of the 1962 Code and arranges with the hospital for payment of claims under procedures described in Chapters 13 and 14 of Title 37 of the 1962 Code, the insurer is entitled to the same discounts allowed to any insurer. Any person making full payment for hospital services within seven days from receipt of a bill for such services shall be entitled to the same discount allowed to any insurer.

[1] The class of Respondents consists of insured and uninsured Patients, whose claims we address separately. Additionally, references to "patients" or "hospitals" do not refer to either the Respondents or Appellants in this action. Instead, such references apply just to hospitals or patients in general.

Hospitals currently bill their patients the same amount for identical procedures based on a Charge Master,[2] but Hospitals give different discounts on these procedures depending on Hospitals' contracts with a patient's insurance company. Patients filed the instant action against Hospitals, arguing that these current billing practices violated the Discount Statute. In response, Hospitals contended that the Discount Statute was an outdated statute that had no application because insurance companies do not currently offer "full hospital service and medical care service contracts" to which the Discount Statute applies and that no insurer contracts with Hospitals "in the same manner as described in Chapters 13 and 14 of Title 37 of the 1962 Code." The parties filed cross motions for summary judgment, and after a hearing, the circuit court granted partial summary judgment in favor of Patients.

The circuit court first noted that the manner in which insurance companies provide health insurance to their policyholders has changed since the Discount Statute was first enacted. However, the circuit court rejected Hospitals' argument that full service contracts no longer exist. Rather, the circuit court held that all of the contracts involved in this litigation were service contracts, as opposed to indemnity contracts, and thus, under a progressive reading of the statute, the Discount Statute applied to the current contracts utilized by Hospitals. Additionally, the circuit court held that the requirement that an insurer must contract "in the same manner as described in Chapters 13 and 14 of Title 37 of the South Carolina Code" simply meant that the insurer must contract directly with Hospitals and determined that insurers currently contract with Hospitals in this same manner. Accordingly, the circuit court ruled that the Discount Statute required the Hospitals to offer uniform discounts to all insured Patients. Additionally, the circuit court held that the second sentence of the Discount Statute required Hospitals to provide

[2] A Charge Master is a list of each medical procedure or service and its cost that a hospital provides.

uninsured Patients with a bill reflecting the lowest discount offered to any insurer. Because Hospitals admitted that they failed to do so, the circuit court ruled that Hospitals violated the Discount Statute.[3]

Hospitals appealed and we certified this case pursuant to 204(b), SCACR. Hospitals present the following issue for review:

> Is the circuit court's interpretation of the Discount Statute erroneous as a matter of law because it is against the legislative intent and ignores the plain meaning of the terms?[4]

STANDARD OF REVIEW

The issue of interpretation of a statute is a question of law for the court. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. *New York Times Co. v. Spartanburg County Sch. Dist. No. 7*, 374 S.C. 307, 309, 649 S.E.2d 28, 29 (2007).

LAW/ANALYSIS

I. Insured Patients

Hospitals argue that the circuit court erred in holding that the Discount Statute mandates that Hospitals provide uniform discounts to all insured

[3] Following the circuit court's order, the legislature repealed the Discount Statute.

[4] Although Hospitals present several other issues for review, we find it unnecessary to address those issues based on our holding on this central issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that the Court need not rule on remaining issues when the disposition of a prior issue is dispositive).

Patients. Hospitals maintain that the legislature intended for the Discount Statute to apply to "full hospital service and medical care service contracts," which no longer exist, and that no insurer contracts "in the same manner as described in Chapters 13 and 14 of Title 37, Code of Laws of South Carolina 1962." We agree.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The history of the period in which the statute was passed may be considered in interpreting the statute. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519 n.6, 642 S.E.2d 751 n.6 (2007).

In 1946, Blue Cross and Blue Shield ("BCBS") received a charter from the State pursuant Act No. 417, 1946 S.C. Acts 1304, later codified as Chapters 13 and 14, Title 37, of the 1962 Code. This charter enabled BCBS to be organized as a nonprofit corporation and this statutory framework authorized BCBS to only sell "service contracts"[5] for hospital and medical care services. Under these contracts, the hospital agreed to provide hospital services to all BCBS subscribers. By statute, BCBS was required to pay the hospital directly, and individual policyholders owed no financial responsibility to the hospital. Medical care service contracts were similar agreements with physicians which enabled physicians to provide medical care services to all BCBS subscribers. In contrast, mutual insurance companies, which were regulated by the Department of Insurance, could only sell "indemnity contracts" and were prohibited from selling service benefit contracts.

[5] These types of contracts are referred to as "service contracts," "full service contracts," and "service benefit contracts."

In 1967, the General Assembly appointed a committee ("S-3 Committee") to examine South Carolina's health insurance laws. The S-3 Committee determined that BCBS could not profitably operate within the confines of Chapters 13 and 14 due to the advancement in healthcare, and that BCBS had already been acting outside the scope of its statutory charter by selling indemnity contracts. The S-3 Committee also determined that BCBS was able to negotiate with the hospitals and doctors for discounts while the mutual insurance companies could not so negotiate. Because BCBS received discounts which were unavailable to the mutual insurance companies and because BCBS was a tax-exempt entity, the S-3 Committee found that BCBS attained an unfair advantage over mutual insurance companies. Accordingly, the S-3 Committee recommended, among other things, that the legislature enact legislation eliminating the distinction between Chapters 13 and 14 nonprofit insurance companies and mutual insurance companies by allowing both to sell service contracts and indemnity contracts. Additionally, the S-3 Committee recommended that hospitals be required to offer all insurance companies uniform discounts.

In response to the S-3 Committee's study, the Chief Insurance Commissioner submitted proposed legislation regarding uniform discounts. The Commissioner's proposed legislation would have simply made it unlawful for any health care facility that contracted with any insurer "to discriminate by offering or granting discounts to such service or insurance organization" and would have required any discount to be uniform to all patients.

In 1968, as a result of the S-3 Committee's recommendations, the legislature passed the predecessor to the current Discount Statute which provided:

> Whenever any insurance company, including corporations organized under Chapter 13 and 14 of Title 37, Code of Laws of South Carolina 1962, contracts with a hospital to provide full hospital service and medical care service contracts for its policy owners in the same or a comparable manner as such coverage is

> provided by corporations organized under Chapters 13 and 14 of Title 37 and such insurers arrange with the hospital for payment of claims under procedures used by corporations under Chapters 13 and 14 of Title 37, such insurers shall be entitled to the same discount allowed to any insurer and any person making full payment for hospital services within seven days from receipt of a bill for such services shall be entitled to the same discount allowed to any insurer.

Act No. 1096, § 1, 1968 S.C. Acts 2582.

Additionally, and in accordance with the S-3 Committee's recommendation, the legislature repealed Chapters 13 and 14. This repeal transformed BCBS from a nonprofit corporation into a mutual insurance company. The legislature also amended the code to allow both nonprofit organizations and mutual insurance companies to issue service contracts and indemnity contracts. In 1987, the legislature amended the Discount Statute to its current version.

Hospitals argue that, considering the statute's text and the history in which it was passed, the Discount Statute is an outdated statute that has no application to today's health insurance contracts. Specifically, Hospitals contend that the legislature intended for the Discount Statute to strictly apply to service contracts as recognized in 1967, which are no longer used, and to insurers that contract "in the same manner as described in Chapters 13 and 14 of Title 37 of the 1962 Code." Patients, on the other hand, argue that the circuit court correctly interpreted the Discount Statute to apply to current health insurance contracts and that such interpretation is consistent with the legislative intent.

We hold that the circuit court erroneously construed the Discount Statute to apply to the current health insurance contracts for several reasons. Foremost, and contrary to the circuit court's broad interpretation, service contracts are a specific and narrow group of prepaid health insurance contracts that stand in sharp contrast to health insurance contracts currently employed or utilized by Patients' insurers. By statute, service contracts

required an insurer to pay the hospital directly and the insurer was further prohibited from charging the subscriber a co-payment or deductible or holding a policyholder financially responsible for any covered service. *See* S.C. Code of Laws § 37-1063 (1962) (providing that "[a]ll contracts . . . shall be a direct obligation of the corporation to pay the hospital in cash for authorized services rendered a subscriber; but the subscriber shall be personally liable for any hospital service not paid by the corporation to the hospital"); and S.C. Code of Laws § 37-1054 (1962) (providing that the purpose of Chapter 13 nonprofit corporations shall be to furnish hospital services "in consideration of the payment by such subscribers of a *definite sum* for the hospital care so contracted to be furnished") (emphasis added).

The circuit court's categorization of current health insurance contracts as "service contracts" simply because a subscriber receives services from the hospital constitutes manifest error when the statute's terms are given their plain meaning.[6] This generalization ignores the plain meaning of the term "service contract" and impermissibly expands the scope of the Discount Statute. *Brown v. S.C. Dept. of Health and Envtl. Control*, 348 S.C. 507, 515, 560, S.E.2d 410, 414 (2002) (holding that where the terms of the statute are clear, the court must apply those terms according to their literal meaning, and an appellate court may not resort to a forced interpretation in an attempt to

[6] Additionally, we note that the circuit court's narrow definition of an indemnity contract as *exclusively* one in which the subscriber pays the hospital and the insurer then provides a cash reimbursement to the subscriber is not consistent with South Carolina law. *See* S.C. Code Ann. § 38-1-20(19) (2006) (defining insurance as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies"). *See also Joseph v. Sears Roebuck & Co.*, 224 S.C. 105, 113-14, 77 S.E.2d 583, 587 (1953) (noting that an insurance contract is likewise a contract of indemnity where "[t]he insurer undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event"); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) (recognizing that a "familiar example of *contractual* indemnity is the third party liability insurance policy" (emphasis supplied)).

expand or limit the scope of a statute). Thus, because the Discount Statute applies to service contracts and no insurer offers such contracts today, Patients failed to show that the Discount Statute applies.

Along the same lines, we also find that the circuit court erred in holding that the language "in the same manner as described in Chapters 13 and 14 of Title 37 of the South Carolina Code" simply meant that the insurer must contract directly with Hospitals. The language of the Discount Statute clearly requires that in order to qualify for the discount, the insurer must adhere to particular statutory requirements as set forth in Chapters 13 and 14, a statutory scheme to which Patients' insurers do not follow. Accordingly, because no insurer contracts with Hospitals in this same manner, the Discount Statute is not applicable to Patients. *See The Honorable Francis X. Archibald*, 1984 WL 249791 (1984) (noting that "in order to get the discount the insurer would have to . . . make payments the same way that nonprofit hospital and medical service corporations do" and that "[a]*n insurer which does business any other way is ineligible*") (emphasis added).

Patients argue that the Court should broadly interpret the Discount Statute to apply to current health insurance contracts because current contracts share similarities with service contracts. While Patients may be factually correct in that similarities exist, we believe that the text of the Discount Statute and its legislative history require a strict interpretation. First, the legislature rejected the Insurance Commissioner's proposed legislation which would have mandated broad, uniform discounts to all contracts for health insurance. Second, the legislature amended the Discount Statute in 1987 by deleting the "or comparable" language, and thus requiring insurers to contract and arrange for payment "in the same manner" as described in Chapters 13 and 14. We believe that this change indicates that the legislature intended to focus on the precise requirements of Chapters 13 and 14. This further illustrates that an insurer is only entitled to the same discount under the specific conditions set forth in Chapters 13 and 14, which are no longer used. *See Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (holding that the Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something). Finally, the fact that the legislature repealed the

Discount Statute immediately after the circuit court issued its order, in our view, also indicates that the legislature did not intend for the Discount Statute to apply to current health insurance contracts.

For the foregoing reasons, we hold that the circuit court erred in broadly interpreting the Discount Statute to apply to current health insurance contracts.

II. Uninsured Patients

The second sentence of the Discount Statute provides: "Any person making full payment for hospital services within seven days from receipt of a bill for such services shall be entitled to the same discount allowed to any insurer." S.C. Code Ann. § 38-71-120. Hospitals argue that the Discount Statute does not apply to uninsured Patients' claims because the second sentence of the statute must be read in conjunction with the first sentence, which is outdated and no longer applicable. We agree.

"The well-settled rule in South Carolina is that, where possible, all provisions of a statute must be given full force and effect." *Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992). However, the primary rule of statutory construction is to ascertain and give effect to the intent of the legislature, and in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996).

We hold that the two sentences in the Discount Statute may not be read independently, but must be read in conjunction with one another in order to ascertain the legislative intent. Doing so leads to the interpretation that an uninsured Patient is entitled to the same discount afforded an insurer who qualifies for the discount under the first sentence of the Discount Statute. In other words, an uninsured Patient is entitled to the same discount that an insurer who contracts with a hospital to provide "full hospital service and medical care service . . . in the same manner" as described in Chapters 13 and

14. However, because service contracts are no longer in existence and insurers do not contract in the same manner as Chapters 13 and 14 corporations, we hold that there is no "same discount" available to uninsured Patients. The second sentence of the statute is not meaningless, but rather, the statute as a whole is simply not relevant because the contracts described therein are not used in the current health care industry.

Accordingly, we hold that the circuit court erred in holding that the Discount Statute applied to uninsured Patients.

CONCLUSION

For the foregoing reasons, we hold the circuit court erred in interpreting the Discount Statute, and therefore, we reverse the circuit court's grant of partial summary judgment to Patients.

WALLER, BEATTY, JJ., and Acting Justices James W. Johnson, Jr. and Edward B. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patrick Delvon Harris, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

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

Opinion No. 26458
Submitted January 23, 2008 – Filed March 10, 2008

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Robert L. Brown, all of Columbia, for Petitioner.

Melisa White Gay, of Mt. Pleasant, for Respondent.

JUSTICE BEATTY: In this post-conviction relief (PCR) case, the Court granted the State's petition for a writ of certiorari to review

the PCR judge's decision granting relief with respect to Patrick Delvon Harris's conviction for armed robbery and sentence of imprisonment for life without parole (LWOP). We reverse.

FACTS

At approximately 12:00 a.m. on March 26, 1998, Jessie Brown and Kevin Outen, employees with Park Place Video in Columbia, observed an African-American male walk through the video poker establishment and leave after staying only a few minutes. Both employees believed the man was "scoping out" the place.

According to Brown, the same man returned at 2:00 a.m. At that time, Outen was on the phone with the store manager. Outen "buzzed in" the man unaware that he was accompanied by two masked men. As the men "rushed" in, one of the masked men pointed a gun at Outen and ordered him to hang up the phone and get on the floor. Outen complied but left the phone on the counter so that the manager could hear what was transpiring in the store. The other masked man ordered Brown at gunpoint to show him where the store kept the money. The man then took the money and handed it to one of his accomplices. Outen was then led by one of the masked men to a back room where two customers had been playing video poker. After hearing the commotion, the customers hid in the room and locked the door. The masked man kicked open the door and ordered Outen and the two customers at gunpoint to get on the ground and remain in the room. While they were in the room, the three captives heard several gunshots before the robbers exited the store. Shortly after the gunshots ended, one of the customers heard a car drive off.

According to Brown, the men "tore the place up" and then fired several gunshots before leaving. Brown identified the man that accosted him as the last man to leave the premises. He described this man as wearing a mask, a dark brown leather coat, and black leather pants.

When Brown emerged from one of the back rooms, deputies with the Richland County Sheriff's Department were already on the scene having been summoned by a 911 call placed by the store manager who heard the commotion while speaking with Outen on the telephone.

Deputies Ray Livingston and Jason Christophel, who were separately patrolling the Parklane Road area, responded to the call within less than a minute. When they arrived, they observed a masked man wearing black pants and a dark leather jacket exit the store and then flee the scene. Deputy Christophel pursued the suspect on foot while Deputy Livingston attempted to apprehend the suspect by driving around the adjacent area. Ultimately, Deputy Christophel apprehended and arrested the suspect within a few minutes. According to Deputies Christophel and Livingston, the suspect, who was identified as Harris, said "You got me. I did it. You got me" as they were arresting him. The deputies then transported Harris back to the scene where they retrieved the mask that he had discarded as he exited the store. At the store, Harris told the officers that the other men had absconded in a burgundy-colored Thunderbird and gave the license plate number.

The deputies then transported Harris to the Richland County Sheriff's Department where he was interviewed by Investigators Eric Barnes and Stephen Curtis. According to Barnes and Curtis, Harris gave an oral statement in which he admitted his involvement in the armed robbery but declined to provide additional details. Eventually, Harris identified his accomplices as Stuart Young and Walter Lewis. The investigators also questioned Brown, Outen, the store manager, and the two customers regarding their account of the robbery.

With this information, the investigators compiled a photographic lineup and presented it to Outen. Outen was able to identify Stuart Young as the robber who did not wear a mask. The next day, the investigators arrested Young after they apprehended him while he was driving Harris's Thunderbird. Young gave a written statement to the investigators in which he admitted his involvement in the robbery and implicated Harris and Lewis. Lewis, who left the state after the

robbery, was ultimately taken into custody after he was arrested in Virginia on unrelated federal charges.

On March 15, 1999, Harris was tried for armed robbery before Circuit Court Judge John Breeden. Because the jury could not reach a verdict, this trial ended in a mistrial. Harris was retried on March 30, 1999.[1] At the conclusion of the second trial before Circuit Court Judge James C. Williams, Jr., Harris was convicted of armed robbery and sentenced to life imprisonment without parole pursuant to section 17-25-45 of the South Carolina Code due to his nine prior convictions for armed robbery.[2] On direct appeal, this Court affirmed Harris's conviction and sentence in State v. Harris, Op. No. 2001-MO-021 (S.C. Sup. Ct. filed Mar. 28, 2001).

Subsequently, Harris filed an application for post-conviction relief, alleging he was being held unlawfully due to: ineffective assistance of trial counsel; lack of subject matter jurisdiction; a sentence which violated ex post facto laws; and a sentence which violated Article XII, § 2 of the South Carolina Constitution.

Circuit Court Judge G. Thomas Cooper, Jr., held a hearing on Harris's petition. At the hearing, Harris's PCR counsel contended trial counsel was ineffective in that he failed to: (1) procure a copy of the trial transcript from Harris's first trial or move for a continuance until such transcript could be obtained; (2) have Harris served with sufficient legal notice of the State's intention to seek LWOP; and (3) adequately consult with Harris prior to the two trials. Additionally, PCR counsel alleged that appellate counsel was ineffective for failing to brief

[1] At the beginning of this trial, Harris moved to have his trial counsel relieved. Harris claimed to have "conflicts" with counsel and was concerned about his representation given he was facing a life sentence.

[2] Section 17-25-45 permits the State to seek a sentence of life without the possibility of parole if the person has one or more prior convictions for a "most serious offense," which includes the offense of armed robbery. S.C. Code Ann. § 17-25-45(A)(1), (C)(1) (2003 & Supp. 2007).

Harris's motion to relieve trial counsel. In support of these allegations, PCR counsel called Harris and his trial counsel, James Mann, as witnesses.

After the hearing, Judge Cooper issued an order granting Harris's application for post-conviction relief. In reaching this decision, Judge Cooper found trial counsel was ineffective and Harris was prejudiced by counsel's failure to procure a copy of the first trial transcript. Because there were "obvious inconsistencies in crucial testimony," Judge Cooper believed trial counsel should have obtained the transcript to prove these "substantial differences." Secondly, Judge Cooper found that counsel's pre-trial consultation with Harris was inadequate given the State was seeking a sentence of LWOP. Finally, Judge Cooper concluded Harris's LWOP sentence was void because there was no evidence that Harris had been served with written notice of the State's intent to seek a sentence of LWOP as mandated by the terms of section 17-25-45(H).

This Court granted the State's petition for a writ of certiorari to review the PCR judge's decision.

DISCUSSION

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been

different. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard, 372 S.C. at 331, 642 S.E.2d at 596. "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Id. (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." Id. This Court will reverse the PCR court's decision when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004).

I.

The State contends the PCR judge erred in finding trial counsel was ineffective in failing to consult with Harris prior to both trials. We agree with the State's contention.

In granting Harris relief on this ground, the PCR judge found Harris's allegations that his meetings with counsel were "limited in number and duration" and that he never received a copy of the discovery materials were "mainly unrefuted by trial counsel." Specifically, the judge noted that trial counsel did not know exactly how many times he had met with Harris to prepare for trial or whether he had provided Harris with the discovery materials. The PCR judge also found significant the fact that counsel did not produce any time records to document his preparation with Harris. The PCR judge stated that "[b]ased upon the lack of evidence to the contrary, the Court would have to conclude that trial counsel's preparation with his client in a case involving life without parole was inadequate and constitutes ineffective assistance of counsel."

At the PCR hearing, Harris testified he met with trial counsel two or three times prior to the first trial. He also admitted that trial counsel reviewed the discovery materials with him for approximately thirty minutes during his first visit. Harris, however, stated counsel never gave him a copy of these materials. Harris also claimed he did not meet with counsel during the ten days between the mistrial and the second trial and he had no opportunity to discuss trial strategy with counsel prior to the second trial.

In contrast, trial counsel testified he was retained by Harris's family and began preparing for the case in late December 1998 after he mailed a Rule 5 motion to the solicitor's office. After he received the discovery materials, counsel "essentially treated [Harris's mandatory life case] like . . . the death penalty appointments [he] had in the past, which is that [he] just put everything else down." Counsel could not recall how many times he met with Harris prior to the first trial; however, he stated "there's no question in my mind that I had completely mastered the defense" and "was prepared on what we had to do on [Harris's] part." Counsel also stated that he went over all the discovery materials with Harris prior to trial. Although counsel could not remember whether he left a copy of the discovery materials with Harris, he testified his routine practice was to leave a copy with his client.

In terms of preparation for the second trial, counsel admitted that he did not meet with Harris between the two trials. However, he testified he met with the solicitor's office at least three times in an attempt to negotiate a plea agreement for Harris. Counsel also stated that he did not try another case in between the two trials and believed the facts of the case were fresh on his mind during the second trial. He also noted there were no additions to the discovery materials between the first and second trials.

We find the PCR judge's conclusion that trial counsel's preparation was inadequate is not supported by the evidence in the record. Notably, counsel testified he had been practicing law for approximately thirty years and that half of his practice involved

criminal cases. Presumably, "counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007).

Additionally, we believe trial counsel's testimony refutes Harris's allegations and directly contradicts the PCR judge's finding. See Scott v. State, 334 S.C. 248, 252, 513 S.E.2d 100, 102 (1999) (stating "an appellate court will not affirm the decision when it is not supported by any probative evidence"). First, there is no question that counsel met with Harris on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation. See Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (recognizing that brevity of time spent in consultation with defendant, without more, did not establish that trial counsel was ineffective).

Furthermore, Harris did not offer any evidence or argument as to how counsel's alleged lack of preparation prejudiced him. Therefore, it is merely speculative that counsel's alleged deficient performance was prejudicial to Harris. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (noting mere speculation and conjecture on the part of Respondent is insufficient to substantiate allegation that counsel's deficient performance was prejudicial to respondent).

Finally, the PCR judge failed to make a finding regarding how the outcome of the trial would have been different had counsel spent more time with Harris or given him a copy of the discovery materials. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (finding PCR judge erred in finding counsel ineffective in preparing respondent's case where respondent failed to show how his counsel's lack of preparation prejudiced him given respondent did not "present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial"); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (holding record did not support PCR judge's conclusion that counsel's deficient performance was prejudicial to respondent given respondent did not show how additional

preparation would have resulted in a different outcome); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997) (finding applicant was not entitled to post-conviction relief where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial). Accordingly, we hold the PCR judge erred in finding that counsel's preparation was inadequate and constituted a ground for granting Harris post-conviction relief.

II.

The State argues the PCR judge erred in finding trial counsel was ineffective in failing to obtain a transcript from Harris's first trial in order to impeach witnesses during the second trial. We agree.

Because trial counsel did not obtain the transcript, the PCR judge found counsel could not effectively present Harris's defense at the second trial. In the judge's view, having a copy of the first trial transcript was critical to Harris's defense given: the first case ended in a mistrial; there was not overwhelming evidence of guilt; and there were discrepancies in several witnesses' testimonies presented at the first and second trials.

For several reasons, we conclude the PCR judge erred in granting Harris relief on this ground. As an initial matter, Harris never presented a copy of the transcript at the PCR hearing. Although the audiotapes from the first trial had been destroyed by the time of the hearing, Harris, on at least two occasions, wrote to the Richland County Clerk of Court approximately one month after his second trial requesting a transcript from each trial. Additionally, we believe Harris's PCR counsel, who was appointed within three years of the mistrial, could have requested the transcript before the audiotapes were destroyed in accordance with the version of Rule 607(i), SCACR, which was in effect at the time of the PCR hearing. See Rule 607(i), SCACR ("[A] court reporter shall retain the primary and backup tapes of a proceeding for a period of at least three years (3) after the date of

the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period.").[3]

Because it was incumbent upon Harris to provide the PCR judge with a copy of the transcript in order to show that he was prejudiced by its absence at the second trial, Harris did not meet his burden to prove that trial counsel was deficient and that the result of his trial would have been different but for this alleged deficiency. It was merely speculative that the transcript would have aided in his defense. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding that where contents of challenged documents were not presented at the PCR hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense); cf. Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.").

Even if Harris met his burden to show that counsel was deficient in failing to obtain the transcript, Harris did not prove this alleged deficiency prejudiced his defense. First, trial counsel testified at the PCR hearing that in preparing for the second trial he concentrated on the notes he had from every witness that testified at the first trial, the notes of his opening statement and closing argument, as well as his notes from his cross-examinations. Because he did not try another case in between Harris's two trials, counsel believed the events of the first trial were fresh in his mind during the second trial. Additionally, counsel explained he did not order the first trial transcript because he

[3] The current version of Rule 607(i) requires court reporters to retain their tapes for a period of at least five years.

did not believe having the transcript would be important in terms of cross-examining the State's witnesses.

In terms of specific testimony, counsel believed the only critical difference in testimony between the two trials was that of Investigator Barnes. Counsel explained that during the first trial, in an in camera hearing, Investigator Barnes was uncertain whether Harris admitted his involvement at the time he revealed the identities of Young and Lewis. In the second trial, Investigator Barnes admitted he made an error in his prior testimony in that he believed Harris did in fact admit to his involvement in the robbery.

In conjunction with this testimony, trial counsel also acknowledged there were differences in Deputy Livingston's testimony during the first and second trials. Counsel, however, emphasized that his cross-examination of Deputy Livingston pointed out the difference in testimony regarding the statement Harris made when he was apprehended by Deputies Livingston and Christophel. In the first trial, Deputy Livingston testified that Harris only stated "You got me;" however, in the second trial, he claimed that Harris stated "You got me. I did it. You got me."

We find the fact that counsel did not obtain a transcript to impeach Livingston and Barnes was inconsequential. Deputy Christophel testified that Harris admitted his involvement in the robbery at the time he was apprehended. Specifically, Deputy Christophel testified that Harris stated, "You've got me. I did it. You got me" at the time he was being handcuffed. Because Deputy Christophel was only called as a witness during the second trial, Harris's counsel could not have impeached him with a prior transcript. Given this testimony was essentially the same as that of Deputies Livingston and Barnes, we find a copy of the transcript was not critical in presenting Harris's defense.

III.

The State asserts the PCR judge erred in granting relief where Harris was unable to show prejudice from counsel's failure to obtain the transcript due to the overwhelming evidence supporting Harris's guilt. We agree with the State's assertion.

The evidence presented at trial established that Deputies Livingston and Christophel arrived at the scene of the robbery within less than a minute of receiving the 911 dispatch. When they arrived, they observed Harris discard his mask and then flee the scene. The deputies were able to apprehend Harris within minutes at a nearby location. According to Christophel and Livingston, Harris immediately admitted his involvement in the robbery. After being transported to the Richland County Sherriff's Department, Harris again admitted his involvement and identified the names of his accomplices. He also informed the investigators that these individuals drove away from the scene in his car. Harris then gave the investigators the license plate number of the vehicle. Additionally, Stuart Young, one of Harris's accomplices, was arrested while driving Harris's car. Shortly thereafter, Outen selected Young out of a photographic lineup as the man who was not wearing a mask during the robbery. In his written statement and trial testimony, Young implicated Harris in the armed robbery.

Based on the foregoing, we find there was overwhelming evidence of Harris's guilt. Therefore, we hold the PCR judge erred in finding counsel was ineffective in failing to obtain a transcript of the first trial in order to impeach the witnesses. See Franklin v. Catoe, 346 S.C. 563, 570 n.3, 552 S.E.2d 718, 722 n.3 (2001), cert. denied, 535 U.S. 1114 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial

counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

IV.

The State argues the PCR judge erred in granting a new trial based on the State's failure to provide Harris with written notice of its intention to seek a LWOP sentence. We agree with the State.

In ruling that Harris's sentence was void, the PCR judge relied on the Court of Appeals' decision in State v. Johnson, 347 S.C. 67, 552 S.E.2d 339 (Ct. App. 2001). In Johnson, the Court of Appeals interpreted the requirements of imposing a sentence under section 17-25-45. The court found that a LWOP sentence could not be imposed unless written notice of intent to seek this sentence was given to both the defendant and defense counsel. Recently, this Court overruled Johnson in James v. State, 372 S.C. 287, 641 S.E.2d 899 (2007), and held that at least ten days' actual notice is all that is required to impose a LWOP sentence.

In the instant case, Harris had at least ten days' actual notice of the potential LWOP sentence. Prior to his second trial, the trial judge informed Harris that he would receive a mandatory LWOP sentence if convicted. Harris acknowledged that a LWOP sentence would be imposed. Shortly thereafter, Harris moved to have his trial counsel relieved. As the basis for this motion, Harris expressed concern with counsel's representation given he was "facing a life sentence." Additionally, at sentencing the solicitor entered into evidence a copy of the State's Notice of Intent to Seek Life without Parole, which had been filed on February 26, 1999. The filing of this notice was well in advance of Harris's two trials, which were conducted on March 15, 1999, and March 30, 1999. Moreover, at the PCR hearing, trial counsel testified that he had received a copy of the State's LWOP notice and that it was part of his file. Although he did not know for certain whether Harris received a copy of the State's LWOP notice, trial counsel testified there was "[n]o question he was informed from the get-go that he was facing life imprisonment, mandatory." Accordingly,

we find the PCR judge erred in holding Harris's LWOP sentence was void. See Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (noting this Court will reverse the PCR court's decision when it is controlled by an error of law); see also Scott v. State, 334 S.C. 248, 252, 513 S.E.2d 100, 102 (1999) (stating "an appellate court will not affirm the decision when it is not supported by any probative evidence"); Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them.").

CONCLUSION

In view of the foregoing, we hold the PCR judge erred in granting Harris's application for post-conviction relief. Accordingly, we reverse the order of the PCR judge.

REVERSED.

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

The Supreme Court of South Carolina

RE: Amendments to Appendix A to Rule 402, SCACR
Rules of the Board of Law Examiners

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the Rules of the Board of Law Examiners, Appendix A to Rule 402, SCACR, are amended as follows.

The title to the Rules of the Board of Law Examiners is amended to read:

APPENDIX A.
RULES OF THE BOARD OF LAW EXAMINERS
(Promulgated Pursuant to Rule 402(a)(4), SCACR)

Additionally, Rule A(3) is amended to read:

> 3. Questions requiring essay type answers will be given on Monday and Tuesday of each examination. The essay portion of the examination may cover any of the following subjects: Corporations, Agency and Partnership, State and Federal Civil Practice and Procedure, Uniform Commercial Code – Articles 2, 3, 4, and 9, Equity, Legal Writing and Research, Wills, Trusts and Estates, Trial Advocacy, Domestic Relations, and Insurance. An applicant should be familiar with principles of law which prevail in this State with respect to the foregoing subjects and any aspects of the law which are peculiar to this State. The grade an applicant receives will be based both upon the candidate's

knowledge of the applicable law as well as the candidate's ability to analyze and apply the law to the facts set forth in the questions.

These amendments shall take effect ninety (90) days from the date of this order. See Rule 402(a)(4), SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

March 5, 2008

The Supreme Court of South Carolina

In the Matter of Jeffrey T. Spell, Petitioner.

ORDER

On March 12, 2007, petitioner was suspended from the practice of law for one year, retroactive to August 24, 2005. In the Matter of Spell, 372 S.C. 514, 642 S.E.2d 749 (2007). Petitioner has filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted, subject to the condition that petitioner establish a mentoring relationship with a member of the South Carolina Bar with at least ten years of experience in the practice of real estate law and that the mentor review petitioner's practices and procedures with regard to his real estate practice and provide reports to the Office of Disciplinary Counsel six months and twelve months after petitioner's reinstatement. We grant the petition, subject to the condition set forth by the Committee on Character and Fitness, and reinstate petitioner to the practice of law in South Carolina.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

March 6, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

MBNA America Bank, N.A., Appellant,

v.

Mark Christianson, Respondent.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 4349
Heard February 5, 2008 – Filed March 4, 2008

AFFIRMED

Edward E. Gilbert, of North Charleston, for Appellant.

David C. Alford, of Spartanburg, for Respondent.

SHORT, J.: MBNA America Bank, N.A. (MBNA) appeals the circuit court's grant of Mark Christianson's motion to vacate an arbitration award. We affirm.

FACTS

MBNA filed an arbitration claim against Mark Christianson in the National Arbitration Forum (the Forum) alleging he had entered into and defaulted on a credit card agreement. Christianson responded several times asserting he never agreed to arbitrate. Despite Christianson's assertions, the Forum continued with the claim and determined the parties entered into an arbitration agreement. The Forum awarded MBNA $13,579.57.

MBNA filed an application for confirmation of the arbitration award in the circuit court, and Christianson filed a motion to vacate the award. MBNA filed a Memorandum of Law in response and attached an unsigned, undated photocopy of one page of a pamphlet it alleges is the arbitration agreement. MBNA provided no other evidence of the existence of an arbitration agreement between these parties.

The circuit court found MBNA failed to provide evidence Christianson agreed to arbitration and the Forum had no jurisdiction to hear the matter absent an arbitration agreement. Accordingly, the circuit court granted Christianson's motion to vacate the award. This appeal followed.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

I. The South Carolina Uniform Arbitration Act and the Federal Arbitration Act (FAA)

The parties to this appeal cite to South Carolina and federal law governing arbitration. Christianson argues MBNA "should not be allowed to argue federal or state [law] at its whim." Accordingly, we initially address this conflict of laws issue. Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). "'[I]nvolving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117. Here, the underlying facts involve interstate commerce.

Despite application of the FAA, however, South Carolina law applies to the initial determination of whether an arbitration agreement exists. See Munoz, 343 S.C. at 539, 542 S.E.2d at 364 (General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.). See also MBNA Am. Bank, N.A. v. Straub, 815 N.Y.S.2d 450, 452 (N.Y. City Civ. Ct. 2006) ("Judicial review of the petition should commence under the New York provisions governing confirmation of an arbitration award, but if the written contract and cardholder agreement are established by the petition the manner of service of the notice and award and treatment of supplementary information should be considered under the Federal Arbitration Act provisions . . . ."). Accordingly, we apply South

Carolina law to the initial determination of arbitrability but look to federal law for additional guidance.

II. Motion to Vacate the Arbitration Award

MBNA argues the circuit court erred in granting Christianson's motion to vacate the arbitration award because the motion was filed more than ninety days subsequent to the entry of the award. We disagree.

An application to vacate, modify, or correct an arbitration award must be made within ninety days. S.C. Code Ann. § 15-48-130(b) (2005) ("An application [for vacating, modifying, or correcting the award] shall be made within ninety days after delivery of a copy of the award to the applicant."). See also 9 U.S.C.A. § 12 (1999) ("Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.").

However, in this case, Christianson disputed the existence of an agreement to arbitrate with MBNA prior to entry of the award. "On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." S.C. Code Ann. § 15-48-20(b) (2005). Similarly, the FAA provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default . . ., the court shall hear and determine such issue. . . . [If a jury trial is demanded and] the jury find[s] that no agreement in writing for arbitration was made . . . the proceeding shall be dismissed.

9 U.S.C.A. § 4 (1999).

We find support from the Kansas Supreme Court in MBNA America Bank, N.A. v. Credit, 132 P.3d 898 (Kan. 2006). Therein, the Court noted MBNA could not rely on the debtor's tardiness in challenging the award if the arbitrator never had jurisdiction to arbitrate and enter an award. Credit, 132 P.3d at 900. The Kansas court stated: "An agreement to arbitrate bestows such jurisdiction. When the existence of the agreement is challenged, the issue must be settled by a court before the arbitrator may proceed." Id. (citing 9 U.S.C. § 4 (2000); Kan. Stat. Ann. § 5-402).[1] The court found that "[u]nder both federal and state law, [the debtor's] objection to the arbitrator meant the responsibility fell to MBNA to litigate the issue of the agreement's existence. Neither MBNA, as the party asserting existence of an arbitration agreement, nor the arbitrator was simply free to go forward with the arbitration as though [the debtor] had not challenged the existence of an agreement to do so." Id. at 900-01 (citing 9 U.S.C. § 4; Kan. Stat. Ann. § 5-402). The Kansas court looked "to MBNA as the appellant to demonstrate that the objection was somehow ineffective to trigger its responsibility to seek court intervention to compel arbitration." Id. at 900.

> If there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide whether the agreement to arbitrate exists and whether the issue in dispute falls within the agreement to arbitrate. . . . Under either the Federal Act or the Kansas Act, the arbitrator's power to resolve the dispute must find its source in the agreement between the parties. The arbitrator has no independent source of jurisdiction apart from consent of the parties . . . .

[1] The Kansas statutes, relied upon by the Kansas Supreme Court, are identical to our corresponding statutes. See Kan. Stat. Ann. § 5-402 & S.C. Code Ann. § 15-48-20 (proceedings to compel or stay arbitration); Kan. Stat. Ann. § 5-411 & S.C. Code Ann. § 15-48-120 (confirmation of an award); Kan. Stat. Ann. § 5-412 & S.C. Code Ann. § 15-48-130 (vacating an award).

Id. at 901 (quoting Dreyer, Arbitration Under the Kansas Arbitration Act: The Role of the Courts, 59 J. Kan. B. Ass'n. 33, 35 (May 1990)) (omissions by court). Accordingly, once Christianson disputed the existence of an arbitration agreement, the Forum did not have jurisdiction to enter an arbitration award until MBNA petitioned the courts to compel arbitration.

Furthermore, MBNA did not demonstrate to the circuit court that Christianson had agreed to arbitrate. Before a circuit court confirms an arbitration award subject to the Federal Arbitration Act, there must be evidence of an arbitration agreement. 9 U.S.C.A. § 13 (1999). The Kansas Supreme Court, addressing this issue in Credit, found:

> MBNA failed to attach a copy of the arbitration agreement to its motion to confirm the award. This violated the Federal Arbitration Act for which MBNA intermittently expresses respect. . . . This alone would have justified the district court in its decision to deny MBNA's motion to confirm the award.

132 P.3d at 901 (citing 9 U.S.C. § 13 (2000)). According to 9 U.S.C.A. § 13:

> The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:
>
> (a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

9 U.S.C.A. § 13 (1999). MBNA denies this code section requires it to file the agreement with its application for confirmation of the award. MBNA argues

the statute merely requires the agreement to be filed before the clerk performs the ministerial act of entering the judgment. We again look to foreign jurisdiction for guidance in rejecting this argument. See, e.g., MBNA Am. Bank, N.A. v. Boata, 893 A.2d 479 (Conn. Ct. App. 2006); MBNA Am. Bank, N.A. v. Berlin, 2005 WL 3193850 (Ohio Ct. App. 2005). As stated by the Kansas Supreme Court, "Given MBNA's casual approach to this litigation, we are not surprised that [a national trend in which consumers are questioning MBNA and whether arbitration agreements exist] may be growing." Credit, 132 P.3d at 902.

Accordingly, we find no error by the circuit court in granting Christianson's motion to vacate the arbitration award.

III. Notice

MBNA next contends the circuit court improperly relied on issues Christianson raised for the first time at the hearing. We find this issue is not preserved for appellate review.

Christianson proceeded pro se in filing his motion to vacate the arbitration award. Before the hearing on the motion to vacate and MBNA's motion to confirm the award, Christianson obtained counsel, who filed a memorandum. MBNA's counsel could not attend the hearing but sent another attorney in his stead. At the hearing, this attorney did not raise the issue that MBNA lacked notice of Christianson's memorandum, nor did the attorney ask for a continuance. Accordingly, this issue is not preserved for our review. See In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

ANDERSON and THOMAS, JJ., concur.