The Supreme Court of South Carolina

In the Matter of Kenneth Gary Cooper, Respondent.

ORDER

On April 25, 2012, respondent was definitely suspended from the practice of law for six (6) months. In the Matter of Cooper, Op. No. 27116 (S.C. Sup. Ct. filed April 25, 2012) (Shearouse Adv. Sh. No. 14 at 22). The Office of Disciplinary Counsel now petitions the Court to appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

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

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

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Joseph P. Griffith, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Joseph P. Griffith, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Griffith's office.

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

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

Columbia, South Carolina
April 26, 2012

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
May 2, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, deceased, Appellant,

v.

AMISUB of South Carolina, Inc., d/b/a Piedmont Medical Center, Respondent.

Appeal from York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 27118
Heard March 6, 2012 – Filed May 2, 2012

REVERSED AND REMANDED

John Gressette Felder, Jr, McGowan Hood & Felder, LLC, of Columbia, William Angus McKinnon,

McGowan Hood & Felder, LLC, of Rock Hill, for Appellant.

William U. Gunn and Joshua T. Thompson, of Holcombe Bomar, P.A., of Spartanburg, for Respondent.

JUSTICE HEARN: Willie James Fee died while in the care of AMISUB of South Carolina, Inc., d/b/a Piedmont Medical Center (Piedmont). Evelyn Grier, as the personal representative of his estate, subsequently brought this medical malpractice claim against Piedmont. The circuit court dismissed Grier's claim on the ground that the expert witness affidavit she was required to submit pursuant to Sections 15-36-100 and 15-79-125 of the South Carolina Code (Supp. 2011) did not contain a competent opinion on proximate cause. Grier appeals, arguing the court erred in finding these statutes require the affidavit contain such an opinion. We agree and therefore reverse and remand for further proceedings.

FACTUAL/PROCEDURAL BACKGROUND

Fee was admitted to Piedmont in January 2008 for treatment of a host of ailments, the list of which is not pertinent to this appeal. He remained at Piedmont until September 2008, at which point he was discharged to another facility for further care. However, he was readmitted to Piedmont twelve days later, and he remained there until his death in February 2009.

Prior to bringing wrongful death and survival proceedings against Piedmont stemming from medical malpractice allegedly committed while it was treating Fee, Grier filed a notice of intent to file suit as required by section 15-79-125(A). Her claims contend Piedmont's failure to monitor and treat Fee for bedsores and sepsis contributed to his death. In conjunction with this notice, Grier also filed an affidavit from Sharon Barber, a nurse with experience treating bedsores and their complications. In it, Nurse Barber opined, based on her review of Fee's medical records, that Piedmont breached

its duty of care towards Fee in multiple respects and these breaches were a contributing cause of Fee's death.

Piedmont subsequently filed a motion to dismiss on the ground that Nurse Barber was not qualified to render an opinion as to cause of death, which meant Grier's affidavit did not contain a competent causation opinion. The circuit court agreed that Nurse Barber was not qualified to opine as to cause of death. Additionally, the court held

> that it is implicit in the Tort Reform Act, and in particular the Notice of Intent, Short and Plain Statement of Facts, and the affidavit requirements at issue in this motion, that a showing of proximate cause must be made by submission of a proper affidavit addressing proximate cause, and made by a person qualified to do so. Plaintiff in this instance has failed to submit such an affidavit, and for that reason Defendant's Motion must be granted . . . .

While the court gave Grier thirty days to submit a qualifying affidavit, Grier failed to do so. The court accordingly dismissed Grier's claim. This appeal followed.

LAW/ANALYSIS

On appeal, Grier concedes Nurse Barber is not qualified to render an opinion as to Fee's cause of death. Thus, the only argument Grier presents is that the circuit court erred in holding the pre-suit affidavit a plaintiff statutorily is required to file before bringing a medical malpractice claim must contain an expert opinion on proximate cause. We agree.

The issue before us is purely one of statutory interpretation. "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). It is well-established that "[t]he cardinal rule of statutory construction is to ascertain and effectuate

the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quotation omitted). Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.* It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that we look beyond the statute's plain language. *Cabiness v. Town of James Island,* 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

In ascertaining the meaning of language used in a statute, we presume the General Assembly is "aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); *see also Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) ("[W]hen Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'" (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).

Finally, statutes in derogation of the common law are to be strictly construed. *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Under this rule, a statute restricting the common law will "not be extended beyond the clear intent of the legislature." *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). Statutes subject to this rule include those which "limit a claimant's right to bring suit." 82 C.J.S. *Statutes* § 535.

With these principles in mind, we turn to the statutes at issue in this case. Section 15-79-125(A) provides, "Prior to filing or initiating a civil

action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100." The statute then gives specific guidance as to the requirements for the notice document:

> The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure.

Id. However, it provides no specifics for the expert affidavit. For that, the statute directs the reader to section 15-36-100. This section in turn states the plaintiff has to submit "an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." *Id*. § 15-36-100(B).

We begin by examining the statute concerning the affidavit itself, section 15-36-100(B). No party disputes that this statute is unambiguous, and thus we must apply its plain language. In our opinion, the language that the affidavit must "specify at least one negligent act or omission" encompasses only the breach element of a common law negligence claim and not causation. Thus, the statute limits its requirement for the affidavit to only breach.

First, the term "negligent act or omission" consistently has been used to refer *only* to breach and never to causation. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) ("A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." (emphasis added)); *Doe ex rel.*

Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) ("To state a cause of action for negligence, the plaintiff must allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) *a breach of that duty by negligent act or omission*; and (3) damage proximately caused by the breach." (emphasis added)); *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000) ("To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; and (3) damage proximately resulting from the breach of duty." (emphasis added)); *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998) ("To establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; and (3) damage proximately resulting from the breach of duty." (emphasis added)). Furthermore, proximate cause requires proof beyond just the act or omission in question and concerns whether it is the "but for" cause of the plaintiff's injuries and whether the harm was foreseeable. *Bishop*, 331 S.C. at 88-89, 502 S.E.2d at 83.

The General Assembly therefore used a term of art which has a well-defined common law meaning as just breach, and we can find nothing indicating the General Assembly intended to vary from it. Accordingly, the plain and unambiguous language of the statute forecloses any argument that the affidavit contain a proximate cause opinion.

Moreover, section 15-36-100 restricts a plaintiff's common law right to bring a malpractice claim by imposing this requirement. Consequently, the language in the statute is to be strictly construed, and section 15-36-100 cannot extend any further than what the General Assembly clearly intended. Once again, this statute plainly and unambiguously uses a term of art which at common law refers only to the breach element of a negligence claim. The plain language of a statute being the best evidence of the General Assembly's intent, there is no clear indication it sought to go any further. Thus, we are in no position to go further ourselves.

We therefore hold under these well-established principles that section 15-36-100(B) requires that the expert render an opinion only as to a breach of the standard of care. In its brief, Piedmont appears to concede as much by pointing out that it "has never made the argument that the 'plain language' of Section 15-36-100(B) requires an expert affidavit to opine on proximate cause. Instead, [Piedmont] focus upon Section 15-79-125(A) which requires a plaintiff alleging medical malpractice show a claim upon which a plaintiff is entitled to relief."[1] Under this guise, Piedmont advances two arguments regarding this statute: (1) the plain language of section 15-79-125(A) requires the affidavit contain an opinion as to proximate cause because it requires that a plaintiff show he is entitled to relief, and in the alternative, (2) section 15-79-125(A) implicitly imposes this requirement. We disagree with both.

Like section 15-36-100(B), section 15-79-125(A) is unambiguous and in derogation of the common law. Read plainly and strictly, section 15-79-125(A) simply requires the contemporaneous filing of both the notice and the affidavit. While this statute supplies several requirements for the notice, it does not speak at all to what is required for the affidavit beyond stating that it is "subject to the affidavit requirements established in Section 15-36-100." S.C. Code Ann. § 15-79-125(A). While Piedmont argues that the affidavit must contain the same information as the notice—i.e., a demonstration that the plaintiff is entitled to relief, which would include causation—its construction is refuted by the plain language of section 15-79-125(A). By its very terms, this statute imposes no content requirements for the expert affidavit and specifically delegates that task to section 15-36-100.

[1] At oral argument, Piedmont changed its tune and relied instead on section 15-36-100(B). In particular, Piedmont argued for the first time that the language requiring the affidavit set forth "the factual basis for each claim" imposes a requirement for a causation opinion. The essence of the argument is that if the plaintiff must show a factual basis for the "claim," that necessarily includes the element of causation. Not only was this the first time it made this argument, the argument is unavailing. The "factual basis" language clearly refers back to the "negligent act or omission" requirement, and therefore it only requires the affiant supply a factual basis for his opinion regarding breach.

We also reject Piedmont's "implicit legislative intent" argument. For this, Piedmont turns to the policies behind tort reform legislation such as section 15-79-125. It correctly notes that one of the major goals behind these requirements is to curtail frivolous litigation by ensuring plaintiffs only present colorable claims. Moreover, section 15-79-125(C) requires that parties to a medical malpractice claim engage in mandatory pre-suit mediation. It is only if this mediation fails that a civil action officially is initiated in the circuit court. S.C. Code Ann. § 15-79-125(E). Thus, Piedmont argues having a fuller picture of a plaintiff's claim prior to mediation, including the basis for proximate cause, enables a more productive mediation process which can avoid the need for a protracted battle in court.

We do not doubt that requiring the affidavit to contain an opinion regarding causation furthers these important goals. Nevertheless, the statute is unambiguous and we are confined to what the statute says, not what it ought to say, for we have no right to modify a statute's application "under the guise of judicial interpretation." *See Coker v. Nationwide Ins. Co.*, 251 S.C. 175, 182, 161 S.E.2d 175, 178 (1968). In other words, when a statute is clear on its face, it is "improvident to judicially engraft extra requirements to legislation" just because doing so may further the intent behind the statute. *See Berkebile v. Outen*, 311 S.C. 50, 55-56, 426 S.E.2d 760, 763 (1993). We must also be mindful that section 15-79-125(A) is to be strictly construed, and imposing requirements which are not clearly intended to be in it violates this rule. We do not believe it is clear the General Assembly intended to include this requirement, and there are many reasons why it could have chosen not to do so. Moreover, Piedmont has not shown how an application of the plain language would lead to a result so patently absurd it could not have been intended by the General Assembly. We therefore are in no position to look beyond the plain language of the statute and read into it a requirement that the expert also opine as to causation at this stage in the proceedings.

Accordingly, we hold nothing in section 15-79-125(A) requires that an expert affidavit in a medical malpractice action submitted pursuant to section 15-36-100(B) contain an opinion regarding causation.

CONCLUSION

In conclusion, we reverse the circuit court and hold the expert affidavit required by sections 15-36-100 and 15-79-125 does not need to contain an opinion as to proximate cause.[2] We therefore remand this matter for further proceedings. Our holding today in no way limits a plaintiff's burden to come forward with expert testimony to support the merits of his claims, if necessary, later in the process. Instead, we merely hold that sections 15-36-100 and 15-79-125 do not require an expert opinion as to causation to be contained within the pre-filing affidavit.

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

[2] Piedmont made a general request for us to affirm under Rule 220(c), SCACR, but did not identify any specific grounds appearing in the record on which we could do so. It has therefore abandoned any additional sustaining grounds. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course, a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief."); *see also State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding a conclusory argument abandoned).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex parte: David G. Cannon, Appellant,

v.

Georgia Attorney General's Office; South Carolina Attorney General's Office; Terry Brown; Romunzo Brown; Forlando Brown, Darren Lumar, M&T Bank; Tommie Rae Hynie Brown; Stephen L. Slotchiver, the Guardian ad Litem of James B., II; Larry Brown, Daryl Brown, Individually and on behalf of his minor children, Lindsey B. and Janise B.; Vanisha Brown; Deanna J. Brown Thomas , Individually and on behalf of her minor child Jackson B.; Yamma N. Brown Lumar , Individually and on behalf of her minor children, Sydney L. and Carrington L.; Tonya Brown; Robert L. Buchanan, Jr. and Adele J. Pope, as Special Administrators; Albert Dallas and Alfred A. Bradley, as Personal Representatives of the Estate of James Brown, a/k/a James Joseph Brown, Respondents,

In re: The Estate of James Brown, a/k/a James Joseph Brown, Respondent.

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

Opinion No. 27119
Heard January 10, 2012 – Filed May 2, 2012

AFFIRMED AS MODIFIED

Max N. Pickelsimer, of Warner, Payne & Black, of Columbia, for Appellant.

Attorney General Alan Wilson, Senior Assistant Attorney General C. Havird Jones, Jr., Assistant Deputy Attorney General Robert D. Cook, Assistant Attorney General J.C. Nicholson, III, Assistant Attorney General Mary Frances Jowers, all of Columbia; Louis Levenson, of Atlanta; Matthew Day Bodman, of Columbia; Robert N. Rosen, T. Heyward Carter, Jr., S. Alan Medlin, and David L. Michel, all of Rosen Law Firm, of Charleston; and William W. Wilkins, J. David Black, Fred L. Kingsmore, Jr., all of Nexsen Pruet, of Columbia, for Respondents.

Albert P. Shahid, Jr., of Charleston, for Guardian Ad Litem.

JUSTICE BEATTY: David G. Cannon appeals from an order of the circuit court awarding attorneys' fees and costs to opposing counsel in this contempt action. Cannon contends the circuit court erred (1) in failing to find the issue of attorneys' fees was moot because he had served his jail sentence for contempt, and (2) in ordering him to pay attorneys' fees and expenses incurred in matters unrelated to the contemptuous conduct for which he was sanctioned. We affirm as modified.

I. FACTS

On December 18, 2007, the circuit court, Judge Doyet A. Early, III presiding, found Cannon in contempt of court for violating (1) an August 10, 2007 order mandating that Cannon give up all authority and cease all activities relating to the James Brown estate, the Brown trusts, and all Brown entities (which Cannon violated by filing amended tax returns without authority); and (2) an October 2, 2007 order requiring Cannon to pay back $373,000 that he had misappropriated from Brown's estate.

The circuit court ordered Cannon to be incarcerated for six months for the contempt. However, the circuit court stated Cannon could purge himself of the contempt "by the payment of the aforementioned $373,000, the payment into this court of $50,000 to be applied towards the payment of attorneys' fees incurred by the various parties, and the payment of a fine of $10,000.00."

Cannon appealed and posted an appeal bond. According to Cannon's attorney, when his bond ran out, Cannon was forced to report to the Aiken County Detention Center on February 11, 2009 to serve his sentence. Cannon was released three months later, on May 11, 2009.

The Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings; it upheld all of the circuit court's findings regarding the contempt except for the amount awarded towards attorneys' fees and the imposition of the fine. *Ex parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). The Court of Appeals found the circuit court abused its discretion as to attorneys' fees because it did not make the necessary factual findings to support the amount awarded, so it "reverse[d] and remand[ed] the issue of attorneys' fees to the circuit court for findings of fact as to the proper amount of attorneys' fees required for indemnification." *Id.* at 667, 685 S.E.2d at 827. The Court of Appeals reversed the fine, stating the circuit court did not indicate the purpose of the fine in its order, but if it was imposed for compensation purposes, it was improper because the record contained no reasonable relationship between Cannon's contemptuous conduct and the imposition of the fine. *Id.* at 668, 685 S.E.2d at 827-28. No further appeal was taken from this decision and the remittitur was issued, thus returning the case to the circuit court.

On remand, the circuit court, Judge Early again presiding, held a hearing for the sole purpose of making findings of fact regarding the proper amount of attorneys' fees to be awarded for indemnification, i.e., to reimburse the parties for attorneys' time related to the issue of Cannon's contemptuous conduct. By order of June 18, 2010, the circuit court ruled Cannon should pay attorneys' fees and costs in the amount of $113,047.91 incurred by Atlanta attorney Louis Levenson's clients.[1] Cannon appealed from this order, and the case was transferred from the Court of Appeals to this Court.

II. LAW/ANALYSIS

A. Mootness of Attorneys' Fees

Cannon first argues the circuit court erred in failing to find the issue of attorneys' fees was moot because he had served his sentence for contempt.

[1] Levenson represents a number of Brown's children and grandchildren. He was the only attorney present seeking attorneys' fees (on behalf of himself and his firm) in this matter.

Cannon contends the award for attorneys' fees was included in the contempt order solely as a purge remedy, i.e., the order provided him with the choice of serving the jail sentence *or* purging his sentence by paying certain funds totaling $433,000, which included $50,000 towards attorneys' fees, into the court. Cannon asserts that, "[h]aving served the entirety of his jail sentence, [he] has complied with the December 18, 2007 Order and a determination of the proper amount of attorneys' fees is now moot."

In support of his argument, Cannon primarily cites *Jordan v. Harrison*, 303 S.C. 522, 524, 402 S.E.2d 188, 189 (Ct. App. 1991) ("[W]here one held in contempt for violation of a court order complies with the order, his compliance renders the issue of contempt moot and precludes appellate review of the contempt proceeding."), and *Garland v. Tanksley*, 107 S.E.2d 866, 870 (Ga. Ct. App. 1959) ("Where a jail sentence is imposed for a contempt of court, and such sentence has been served in its entirety at the time the writ of error is presented for argument to the appellate court, it will be dismissed as moot.").

As an initial matter, we note there is no indication Cannon made this argument to the Court of Appeals when it originally heard his appeal from the contempt order, even though he had been released from jail by the time of oral argument. Further, Cannon did not seek review of the Court of Appeals' decision, which affirmed the imposition of attorneys' fees and remanded to the circuit court only the issue of the proper *amount* of attorneys' fees necessary for indemnification. Thus, the issue does not appear to be properly before us. *See generally Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010) (stating an unchallenged or unappealed ruling, whether right or wrong, is the law of the case); *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939) (noting the general rule in civil cases that issues must be raised at the earliest opportunity, or they will be considered waived); *Salley v. McCoy*, 186 S.C. 1, 195 S.E. 132 (1937) (holding the conclusions announced in a prior appeal would not be disturbed in a subsequent appeal).

In any event, the cases cited by Cannon are inapposite. In the first case, the defendant was held in contempt for failing to pay child support and

sentenced to two months in jail, which he could purge by paying the arrearages and a fine. *Jordan*, 303 S.C. at 523, 402 S.E.2d at 188. The defendant paid the amounts as ordered and then appealed. *Id.* The Court of Appeals found Harrison's compliance with the order rendered his appeal moot. *Id.* at 524, 402 S.E.2d at 189. In contrast, Cannon did not comply with the circuit court's order, which, among other things, required him to return $373,000 misappropriated from Brown's estate.

In the second case, attorney Garland was found in contempt for his inappropriate conduct and remarks during a trial and sentenced to a total of 40 days in jail. *Garland*, 107 S.E.2d at 868. The Georgia Court of Appeals ruled the trial court abused its discretion in refusing to grant Garland's petition for a supersedeas so that his appeal would not become moot if his time in jail ended before his appeal could be heard. *Id.* at 873. In *Garland*, unlike the current matter, the contempt order imposed *only* jail time and did not require the payment of attorneys' fees to indemnify the opposing party. In addition, the order provided no method for purging the contempt and was more akin to criminal, not civil, contempt.[2]

Moreover, under South Carolina law, the payment of attorneys' fees is not considered part of the punishment; rather, it is for indemnification.

"Civil contempt differs from criminal contempt in that it seeks only to 'coerc[e] the defendant to do' what a court had previously ordered him to do." *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) (alteration in original) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)).

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[2] *Cf. Turner v. Rogers*, 131 S. Ct. 2507 (2011) (holding civil contempt case was not moot where the dispute was capable of repetition, yet evading review; Turner had been imprisoned on several occasions for civil contempt for failure to pay child support and would likely suffer future imprisonment); *State v. Passmore*, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005) (finding Passmore's appeal after serving her sentence for criminal contempt was not moot based on exceptions to the mootness doctrine; the issue was capable of repetition, but evading review, and Passmore could continue to be affected by collateral consequences).

"[O]nce a civil contemnor complies with the underlying order, he is purged of the contempt and is free." *Id.*

"In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees." *Poston v. Poston*, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998); *see also Miller v. Miller*, 375 S.C. 443, 463, 652 S.E.2d 754, 764 (Ct. App. 2007) ("Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory.").

"The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding." *Poston*, 331 S.C. at 114, 502 S.E.2d at 90. "Thus, the court is not required to provide the contemnor with an opportunity to purge himself of these attorney's fees in order to hold him in civil contempt." *Id.*

Contrary to Cannon's assertion, attorneys' fees were awarded as indemnification and they are not subject to being "purged" as he now argues. *See id.* Moreover, Cannon failed to comply with the orders, and his jail sentence could not operate as a "purge." *Turner*, 131 S. Ct. at 2516. Consequently, we hold the circuit court did not err in rejecting Cannon's assertion that the issue of attorneys' fees was rendered moot by the service of his jail sentence.

B. Amount of Attorneys' Fees

Cannon next contends the circuit court abused its discretion in determining the amount of attorneys' fees because Levenson was awarded "reimbursement for myriad fees and expenses arising from conduct totally unrelated to enforcement of the August 10, 2007 and October 2, 2007 orders, including approximately $24,000.00 in fees and expenses incurred prior to the entry of either Order."

"Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order."

Curlee v. Howle, 277 S.C. 377, 386, 287 S.E.2d 915, 919 (1982). "[T]he compensatory award should be limited to the complainant's actual loss." *Id.* at 387, 287 S.E.2d at 920. "Included in the actual loss are the costs in defending and enforcing the court's order, including litigation costs and attorney's fees." *Id.*

"The burden of showing what amount, if anything, the complainant is entitled to recover by way of compensation should be on the complainant." *Id.* The determination of the amount of the award is within the court's discretion. *Poston*, 331 S.C. at 114, 502 S.E.2d at 90; A.S. Klein, Annotation, *Allowance of Attorneys' Fees in Civil Contempt Proceedings*, 43 A.L.R.3d 793, 797 (1972 & Supp. 2011).

The circuit court convened the hearing on remand on May 20, 2010 solely to address the appropriate amount of attorneys' fees to be awarded in the contempt matter. At that hearing, Levenson explained that he first became involved in the case in January 2007 and that he had expended considerable time in dealing with various matters concerning Brown's estate. Upon questioning, Levenson acknowledged that his affidavit and expense list was broader than the scope of the contempt issue as he was uncertain what would be covered in this particular hearing. The circuit court directed Levenson to file an amended affidavit and expense sheet to seek reimbursement for fees and expenses directly related to the two matters for which Cannon was found in contempt in the December 18, 2007 order: (1) Cannon's failure to pay the $373,000 ordered by the court on October 2, 2007, and (2) Cannon's participation in amending the tax returns in violation of the August 10, 2007 order that removed him from his fiduciary position.

In his amended affidavit dated June 4, 2010, Levenson stated he is a Georgia attorney working at the law firm of Levenson & Associates in Atlanta, and he represents some of Brown's children and grandchildren. Levenson stated he was hired on a contingency fee basis, so he had to reconstruct the legal work he performed "in order to accurately apportion" the legal time incurred by himself and his staff "with respect to David G. Cannon's contempt and the matters related to efforts by affiant in finding and

turning over assets and documents held by David G. Cannon to the parties and to the Court." Levenson attached exhibits listing $87,891.25 for legal fees and $25,156.66 for expenses related "exclusively [to] the discovery and citation proceedings." The total amount sought in reimbursement was $113,047.91.

Citing the six-part test contained in *Taylor v. Medenica*, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998), the circuit court stated the fees and expenses incurred by Levenson, including 277.9 legal hours and 51.75 paralegal hours, were reasonable. The court found the fees covered the time period in question and "were related to discovery issues surrounding the willful contempt involving issues such as the tax returns, and that such fees were reasonable and necessary in pursuit of enforcement of this Court's previous orders and ultimately finding Cannon in contempt."

The circuit court noted Levenson is an attorney in good standing with both the Georgia and the South Carolina Bars, and has been a member of each since 1978 and 1994, respectively; that the work resulted in a beneficial result to Levenson's clients, as well as the trust and estate; the amount of fees is commensurate with what the court would expect in a similar case; the fees were incurred in engaging in complex discovery matters and hearings before the court; and both the fees and expenses incurred were reasonable and necessary in pursuit of enforcement of the court's prior orders.

We find no abuse of discretion in the circuit court's decision to award attorneys' fees and expenses in this case, nor in its evaluation of the *Taylor* factors. However, upon reviewing the amended affidavit and the updated and redacted expense sheet, it appears these documents still include some items that are not related solely to the two matters for which Cannon was found in contempt in this action, as there are line entries that predate the earliest of the two orders that Cannon was accused of violating. Although Levenson is entitled to reimbursement for discovery relating to enforcement of the orders for which Cannon was held in contempt, he is not entitled, in this particular proceeding, to seek reimbursement for fees and costs related to discovery in other, ongoing matters involving the Brown estate. As a result, we modify

the award $113,047.91 to reduce it by the $24,000 Cannon has alleged is unrelated to the specific matters for which Cannon was held in contempt in this case.

III. CONCLUSION

We conclude the circuit court properly found the issue of attorneys' fees was not mooted by Cannon's service of his jail sentence. We further conclude the circuit court did not abuse its discretion in making an award of attorneys' fees and costs, but we modify the award to reduce it by the $24,000 incurred in matters unrelated to the contemptuous conduct for which Cannon was sanctioned in this particular proceeding, for a total amount due of $89,047.91.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gaines Adams, Respondent,

v.

H.R. Allen, Inc., CNA, and Zurich North America, Defendants,

Of whom H.R. Allen, Inc. and Zurich North America are Appellants,

and CNA is a Respondent.

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

Opinion No. 4967
Heard March 20, 2012 – Filed May 2, 2012

VACATED AND REMANDED

James Paul Newman Jr., Weston Adams III, Helen F. Hiser, and Erroll Anne Y. Hodges, all of Columbia, for Appellants.

Alan Randolph Cochran, of Greenville; James P. Newman and Andrew E. Haselden, both of Columbia, for Respondents.

PER CURIAM: Appellants, H.R. Allen, Inc. (Employer) and Zurich North America (Zurich), appeal from an order of the circuit court affirming the Workers' Compensation Commission's Appellate Panel's (Commission's) award of benefits to Respondent Gaines Adams.

Although Appellants raise six issues on appeal, the threshold issue of procedural due process is determinative. We hold procedural due process requires that the parties to a rehearing must be provided an opportunity to be heard and to confront and cross-examine witnesses. Accordingly, we vacate the circuit court's ruling and remand the case to the Commission to conduct a de novo hearing on the merits.

FACTS/PROCEDURAL HISTORY

On March 15, 1999, Adams fell from a ladder, shattering a bone in his left heel.[1] Dr. Michael Tollison performed an ORIF—open reduction internal fixation. Adams returned to "light duty" on August 30, 1999. On December 17, 1999, Dr. Tollison determined Adams had reached maximum medical improvement (MMI) and discharged him with twenty-four percent impairment of the left foot. Dr. Tollison's progress note stated that in the future Adams "may require a subtalar joint fusion with tribal bone graft." Adams's work restrictions required him to avoid climbing ladders, walking on roofs, carrying heavy items, and working on scaffolds.[2]

Adams saw Dr. Tollison in 2001 for hypersensitivity in his left foot. Adams's condition improved; however, Dr. Tollison again noted that Adams

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[1] Any reference to a problem with Adams's right lower extremity is a scrivener's error; Adams sustained injuries to his left foot only.

[2] Respondent CNA was Employer's workers' compensation carrier, and this was an admitted accident.

likely would require subtalar joint fusion. Adams did not visit Dr. Tollison again until October 2006.

In July 2006, Employer assigned Adams to work part-time installing overhead lighting fixtures at a distribution center. On October 17, 2006, Adams returned to Dr. Tollison with increased pain and lack of mobility in his left ankle. Dr. Tollison diagnosed Adams as having left, post-traumatic hind foot arthritis; left, sural nerve neuralgia; traumatic arthropathy involving ankle and foot; and mononeuritis of the lower limb. Adams returned to work with additional permanent restrictions and a letter from Dr. Tollison that stated: "If employer has no work available according to these restrictions, it is up to the employer to release [Adams] from work." On October 26, 2006, Employer terminated Adams's employment, stating "no permanent light duty work [was] available."

On October 20, 2007, Adams filed a Form 50 contending he had sustained an accidental injury on October 26, 2006 due to "repetitive walking and standing on unlevel/hard surfaces." CNA denied that Adams's condition was caused by "a new accident"; asserted that compensability of any injury arising out of the March 1999 accident was barred; and stated CNA was not Employer's workers' compensation carrier on the date of Adams's alleged injury. Adams subsequently added Zurich, Employer's workers' compensation carrier from December 13, 2005 to December 13, 2006, as a defendant.

The single commissioner conducted a hearing on May 7, 2008. Following the hearing, the commissioner left the record open for Dr. Tollison's deposition. On June 16, 2008, the single commissioner ruled that Adams had sustained "a compensable injury, whether it is considered repetitive trauma culminating in the last injurious exposure on October 26, 2006[,] or whether this is considered a[n] October 26, 2006 on-the-job accident." The commissioner dismissed CNA and found Zurich liable to Adams for benefits related to the October 26, 2006 injury, including fusion surgery and temporary, total disability benefits following surgery.

After Zurich requested review of the single commissioner's decision, it became evident that the reporter's equipment had malfunctioned and portions of the hearing were inaudible. Adams asked the Commission to remand the case to the single commissioner "to retake such testimony as may be necessary to replicate the record." Thereafter, the Commission ordered: "[T]his matter is remanded to Commissioner Williams for rehearing."

The single commissioner conducted the rehearing on January 15, 2009. Each of the participants, with the exception of Adams, was given a copy of the original transcript. Shortly after Adams began testifying, Zurich's counsel repeatedly objected to testimony that it alleged was "outside the scope" of the original transcript. When CNA objected to Zurich's attempt to follow up on Adams's answer, Zurich explained: "But his answer wasn't the same as it was in the original."

Zurich asked the single commissioner for permission to question Adams's supervisor about a description of the working conditions that had been posed to Dr. Tollison during his deposition. The commissioner denied Zurich's request, stating:

> **The Single Commissioner:** I'll deny that, obviously. I already issued a ruling in this case based on the evidence. And I heard the evidence at the last case, so I didn't need a transcript to make any ruling. So, I'm going to deny that motion right now.
>
> **Zurich:** If we could just place that on the record, that we would like to have them address the hypothetical that the Claimant's own attorney gave after the hearing so we couldn't address it at the [first] hearing because he didn't give it until afterward.
>
> **The Single Commissioner:** I'm going to deny that, obviously, because my ruling wasn't based on any of that. You can move on.

Following the rehearing, the single commissioner reissued the prior order. Zurich filed an application for review alleging numerous errors, including a contention that significant irregularities had occurred during the rehearing. On June 26, 2009, the Commission unanimously adopted the single commissioner's order; thereafter, the circuit court conducted a hearing and affirmed the Commission's order in its entirety. This appeal followed.

ISSUE ON APPEAL

Did the Circuit Court err in upholding the hybrid manner in which the single commissioner conducted the rehearing?

LAW/ANALYSIS

Appellants contend they "were forced to repeat the question portion of the original hearing, but the witnesses were allowed to answer in any way they saw fit, often providing new testimony." Appellants argue that while Adams was allowed to answer questions freely, they were not allowed to ask "routine follow-up questions in response to new testimony." They assert this "hybrid manner" of conducting the rehearing was "at worst a violation of Appellant's due process rights and at best, highly unfair."

Adams contends that the trial court has discretion to adopt "the most effective method of reconstruction" of a transcript. He additionally contends, "Appellant[s] suffered no consequential prejudice."

Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. China v. Parrott, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278 (1968). However, the reconstructed record must allow for meaningful appellate review. State v. Ladson, 373 S.C. 320, 321, 644 S.E.2d 271, 271 (Ct. App. 2007). "A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the

appellate court from conducting a meaningful appellate review." Id. at 325, 644 S.E.2d at 274 (citations and internal quotation marks omitted).

The South Carolina Constitution provides that in procedures before administrative agencies: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . ." Art. I, § 22 (2009 & Supp. 2011). The South Carolina Supreme Court has explained:

> "Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses."

In re Dickey, 395 S.C. 336, 360, 718 S.E.2d 739, 751 (2011) (quoting In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)).

The Administrative Procedures Act (APA) requires that, in a contested case, all parties must be afforded the opportunity for a hearing. S.C. Code Ann. § 1-23-320(A) (2005 & Supp. 2011). The APA additionally requires: "Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved." S.C. Code Ann. § 1-23-320(E) (2005 & Supp. 2011). Moreover, the APA provides that, in a contested case, "[a]ny party may conduct cross-examination." S.C. Code Ann. § 1-23-330(3) (2005).

In State v. Mouzon, the South Carolina Supreme Court distinguished between "trial errors, which are subject to harmless error analysis," and "structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards." 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (quoting Arizona v. Fulminante, 499 U.S. 279 (1991)). In

LaSalle Bank Nat'l Ass'n v. Davidson, the court held that the failure of a judge to attend a mortgage foreclosure proceeding was a structural defect that violated the Appellants' "constitutional guarantee to procedural due process." 386 S.C. 276, 277, 688 S.E.2d 121, 121 (2009). There, the court ordered a new trial, stating: "The purported hearing was a nullity, and the resulting order must be vacated. The judge's absence from the hearing deprived the [Appellants] of the opportunity to be heard and, thus violated their constitutional guarantee of procedural due process." Id. at 281, 688 S.E.2d at 123; see also U.S. v. Marcus, 130 S. Ct. 2159, 2164 (2010) (stating that "certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial").

In this case, a comparison of the two transcripts supports Appellants' allegation that the rehearing allowed Adams an opportunity to "amplify" the responses he provided at the first hearing, while Appellants were not provided the opportunity to cross-examine Adams on new responses. We are concerned by the single commissioner's decision to provide all participants—except Adams—with a copy of the original transcript. In our view, the commissioner was required to treat all witnesses similarly. Had Adams been provided a copy of the original transcript, he—like the other witnesses—would have been in a position to read his transcribed responses and to complete the inaudible portions of the original testimony. Instead, Adams was provided the unique opportunity to "freely respond," while Appellants were not allowed to freely cross-examine him.

We agree with Appellants' contention that "the preferable options would have been to have reconstructed only the incomplete portions of the original transcript or to have remanded for an entirely new hearing." While we agree the trial court has discretion in determining how to reconstruct missing portions of a transcript, this discretion must lie within the limits required by procedural due process. Here, although the Commission ordered a rehearing, the single commissioner conducted the subsequent hearing in a hybrid manner that was neither a true rehearing of the matter on the merits nor a straight-forward reconstruction of the original transcript. Such a hybrid approach to rehearing constitutes a structural defect that cannot be reviewed

under the harmless error standard. While we are mindful of the importance of judicial efficiency, we find the hybrid rehearing procedure in this case violated Appellants' right to procedural due process.[3]

CONCLUSION

Based on the foregoing, we vacate the circuit court's order and remand the case to the Commission to conduct a de novo hearing on the merits.

VACATED AND REMANDED.

PIEPER, KONDUROS, and GEATHERS, JJ., concur.

[3] We decline to address Appellant's remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).