The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
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DEPUTY CLERK

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N O T I C E

IN THE MATTER OF MARGARET C. TRIBERT, PETITIONER

Margaret C. Tribert, who was definitely suspended from the practice of law for a period of one year, retroactive to July 9, 1999, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, July 13, 2001, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

June 11, 2001

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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N O T I C E

IN THE MATTER OF BRIAN DUMAS, PETITIONER

On July 20, 1992, Petitioner was disbarred from the practice of law. See In the Matter of Dumas, 309 S.C. 5, 419 S.E.2d 791 (1992). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than August 10, 2001.

Columbia, South Carolina

June 11, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

June 11, 2001

ADVANCE SHEET NO. 21

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Corey Prioleau, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 25301
Heard March 22, 2001 - Filed June 11, 2001

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for petitioner.

Assistant Appellate Defender Aileen P. Clare, of the South Carolina Office of Appellate Defense, of Columbia, for respondent.

JUSTICE PLEICONES: Respondent Corey Prioleau ("Prioleau") was convicted of kidnapping, armed robbery, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under twenty-one years of age in connection with a car-jacking in Sumter County. The Court of Appeals reversed his conviction, finding the trial court committed reversible error in admitting improper hearsay evidence and in allowing a prosecution witness to identify Prioleau from a photographic lineup in the courtroom. State v. Prioleau, 339 S.C. 605, 529 S.E.2d 561 (Ct. App. 2000). We granted the State's petition for certiorari. We reverse.

This is a companion case to State v. Dinkins, Op. No. 25302 (S.C. Sup. Ct. filed June 11, 2001) (Shearouse Adv. Sh. No. 21).

FACTS

Chris Branham ("Branham"), Amy Vance ("Vance"), and Melanie Lively ("Lively") were sitting in Branham's Ford Explorer, preparing to leave the parking lot of a Burger King restaurant in Sumter County late one summer evening. As Branham, the driver of the vehicle, began backing out of the parking space, two men approached the vehicle. One of the men, identified later as Corey Prioleau, reached inside the vehicle, placed a gun to Branham's chest, and demanded Branham exit the vehicle. When Branham complied, the man ordered Branham to get in the back seat.

As Prioleau climbed into the driver's seat, the second man, later identified as Michael Dinkins ("Dinkins"), got in the back seat behind the driver. Once inside the vehicle Prioleau handed the gun to Dinkins, and left Burger King with the three victims in tow. Prioleau drove about eight miles, ending up in a cotton field. During the drive the perpetrators demanded

money from the victims and threatened to kill the victims if "they saw blue lights."

Once they arrived at the cotton field, the perpetrators ordered all three victims out of the vehicle and left in Branham's car, threatening to come back and find the victims if they called the authorities. The victims went to the nearest house and contacted the police. The vehicle was found abandoned the next morning. It had been totally destroyed by fire.

At trial the jury heard testimony from the three victims, including their identifications of Dinkins and Prioleau as the perpetrators. Over both defendants' objections, the court allowed the State to introduce a statement given to police by Devon Dinkins ("Devon").[1] Over Prioleau's objection, the

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[1]Since the statement is at the heart of the dispute, we include it below in its entirety:

> I'll start by who all was there at Burger King that night about a month or so ago. It was me, Tiawan Tindal, Michael Dinkins, Corey Prileau [sic]. We were having a conversation. I forgot how it got started, but Corey was saying something about carjacking. I was telling him that I didn't believe he was going to do this because they had talked about doing a jacking before or something. Corey looked around and said "You don't believe me" or something like that and next thing I knew Corey got out the car and I seen the gun. I didn't even know the gun was there until then. It was a dark gun. He was saying something about a white Suburban or Blazer type vehicle that was parked there at Burger King. The people getting into this vehicle were young caucasion [sic] kids. I saw about three, one boy and two girls. Corey got out the car, Tiawan's car. Mike got out the car. They walked around the front of the car and me and Tiawan was saying we didn't believe this was happening. We left and went to my neighbor's house and stayed there for about 30 minutes. Then I

court also allowed Lively to pick Prioleau out of a photographic line-up for the first time during the trial. The jury found both men guilty of all charges.

ISSUE I

Did the Court of Appeals err in finding the admission of Devon's statement was reversible error?

ANALYSIS

On certiorari the State does not challenge the Court of Appeals' finding that the introduction of Devon's statement was error. The State maintains, however, that the error was harmless.

Whether the improper introduction of evidence is harmless requires the Court to determine if the defendant's "guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993); see also State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (finding an error is harmless if it could not reasonably have affected the result of the trial); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (even if evidence was wrongly admitted, its admission may constitute harmless error if the evidence did not affect the outcome of the trial). Thus, to determine whether the error in admitting Devon's statement was harmless, we must review the competent evidence presented against Prioleau at trial.

Victims'/witnesses' identification

Prior to trial both Branham and Vance identified Prioleau from a photographic lineup as the man who approached the car, placed a gun in

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left and went home and Tiawan left and went home. I didn't see Mike or Corey again until about two weeks later and the conversation didn't come back up.

Branham's chest, and later drove the car away. During the trial, both made in-court identifications of Prioleau. Both testified that they had an opportunity to see Prioleau as he walked across the well-lit Burger King parking lot towards the vehicle.

Lively did not make a pre-trial photographic identification of Prioleau. However, at trial, and over the defendant's objection, she selected Prioleau's picture from the same lineup previously shown to Branham and Vance. She further testified that immediately upon Prioleau's entrance into the preliminary hearing room, she recognized him as the driver. Lively also identified Prioleau in court. She testified that, on the night of the incident, she "g[o]t a good look at" the driver as he approached the vehicle.

Stacey Hicks testified that she was inside the Burger King on the night of the incident and spoke with four young men in line behind her. In the courtroom she identified Corey Prioleau as one of the four men in line behind her that evening.

Victims' initial descriptions

In finding the error prejudicial to Prioleau, the Court of Appeals found it compelling that the description of the driver the victims gave police on the night of the incident did not fit Prioleau. Detective Mike Hicks testified that the victims described one of the assailants as being five feet, nine inches tall and the other as being five feet, eight inches tall.

Branham testified that he described the driver to police as being five feet, nine inches tall, with a bald head. He testified that the photograph he selected from the lineup depicted a man with hair, that Prioleau had hair on the day of the trial, and that Prioleau was more than five feet, nine inches tall.

Vance testified that she described the driver as being five feet, nine inches tall, and that Prioleau was six feet, two inches tall. She explained that, since the perpetrator had been sitting down, she could not accurately judge his height. She denied describing the driver as having a bald head.

Lively testified that she initially described the driver as being six feet tall, and that she did not describe him as having a bald head. Vance and Lively both testified that the driver was wearing a visor on his head during the incident.

On the basis of this evidence, the Court of Appeals found that the error in admitting Devon's statement was not harmless. It found that the statement

> placed Prioleau armed with a pistol at the scene of the crime by a person who knew him and whose ability to identify him could not be seriously questioned and described Prioleau's comments about car-jacking and his approach towards the victims' car. This evidence was not cumulative to other testimony.

State v. Prioleau, 339 S.C. at 613, 529 S.E.2d at 565. The court found the admission of the statement prejudicial because

> [t]he only corroboration of this evidence was the testimony of the victims, whose identification of Prioleau was subject to attack because the early descriptions of the driver arguably did not match him. The victims' identifications of Prioleau were not as strong as their identifications of Michael Dinkins. . . . Considering these factors, we find the error in admitting the statement cannot be considered harmless.

Id. In light of the competent evidence presented at trial, we disagree.

We are not convinced that because the victims' initial descriptions of Prioleau did not exactly match his actual description, the admission of Devon's statement affected the result of the trial. The victims were able to view Prioleau only momentarily as he walked across the parking lot. However, they spent a considerable amount of time with him while he was driving the stolen car. These facts reasonably account for their mistaken descriptions regarding his height.

In addition, although the victims described the driver as being bald, they also described him as wearing a visor. Although Prioleau had hair on the date of his arrest, we note that two weeks elapsed between the date of the incident and Prioleau's arrest.

The jury heard all three victims testify that they had an opportunity to view Prioleau. Two of the three victims selected his likeness from a photographic lineup prior to trial.[2] The other victim identified Prioleau prior to trial; all three identified him in court as the one of the perpetrators.[3] Given the evidence presented against Prioleau, we find the error in admitting Devon's statement was harmless.

ISSUE II

Did the Court of Appeals err in finding the admission of Lively's in-court photographic identification of Prioleau constituted reversible error?

ANALYSIS

The Court of Appeals found that the trial court committed reversible error by permitting Lively to make an in-court photographic identification of Prioleau. The appellate court found that this procedure improperly bolstered the identifications of the other two victims. The State argues any error in allowing the identification was harmless. The State further asserts that, since Prioleau did not argue Lively's identification improperly bolstered the other victims' identifications, either before the trial court or in its argument to the Court of Appeals, it was error for the Court of Appeals to consider that

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[2]Prioleau has not challenged the admissibility of the lineup as being unduly suggestive or otherwise improper.

[3]We have previously noted that a victim's degree of attention during the commission of a crime is presumably acute. See State v. Ford, 278 S.C. 384, 386, 296 S.E.2d 866, 867 (1982).

argument. We agree that this issue has not been preserved, and therefore, decline to address it.

In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge. State v. New, 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct. App. 1999). Furthermore, a party may not argue one ground at trial and an alternate ground on appeal. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000).

At trial, when it became apparent that the solicitor was attempting to elicit an in-court photographic identification from Lively, Prioleau's attorney objected. The only stated basis for the objection was that "[the solicitor is] in essence doing a lineup in court." Counsel did not argue that the identification improperly bolstered the other victims' testimony. His only argument was that the procedure was unduly suggestive. Prioleau's brief to the Court of Appeals argued that the identification procedure was unduly suggestive, since Lively could simply look at Prioleau, who was present in the courtroom at the time, and pick his photograph from the lineup. The Court of Appeals did not base its conclusion on a finding that the procedure was unduly suggestive, but found

> the use of this procedure was prejudicial, notwithstanding the victim's allegedly independent identification at trial, because it improperly bolstered the initial photographic line-up identifications made by the remaining two victims. There was little likelihood the witness would be unable to identify Prioleau's photograph while he was seated across from her in the courtroom. By selecting his picture, the witness gave undeserved credibility to the pre-trial identifications made by the remaining two victims. . . . Under these circumstances, the improper bolstering was not harmless error.

State v. Prioleau, 339 S.C. at 615, 529 S.E.2d at 566.

Prioleau did not base his objection at trial on the theory that the identification improperly bolstered the identifications made by Branham and Vance. Because the Court of Appeals considered a basis for reversal which was neither presented below nor argued on appeal, we reverse its finding as to this issue. See, e.g., State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997) (argument not made to trial court not preserved for review).

CONCLUSION

As to Issue I, we conclude that the admission of Devon's statement was harmless error. Regarding Issue II, the Court of Appeals improperly considered a grounds for reversal not raised below. For these reasons, we REVERSE the Court of Appeals' decision and affirm Prioleau's conviction.

MOORE, A.C.J., WALLER and BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael Dinkins, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 25302
Heard March 22, 2001 - Filed June 11, 2001

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of the South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy

Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for respondent.

PER CURIAM: Michael Dinkins ("Dinkins") was convicted of kidnapping, armed robbery, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under twenty-one years of age in connection with a car-jacking in Sumter County. The Court of Appeals affirmed his conviction, finding the trial court's erroneous admission of hearsay evidence from Devon Dinkins ("Devon") was harmless. State v. Dinkins, 339 S.C. 597, 529 S.E.2d 557 (Ct. App. 2000). We granted Dinkins' petition for certiorari. We affirm.

Dinkins was a codefendant of Corey Prioleau. The Court of Appeals reversed Prioleau's conviction. State v. Prioleau, 339 S.C. 605, 529 S.E.2d 561 (Ct. App. 2000). Today, we reverse that decision. See State v. Prioleau, Op. No. 25301 (S.C. Sup. Ct. filed June 11, 2001) (Shearouse Adv. Sh. No. 21).

The reader is referred to our opinion in State v. Prioleau, supra, and to the Court of Appeals' opinion in State v. Dinkins, supra, for a review of the facts relevant to this matter.

We agree with the Court of Appeals' analysis of the evidence presented against Dinkins, and with that Court's conclusion that the admission of Devon's statement was harmless error. See id. We take this opportunity, however, to address a statement in that opinion with which we do not agree.

The Court of Appeals intimated in its Dinkins decision that the evidence against Prioleau was less substantial than that offered against Dinkins. State v. Dinkins, 339 S.C. at 604, 529 S.E.2d at 560. For the reasons discussed in our opinion in State v. Prioleau, supra, we do not agree

with this characterization of the evidence.

The State presented particularly strong cases against both defendants, including the victims' identifications of both Dinkins and Prioleau.

Because we agree with the Court of Appeals' analysis of the evidence against Dinkins and its conclusion that the error in admitting Devon's statement was harmless, we AFFIRM.

MOORE, A.C.J., WALLER, BURNETT and PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jean B. Vaughn, as
Personal Representative
of the Estate of Mary
Henrietta Bernhardt,
Deceased, Respondent,

v.

John R. Bernhardt, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Joseph J. Watson, Circuit Court Judge

Opinion No. 25303
Heard April 5, 2001 - Filed June 11, 2001

AFFIRMED

Harold P. Threlkeld, of Anderson, for petitioner.

Steven C. Kirven, of Watkins, Vandiver, Kirven, Gable & Gray, of Anderson, for respondent.

CHIEF JUSTICE TOAL: We granted certiorari to review the Court of Appeals' decision in *Vaughn v. Bernhardt*, 339 S.C. 125, 528 S.E.2d 82 (Ct. App. 2000). We affirm.

FACTUAL/PROCEDURAL BACKGROUND[1]

In the years prior to her death, Mary Henrietta Bernhardt ("Decedent") established several accounts ("Joint Accounts") titled jointly in her name and her nephew's name, John R. Bernhardt ("Bernhardt"). The Joint Accounts contained right of survivorship provisions. The assets in the Joint Accounts represented principal amounts contributed solely by the Decedent, plus interest or income earned on principal contributed by the Decedent.

On June 7, 1995, Decedent was admitted to St. Francis Hospital. On June 15, 1995, one week after the Decedent was hospitalized, Bernhardt transferred all of the proceeds from the Joint Accounts into a new account titled solely in his name.[2] The Decedent did not consent to Bernhardt transferring the proceeds into the new account. On June 22, 1995, the Decedent died at the age of 82.

After the Decedent's death, Bernhardt used $5,000 of the Joint Accounts' funds to pay for her funeral expenses. Jean B. Vaughn, ("Vaughn"), the personal representative of the Decedent's estate, demanded Bernhardt return the Joint Accounts' funds to the estate. Bernhardt refused to relinquish the funds, and this action was commenced in probate court.

The probate court found Bernhardt was not entitled to the funds he

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[1]The following facts were stipulated.

[2]Bernhardt withdrew approximately $52,884.86 from the Joint Accounts.

withdrew from the Joint Accounts and ordered him to pay the funds to the estate, minus the funeral expenses. The probate court ruled the statutory presumption of entitlement to funds under S.C. Code Ann. § 62-6-104(a) (1987), which Berhnardt would have as the sole surviving party to the joint accounts, only applied to sums on deposit in joint survivorship accounts at the death of the contributing party. According to the probate court, because Bernhardt withdrew the funds prior to the Decedent's death, he was not entitled to this presumption. The circuit court and the Court of Appeals affirmed the probate court's order. *Vaughn, supra.*

We granted Bernhardt's petition for a writ of certiorari to review the Court of Appeals' decision. The following issue is before this Court on certiorari:

> Did the Court of Appeals err in holding a non-contributing party to a joint bank account loses his right to survivorship when he withdraws all of the funds from the joint account prior to the death of the contributing party?

LAW/ANALYSIS

Bernhardt argues the Court of Appeals erred by concluding the Joint Accounts' funds are the property of the Decedent's estate because Bernhardt withdrew the funds and deposited them into a new account prior to the Decedent's death. We disagree.

A. Statutory Construction

Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. *Id.*

The statutes concerning multi-party accounts and survivorship rights are unambiguous. Section 62–6-103(a) provides, "A joint account belongs, *during*

the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." S.C. Code Ann. § 62–6-103(a) (1987) (emphasis added). Any sums "remaining on deposit" at the time of the death of one of the parties to the account belongs to the surviving party or parties as against the estate of the decedent. S.C. Code Ann. § 62-6-104(a). The term "sums on deposit" specifically includes the balance payable on a multiple-party account and does not extend to withdrawn funds or proceeds. S.C. Code Ann. § 62-6-101(13) (1987). Because there was no multiple-party account in existence when the Decedent died, Bernhardt is not entitled to the survivorship presumption.

According to the stipulated facts, Bernhardt did not contribute any money to the Joint Accounts. Thus, under the provisions of section 62-6-103(a), all the funds from the Joint Accounts belonged to the Decedent during her lifetime because she was the sole contributor.[3] Seven days prior to the Decedent's death, Bernhardt transferred the funds from the Joint Accounts into an account titled solely in his name. When the Decedent died, there were no sums on deposit in the Joint Accounts because Bernhardt had removed the funds. Therefore, Bernhardt cannot claim ownership of the funds based on section 62-6-104(a), the right of survivorship provision.

Bernhardt argues the ownership provision, section 62-6-103(a), does not apply to this case because it only applied during the lifetime of the parties, and the Decedent is now dead. We disagree. Section 62-6-103(a) is not rendered inapplicable just because the Decedent died. Section 62-6-103(a) certainly applied seven days prior to the Decedent's death when Bernhardt transferred the funds from the Joint Accounts into a personal account, because those funds belonged to the Decedent. Because both parties to the Joint Accounts were still living at the time of the transfer, section 62-6-103(a) dictates the funds removed by Bernhardt belonged to the Decedent at that time.

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[3]None of the stipulated facts indicate the Decedent had a contrary intent.

B. Persuasive Authority

This Court has never addressed the question of whether a party on a joint account with the right of survivorship can withdraw the funds prior to the other party's death without causing the funds to become assets of the decedent's estate. In deciding this novel issue, the Court of Appeals relied on *Shourek v. Stirling*, 621 N.E.2d 1107 (Ind. 1993), a persuasive Indiana case with almost identical facts. We agree with the Court of Appeals' and the Indiana Supreme Court's interpretation.

In *Shourek*, the decedent added her niece as a joint owner of a checking account and four certificates of deposit. *Id.* at 1108. All accounts contained rights of survivorship and an unrestricted right of withdrawal by either joint tenant. *Id.* Merely four hours before her aunt's death, the niece withdrew approximately $65,000 from some of the joint accounts. *Id.* Construing statutes identical to South Carolina's, the Indiana Supreme Court found the presumption of survivorship on a joint account does not apply where there is a withdrawal of funds while the account holder is still alive. *Id.* at 1110. According to the Indiana Supreme Court, in order for the niece to benefit from the survivorship presumption, the funds must have remained on deposit when her aunt died. Consequently, the court required the niece to establish her entitlement to ownership without the benefit of a survivorship presumption. *Id.*

The present case raises several policy concerns. While the Decedent may well have intended for Bernhardt to receive the Joint Accounts' funds after her death, Bernhardt choose to rely solely on the statutory presumption and did not present other evidence of intent. As explained above, however, he is not entitled to the presumption. The effect of our decision today may be to frustrate the Decedent's intent, but to hold otherwise would be to ignore the plain meaning of the statute. Furthermore, accounts with right of survivorship provisions are often set up to allow caretakers to assist elderly people with the management of their finances. Their financial protection can best be honored by adhering to the statutory presumption.

CONCLUSION

Based on these policy considerations, we uphold the plain language of the statutes, and **AFFIRM** the Court of Appeals' decision.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Charles Johnson, Petitioner,

v.

William D. Catoe, Director, South Carolina Department of Corrections, Respondent.

IN THE ORIGINAL JURISDICTION

Opinion No. 25304
Heard February 20, 2001 - Filed June 11, 2001

DENIED

John H. Blume, Cornell Law School, of Ithaca, New York; and David P. Voisin, of the Mississippi Office of Post-Conviction Counsel, of Jackson, Mississippi, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant

Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, for respondent.

Lawrence C. Marshall, of the Center on Wrongful Convictions, of Chicago, Illinois; Barry C. Scheck, and Peter J. Neufeld, of The Innocence Project, of New York, New York; and Vance L. Cowden, of the Department of Clinical Legal Studies, of Columbia, for *amicus curiae*.

JUSTICE MOORE: We have accepted this case in our original jurisdiction to consider whether petitioner is entitled to a new trial based upon after-discovered evidence. We find that he is not so entitled.

FACTS

In September 1985, Daniel Swanson was driving his RV through North Carolina on his way to Florida when he picked up petitioner, who was hitchhiking. The following day, Swanson and petitioner picked up hitchhikers, Curtis Harbert and Connie Sue Hess, on Interstate 95. Thereafter, Swanson was shot in the back of the head with a .357 pistol at close range. His body was concealed under a mattress.

Petitioner, Harbert, and Hess continued in the RV. Petitioner, who was drinking, was driving erratically. Trooper Bruce Smalls stopped the RV after being notified about petitioner's reckless driving. During the stop, he was shot and killed.

After Trooper Smalls was initially shot, he fell or was pushed out of the RV's doorway, and landed on the shoulder of the highway. There was a small blood smear on the inside of the door jam. He was then shot while he was lying on the ground. His body was dragged down a steep embankment, with his feet closest to the RV.

Harbert and Hess went south on foot. They went into the wooded median and then to a closed weigh station about a half mile from the RV. They flagged down a car whose occupants took them back to the RV after Harbert and Hess told them about the murder. Harbert and Hess gave a description of petitioner who they said killed the trooper. They both had some of Swanson's possessions.

Petitioner crossed the interstate on foot and went north. He was later stopped by police and they discovered he was carrying the .357 pistol used to kill Swanson and various items belonging to Swanson, including a TV set, in a white bag. Petitioner was wearing Swanson's watch. Swanson's class ring was found in the patrol car in which petitioner was transported.

The weapon used in the trooper's murder, a .38 pistol, along with a shotgun in its case were later found in the median. The weapons were not found in the same place and were covered with pine straw.

Petitioner had blood on him, but the blood was too small to provide a sample that could be tested. His blood alcohol level at the time of the crime was projected to be 0.23 percent. No gun powder residue was found on petitioner, Harbert, or Hess.

Petitioner was convicted in Jasper County for the murder of Trooper Smalls and was sentenced to death. On appeal, this Court reversed his conviction and sentence. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). After a retrial, petitioner was again convicted of murder and sentenced to death. This Court affirmed the conviction and sentence, and the United States Supreme Court denied his request for a writ of certiorari. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992).

Petitioner also pled guilty to the murder and armed robbery of Swanson in Clarendon County. He was sentenced to imprisonment for life for the murder and twenty-five years for the armed robbery. No direct appeal was taken from the guilty pleas.

Petitioner's post-conviction relief application, regarding his conviction and sentence for the murder of Trooper Smalls, was denied, and this Court denied his request for a writ of certiorari. He then made a request for federal habeas corpus relief, which was denied by the federal district court. The decision was affirmed by the Fourth Circuit Court of Appeals, with Judge Ervin concurring in part and dissenting in part. Johnson v. Moore, 164 F.3d 624 (4th Cir. 1998). The United States Supreme Court denied his request for a writ of certiorari. Johnson v. Moore, 526 U.S. 1042, 119 S.Ct. 1340, 143 L.Ed.2d 504 (1999). We denied petitioner's subsequent request for a writ of habeas corpus. Johnson v. Catoe, 336 S.C. 354, 520 S.E.2d 617 (1999).

Petitioner's request to delay setting an execution date was denied and an execution date was set for October 29, 1999. Petitioner thereafter sought a stay of execution pending the filing of a petition for a writ of habeas corpus based on after-discovered evidence. We granted the stay of execution to consider whether petitioner should be granted leave to move for a new trial based on after-discovered evidence in light of a statement given by Hess on October 22, 1999. In this statement, Hess stated Harbert killed Swanson and she, alone, killed Trooper Smalls.

We appointed the Honorable William P. Keesley as referee to take evidence and issue a report containing his recommendations to the Court on the new trial motion, including his findings regarding the competency and credibility of Hess. The referee was further instructed to set forth his recommendations on the motion for a new trial pursuant to the standard set forth in State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999).[1]

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[1] Under Spann, in order to prevail on a new trial motion, the movant must show the after-discovered evidence:

> (1) is such that it would probably change the result if a new trial were granted;
> (2) has been discovered since the trial;
> (3) could not in the exercise of due diligence have been

Following hearings, the referee issued his report finding Hess was competent but not credible, and finding that it was not probable Hess's statement would change the result of petitioner's conviction or death sentence if a new trial were granted.

Before addressing Hess's October 22nd statement, we believe it is pertinent to look at Hess's prior statements from 1985 through 1999. On September 27, 1985, Hess gave two statements indicating that petitioner killed Swanson and Trooper Smalls. On September 28, 1985, Hess gave a statement that Harbert killed both Swanson and Trooper Smalls. On September 30, 1985, Hess again gave a statement that petitioner killed both Swanson and Trooper Smalls.

At petitioner's first trial in February 1986, Hess testified that after being stopped by the trooper, she saw petitioner pick up a gun. At this point, she said she exited the RV and then heard shots. On cross-examination by the State, Hess stated petitioner killed Swanson and the trooper. However, she reiterated she did not know if petitioner had killed Trooper Smalls after he picked up the gun because she could not see what occurred. On re-direct examination, Hess testified concerning her statement that Harbert had committed the crimes. Hess indicated she lied at that time in an attempt to protect petitioner, because the police would not believe her story that after she ran from the shooting she returned to get her shoes, because she was afraid of "going to the electric chair," because the police promised they would not tell Harbert she had implicated him in the murders, and because they had promised her food in exchange for her story.

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discovered prior to trial;
(4) is material;
(5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. at 619-620, 513 S.E.2d at 99 (citation omitted).

In May 1987, Hess, who was in Nebraska, contacted her former attorney.[2] She asked that he tell the appropriate authorities that Harbert had killed Swanson. She stated petitioner did not do the shooting, that her previous statement was incorrect, and that she wanted to correct the mistakes.

On October 21, 1999, Hess was visited in the Liberty Centre[3] in Norfolk, Nebraska by Diana Holt, a representative of petitioner, to determine if Hess could add anything that might assist petitioner before he was set to be executed eight days later. Initially, Hess stated Harbert killed Swanson, but she could not remember the trooper's shooting. Holt asked Hess if her recollection could be refreshed by looking at her 1985 statement. Hess responded it would be helpful.

After refreshing her recollection by looking only at the 1985 statement that implicated Harbert, Hess stated Harbert killed Swanson because he was mad that Swanson had wanted to or had engaged in homosexual activity with Harbert; that Harbert said he would kill the trooper because the trooper would find the body if he entered the RV; and that Harbert fired all the shots that killed Trooper Smalls.

Hess gave a different statement later that day. In this statement, which was notarized, Hess stated that only Harbert fired the first shots at Trooper Smalls. She said after Trooper Smalls slumped in the doorway, she grabbed the gun from Harbert and pushed or kicked the trooper out with her foot and said, "there you go, bastard." Hess stated she then fired the rest of the shots when the trooper was on the ground. She also mentioned throwing the gun

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[2] The indictments against Hess and Harbert for the murder of Trooper Smalls and for the murder and crimes in connection with the murder of Swanson were dismissed.

[3] Liberty Centre provides opportunities for people with mental illnesses to be rehabilitated into the community. The program, of which Hess is a member, consists of a day program and a 24-hour staffed group home facility called Park Place.

away.

After leaving Hess, Holt received a call from Hess on her cellular phone. Hess stated she had lied and began to cry. She stated she was the only one who shot Trooper Smalls, and that Harbert had not shot the trooper. Holt then decided to see Hess the next day to get the statement in writing.

The next day, when Holt arrived, Hess stated she could not leave the Liberty Centre. Holt then met with Patty Skokan, Assistant Director of Liberty Centre, and Dawn Zangari, Hess's case manager, and learned a notary was not available on the premises. Skokan advised Hess that she should see an attorney before signing the affidavit, which Hess agreed to do. Beverly Springer, who held a fundraising and community relations position at the Centre, was also present during this communication. Springer, who was deposed in this matter, stated Hess did not want Holt to get mad at her for speaking with an attorney. Springer also stated that Hess indicated Holt was her friend because she had bought Hess a soft drink and french fries.

Later that afternoon, several people met at attorney Jeffrey Hrouda's office for the signing of the affidavit. Hrouda agreed to represent Hess regarding the affidavit. Before Hrouda and Hess met with the others, they spoke privately. During this time, Hrouda informed Hess of her constitutional rights and advised her not to sign the affidavit.

Hess, Hrouda, Skokan, Springer, Holt, Harry Moore, the Madison County Public Defender who would be notarizing the statement, and Julie Rogers, a public defender who would serve as a witness, then met. Before Holt read the affidavit aloud to Hess, Hrouda went over with Hess that she had the right against self-incrimination and that she did not have to sign the affidavit. Holt read the affidavit line by line and Hess responded yes after each line. At one point, Hess indicated a correction needed to be made. She stated one line should have said petitioner had no idea <u>she</u> was going to shoot the trooper instead of petitioner had no idea <u>Harbert</u> was going to shoot the trooper. The affidavit was corrected and a new copy was faxed to Hrouda's office. Holt went through the affidavit again line by line. After that, Moore,

serving as the notary, told Hess the affidavit could be used against her, and that she could be prosecuted. Moore asked if she gave the statement voluntarily, if she was pressured, if Holt had promised her anything, if she had been threatened, and the source of the information. Moore then administered the oath and Hess signed the affidavit.

In this affidavit, now known as Hess's October 22nd statement, Hess stated that her testimony involving the deaths of Swanson and Trooper Smalls was false. She stated Swanson wanted her and Harbert to have sex with him, so they undressed and got in bed together. She then went to the front of the RV to speak with petitioner. She stated Harbert shot Swanson, and then broke into the compartment where Swanson kept his guns.

When Trooper Smalls stopped the RV, Harbert handed her the gun. When the trooper started to enter the RV, she shot him three times. At that point, the trooper was propped up against the RV's doorway. She stated she kicked him out of the RV and shot him as he lay on the side of the road, while screaming, "there you go, bastard." After that, she stated she ran down the interstate with Harbert, and she threw the gun away.

Hess stated she lied about what happened because she did not want to die, and that the solicitor had told her she would "fry" if she had anything to do with the murder. She stated she is now telling the truth because she cannot let petitioner die for something he did not do.

At the hearing before the referee, Hess pled the Fifth Amendment privilege against self-incrimination to the questions regarding the murders. Hess, however, answered questions regarding her mental health, such as that she believed she has multiple personalities, and that on October 14, 1999, she expressed a desire to hang herself. She also stated that in October 1999, she was feeling a lot of stress and was sad because her father was dying. She also answered questions about her past drug use. Hess further stated she had heard voices and seen things, such as little dinosaurs and skeletons with red eyes. Hess stated that at times she has told people things that are not true.

ISSUES

(1) Is Hess a competent witness?

(2) Is Hess a credible witness?

(3) Has the standard for a new trial based upon after-discovered evidence been met?

DISCUSSION

Competency

The referee found Hess competent as a witness. The referee noted, however, that Hess has a "very long history of mental health problems" that includes "over 5000 pages of mental health records that were obtained for the purpose of [the] hearing." The consensus of the experts who testified at the hearing was that Hess suffers from borderline personality disorder.[4] The referee noted that "[n]o expert stated that Hess is now or was ever incompetent to testify at any relevant time."

The referee found there was nothing in the "record sufficient to overcome the presumption that Ms. Hess is competent as a witness. She was

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[4] At the hearing, the experts for both sides discussed how Hess met the criteria for borderline personality disorder. This disorder can include the following:

(1) Shifts in mood lasting a few hours;
(2) Self-destructive acts, such as suicidal threats and gestures;
(3) Unstable, chaotic intense relationships characterized by viewing the self and others as "all good" or "all bad;" and
(4) Frantic efforts to avoid real or imagined abandonment, characterized by a heavy need for affection and reassurance.

competent to give the affidavit and would be deemed competent to testify as a witness in light of the [Rule 601(a), SCRE][5] presumption."

Neither petitioner nor the State voiced an objection to the referee's finding of competency. In any event, in the absence of any evidence to the contrary, we adopt the referee's finding that Hess was a competent witness.

Credibility

In making his determination that Hess was not credible, the referee first reviewed the mental health evidence, and then evaluated whether it was likely that Hess's October 22nd statement was true by comparing the affidavit to the facts of the crime.

The referee found Hess "lies for a variety of reasons, and no one knows what prompts her to be untruthful on any particular occasion." He further stated his belief that "Hess will say almost anything, knowing it to be untrue, for reasons satisfactory to her, but a mystery to the rest of us."

The referee stated the following:

> the only way people know when . . . Hess is recounting what actually happened or is espousing a fabrication from within her very disturbed mind is when they have concrete evidence that directly supports or refutes what she is saying. There is simply no way to know whether and to what extent all the questions of primary gain, the desire to please people, impulsiveness, self-protection, attention-seeking behavior, and her perceptions of right and wrong come into play.

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[5] "Every person is competent to be a witness except as otherwise provided by statute or these rules." Rule 601(a), SCRE.

Comparing Hess's October 22nd affidavit with the known evidence of the murder of Trooper Smalls, the referee found Hess's October 22nd statement was not consistent with the evidence. He further stated his belief that her earlier statements were more consistent with the physical evidence.

The referee conceded the crime may have happened differently, but he felt the most reasonable scenario was the one used to convict petitioner. This scenario had the trooper being distracted by Hess leaving the RV and Harbert gathering his belongings, which permitted petitioner the opportunity to grab the .38 pistol from the area of the driver's seat and begin shooting at the trooper. Petitioner shot two or three more times, and then moved in front of the trooper and fired again, continuing to fire after Trooper Smalls fell or was pushed out of the RV. The referee concluded that it was not probable another jury would believe Hess's new affidavit if presented with the evidence he had.

On the day of the murder, Hess stated more than once that petitioner killed the trooper. The next day she said Harbert committed the crime; however, two days after this, she stated petitioner killed the trooper. At petitioner's first trial in 1986, she stated she could not see who shot the trooper; however, on cross-examination, she testified petitioner shot him. In May 1987, Hess called her former attorney and stated that Harbert had killed Swanson and that she wanted to correct the mistakes. On October 21, 1999, Hess first stated Harbert killed Swanson and that she could not remember the shooting of Trooper Smalls. In her next statement, given after she was prompted by her 1985 statement implicating Harbert in the murders, she said Harbert killed Swanson and the trooper. In her third October 21st statement, Hess stated Harbert fired the first shots at the trooper and then she fired the rest of the shots. In her final October 21st statement that became her October 22nd affidavit, Hess stated she, alone, killed Trooper Smalls. We feel these numerous varying statements undermine any determination that Hess could be a credible witness.

By considering Hess's mental health, her past statements, and by comparing her October 22nd statement with the known facts of the crime, as

the referee properly did, we must conclude Hess is not a credible witness.

Standard for a New Trial

For petitioner to show he is entitled to a new trial, pursuant to State v. Spann, supra, he must show the evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; (5) is not merely cumulative or impeaching.

We find petitioner has failed to meet the requirement for a new trial that the evidence is "such that it would probably change the result if a new trial were granted." We do not believe it is probable a jury would find Hess credible given her prior inconsistent statements.[6] Beyond these problems with Hess's credibility, we believe, as the referee found, that the known facts about Trooper Smalls's shooting do not correlate with Hess's claim that she killed the trooper. We further find the consistency of Harbert's statements to police and at petitioner's trial undermines the possibility that the result of a new trial would be different. Harbert has consistently claimed petitioner killed both Swanson and Trooper Smalls. Accordingly, we adopt the referee's findings and deny the motion for a new trial.

DENIED.

TOAL, C.J., and BURNETT, J., concur. WALLER and PLEICONES, JJ., dissenting in separate opinions.

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[6] The dissent by Justice Pleicones contends a jury should have the opportunity to assess whether Hess is credible. However, in these circumstances, it is the province of this Court to make that finding because this matter was heard in our original jurisdiction. Furthermore, to decide whether Hess's statement would probably change the result of petitioner's trial, we are required to determine Hess's credibility.

JUSTICE WALLER: The issue presented in this habeas corpus matter is a simple, but troubling, one: Should the State of South Carolina execute a man for murder when someone else confesses to committing the murder and that confession has never been presented to a jury? Because I would answer that question in the negative, I respectfully dissent.

Both the majority and Justice Pleicones's dissent analyze this issue under the standard set forth in State v Spann, 334 S.C. 618, 513 S.E.2d 98 (1999). Pursuant to Spann, a new trial motion based upon after-discovered evidence should be granted when the evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. Given Hess's questionable credibility, the majority concludes that Hess's statement would probably not change the result of a new trial. Justice Pleicones disagrees.

I believe that strict adherence to the Spann test yields the result the majority enunciates in its opinion. This result, however, is what I find troubling. Considering the unusual circumstances of this case,[7] I believe that to deny Johnson a new trial in the face of a confession by someone who was admittedly present when the murder was committed would constitute "a denial of fundamental fairness shocking to the universal sense of justice." Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (citations and internal quotes omitted). Using this standard, I arrive at the conclusion that our system of justice dictates that before Johnson is put to death he must be given an opportunity to present such evidence to a jury of his peers.

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[7]Absent the statements of Curtis Harbert and Hess, there is no conclusive evidence that Johnson committed this murder. Moreover, Hess has given numerous statements alternatively implicating Johnson and Harbert, and now herself, as the shooter. Johnson has maintained that he has no memory of shooting Trooper Smalls. See, e.g., State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987).

Accordingly, I would grant the motion for a new trial.

JUSTICE PLEICONES: I respectfully dissent. Applying the five part test, enunciated in State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999), a decision to grant petitioner a new trial rests upon the determination that Connie Hess's confession "would probably change the result if a new trial were granted." Id. at 619, 513 S.E.2d at 99. I believe the confession would probably change the result on retrial and, therefore, would grant petitioner's motion for a new trial.

In support of the decision to deny petitioner's new trial motion, the majority finds that, in light of her history of fabrications and her mental health status, Hess's confession is not credible. They conclude that the new evidence would not likely change the result of a new trial because Hess's confession is not consistent with the known facts of the crime, and because Curtis Harbert has consistently maintained that petitioner killed Trooper Smalls.

As support for its determination that Hess is not a credible witness, the majority cites her prior inconsistent statements. Comparing the circumstances under which the various statements were made convinces me that Hess's confession is worthy of belief.[8] When Hess's 1985 statements were made, she was under investigation for the commission of a capital

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[8]I agree that we must address Hess's credibility in determining petitioner's entitlement to a new trial. However, in my opinion, we need not be convinced as an absolute matter of the truth of the new evidence before granting a new trial. We need only find the new evidence worthy of belief. See State v. Fowler, 264 S.C. 149, 213 S.E.2d 447 (1975) (where newly discovered evidence is incredible and improbable under all the circumstances, motion for new trial will be denied); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959) (trial court's denial of defendant's motion for new trial on basis of after-discovered evidence affirmed where trial court concluded new evidence was not worthy of belief). For the reasons stated in this dissent, I find the new evidence here worthy of belief and would therefore grant petitioner's motion.

offense. It is not unlikely that her statements were motivated by expectations of reward and self-preservation. Our law recognizes, and common sense dictates, that self-serving statements are inherently less reliable than are self-inculpatory statements. See, e.g., Rule 804(b)(3), SCRE (providing exception to rule against hearsay where the statement, at the time of its making is against declarant's pecuniary or proprietary interest, the rationale being the assumption that persons do not make statements which are damaging to themselves unless satisfied that the statements are true).

When Hess signed the most recent statement, confessing to the murder of Trooper Smalls, she did so only after consulting with counsel. Her attorney advised Hess of her right to remain silent and that it was not in her best interest to sign the statement. Counsel urged her not to sign the statement. Despite this advice, Hess confessed. In light of these facts, I cannot agree that Hess's admission of guilt is incredible as a matter of law.[9] Further, since it is uncontroverted that Hess is competent to testify, a jury should have the opportunity to determine the extent to which her testimony is colored by her mental problems, and to decide the relative weight her testimony is afforded.

Unlike the majority, I do not find Harbert's statements a sufficient basis to say it is probable that a jury would not reach a different result. Although they are consistent in naming petitioner as the shooter, they do contain inconsistencies. Moreover, Harbert's statements, like Hess's previous statements, were obtained while he was a suspect in the state trooper's murder.

The majority adopts the referee's finding that Hess's confession is not consistent with the known facts of the case. However, at trial the State presented no physical evidence to establish that petitioner, and not Harbert or

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[9]The presence of the public defender, who notarized the statement and advised Hess of its damning nature, and of Liberty Center staff during its signing further demonstrate the statement's reliability.

Hess, killed Trooper Smalls. In fact, the record is devoid of any evidence which would exclude any of the three as Trooper Smalls's murderer. While it is true that police found no gun powder residue on Harbert, or Hess, no tests for gun powder residue were performed on those two until after sufficient time had elapsed for any residue to dissipate. Tests conducted in a timely manner on petitioner revealed no gun powder residue.

I conclude by noting that our system of justice reveres the probative value of confessions. To echo the words of the United States Supreme Court,

> [a] confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions can have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of its mind even if told to do so.

Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 1257, 113 L. Ed. 2d 302 (1991) (internal citations and punctuation omitted).

Given the lack of physical evidence to indicate petitioner, and not Harbert or Hess, fired the shots which killed Trooper Smalls, it is my opinion that Hess's confession would probably change the result if a new trial were granted, and therefore, I dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Greenville County
Magistrate J. Metz
Looper, Respondent.

Opinion No. 25305
Submitted May 25, 2001 - Filed June 11, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Senior Assistant Attorney General Nathan Kaminski, Jr., both of Columbia, for the Office of Disciplinary Counsel.

A. Camden Lewis, of Lewis, Babcock & Hawkins, and Richard A. Harpootlian, of Richard A. Harpootlian, P.A., both of Columbia, for respondent.

PER CURIAM: In this judicial grievance matter, respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent, a former magistrate for Greenville County who resigned on March 7, 2001, admits misconduct and consents to a public reprimand. We accept the agreement and publicly reprimand respondent, the most severe sanction we are able to

impose in these circumstances. The facts in the agreement are as follows.

First Matter

While traffic charges against a defendant were pending in respondent's court, respondent engaged in one or more communications with the arresting officer and other officers in the Greenville County Sheriff's Department regarding the charges. The traffic charges were never set for trial and eventually the charges were nol prossed by the solicitor without further explanation. However, before the charges were nol prossed, and while they were pending in respondent's court, respondent went to a car dealership owned by the defendant's father, and at which the defendant was employed as a salesman, and negotiated with the defendant the trade-in of his automobile for a new automobile. Approximately one year later, while the charges were still pending in respondent's court, respondent purchased another new vehicle from the dealership. Although there is no clear and convincing evidence respondent received favorable treatment in these transactions, he acknowledges they created an appearance of impropriety.

Second Matter

Respondent, as owner, director, and officer, along with his wife, of a corporation, was involved in litigation pending before Greenville County Magistrate R. Carey Werner. While the matter was pending before Judge Werner, respondent engaged in communications with Judge Werner for the purpose of making him aware of respondent's personal interest in the action. The opposing party was not present during the communications. Although Judge Werner did not allow the communications to influence his decision in the case, he felt the communication by respondent should have been avoided.

By his actions, respondent has violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 3 (a judge shall perform the duties of judicial office impartially and diligently); and Canon 4 (a judge shall so conduct the

judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations). These violations also constitute grounds for discipline under Rule 7(a)(1), RJDE, Rule 502, SCACR.

We accept the agreement for a public reprimand because respondent is no longer a magistrate and because he has agreed not to hereafter seek another judicial position in South Carolina unless first authorized to do so by this Court. As previously noted, this is the strongest punishment we can give respondent given the fact that he has already resigned his duties as a magistrate. Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

Pleicones, J., not participating

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jasper
County Magistrate
Donna D. Lynah, Respondent.

Opinion No. 25306
Submitted May 25, 2001 - Filed June 11, 2001

DEFINITE SUSPENSION

Henry B. Richardson, Jr. and Deborah S. McKeown, both of Columbia, for the Office of Disciplinary Counsel.

R. Thayer Rivers, Jr., of Ridgeland, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any of the stated sanctions set forth in Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and suspend respondent for nine months, retroactive to October 6, 2000, the date she was placed on interim suspension. See In the Matter of Lynah, 342 S.C. 617, 530 S.E.2d 60 (2000).

The facts as set forth in the agreement are as follows. On or about July 29, 1999, respondent, while serving in her capacity as a Jasper County Magistrate, issued an order which purported to give public notice, pursuant to S.C. Code Ann. § 29-15-10 (1991), of a judicial sale of a motor vehicle for "accrued charges" allegedly due Jasper County Magistrate Joyce Lynn Leavell. Although Judge Leavell was not the proprietor, owner or operator of any storage place, garage, or repair shop, as required in order to be granted relief under section 29-15-10, and although no judicial sale was actually conducted, respondent subsequently issued a Magistrate's Bill of Sale which stated she had sold the motor vehicle at public auction for $30 and that the buyer was Judge Leavell. Respondent was aware that the motor vehicle in question was worth far more than $30. Moreover, in further violation of section 29-15-10, respondent failed to advertise the sale, and she issued the Bill of Sale without any evidence that Gary Brown, holder of record title to the motor vehicle, had been given written notice by Judge Leavell that she was claiming a lien on the motor vehicle. In issuing the Bill of Sale, respondent knew Judge Leavell was not seeking to recover the costs of repairs to or storage of the motor vehicle, but that she was simply seeking to obtain a certificate of title to the motor vehicle. Judge Leavell did in fact use the Bill of Sale to obtain a certificate of title to the motor vehicle from the South Carolina Department of Revenue.

Brown has since filed a civil action against Judge Leavell concerning the motor vehicle. Respondent and Judge Leavell were both charged with misconduct in office. Judge Leavell was also charged with breach of trust. The arrest of the judges received widespread media attention and acted to discredit the judiciary in the State of South Carolina. Respondent maintains she signed the Notice of Judicial Sale and the Magistrate's Bill of Sale at the request of Judge Leavell, who was respondent's supervisor, and after certain representations were made to respondent by Judge Leavell. The charges against respondent have been dismissed and she is cooperating fully in the investigation of this matter by the State Law Enforcement Division, the Office of Disciplinary Counsel, and the Fourteenth Circuit Solicitor's Office.

By her conduct, respondent has violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 2 (a judge shall avoid impropriety in all of the judge's activities); Canon 3 (a judge shall perform the duties of judicial office impartially and diligently). These violations also constitute grounds for discipline under Rule 7(a)(1), RJDE, Rule 502, SCACR.

In our opinion, respondent's conduct warrants a suspension from her judicial duties for nine months. Accordingly, we hereby suspend respondent for nine months, retroactive to October 6, 2000, the date of her interim suspension.

DEFINITE SUSPENSION.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sea Cabins on the Ocean IV Homeowners Association, Inc., Grand Strand Realty, Gerald W. Arney, Mary P. Arney, Bobby McLean, Thelma McLean, Thomas P. Woodruff, Virginia C. Woodruff, Ronald L. Peck, Philip H. Morris, Linda M. Morris, Jack L. Tyson, Shirley S. Tyson, Timmy R. Helms, Thomas Minton, Frank R. Buoniconti, Jeanne L. Buoniconti, Robert A. DeSimone, Jim F. Moore, Jo Mingas Moore, William R. Kennedy, Jr., Hilda B. Kennedy, Steve A. Brock, Gary W. Alphin, W.F. Tugwell, Jr., Ronald D. Hall, Bath Investments Properties, c/o Thomas Myers, David L. Saunders, Ray A. Bolick, Nancy P. Bolick, Elizabeth Kandler Elliott f/k/a Elizabeth A. Kandler, Jimmy L. Love, Etta Love, Charles A. Ginardi, Carol W. Ginardi, Russell L. Pinkelton, R. Steve Metcalf, Ray E. Jennings, L. Derek Herring, William P. Brown, J.P. Batten, Jr., Tony Sherrill, Carolyn H. Sherrill, Joseph M. Baker, Martha K. Baker, Don Ferrell, Nancy C. Williamson, Alan H. Branan, Francis G. Logue,

Patricia J. Logue, Dominick Mauriello Trust f/k/a Dominick Mauriello and Marjorie Mauriello, John W. Blake, Sharon D. Blake, Bobby Young, Forrest D. Bricker, Robert E. Sease, Jane A. Sease, Howard E. Virkler, Macy L. Hoyle (died 9/13/90), Jane Brendel, Richard Brendel, Stacy Jean Snyder, Fred M. Snyder, Joyce Snyder, Daniel E. Wilson, Wanda M. Wilson, Bobby J. Garrison, Barbara S. Garrison, Hambry Brothers, Inc., Vera G.M. Hankin, Sarah S. McLean, A.F. McLean, Jr. (as trustee for William H. McLean), Estate of Sarah S. McLean f/k/a Sarah S. McLean, Mellon Bank, Phillips E. Powell, Diane F. Powell, Joseph A. Galiano, Denise Galiano, Vincient and Catherine Pastore, Vincient, Jennifer, and Deigo Monticciolo, Charles H. Hammond, J.E. Bobbit, Jr., Wallace Webster Quate, Jr., William Maegruder, Peggy Maegruder, George W. Joyce, Sara Murray Joyce, Reggie Keith Safrit, Martha Stirewalt Safrit, Beach Properties/Linwood Jackson/James R. Bullock, Jr., Frankwell, a partnership, Edward C. McGimsey, Partner c/o Morganton Hardware Co., James J. Linden, Alice C. Linden, Kirkland P. Broom, Ann S. Broom, John R. Henderson,

Mary Ann Henderson, James T. Grier, Janet R. Grier, Emma H. Valentine, Francisco Valentine, Johnny C. Whitmore, Emma G. Whitmore, Guy A. Walters, Jr., Ann H. Walters, Felder W. West, Jack N. Morris, John E. Varol, Ralph V. Varol, Garland J. Candle, Tony R. Craven, Doloris Craven, Grady Oliver, Carol Oliver, Robert C. Barry, Jr., Jimmie R. Foxx, Eva V. Lewis, Richardo F. Cecchini, Nilda E. Cecchini, Anthony P. Sapienza, Anne M. Sapienza, Clyde R. Randal, Jean M. Randal, Bernard J. Milano, Mary N. Milano c/o PMM Company, David Steele Jarrett, Kathy Saunders Jarrett, Charles Weir, James Vernon Gross, Dorothy D. Gross, David R. Eva, Judith E. Eva, Estate of Sara S. McLean f/k/a Sara S. McLean, Richard V. Adams, Sherrell Dennis Hedrick, Galileo D. Casquejo, Thomas M. Clayton, Linda B. Clayton, Russell L. Pinkelton, Judy Pinkelton, Stan Halpern, William D. Powell, Patsy Powell, Jerry L. Calvert, Ruth C. Calvert, W.B. Seddinger, Edward Bell, Jr., Mary Lee M. Bell, Myles G. Keery, Sabra L. Keery, Fleming, Francis & Associates, Burl Kenneth Flemming, Alma Jean Flemming, David Frances, Betty L. Frances, c/o Mr. David L. Frances, Larry Peak,

James R. McCracken, Max R. Schmidt, Alice V. Schmidt, Delores Randall, Hambry Brothers Concrete, Inc., Richard Link, Ray W. Welsh, Wendy C. Welsh, Bobby L. Tuttle, Thomas T. Archer, Martha C. Archer, Ted D. Fuller, Nancy K. Fuller, Danny Edwards, Sandra Edwards, Edwin T. Yarborough, Suzanne C. Yarborough, Epworth Children's Home, Dr. A.W. Macklin, James A. Pierce, III, c/o Marietta Pallet Company, E. Wayne Harper, Brabston B. Harper, John G. Hansen, Richard V. Adams, James H. Kirk, Agnes C. Kirk, W. James Dubose, Henry Voznick, Jean H. Voznick, Thomas F. Conn, Madeline Conn, Arlon O. Jones, Charles E. Ramsey, John M. McCoy, Gerald L. Fowler, William R. McAdams, Jerry E. Moats, Fowler Moats, Inc., Chester F. D'Agostina, Janis R. D'Agostina, Wall-Johnson, Leon W. Wall, Joyce B. Wall, A. Gray Johnson, Jo Ann R. Johnson, Jerry McKee, Donna McKee, James E. Messick, Jr., Jean M. Messick, Arnold M. Schwartz, Janice M. Schwartz, Jing Ming Liu, Ellie Y. Lao, Warren Heiser, Mary Ann Heiser, Earl R. Betts, Jr., Carol A. Betts, John R. Stass, Barbara J. Stass, Hardiena J. Smith, as personal representative of William B. Smith,

Jack M. Ladford, Ila L. Carver, Walter W. Little, Doris H. Russ, Kenneth F. Spainhour, Carolina A. Spainhour, John R. Spies, Alice L. Spies, Randall David Torcasi, Robert Q. Yeckley, Carl S. Sigmon, Louie O. Lavender, Jr., Noble Vaughn, Jr., Cornelia L. Vaughn, Larry D. Procter, Kara P. Procter, Roy L. Lynam, Donna A. Lynam, Jeffrey Huber, Deborah J. Huber, Emmett Floyd, Kathy Floyd, James Russell Millner, Donald C. Winterich, Richard R. Steinke, Lewis B. Keener, LaFayette F. Decker, Cecelia M. Decker, Anthony L. Buoniconti, Margaret A. Buoniconti, Calvin L. Palmer, Jr., Rosie B. Palmer, Duane Knight, Sharon G. Knight, W. Glenn Jenkins, Charm House Design, Stephen L. Nader, William O. Reeside, Jane S. Reeside, Michael Ray, Cynthia N. Ray, Don A. Ray, Eleanor J. Ray, Cranston Blanks, Jr., Margaret L. Blanks, J. R. Gibbons, Gladys Gibbons, R. M. Glasscox, Cheryl Glasscox, Haracio P. and Martha A. Moreno-Compos, Gerald V. Hull, Emma J. Hull, James B. Davenport, Carolina Land Company, George E. Wells, Robert W. Braam, Maurice W. Brady, Ronald Bittles, Florence Bittles, David Whitley, Michael G. Carovillano, Judith A.

Carovillano, John Petrozzi, Thomas F. Murtha, Dorothy A. Murtha, John F. Quinn, Jane H. Quinn, Presbyterian College c/o Bailey Bank, George W. Wilson, Mark Wilson, Donald M. Bryant, Sandra B. Bryant, Jack Holsclaw, Mary H. Clarke, Valerie H. McRary, Gene S. Clarke, Thomas B. McRary, c/o Skyland Furniture Shoppe, Gerald W. Edmonds, Doris A. Edmonds, Jack S. Brown, Talma L. Brown, David T. McLaughlin, Carol H. McLaughlin, Harry Whitener, Eva S. Whitener, William J. Brennan, Gracia B. J. Brennan, Jerry R. Sutherland, Jo Ann Sutherland, L.D. Austin Company, Randolph Jones, Frances Jones, Seigfried Abrahams, Harold Langenderfer, Joan M. Langenderfer, Delbert L. and Marianne C. Wolcott, William B. Seddinger, William Harnett, W. Nelson Lewis, Barbara Craven, Helen, Gene, Lance & Teresia Maye, R.A. Elmore, III, Judy A. Elmore, Rodney Thompson, Mark Cosgrove, Evelyn Cosgrove, Robert Brown, Danny G. Turner, Elaine M. Turner, Harry Anedisian, Louise I. Anedisian, Ferrel G. Camp, Joyce A. Camp, Ruth Fridinger, Stephen C. Cesar, Bonnie L. Cesar, John C. Sanders, Ann Marie Sanders, John R. McClure, Rebecca D. McClure,

Jay Elliott Gordon, Faye H. Gordon, Gene S. Edmonds, Helen E. Edmonds, F. Bruce Pearch, Florence Pearch, Carl Spahn, Jr., Debra A. Spahn, Ralph J. DeFillips, Dorothy J. Phillips, Mary R. Trogden, Linda S. Toleno, Sally Davis, Stanley L. Smith, Doris H. Smith, Gerald W. Krimminger, Joyce A. Krimminger, Anthony P. Sapienza, Anne M. Sapienza, Daniel P. Mageras, Janet A. Mageras, Earl Downing, Sharon B. Downing, Robert V. Steele, Lori Steele, B. L. Sizemore, D. Ann Sizemore, Roger W. Huffman, Patricia W. Huffman, John W. O'Connor, James W. McMaster, Lana McMaster, Thomas L. Herb, Joy V. Herb, James W. McArthur, Theodore M. Cooley, Ralph W. Pope, Wallace H. Burgess, Gordon McCoy, Mary J. McCoy, John F. Barna, John Capito, Jr., Margaret B. Capito, Harry W. Wayne, David A. Dunlap, Elizabeth Stover, Americo R. Caggiano, Viola Catherine Caggiano, W.B. Seddinger, Reggie K. Safrit, Lori Anne Boyle, Linda Boyle, Fredrick J. Saleeby, Reid S. Saleeby, John G. Underwood, Jr., M/M Edward Gregory, Johnny T. Gregory, Randy S. Hammett, DPS Investment, Francis Feltham, Thomas and Eunice Kirby, Joseph Jengehino, Maryann J. Jengehino,

AllanWarrington, Greenville Progressive Womens Investment Club, Robert A. Jackson, Richard Arvonio, Cherry Grove Sales, Inc., Frederick S. Carter, and Patsy S. Carter, Petitioners,

v.

City of North Myrtle Beach, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 25307
Heard March 6, 2001 - Filed June 11, 2001

AFFIRMED IN RESULT

Newman Jackson Smith, of Nelson Mullins Riley & Scarborough, of Charleston, for petitioners.

Andrew F. Lindemann and William H. Davidson, II, of Davidson, Morrison and Lindemann, P.A., and W. Cliff Moore, III, of Ellis, Lawhorne and Sims, P.A., of

Columbia, for respondent.

JUSTICE BURNETT: Petitioners Sea Cabins on the Ocean IV Homeowners Association, Inc., et al., (Sea Cabins) brought this inverse condemnation action against Respondent City of North Myrtle Beach (City) alleging certain "affirmative and aggressive actions" by City constituted an unconstitutional temporary taking of their private pier for public use without compensation in violation of the Fifth Amendment to the United States Constitution and Article I, § 13 of the South Carolina Constitution. The master-in-equity agreed and awarded Sea Cabins $900,000 as just compensation for the temporary taking.

Finding Sea Cabins was not denied "all economically viable use" of its property as a whole during the alleged temporary taking, the Court of Appeals unanimously reversed. Sea Cabins on the Ocean IV Homeowners Assoc., Inc., v. City of North Myrtle Beach, 337 S.C. 380, 523 S.E.2d 193 (Ct. App. 1999). The Court granted Sea Cabins' petition for a writ of certiorari to review the Court of Appeals' decision.

FACTS

Sea Cabins was created by master deed in 1980 pursuant to the South Carolina Horizontal Property Act. S.C. Code Ann. §§ 27-31-10 to -420 (1991). A private 900 foot fishing pier extending into the Atlantic Ocean was included in Sea Cabins' common elements. On September 21, 1989, Hurricane Hugo damaged the pier.

By letters dated February 1 and 20, 1990, City Manager notified Sea Cabins he was going to recommend to City that the remaining portion of its pier (and other similar piers) be declared a nuisance and action be taken to remove them. On March 6, 1990, City adopted a resolution declaring all public and private pier pilings, including Sea Cabins' pier, public nuisances and ordering that they be removed within forty-five days.

Sea Cabins notified City Manager it intended to rebuild the pier and requested several extensions of time in which to file a repair permit application. The City granted Sea Cabins several extensions.

On March 20, 1990, City Council gave first reading to a proposed Beach Franchise Ordinance which provided that any pier permitted to be rebuilt must be rebuilt as a public pier. By letter dated March 23, 1990, the City Manager informed Sea Cabins that City Council had discussed that all built and rebuilt piers must be open to the public. In the same letter, the City Manager recognized Sea Cabins intended to rebuild its pier and granted a 60-day extension by which to abate the pilings nuisance.

On April 9, 1990, City ratified the Beach Franchise Ordinance. As a result of this ordinance, Sea Cabins had to either 1) execute the non-negotiable pier franchise agreement, thereby allowing public access to the pier, or 2) accept denial of a permit to repair the pier, resulting in declaration of the pier as a public nuisance and having it removed.

On June 25, 1990, Sea Cabins submitted an application, including plans and specifications, to City for a permit to repair its pier as a non-conforming use.[1] Sea Cabins did not execute a pier franchise agreement.

Three days later, Sea Cabins filed an action in federal district court against City alleging its actions (declaration of the pier as a nuisance and passage of the Beach Franchise Ordinance) resulted in the unlawful taking of private property in violation of various provisions of the United States and South Carolina Constitutions. On July 2, 1990, the federal court conducted a hearing on Sea Cabins' motion for a temporary restraining order seeking to enjoin City from removing the remainder of the pier. Sea Cabins agreed to remove unsafe portions of the pier and City agreed it would not

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[1]Under City's zoning ordinance, Sea Cabins' pier was a nonconforming use because the area in which it existed was not zoned for that use when City incorporated.

attempt to remove any other portions of the pier. This agreement rendered City's nuisance claim against Sea Cabins' pier moot.

During this time frame, City's Chief Building Inspector and a structural engineer inspected and reviewed Sea Cabins' pier. In mid-August 1990, City's Zoning Administrator rejected Sea Cabins' pier repair permit on the basis the pier was destroyed, not merely damaged, and informed Sea Cabins the pier could not be reconstructed until receipt of a special zoning exception. See CITY OF NORTH MYRTLE BEACH, SC, CODE Article VII, § 23-133(3) ("[a] nonconforming use shall not be reestablished after damage to the building exceeding seventy-five (75) percent of its replacement cost at the time of destruction.") (Zoning Ordinance). The Zoning Board of Adjustment affirmed the Zoning Administrator's decision on October 9, 1990. The circuit court affirmed.

On June 22, 1992, the federal district court granted Sea Cabins partial summary judgment. The federal court found City's April 1990 ordinance void as applied to Sea Cabins because state law permitted the rebuilding of piers which were in existence prior to Hurricane Hugo. See S.C. Code Ann. § 48-39-290(A)(3) (Supp. 2000) (non-public fishing piers which existed on September 21, 1989, may be rebuilt and used for the same purposes).

Initially, the Court of Appeals issued an opinion upholding the circuit court's order affirming the Zoning Board's ruling Sea Cabins could not rebuild the pier because it was more than 75% destroyed. Thereafter, the Court of Appeals granted Sea Cabins' petition for rehearing and issued a new opinion reversing the circuit court's order. Sea Cabins on the Ocean IV Homeowners Assoc. v. North Myrtle Beach Zoning Board of Adjustment, Op. No. 93-UP-081 (S.C. Ct. App. filed June 24, 1993). The Court of Appeals held the circuit court applied an incorrect standard in finding the pier was more than 75% destroyed rather than determining whether the cost of repairs exceeded 75% of the cost to replace the pier at time of its destruction. Id.

On July 29, 1993, the federal district court entered an order finding Sea Cabins had a property interest in the pier, but that its takings claim was premature because Sea Cabins had not sought compensation under available state procedures. Sea Cabin on the Ocean IV Homeowners Assoc. v. City of North Myrtle Beach, 828 F.Supp. 1241 (D.S.C. 1993). As a result, on August 12, 1993, Sea Cabins brought the instant inverse condemnation action.

On December 20, 1993, this Court denied City's petition for a writ of certiorari to review the Court of Appeals' decision reversing the Zoning Board decision.

City issued Sea Cabins a pier building permit on April 19, 1994. After several revisions, construction and repair began on October 10, 1994, and the pier was completed in March 1995.

ISSUE

Did the Court of Appeals err by analyzing Sea Cabins' inverse condemnation action as involving a temporary regulatory rather than a temporary physical taking?

DISCUSSION

Court of Appeals' Opinion

Relying on federal law, the Court of Appeals held a temporary taking effected by a regulation is compensable if it denies the landowner all economically viable use of his land. The court concluded because it is appropriate to consider the landowner's "parcel as a whole," loss of use of the pier did not deny all economically viable use of Sea Cabins' property and, therefore, there was no compensable taking. Sea Cabins on the Ocean IV Homeowners Assoc. v. City of North Myrtle Beach, 337 S.C. 380, 523 S.E.2d 193 (Ct. App. 1999).

Thereafter, the Court of Appeals cited the elements of an inverse condemnation action: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use, and (4) the taking has some degree of permanence. Gray v. South Carolina Dept. of Highways and Public Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992). Noting South Carolina has recognized a temporary taking in two inverse condemnation cases and that both of these cases applied federal law,[2] the Court of Appeals "juxtaposed" the requirement that a temporary taking must be compensable under federal law. Accordingly, under the Court of Appeals' analysis, since City's actions did not deny Sea Cabins all economically viable use of its land, there was no compensable temporary taking, and Sea Cabins failed to establish the "some degree of permanence" element of inverse condemnation.

Sea Cabins argues the Court of Appeals erred by analyzing this action as a regulatory rather than a physical taking. As a part of this claim, Sea Cabins maintains that because the issuance of a pier repair permit was conditioned on public access, a physical taking occurred. We affirm in result.

Physical vs. Regulatory Takings

The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use, without just

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[2]The Court of Appeals referred to Lucas v. South Carolina Coastal Council, 309 S.C. 424, 424 S.E.2d 484 (1992), and Staubes v. City of Folly Beach, 331 S.C. 192, 500 S.E.2d 160 (Ct. App. 1998). These cases involve regulatory takings.

DeStephano v. City of Charleston, 304 S.C. 250, 403 S.E.2d 648 (1991), also involved a claim for a temporary taking.

compensation." U.S. Const. amend. V.[3] "[T]his provision does not prohibit taking of private property, but instead places a condition on the exercise of that power." First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 314 (1987). The purpose of the Takings Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). "[T]he Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992), citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

There are at least two discrete categories of government action which are compensable takings without case-specific inquiry into the public interest advanced in support of the action. If state law authorizes permanent physical occupation of property, there is a taking for which just compensation is due without regard to the public interest it may serve or the minimal economic impact to the landowner. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (New York law requiring landlords to allow television cable companies to install cable facilities in their apartment buildings constituted a taking); Kaiser-Aetna v. United States, 444 U.S. 164 (1979) (United States could not insist upon public access to marina simply because water had become navigable without paying just compensation). Also, if state law so regulates property that it loses all economic value, there is a taking for which just compensation is due. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (taking occurs where owner of real property has been called upon to sacrifice all economically beneficial or productive use of property in the name of the common good).

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[3]The Fifth Amendment is implicit in the due process clause of the Fourteenth Amendment to the United States Constitution and applicable to the states. Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897).

In other situations, a balancing test is applied to determine whether there has been a taking. Three factors are typically balanced to decide whether the public benefit from a regulation or law outweighs the private harm to the landowner: (1) the character of the government action; (2) the economic impact of the regulation on claimant; and (3) the degree to which the regulation/law has interfered with distinct investment-backed expectations. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). If the public benefit outweighs the harm to the landowner, there is no taking and the government need not pay compensation.

However, where a regulation or law imposes a "physical exaction" as a condition of issuing a permit, more stringent review is required. In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), owners of a beachfront lot applied for a permit which would allow them to replace a small bungalow on the lot with a larger home. The California Coastal Commission granted the permit, subject to the condition the Nollans allow the public to pass across the beach portion of their lot to public parks on either side of their property. The coastal commission asserted various purposes in support of the permit condition, including "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." Id. at 835. The Nollans appealed. The California Court of Appeal ruled the Nollans' inverse condemnation claim failed because, although the permit condition diminished the value of the beachfront lot, it did not deprive the Nollans of all reasonable use of their property.

Recognizing the tension between the government's eminent domain authority which requires just compensation and the government's authority to restrict use of private property pursuant to its police powers without paying compensation, the United States Supreme Court (USSC) reversed. Id. The USSC held that had the coastal commission required the Nollans grant a public easement across their beachfront on a permanent basis rather than conditioning their permit to rebuild on an agreement to do so,

there would have clearly been a compensable taking.[4] It emphasized the right to exclude others is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Id. at 831, citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 433. Similarly, it stated "a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises." Id. at 832.

On the other hand, the USSC recognized that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Id. at 834 citing Agins v. City of Tiburon, 447 U.S. 255, 2660 (1980). If the government has a legitimate police power purpose to deny a development permit, a condition which serves the same purpose is not a taking. For instance, if the coastal commission could exercise its police power to forbid construction of the Nollans' house altogether, imposing a height limitation as a permit condition so that the public could view the beach would not be a taking.

The Nollan Court adopted the "essential nexus" test to determine whether a physical exaction condition results in a taking of property. Under the essential nexus test, the Court evaluates: 1) whether the "legitimate state interest" justifying the condition is furthered by the condition; 2) whether the condition imposed "substantially advanced the cited legitimate state interest"; and 3) whether the proposed project will "substantially impede" the legitimate state interests.

The Nollan Court determined the easement as a condition of the building permit effected a taking as the condition (public access) did not

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[4]See Kaiser-Aetna v. United States, 444 U.S. at 181 ("And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.").

serve the alleged legitimate state interests of protecting the public's ability to see the beach, assist the public in overcoming the "psychological barrier" to using a developed shorefront, and preventing congestion on public beaches. Accordingly, the Nollans were entitled to compensation.

In Dolan v. City of Tigard, 512 U.S. 374 (1994), the USSC considered the degree to which a public exaction permit condition must relate to the projected impact of the proposed development. In Dolan, the landowner applied for a permit to expand her store and pave her parking lot. The city conditioned approval of the application upon the landowner's agreement to dedicate 1) a public green way in order to minimize flooding that would be exacerbated by the increases in impervious surfaces associated with the development and 2) a pedestrian/bicycle pathway to relieve traffic congestion in city's business district. The USSC determined that if an "essential nexus" existed between the "legitimate state interest" and the permit condition, a "rough proportionality" must exist between the physical exaction and the projected impact of the requested permit. The Court held there was an "essential nexus" between the legitimate public purposes (reducing flooding and traffic) and the two permit conditions. It concluded, however, there was no reasonable relationship between the public nature of the green way (the easement could have been private) and reducing flooding. With regard to the second condition, the USSC found the city failed to demonstrate the additional traffic generated by the landowner's development reasonably related to the dedication of a pathway easement.[5]

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[5]Most recently, the USSC held Dolan's "rough proportionality test" applied only to physical exactions. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). Prior to Del Monte Dunes, there was considerable debate as to whether the Nollan/Dolan tests applied to more than regulations mandating physical exactions. See Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233 (1999); David L. Callies, *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas,* A.B.A. SEC.

Whole Parcel Doctrine

The "whole parcel doctrine" applies where there is a regulatory taking. Under this doctrine, "[i]n deciding whether a particular governmental action has effected a taking, [the Court] focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978); Beard v. South Carolina Coastal Council, 304 S.C. 205, 403 S.E.2d 620 (1991) (same).

Temporary Takings

Where there is a temporary regulatory (non-physical) taking, a landowner is entitled to compensation between the effective date of an ordinance and the date of its invalidation, if the ordinance deprives the landowner of all use of his property. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). "'[T]emporary' [regulatory] takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." Id. at 318.

In First English, the plaintiff church owned land on which it operated a campground. After a flood destroyed the campground buildings, Los Angeles County instituted a temporary regulation prohibiting reconstruction of buildings in a flood control area. The church filed suit complaining the ordinance effected a taking.

The USSC found that if the ordinance effected a taking, simply invalidating it was an insufficient remedy and the church was entitled to monetary compensation for the period of time during which it was in effect. Id. at 307-08, 319. The USSC noted "[w]e limit our holding to the facts presented, and of course do not deal with the quite different questions that

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STATE & LOCAL GOVERNMENT LAW (1996).

would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." Id. at 321.

ANALYSIS

Sea Cabins claims City's Beach Franchise Ordinance conditioning a pier building permit on public access was an attempt, albeit temporary,[6] by City to gain public access to its pier without paying compensation. Based on this claim, we find analysis under the tests established in Nollan v. California Coastal Comm'n, supra, and Dolan v. City of Tigard, supra, appropriate. Assuming for purposes of these tests that City had a legitimate governmental interest in imposing the public access condition, the interest was superseded when the General Assembly passed amendments to the South Carolina Beachfront Management Act specifically authorizing the rebuilding of private piers which were in existence prior to Hurricane Hugo. Once § 48-39-290(A)(3) became effective, City no longer had a legitimate governmental interest in conditioning issuance of a pier rebuilding permit to Sea Cabins on public access. See Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361 (1999) (statute preempts municipal ordinance where there are inconsistent and irreconcilable conditions between the two). Accordingly, had City conditioned Sea Cabins' rebuilding permit on public access, we conclude City would have likely effected a taking of Sea Cabins' property.

Nonetheless, we find City did not enforce the Beach Franchise Ordinance against Sea Cabins. City denied Sea Cabins' pier rebuilding application on the basis of provisions in its Zoning Ordinance, not because Sea Cabins refused to sign a pier franchise agreement.[7] Accordingly, City's

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[6]Because it ultimately obtained a rebuilding permit which did not have a public access condition, Sea Cabins asserts the taking was temporary.

[7]See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (claim that government regulations

Beach Franchise Ordinance conditioning a building permit on a physical exaction (public access) did not deprive Sea Cabins of the use of its property.

Moreover, we find City's denial of Sea Cabins' pier application based on applicable provisions of its Zoning Ordinance did not result in a temporary taking. Although City's permit denial was ultimately reversed by the Court of Appeals on the basis the circuit court considered the percentage of physical damage to the pier rather than the replacement cost of the pier, Sea Cabins has never claimed this Zoning Ordinance precluding the reestablishment of a legal nonconforming use under certain circumstances is unconstitutional in that it either failed to advance a legitimate governmental interest or denied all economically viable use of its property as a whole.[8] See Long Cove Club Assoc. L.P. v. Town of Hilton Head Island, 319 S.C. 30, 458 S.E.2d 757 (1995) (application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate [governmental] interests or denies an owner all economically viable use of his land). Application of City's Zoning Ordinance to Sea Cabins' pier rebuilding permit request did not effect a taking.

Further, there was no temporary taking during Sea Cabins' appeal of the adverse zoning ruling. Regulatory delay does not normally give rise to a temporary taking claim. First English Evangelical Lutheran Church v. Los Angeles County, supra. Similarly, although a property owner who successfully challenges the applicability of a governmental regulation is

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effect a taking is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding application of the regulations to the property at issue); Anton v. South Carolina Coastal Council, 321 S.C. 481, 469 S.E.2d 604 (1996) (taking does not occur until permit is denied).

[8]83 Am.Jur.2d Zoning and Planning § 680 (1992) (ordinances which prohibit restoration of a nonconforming use in excess of a prescribed percent of the replacement value of the destroyed or damaged property have been upheld).

likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking. See Later v. Planning and Zoning Comm'n of the Town of Cromwell, 1992 WL 156568 (Conn. Super. Ct. 1992) ("inevitable by-product" of zoning dispute is not taking); Smith v. Town of Wolfeboro, 615 A.2d 1252, 1258 (N.H. 1992) ("The delay inherent in the statutory process of obtaining subdivision approval, including appeals to the superior court and to this court, is one of the incidents of ownership. Any decrease in the value of the subject property that occurs during the pendency of governmental decision making must be borne by the property owner and does not give rise to a compensable taking."); Miller and Son Paving, Inc. v. Plumstead Township, Bucks County, 717 A.2d 483 (Pa. 1998) (delays attributable to legal challenges to zoning provisions do not automatically constitute taking); Chioffi v. City of Winooski, 676 A.2d 786 (Vt. 1996) (regulatory delay resulting from zoning board's denial of variance, which was ultimately granted after appeal and remand for new trial, did not constitute temporary taking entitling property owner to compensation for period of delay).[9]

In conclusion, we hold City's actions did not result in a temporary taking of Sea Cabins' pier. We affirm the Court of Appeals' decision reversing the award of compensation to Sea Cabins.

AFFIRMED IN RESULT.

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

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[9]This is not to say a property owner has no remedy when the government acts arbitrarily. See Worsley Companies, Inc. v. Town of Mount Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000) (substantive due process prohibits a person from being denied life, liberty, or property for arbitrary reasons). In proper circumstances, a property owner may have a due process or tort claim for damages. See John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1046 (2000).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shirley E. J. Green, Personal Representative of the Estate of Marilyn Anne Cottrell,

Appellant,

v.

Willard C. Cottrell, Personal Representative of the Estate of Martin L. Cottrell, and National Bank of South Carolina, Trustee of the Martin L. Cottrell Trust, Dated November 21, 1997,

Respondents.

Appeal From Dorchester County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 3353
Heard May 8, 2001 - Filed June 11, 2001

AFFIRMED

F. Craig Wilkerson, Jr., of Rock Hill; John S. Nichols, of Bluestein & Nichols, of Columbia, for appellant.

John G. Frampton, of Chellis & Frampton, of Summerville; Edward D. Buckley, Jr., Stephen P. Groves, Sr., and Stephen L. Brown, of Young, Clement, Rivers & Tisdale, of Charleston, for respondents.

ANDERSON, J.: Shirley E. J. Green, as Personal Representative of the Estate of Marilyn Anne Cottrell, appeals the Circuit Court's grant of summary judgment to Willard C. Cottrell, Personal Representative of the Estate of Martin L. Cottrell, and the National Bank of South Carolina, as Trustee of the Martin L. Cottrell Trust. The court held Marilyn Cottrell was not an omitted spouse pursuant to S.C. Code Ann. § 62-2-301. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1996, 56-year-old Martin Cottrell, his brother Willard, and his sister-in-law met with Attorney Thomas Cothran to create Martin's estate plan.[1] Martin told Cothran he wanted his assets to remain in his bloodline. Cothran drafted a will bequeathing Martin's personal property to his brother and devising his home to his father. The remainder of Martin's estate formed a residuary trust for the benefit of his niece and two nephews. Martin executed the will on April 23, 1996.

Martin returned to Cothran's office a year and a half later, this time with his girlfriend, Marilyn Anne Jackson. Martin wanted to revise his estate plan to include Marilyn and to accommodate any future marriage to her, but to keep his assets ultimately within his family bloodline. In an affidavit submitted to the Circuit Court, Cothran described this meeting as follows:

> 5. On November 18, 1997, Affiant met with Marty and Marilyn

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[1] Cothran had known Martin since 1993.

Anne Jackson to discuss revisions to Marty's estate plan. At this meeting[,] both of them participated in the discussion of how to modify the recently created drafts of Marty's estate plan. Marty again expressed to Affiant his feeling that keeping family assets in the bloodline was very important to him, but benefits to his blood kin would be delayed until after Marilyn[']s life time (sic) needs were taken care of by way of [a] trust for her. Marty had previously told Affiant that he wanted a trust for Marilyn's benefit in such a way that she would have her needs taken care of during her life time (sic)[,] but he stated very clearly that he wanted any assets remaining at her later death to benefit his family. During a two hour conference, Affiant, Marty, and Marilyn fully discussed estate plan options including outright gifts, gifts in trust, provisions for spouse and blood kin, etc. Marilyn expressed appreciation for the provisions made for her and she expressed full agreement that such provisions were fair and appropriate to provide for her and to provide for Marty's brother's family.

6. Marty repeatedly said that he wanted Marilyn to marry him and he made the estate plan provisions for her in contemplation of their eventual marriage. Marty wanted life time (sic) benefits for Marilyn in his estate plan even if they were never married. Affiant, Marty, and Marilyn fully discussed (during the November 18th conference) the estate tax advantages of a trust[,] which qualifies for the federal estate tax marital deduction by providing for a surviving spouse for life and then the remainder being available for the family of the spouse who dies first. This type of trust is commonly referred to as a "Qualified Terminable Interest Trust" or a "QTIP" trust and can save estate taxes only if the parties are legally husband and wife. Marty wanted the trust for Marilyn designed to take advantage of this tax saving device after he and Marilyn were married, but did not want to

have to change his estate plan after they were married. Therefore, the estate plan was designed to put into effect his wishes to protect Marilyn regardless of their marriage, but was clearly (as articulated by Marty and approved by Marilyn) prepared in contemplation of their marriage even though a wedding date was not set at the time of the signing of Marty's estate plan on November 21, 1997.

7. Marty signed his estate plan (Revocable Trust Agreement and Will) on November 21, 1997. Provisions were included for Marilyn's benefit if Marty and Marilyn were not married at the time of Marty's death. Other provisions were included for Marilyn's benefit if they were married at the time of Marty's death. The "QTIP" provisions could only apply if they were married at the time of Marty's death; therefore, on the face of the estate plan, Marty clearly made his estate plan in contemplation of marriage to Marilyn. This is in full accord with Marty's wishes as stated to Affiant during the estate planning process and as explained by Affiant to both Marty and Marilyn.

On April 4, 1998, 58-year-old Martin married 49-year-old Marilyn. Within eleven days of the marriage, both of them were dead. Martin died of an acute myocardial infarction on April 7, 1998. Marilyn died on April 15, 1998, from a cerebellar infarction due to basilar artery thrombosis. Neither Martin nor Marilyn had any surviving children.

Martin did not execute a new will after the marriage. His last will and testament was the one Cothran drafted in 1997. This will, dated November 21, 1997, provided:

> I [Martin Cottrell] am not married. I have no children. I have a special friend, MARILYN ANNE JACKSON, for whom I am making certain provisions in my estate plan (whether under this instrument or under any other instrument). **Except as otherwise**

> **specifically provided, I intend for these provisions to apply for her benefit whether or not we should ever become husband and wife**.

(emphasis added).

In the will, Martin bequeathed his personal and household effects to Marilyn.

The Revocable Trust Agreement, also dated November 21, 1997, provided:

> The Settlor [Martin Cottrell] is not married. The Settlor has no children. The Settlor has a special friend, MARILYN ANNE JACKSON, for whom he is making certain provisions in his estate plan (whether under this instrument or under any other instrument). Except as otherwise specifically provided, **the Settlor intends for these provisions to apply for her benefit whether or not they should ever become husband and wife**.

(emphasis added).

In addition to the Trust Agreement's references to Marilyn as Martin's "special friend," the Agreement contained numerous references to Marilyn as the Settlor's "wife" or "spouse" and the Trust C provisions were only effective in the event Martin and Marilyn married.[2]

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[2] Article VI, (1)(a) of the Agreement stated "Trust C shall be all of the Trust estate as to which a "QTIP election" is made. All other assets of the Trust estate including that part which is effectively disclaimed by the **Settlor's special friend (if she is the Settlor's wife)** under paragraph (3) herein shall become a part of Trust B." (emphasis added). It further stated in subsection (c):

> The term "QTIP" means "qualified terminable interest property" as defined in the Internal Revenue Code. A "QTIP

election" means an election made by the Personal Representative of the Settlor's estate (or other authorized person) made pursuant to Internal Revenue Code *section 2056(b)(7)* or any similar section which has the effect of qualifying any asset to which it applies as part of the marital deduction in the Settlor's estate tax calculation. **No QTIP election may be made if the Settlor's special friend is not the Settlor's wife**.

(italics in original) (emphasis added).

(2) Disclaimed Property to **Trust C**. If the Settlor's special friend survives the Settlor and she is the Settlor's wife and she or her legal representative makes a qualified disclaimer (as defined in *Section 2518* of the Internal Revenue Code) of (a) any portion of the Trust estate that would otherwise pass to her by the Settlor's Will, or (b) any property that would pass to her outside of the Settlor's Will so as to cause that property to become part of the Settlor's probate estate or the Settlor's taxable estate, the property that is disclaimed shall pass to the trustee (in the same manner as if the Settlor's special friend had predeceased the Settlor) and shall be held, administered, and distributed under the terms of **Trust C**. No disclaimed property shall become a part of **Trust C if the Settlor's special friend is not the Settlor's wife**.

(3) Disclaimed Property to **Trust B**. **If the Settlor's special friend survives the Settlor** and she is the Settlor's wife and she or her legal representative makes a qualified disclaimer (as defined in *Section 2518* of the Internal Revenue Code) of any portion of **Trust C**, the portion that is disclaimed shall pass to the trustee of **Trust B** (in the same manner as if the Settlor's special friend had predeceased the Settlor) and shall be held, administered, and distributed under the terms of **Trust B**.

(italics in original) (emphasis in original, in part, and added, in part).

Martin's brother, Willard, was appointed personal representative of Martin's estate. Marilyn's sister, Shirley Green, was appointed personal representative of Marilyn's estate.

By petition dated December 3, 1998, Green filed an action claiming Marilyn was an "omitted spouse" and entitled to Martin's entire estate. The action further alleged breach of contract, unjust enrichment, and the creation of a constructive trust. Besides the entire estate, Green sought the delivery of

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Article VIII mandated: "**There shall be no Trust C unless the Settlor's special friend is also his wife; therefore[,] all references in this ARTICLE are to the Settlor's "wife**." (emphasis in original, in part, and added, in part). Trust C provisions directed the trustee to pay all income from the trust to the **Settlor's wife** during her lifetime. At the wife's death, any remaining principal of consent of the Settlor's spouse **if the spouse survived the Settlor**.

Article XII addressed the Marital Deduction Savings Clause for Trust C, stating in pertinent part:

> It is the Settlor's intention that the **Settlor's wife** under the provisions of **Trust C** have substantially that degree of beneficial enjoyment of the Trust Estate during her lifetime[,] which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust[,] and the Trustee shall not exercise its discretion in a manner [that] is not in accord with this expressed intention. **The Trustee shall invest the Trust Estate so it will produce for the Settlor's wife during her lifetime an income or use which is consistent with the value of the Trust Estate and with its preservation**. It is expressly provided that the Trustee shall not[,] in the exercise of its discretion[,] make any determination inconsistent with the foregoing.

(emphasis in original, in part, and added, in part).

personal property and homestead exemptions.

On January 4, 1999, Willard Cottrell moved for removal of the action to the Circuit Court. In a motion filed with the court on June 24, 1999, Green sought summary judgment. Willard later moved for summary judgment.

The Circuit Court heard the parties' cross motions on September 8, 1999. The judge subsequently ruled Marilyn was not an "omitted spouse" within the meaning of §62-2-301 because Martin's will was made in contemplation of his marriage to Marilyn and "Marilyn Anne Cottrell was clearly provided for within the meaning of the omitted spouse statute and that there is no genuine issue of material fact in this regard." The trial judge granted summary judgment to Willard.[3] Green appeals.

STANDARD OF REVIEW

An action under the omitted spouse statute is an action at law. Timmerman v. Timmerman, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998).

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Bruce v. Durney, 341 S.C. 563, 565, 534 S.E.2d 720, 722 (Ct. App. 2000) (quoting Rule 56(c), SCRCP). This Court will review the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

LAW/ANALYSIS

Green argues genuine issues of material fact existed regarding whether

[3] The trial court did not address whether an action under the omitted spouse statute survives the omitted spouse and may be brought by a personal representative. We decline to address that issue.

Marilyn was an "omitted spouse" under § 62-2-301. Specifically, Green alleges the court failed to take notice of the language of the will that the parties were not married and to weigh the distribution of the assets to determine "if there was a meaningful 'providing for'" of Marilyn.

Section 62-2-301 reads:

> (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless:
>
> (1) **it appears from the will that the omission was intentional**; or
>
> (2) **the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence**.
>
> (b) In satisfying a share provided by this section, the devises made by the will abate as provided in § 62-3-902.
>
> (c) The spouse may claim a share as provided by this section by filing in the court and mailing or delivering to the personal representative, if any, a claim for such share within eight months after the date of death or within six months after the probate of the decedent's will, whichever limitation last expires.

(emphasis added).[4]

This statute forms part of the South Carolina Probate Code, which went into effect on July 1, 1987. The legislative purpose behind the Probate Code was:

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[4] Compare this section with the Uniform Probate Code §2-301(a) (as amended in 1993), which states:

> If a testator's surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 or 2-604 to such a child or to a descendant of such a child unless:
>
> (1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;
>
> (2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
>
> (3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(2) **to discover and make effective the intent of a decedent in the distribution of his property**;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(4) to facilitate use and enforcement of certain trusts;

(5) to make uniform the law among the various jurisdictions.

S.C. Code Ann. § 62-1-102 (1987) (emphasis added).

The omitted spouse statute "attempts to accomplish two ends — carrying out the decedent's probable intent and protecting the still-surviving spouse." David E. Wagner, Article, The South Carolina Probate Code's Omitted Spouse Statute and In Re Estate of Timmerman, 50 S.C. L. Rev. 979, 979 (1999).

A surviving spouse who wishes to qualify as an "omitted spouse" must demonstrate:

(1) the decedent spouse executed the will in question prior to the marriage;

(2) the will does not provide for her as the surviving spouse;

(3) the omission was unintentional; and

(4) the decedent did not provide for the spouse with transfers

outside of the will.[5]

Id. at 983 (citing S.C. Code Ann § 62-2-301(a)).

Green clearly passed the first of these hurdles. Martin's will was executed before his marriage to Marilyn. To determine whether the second condition was met — whether Martin "provided for" Marilyn in the will — we look to:

(1) specific language in the will; or

(2) "sufficient extrinsic evidence that a bequest was made 'in contemplation of marriage.'"

See Miles v. Miles, 312 S.C. 408, 440 S.E.2d 882 (1994) (holding a spouse has not been provided for in the absence of specific language in the will or extrinsic evidence a bequest was made in contemplation of marriage).

Green cites Miles in support of her proposition that Marilyn was not provided for by the will. In that case, Grady Miles executed a will on October 26, 1989, leaving Georgia Mae Hall his automobile and a life estate in his home. At the time Grady executed the will, Georgia had rejected numerous proposals of marriage from him. Georgia finally agreed to marry Grady a year after the will was executed. Grady and Georgia married and Grady died on September 21, 1991, without executing a new will. Georgia asserted she was an "omitted spouse" and filed an action claiming Grady's entire estate.

The Supreme Court held Grady's bequest and devise to Georgia prior to their marriage did not forestall application of the omitted spouse statute as there was no evidence the bequest and devise were made in contemplation of

[5] The first two criteria are described as "qualifying" conditions and the latter two as "exclusionary" conditions. David E. Wagner, Article, The South Carolina Probate Code's Omitted Spouse Statute and In Re Estate of Timmerman, 50 S.C. L. Rev. 979, 984 (1999).

marriage. The Court ruled "a spouse has not been 'provided for' within the meaning of §62-2-301 unless the decedent considered the surviving spouse in that capacity at the time the will was executed." Id. at 411, 440 S.E.2d at 883.

Green maintains Martin "could not have considered his special friend in the capacity of his wife - and he clearly did not." Green relies heavily on Miles; however, we find the facts of that case are distinguishable. The most obvious distinction between Miles and the instant case is that Martin's will and trust contain numerous, explicit references and bequests to Marilyn in her capacity as Martin's "wife" or "spouse." The face of the will refers to Martin's possible future marriage to Marilyn and the Trust Agreement specifically refers to Marilyn in her potential capacity as Martin's wife. In Miles, there was a total absence of any reference in the will to Georgia as a spouse.

Martin's attorney affirmed Martin executed the will and the accompanying trust agreement to care for Marilyn both in her capacity as "special friend" and as "wife." Marilyn was actively involved in the creation of Martin's estate plan. Marilyn accompanied Martin to Cothran's office and both Cottrell and Marilyn consulted with Cothran about the plan. Martin "repeatedly said that he wanted Marilyn to marry him" and he did not want to change his estate plan after they married.

There is no evidence in the record Marilyn rejected Martin's proposal or that at the time he executed the will, Martin had any reason to doubt that Marilyn would become his wife in the future. Cothran opined Martin "made the estate plan provisions for [Marilyn] in contemplation of their eventual marriage."

The QTIP trust further distinguishes the facts of this case from those of Miles. Martin executed the trust documents on the same day he executed the will. The will refers to the trust. Trust C would only take effect in the event Martin and Marilyn married. There would have been no need for Martin to create a QTIP trust had he not contemplated marriage to Marilyn at the time he executed both the will and the trust. Viewing the above in the light most favorable to Marilyn, we conclude she failed to demonstrate a genuine issue of

material fact existed that Martin did not provide for her in his will. Cf. In re Estate of Norem, 561 So.2d 434 (Fla. Dist. Ct. App. 1990) (reversing summary judgment to wife seeking status as pretermitted spouse when wife made no showing trust provision for Norem's "intended spouse" was not made in contemplation of marriage).[6]

The exclusions also prohibit Marilyn from qualifying as an "omitted spouse" under the statute. Green failed to demonstrate a genuine issue of material fact existed that Marilyn was **unintentionally** omitted from Martin's will. Once again, we note the will plainly stated:

> I have a special friend, MARILYN ANNE JACKSON, for whom I am making certain provisions in my estate plan (whether under this instrument or under any other instrument). Except as otherwise specifically provided, **I intend for these provisions to apply for her benefit whether or not we should ever become husband and wife**.

(emphasis added). Compare Uniform Probate Code § 2-301(a)(2) (stating the surviving spouse is not entitled to an intestate share when "the will expresses the intention that it is to be effective notwithstanding any subsequent marriage").

The Revocable Trust Agreement contained a similar provision: "Except as otherwise specifically provided, **the Settlor intends for these provisions to apply for [Marilyn's] benefit whether or not they should ever become husband and wife**." (emphasis added).

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[6] Florida, like South Carolina, has read a "contemplation of marriage" requirement into its omitted spouse statute. See Miles v. Miles, 312 S.C. 408, 440 S.E.2d 882 (1994); Mary Ellen Kazimer, The Problem of the "Un-Omitted" Spouse under Section 2-301 of the Uniform Probate Code, 52 U. Chi. L. Rev. 481, 492 (1985) ("The Florida Supreme Court, in [Ganier's Estate v. Ganier's Estate, 418 So.2d 256 (Fla. 1982)], read a contemplation-of-marriage requirement into its omitted-spouse statute, thus forbidding inquiry into the testator's post-execution intent.").

Cothran's affidavit provides further evidence Martin did not want to revise his estate plan after his marriage to Marilyn and that Martin wanted to keep his assets within the bloodline. "Marty wanted the trust for Marilyn designed to take advantage of this tax saving device after he and Marilyn were married, but did not want to have to change his estate plan after they were married." This indicated Martin's failure to devise more of his estate to Marilyn was **intentional**.

Green also failed to present any evidence creating a genuine issue of material fact that Marilyn was not provided for by transfers outside of Martin's will, namely the QTIP Trust. In In Re Estate of Timmerman, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998), this Court examined the sufficiency of transfers outside of a will.

The Honorable George Bell Timmerman, former Circuit Court judge and governor, was married to Helen Timmerman for 45 years before her death in 1980. While married to Helen, Timmerman executed a will leaving his entire estate to her or to her sister, Margaret Dupre Long, if Helen predeceased him. The will additionally named several nieces and nephews as alternate beneficiaries.

In 1993, 82-year-old Timmerman married Ingrid Zimmer. Ingrid was over 30 years younger than Timmerman. Timmerman died less than two years later of injuries resulting from an auto accident. Although Timmerman consulted two estate-planning lawyers prior to his death, he never executed any of the documents they prepared for him.

Ingrid brought an action under the omitted spouse statute. The Probate Court held she was not an "omitted spouse" because of large transfers totaling $1,191,000 Timmerman made to her outside of the will.[7] This Court affirmed

[7] Timmerman added Ingrid as a survivor on his checking account; opened a joint account with her; reduced his retirement benefits so that Ingrid would

explaining "the sheer magnitude of the transfers from Timmerman to Ingrid is enough to support the probate court's finding that Timmerman did not intend for Ingrid to receive any benefits under the omitted spouse statute." Timmerman, 331 S.C. at 459, 502 S.E.2d at 922. As further support for the ruling, this Court noted that despite seeking estate planning advice, Timmerman "chose to leave his old will intact." Id. Martin similarly chose to leave his prior will and estate plan intact.

Green seeks to distinguish Timmerman by arguing Marilyn only received "nominal" property as Martin's special friend and no provisions were made for her after the marriage. The evidence in this case demonstrates that Martin did not want to change his will after marriage and that he provided for Marilyn by means of transfers outside the will. Additionally, on the same day he executed the will, Martin specifically created a QTIP trust for Marilyn in the capacity of his wife. This trust was above and beyond the bequests to Marilyn as "special friend."

CONCLUSION

The Probate Code attempts to reconcile two competing goals: to effectuate the testator's intent and to provide for the surviving spouse. Martin's intent to provide for Marilyn with the QTIP Trust and other bequests is evident from the face of the will and trust agreement.

Because Green failed to demonstrate a genuine issue of material fact existed regarding Marilyn's qualification as an "omitted spouse" under the statute, the judgment of the Circuit Court is

AFFIRMED.

HUFF and SHULER, JJ., concur.

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receive $2,200 a month after his death; gave Ingrid $320,143; and insured she would receive $16,000 in life insurance benefits at his death.