The Supreme Court of South Carolina

RE: Relaxation of Rules for Admission Pro Hac Vice and for Admission to Practice of Law for Lawyers Displaced by Hurricane Katrina

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ORDER

In recognition of the devastation and disruption of daily life suffered by the residents of Louisiana, Mississippi and Alabama as a result of Hurricane Katrina, we offer our support to the lawyers admitted to practice in those states, and who have been displaced due to Hurricane Katrina, by relaxing our rules for admission pro hac vice and for admission to the practice of law in the State of South Carolina.

For lawyers who are admitted to practice law in the states of Louisiana, Mississippi, and Alabama and have been displaced by Hurricane Katrina, we hereby waive the fee required by Rule 404, SCACR, for admission pro hac vice. Moreover, we waive the requirement that an application for admission pro hac vice be filed in each matter in which the lawyer participates. Instead, affected lawyers may file an application for admission pro hac vice, which contains the information required by Rule 404(c), with this Court seeking to be admitted pro hac vice for a period of

time not to exceed nine months from the date of this order. If the application is granted, the lawyer may participate pro hac vice in multiple matters during that period of time if an attorney admitted to practice law in South Carolina is associated as attorney of record.

We also extend the application period for taking the February 2006 South Carolina Bar Examination until November 15, 2005, and waive all application fees for lawyers admitted to practice law in Louisiana, Mississippi and Alabama who have been displaced by Hurricane Katrina.

Finally, the South Carolina Bar is encouraging its members to offer assistance to victims of Hurricane Katrina in a host of ways, including offering the use of office space and other services to displaced lawyers as they attempt to resume normal and professional activity. We would like to assure members of the Bar as well as the displaced lawyers that it is not the unauthorized practice of law for members of the Bar to assist displaced lawyers in this manner nor for a displaced lawyer to handle their client base from this state.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
Chief Justice Jean Hoefer Toal

Columbia, South Carolina
September 13, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36

September 19, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Newberry
County Magistrate Joseph
Griffin Beckham, Respondent.

Opinion No. 26038
Submitted July 6, 2005 - Filed September 19, 2005

SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

W. Chadwick Jenkins, of Newberry, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or suspension not to exceed ninety (90) days pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the Agreement and suspend respondent for sixty (60) days. The facts as set forth in the Agreement are as follows.

FACTS

I.

A defendant was charged with criminal domestic violence (CDV). When the matter came to trial before respondent neither the victim nor the arresting officer were present to offer any testimony against the defendant. The defendant was present but did not plead guilty. Notwithstanding the foregoing, respondent found the defendant guilty of CDV. The only information in support of this finding was the law enforcement incident report.

Thereafter, the defendant's attorney contacted respondent over the telephone. During the ex parte conversation, the attorney convinced respondent that he had erroneously found the defendant guilty.

During the telephone conversation, respondent told the attorney that if he filed a motion to reopen the case, he would grant the motion. It appears respondent agreed to grant the motion to reopen without notice or opportunity to be heard being afforded the State or the victim and, for purposes of this Agreement, respondent does not deny these facts. However, respondent represents it is possible he checked with law enforcement to see if the State objected to the reopening or that the attorney told respondent he had talked with law enforcement representatives and they had no objection. The matter was reopened and the defendant was found not guilty.

A representative of the Sheriff's Department signed the Ishmell[1] order after respondent told the attorney he would grant the motion to reopen. The Ishmell order designates the reason for its issuance as "signed off in error." Respondent now recognizes this was not an accurate statement since he had not found the defendant guilty as the result of clerical error, but as the result of judicial error.

[1] See Ishmell v. South Carolina Highway Department, 264 S.C. 340, 215 S.E.2d 201 (1975).

After discussing this matter with ODC and his own attorney, respondent now recognizes he was in error in finding the defendant guilty under the circumstances and, in fact, his actions constituted judicial misconduct, albeit unintentional. Respondent now recognizes and acknowledges that his ex parte conversation with the defendant's attorney and, additionally, his ruling on a motion without giving the State an opportunity to be heard constituted misconduct. In mitigation, respondent represents he agreed to reopen the matter as he did because it was so very clear to him that he had committed reversible error in his handling of the matter.

Respondent acknowledges that the inaccurate statement on the Ishmell order constitutes judicial misconduct. After discussing this matter with ODC, respondent is now aware that Ishmell orders are authorized only under limited circumstances to correct clerical errors and the use of such orders under the circumstances here constituted judicial misconduct.

For quite some time and long prior to respondent's magisterial appointment, it was standard practice in the Newberry County Magistrate's Court for a representative of the Sheriff's Department to appear at bench trials in criminal cases in lieu of the appearance of the arresting officer and/or complaining witness(es). In addition, unless the defendant was represented by counsel, it was standard practice to have the Sheriff's Department representative (who had no first hand knowledge of the case) to testify for the State by reading the information from the incident report. If the defendant was represented by an attorney, the case would be continued until the arresting officer and/or the complaining witness(es) could be present.[2]

[2] The Newberry County Magistrate's Court recognized that, if the defendant was represented by counsel, counsel would likely offer a hearsay objection to the admission of information in the incident report (unless the report was introduced by the officer who prepared the report) and the objection would have to be sustained.

Respondent represents he followed the procedure described above as it was used by his predecessors and by current Newberry County magistrates. Respondent correctly asserts that hearsay evidence is not inadmissible per se, but is admissible unless an objection is made in a timely fashion. ODC does not dispute this contention.

After discussing the Newberry County Magistrate Court's procedure and related legal principles with ODC and his own attorney, respondent now recognizes that the Magistrate's Court was, in effect, depriving pro se defendants of the constitutionally guaranteed right to confront their accusers. This practice constituted judicial misconduct, albeit unintentional. Respondent warrants that, in the future, he will cease allowing defendants to plead guilty or be convicted solely on the basis of incident reports.

ODC does not contend that it is judicial misconduct for a judge to allow hearsay testimony into a proceeding where there is no objection, even in cases where a defendant is pro se, but, instead, contends that fundamental principles of jurisprudence require some admissible evidence of the commission of a crime as a prerequisite to proceeding with a criminal case. In addition, ODC contends Magistrate's Court should not accommodate the prosecution and deprive pro se defendants of basic constitutional rights.

The Court emphasizes that while a criminal defendant may plead guilty without any evidence of his guilt being submitted, a defendant who pleads not guilty cannot be convicted solely on the basis of a police incident report. The burden is on the government to prove a defendant's guilt beyond a reasonable doubt based on competent evidence.

II.

For many years, respondent had been personal friends with both a law enforcement officer (Officer) and a public official (Official).

A vacancy which would constitute a promotion for the Officer became available.

The Official, while not formally the promoting authority, had sufficient input in the selection process such that, in all likelihood, his recommendation would be followed. Respondent met with the Official for the purpose of recommending the Officer for the promotion. Respondent admits that, under the circumstances, he improperly lent the prestige of his judicial office for the purpose of benefiting another.

III.

It is standard practice in the Newberry County Magistrate's Court system not to have scheduled bond hearings but, instead, to have bond hearings as needed. Instead, a magistrate or magistrate's employee telephones the detention center several times a day to determine if a bond hearing is necessary. If a hearing is necessary, a hearing is held by a magistrate for the entire detention center population awaiting bond hearings. This procedure was being used before respondent's magisterial appointment, is used by the Chief Magistrate, and respondent assumed the procedure met published requirements.

As a result of discussions with ODC, respondent is now aware that the procedure is not in strict compliance with procedures for bond hearings as set out in the Chief Justice's administrative order dated November 28, 2000. The Chief Justice's order requires bond hearings to be scheduled at least two times a day. The order is included in the instruction course given to all magistrates by South Carolina Court Administration prior to assuming magisterial duties and a copy is included in the Bench Book provided by South Carolina Court Administration to all magistrates and other summary court judges. Respondent acknowledges that failure to follow a court order constitutes judicial misconduct.

ODC does not contend that the foregoing procedure prejudiced any individual defendants, but only that the procedure does not strictly conform to the Chief Justice's directives. In mitigation, respondent was in a dilemma because the instructions from the chief magistrate were at variance with the provisions of the Chief Justice's order.[3]

IV.

Respondent is married to the daughter of William Frank Partridge, Jr. (Father-in-law). Father-in-law is an attorney. His offices are in Newberry and, on occasion, he defends cases in Newberry County Magistrate's Court (but not before respondent), prosecutes cases in family court for the Solicitor in Newberry County (thereby representing the State), and serves as a part-time municipal judge. Father-in-law has a son, William Franklin "Troup" Partridge, III (Brother-in-law), who is also an attorney with his principle office in Columbia.

For purposes of this Agreement, the parties believe that Brother-in-law was a friend of Eric Boland. Mr. Boland's son, Matthew Boland (Matthew), received a speeding ticket from South Carolina Highway Patrol Trooper M.K. Horne. Trooper Horne issued a ticket to Matthew alleging he was driving 85 M.P.H. in a 55 M.P.H. zone (a six point violation). Mr. Boland contacted Brother-in-law and Brother-in-law contacted his father, Father-in-law, about representing, assisting, and/or advising Matthew in connection with the ticket.

At a regularly scheduled weekly luncheon between respondent and Father-in-law, Father-in-law told respondent he needed to speak to Trooper Horne about Matthew's ticket and asked

[3] The Chief Justice's Administrative Order provides that a Chief Magistrate may request that the Chief Justice approve a bond hearing schedule which deviates from the twice daily bond hearings required by the order. The Newberry County Magistrate's Office did not have the Chief Justice's approval to deviate from her order.

respondent to convey that message to Trooper Horne. Thereafter, respondent delivered Father-in-law's message to Trooper Horne during a conversation in respondent's office.

Respondent represents Trooper Horne spontaneously volunteered something to the effect "tell Father-in-law not to worry about it [Matthew's ticket], I'll mark it not guilty." Respondent further represents he did not ask Trooper Horne to provide any assistance to Father-in-law or Brother-in-Law and, instead, only passed on the message that Father-in-law wanted to talk with Trooper Horne about Matthew's ticket. ODC has no basis upon which to contest this representation.

The Chief Magistrate called Matthew's case for trial on the occasion specified on the ticket and contends he found Matthew "guilty" in his absence, notwithstanding that neither Matthew nor Trooper Horne were present.[4] The Chief Magistrate marked the ticket "NRVC" which is a standard notation to indicate the defendant failed to appear or post bond and the administrative process should suspend the defendant's driver's license in accordance with applicable law.

At some point, someone checked a box on Matthew's ticket indicating Matthew did appear before the Chief Magistrate when Matthew did not appear in court on the occasion specified. Someone also checked a "not guilty" box on the ticket. "Not guilty" is inconsistent with the NRVC notation made by the Chief Magistrate. The ticket was forwarded to the South Carolina Department of Motor Vehicles (DMV).

[4] Presumably, Trooper Horne's response was relayed by someone back to Father-in-law and, eventually, by someone to Matthew because Matthew posted no bond and did not appear at trial on the date specified on the ticket.

DMV sent Matthew an official notice suspending his driver's license for failure to pay the traffic ticket. Thereafter, Mr. Boland contacted Brother-in-law about the matter and, in turn, Brother-in-law contacted respondent. Respondent states that "[Brother-in-law] basically called and said that [Matthew] called him or something of that nature, or his dad. Somebody called him saying that the boy in question had a NRVC Notice on the ticket, which it was found guilty, whatever it was done."

Respondent then asked a magisterial employee to check on the matter. The employee reported to respondent that the charge shown on the computer was "guilty," but the ticket was marked "not guilty." The employee spoke with the Chief Magistrate about the matter and reported back to respondent that the Chief Magistrate "said it was guilty." Respondent reported the foregoing to Brother-in-law.

Subsequently, Brother-in-law approached respondent while respondent was holding night court and requested to see the file on Matthew's ticket. Respondent provided Brother-in-law with copies of information he requested from the Magistrate Court's files concerning the ticket. The information respondent furnished to Brother-in-law were matters of public record.

ODC contends that Brother-in-law then called the Chief Magistrate on the telephone about Matthew's ticket and explained that the ticket was supposed to have been "not guilty" and that it had been sent to DMV due to a clerical error. The Chief Magistrate told Brother-in-law that there was no error, that it was his intention to find Matthew guilty, and that no change could be made concerning the disposition of the ticket.

Brother-in-law then asked Father-in-law to assist Matthew in the matter. Father-in-law prepared an affidavit for Matthew's signature, a motion for an ex parte order and ex parte order, and an order and rule to show cause, all styled "Ex Parte [Matthew]." Circuit Court Judge Wyatt Saunders signed Father-in-law's orders, including an order that the Chief Magistrate appear before the judge the next

business day. Brother-in-law had previously served as a law clerk to Judge Saunders.

Judge Saunders and Brother-in-law have represented to ODC that Brother-in-law happened by the judge's chambers to say "hello" after the orders had been signed and the judge asked Brother-in-law to contact the sheriff to have the orders served upon the Chief Magistrate that evening. Brother-in-law went to Father-in-law's home and telephoned the Newberry County Sheriff in the presence of Father-in-law and requested the orders be served on the Chief Magistrate. A deputy sheriff retrieved the orders from Brother-in-law at Father-in-law's home and served the order on the Chief Magistrate that evening.

ODC further represents that the orders do not have a docket number, that no summons was attached to the orders, that no filing fee was paid to the Clerk of Court, even though they bear a "date time" stamp, that no motion fee was paid, that the Sheriff's Department provided no one with proof of service of the orders, and no fee was paid to the Sheriff's Department for service of the pleadings and order.[5]

The next business day, a hearing was held before Judge Saunders. Mr. Boland, Matthew, and the Chief Magistrate were present. The State had not been served with a copy of the pleadings and was not represented at the hearing. At the hearing, Matthew testified that he ". . . believed for some time that he had been found not guilty" and "was under the impression [he] was found not guilty for sometime." At some point during the proceeding, the Chief Magistrate volunteered he would ". . . help on the ticket. . . ."

Judge Saunders allowed the Chief Magistrate and Matthew to discuss the matter so that, in his words, ". . . toward the end of perhaps using [the Chief Magistrate's] good office to assist you." The Chief Magistrate and Matthew discussed the matter, which resulted in the Chief Magistrate, with the consent of a passing Sheriff's

[5] Because the matter was criminal in nature, not all of these procedures were required.

Department official, reopening the ticket and accepting bond forfeiture for a two point violation.

ODC's investigations revealed the following:

1. Trooper Horne advised ODC he had intended to cause Matthew's ticket to be marked "not guilty" due to a request from someone, but he could not remember who made that request.

2. Judge Saunders reported the pleadings and orders were on his desk when he arrived at work and he does not know how they came to be placed there. He further stated he did not know how Mr. Boland and Matthew came to be before him to get the pleadings and orders, that he would have held a hearing for any other citizen under like circumstances, and it was only a coincidence his former law clerk appeared in his chambers to be available to assist him in having the pleadings served on the Chief Magistrate that evening.

3. The Newberry County Clerk of Court stated she could not locate the original or any copies of the pleadings in her office and states that, under normal circumstances, her office would not clock copies of legal documents without giving them a docket number and retaining the originals. The originals of the pleadings cannot be located in the Magistrate's Office or anywhere else by ODC.

4. The day after the hearing, Father-in-law appeared before the Chief Magistrate on two other traffic tickets issued to Matthew. The Chief Magistrate reduced one of the tickets to a two point violation and dismissed the other ticket.

Respondent has no direct knowledge of the four above-itemized representations by ODC, but has no basis to contest the validity of the representations. For purposes of this Agreement, these itemizations are treated as the facts.

While respondent represents he was only conveying a message from Father-in-law to Trooper Horne about Matthew's ticket, respondent now recognizes that, even if only so doing, the communications to Trooper Horne from respondent's Father-in-law was likely to be interpreted as a request to provide special treatment to Matthew. In so doing, respondent committed judicial misconduct.

In his initial response to the Notice of Full Investigation, respondent stated:

> At the request of a citizen who had received a ticket, I reviewed the outcome of the court proceedings for him. In speaking with [a Magistrate Court employee] I realized that the ticket was marked as "Not Guilty" but [the employee] had also sent the ticket in as "NRVC." I notified [the employee] of this apparent computer error immediately. After this discussion with [the employee], I had nothing further to do with this matter. I never told [the employee] that the Attorney General had called and I have never spoken to the Attorney General. The Attorney General's office should have call logs, etc., which would show no such conversation ever took place.
>
> As to the allegations of my speaking with the trooper, I do speak to law enforcement on a regular basis but no improprieties occur in our conversations. I may have spoken to the issuing officer but I <u>do</u> <u>not</u> <u>recall</u> <u>any</u> <u>specifics</u> <u>of</u> <u>our</u> <u>conversation</u>. (Emphasis in original).
>
> [The Chief Magistrate] handled all matters concerning this ticket and I did not adjudicate it in any manner. I am unaware of any other matters involving [Matthew] and I <u>did</u>

> not know my father in law, as a private attorney, represented [Matthew] until receiving the Notice of Full Investigation in this matter. (Emphasis in original).

Thereafter, respondent filed a Supplemental Response to the Notice of Full Investigation. In this response, respondent represented:

> After careful review and consideration of this matter, I remembered additional details regarding the allegations in Paragraph 14. I would like to amend my response to Paragraph 14 of the Notice as follows:
>
> [Father-in-law] spoke to me regarding a traffic ticket [Matthew] had received. I indicated that I would convey this information to the Highway Patrolman who issued the ticket and believe that I did so on the court date. Although I am uncertain about the details, I believe that the trooper came into my office and I indicated that [Father-in-law] had spoke (sic) to me about the ticket and the Patrolman volunteered that this would not be a problem and that he would simply "not guilty" the ticket. I assumed that this matter was handled before [the Chief Magistrate], the presiding judge that day. (Emphasis in original).

Respondent acknowledges that his initial response omitted reference to relaying the message from Father-in-law to Trooper Horne. Respondent represents he did not remember that conversation until some time until after filing his initial response to the Notice of Full Investigation and, after he did, he filed the Supplemental Response. ODC has no basis to contest this representation. Respondent concedes that the inconsistencies in these two responses, even if due to faulty memory, constituted judicial misconduct since the initial response contained information respondent now recognizes was inaccurate and incomplete.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not lend the prestige of judicial office to advance the private interests of others); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3B(2) (judge shall be faithful to the law and maintain professional competence in it); Canon 3B(7) (judge shall not initiate, permit, or consider ex parte communications); Canon 3B(8) (judge shall dispose of all judicial matters promptly, efficiently, and fairly); Canon 4 (judge shall conduct his extra-judicial activities to minimize the risk of conflict with judicial obligations); and Canon 4A(3) (judge shall conduct his extra-judicial activities so as not to interfere with the proper performance of his judicial duties).

By violating the Code of Judicial Conduct, respondent admits he has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. In addition, he admits he violated Rule 7(a)(7), RJDE, by willfully violating a valid court order issued by a court of this state.

CONCLUSION

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and suspend respondent for sixty (60) days. Respondent's

request that the suspension be made retroactive to the date of his interim suspension is denied.[6]

SUSPENSION.

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

[6] On April 8, 2005, respondent was placed on interim suspension. The interim suspension was based on allegations unrelated to the matters addressed by this opinion. The parties have agreed the Agreement concludes not only the matters addressed in the Agreement, but also the complaint from which the interim suspension arose.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Karen Davis, Dorothy L. Hershey, William W. Nivens, Jr., Theresa L. Varas, Appellants,

v.

Greenwood School District 50, Respondent.

Appeal from Greenwood County
Wyatt T. Saunders, Jr, Circuit Court Judge

Opinion No. 26039
Heard June 14, 2005 - Filed September 19, 2005

AFFIRMED

W. Allen Nickles, III, and Dwayne T. Mazyck, both of Gergel, Nickles & Solomon, of Columbia, for Appellants.

Kenneth L. Childs, Allen D. Smith, and Allison Aiken Hanna, all of Childs & Halligan, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This is an appeal from the trial court's decision granting summary judgment in favor of Greenwood School District 50 (the District). At issue is whether the District was legally bound to give financial incentives to teachers who become national board certified. This case was certified for review pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL / PROCEDURAL BACKGROUND

Karen Davis, Dorothy L. Hershey, William W. Nivens, Jr., and Theresa L. Varas (Appellants) are employed by the District as continuing contract teachers.[1] Appellants have been employed by the District since at least the 1999-2000 school year. Appellants are licensed by the South Carolina Board of Education.

In 1997, the General Assembly enacted a statute giving a monetary incentive to teachers who completed the national board certification process.[2] Since 2000, the state has paid teachers an annual bonus of $7,500 for acquiring this certification. In addition, the state has reimbursed the teachers for the certification fee. Further, some school districts, including the District, have offered additional "bonuses" or "incentives" or "supplements"[3] to teachers who complete the certification process.

At the beginning of the 1999-2000 school year, the Greenwood County School Board (the Board) adopted an incentive program to encourage teachers to become national board certified. Teachers becoming certified would receive a ten percent increase in their annual salary.[4] During that same school year, the District superintendent, Dr. Kinlaw, traveled to various

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[1] Continuing contract teachers are teachers whose contracts are renewed annually by the District unless the District fires the teachers for cause. *See* S.C. Code Ann. § 59-26-40 (Supp. 2004) (explaining the various contract levels for teachers).

[2] National board certification is an additional certification process above and beyond the state certification process. National board certification is a certificate teachers may seek on a voluntary basis in addition to the state certification. The certificate is valid for ten years.

[3] We will refer to the monetary increase for national board certified teachers as an incentive.

[4] The rate remained at ten percent for the 2000-01 and the 2001-02 school years.

schools in the District to talk about national board certification and the incentive program. The parties dispute how the program was portrayed, but all written documentation from the teachers' meetings reflects that Dr. Kinlaw told the teachers that they would receive a ten percent increase subject to the Board's approval each year.

During the 2002-03 year, however, the District had a budget shortfall. At the same time, the number of national board certified teachers had increased. To deal with the financial dilemma, the Board decided to offer a flat-rate incentive of $3,000 instead of a ten percent salary increase.

Appellants filed suit claiming that the District should be estopped from changing the incentive policy. Appellants also alleged breach of contract, breach of fiduciary duty, and violation of the South Carolina Payment of Wages Act. The trial court granted the District's motion for summary judgment. This appeal followed.

The following issue has been raised for review:

> Did the trial court err in granting summary judgment for the District?

LAW / ANALYSIS

Summary Judgment

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Fleming*, 350 S.C. at 493, 567 S.E.2d at 860. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.* at 493-94, 567 S.E.2d at 860.

A. Breach of Contract

Appellants argue that the District is liable for breach of contract. We disagree.

In order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). In addition, the Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the parties. S.C. Code Ann. § 32-3-10 (1991).

In the present case, Appellants are continuing contract teachers. Each year, the District offers the teacher a new contract for the following school year only. Appellants entered into a new contract every year subject to any changes in terms. Because the terms of the contract were subject to the approval of the Board each year, we hold that the District is not bound to the ten percent per year incentive program. Even if an agreement existed, it would be void under the Statute of Frauds because the alleged agreement was not in writing or signed by the parties.

Accordingly, we hold that the District was not liable for breach of contract.

B. Promissory Estoppel

Appellants argue that they are entitled to relief under the doctrine of promissory estoppel. We disagree.

Promissory estoppel requires a claimant to prove: (1) the presence of an unambigous promise; (2) the promisee reasonably relied upon the promise; (3) the reliance was expected and foreseeable by promisor; and (4) the promisee was injured as a result of reliance upon the promise. *Satcher v. Satcher*, 351 S.C. 477, 484, 570 S.E.2d 535, 538 (Ct. App. 2002).

In the present case, Appellants claim that they relied upon Dr. Kinlaw's promise that they would receive a pay increase for becoming national board

certified. We hold that Appellants have failed to show that their reliance on Dr. Kinlaw's statement was reasonable. The record indicates that Dr. Kinlaw informed Appellants on several occasions that the incentive was subject to the Board's approval. Therefore, it was unreasonable for Appellants to rely upon Dr. Kinlaw's statement that they would receive a ten-percent salary increase if they became national board certified.

As a result, we affirm the decision of the trial court to grant summary judgment in favor of the District on the issue of promissory estoppel.

C. Fiduciary Duty

Appellants argue that the District breached a fiduciary duty owed to the teachers. We disagree.

A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). A school district has a position of confidence with regard to its employees and therefore, a fiduciary duty exists between a school district and its employees. *Armstrong v. Sch. Dist. Five of Lexington and Richland Counties*, 26 F.Supp.2d 789, 797 (D.S.C. 1998). One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004).

In general, courts will not disturb matters within the school board's discretion unless there is clear evidence of corruption, bad faith, or a clear abuse of power. *H.H. Singleton v. Horry County Sch. Dist.*, 289 S.C. 223, 227-28, 345 S.E.2d 751, 753-54 (1986) (citing *Law v. Richland Sch. Dist. No. 1*, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978)). Furthermore, an appellate court will not substitute its judgment for that of the school board's in view of the powers, functions, and discretion that must necessarily be vested in such boards if they are to execute the duties imposed upon them. *Id.* at 228, 345 S.E.2d at 754.

In the present case, the District, acting through the Board, made the decision to reduce the annual incentive from ten percent of one's annual salary to a sum certain of $3,000 per year. There is no evidence that the Board acted in bad faith or with malice in making this decision. Rather, a reasonable decision was made to give each teacher who was national board certified a sum certain to ensure that incentive could be offered in years where the budget might be tight. We find that this decision was clearly within the Board's discretion and that the Board did not breach its fiduciary duty to the teachers.

Accordingly, we hold that the trial court correctly granted summary judgment in favor of the District on the issue of whether the District breached its fiduciary duty toward Appellants.

D. South Carolina Payment of Wages Act

Appellants argue that the trial court erred in ruling that District is not liable under the South Carolina Payment of Wages Act. We disagree.

The South Carolina Payment of Wages Act (the Act) prohibits employers from unilaterally withholding an employee's benefits. S.C. Code Ann. § 41-10-40(C) (Supp. 2003). According to the Act:

> [e]very employer shall notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made from the wages, including payments to insurance programs. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Any changes in these terms must be made in writing at least seven calendar days before they become effective. This section does not apply to wage increases.

S.C. Code Ann. § 41-10-30(A) (Supp. 2003).

In the present case, after the Board adopted the budget, the District informed Appellants about the change in wages well in advance of the seven-

day statutory requirement. In addition, Appellants attended meetings where the District answered questions about the change and explained why the change had to be made. Because Appellants were notified of the change in policy as required by law, we hold that the District did not violate the South Carolina Payment of Wages Act.

CONCLUSION

Finding no genuine issue of material fact, we affirm the trial court's decision granting summary judgment in favor of the District.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phelix Byrd, Appellant,

v.

The City of Hartsville and Darlington County, Defendants,

Of which The City of Hartsville is Respondent.

Appeal From Darlington County
John M. Milling, Circuit Court Judge

Opinion No. 26040
Heard February 3, 2005 - Filed September 19, 2005

AFFIRMED

Charles S. Altman, of Finkel & Altman, of Charleston, for Appellant.

David L. Morrison and Andrew F. Lindemann, both of Davidson, Morrison & Lindemann, of Columbia, and Martin S. Driggers, of Driggers & Moyd, of Hartsville, for Respondent.

JUSTICE PLEICONES: This is an inverse-condemnation case. Appellant Phelix Byrd (Byrd) appeals from the circuit court's grant of

summary judgment for Respondent City of Hartsville (the City). We certified the case pursuant to Rule 204(b), SCACR. We affirm.

FACTS

Byrd owned land that lay partly in the City (the City Tract) and partly in Darlington County. The property was part of what used to be Coker Farms, a National Historic Landmark (NHL).[1] After Coker Farms was divided and sold piecemeal, the NHL designation remained over all of the parcels, including Byrd's. As discussed below, the City's desire to maintain the NHL designation is central to this action.

Byrd wanted to subdivide his property and sell parcels to developers. He eventually found someone interested in buying and developing a small parcel (the Small Parcel) of the City Tract. The City Tract was zoned for agricultural use, however, and the sales contract was conditioned on the Small Parcel being zoned for commercial use. Thus, a petition to rezone the Small Parcel was filed with the City.

The City Council repeatedly deferred action on the matter. The City feared that commercial development of any part of Coker Farms without the blessing of the National Park Service would lead to revocation of the NHL designation for all of Coker Farms.[2] In fact, a non-profit organization was

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[1] The National Park Service, a division of the United States Department of the Interior, has authority over NHL designations.

[2] According to the unsworn statements of two employees of the National Park Service, NHL status does not prohibit the property owner from developing the property, but the service might remove the designation if development changes "the integrity of the designation." These employees also stated that the National Park Service might assist a property owner who wants to retain NHL status and also improve his property. The parties stipulated that these unsworn statements would be admissible at a trial of this case.

working with the National Park Service on preserving the Coker Farms NHL designation through an agricultural trust. The City believed that a premature rezoning would disrupt that effort, and it delayed action on the petition until it was satisfied that rezoning the Small Parcel would not jeopardize the NHL.

Eleven months after the petition was filed, the City announced that it was assured that rezoning Byrd's property would not affect the NHL. The City therefore zoned the Small Parcel for commercial use. By this time, though, Byrd's purchaser had lost the financing necessary to develop the property, and the sale never closed.

Three months later, Byrd filed a petition to zone the rest of the City Tract for commercial use. The City granted this request less than two months after it was made.

Soon thereafter, Byrd entered into contracts to sell parcels of the City Tract for development. These sales were not consummated, however, because Darlington County (the County), which maintained the records for both County and City property, would not approve the deeds. The reason was that the tax records for Byrd's property contained "flags" restricting the issuance of deeds.[3] In an attempt to protect the NHL designation, the County had placed these flags on the tax records for all Coker Farms property, whether located in the County or the City. The flags were not removed from Byrd's records until about three years after the City Tract had been rezoned.

PROCEDURAL POSTURE

Byrd asserted two causes of action against the City. First, he claimed that the delay of the zoning petitions effected a regulatory inverse condemnation of the City Tract. Second, he claimed that the City engaged in a civil conspiracy with the County in flagging the tax records.[4]

[3] The flags stated: "N'tl Park Ser. Ord/No Per Or Deeds Issued."

[4] The County settled with Byrd.

In separate orders, the circuit court granted summary judgment for the City on both the inverse-condemnation and conspiracy claims. With respect to the latter, the court held that even if there were a conspiracy, the City would be immune from liability under the Tort Claims Act.[5] Byrd did not appeal from that ruling, so it is not before the Court. See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 353 S.C. 249, 251, 578 S.E.2d 8, 9 n.1 (2003) (holding that a ruling not challenged on appeal is the law of the case, regardless of the correctness of the ruling). We therefore address only the inverse-condemnation claim.

ISSUE

Whether the circuit court erred in granting summary judgment for the City on Byrd's inverse-condemnation claim.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, we apply the same standard as the circuit court. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). Summary judgment is appropriate "if 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." Rule 56(c), SCRCP. "[T]he evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Osborne, 346 S.C. at 7, 550 S.E.2d at 321.

ANALYSIS

Both the United States Constitution and the South Carolina Constitution provide that if the government takes private property for public

[5] The circuit court relied on the provision that a "governmental entity is not liable for loss resulting from: employee conduct … which constitutes … intent to harm …." S.C. Code Ann. § 15-78-60(17) (Supp. 2003).

use, then it must compensate the owner for the value.[6] While the government typically takes property through an eminent-domain proceeding,[7] a taking may occur without such a proceeding. That is called "inverse condemnation." See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316, 107 S. Ct. 2378, 2386, 96 L. Ed. 2d 250, 265 (1987). An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property.

Whether physical or regulatory, this Court has held that there are four elements to inverse condemnation: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence. See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 15, 281 S.E.2d 796, 797 & n. 2 (1981). We take this opportunity to modify and clarify that test.

First, we remove the element "some degree of permanence," for it conflicts with the principle that the government must compensate for even a

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[6] The Takings Clause of the Fifth Amendment to the United States Constitution provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897).

In addition, the South Carolina Constitution states, "Except as otherwise provided in this Constitution, private property shall not be taken for … public use without just compensation being first made therefor." S.C. Const. art. I, § 13. Takings analysis under South Carolina law is the same as the analysis under federal law. Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 306, 534 S.E.2d 270, 275 (2000).

[7] See The South Carolina Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 through 28-2-510 (1991 and Supp. 2004).

temporary taking. See First English, 482 U.S. at 318, 107 S. Ct. at 2388, 96 L. Ed. 2d at 266 (stating that temporary takings are "not different in kind from permanent takings, for which the [United States] Constitution clearly requires compensation").

Second, the element requiring the taking be for "public use" does not apply to regulatory-takings cases. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326, 122 S. Ct. 1465, 1481, 152 L. Ed. 2d 517, 542-43 (2002) (emphasizing that "neither a physical appropriation nor a public use has ever been a necessary component of a 'regulatory taking'"). Consequently, there are only two elements to a regulatory inverse condemnation: affirmative conduct and a taking. In this case, Byrd has alleged a regulatory inverse condemnation, so summary judgment is appropriate only if there is no genuine issue of material fact with regard to the City's affirmative conduct or the taking of the City Tract.

I. AFFIRMATIVE CONDUCT

Byrd has presented evidence of affirmative conduct on the part of the City in ruling on the zoning petitions. But for the City's zoning ordinances, the petitions would have been unnecessary. Regulatory delay is part of the regulatory process, so indeed it is the product of governmental action.

Byrd is incorrect, however, in asserting that the City engaged in a single course of conduct – a thirteen-month delay of a decision to rezone his property. Byrd's argument overlooks that there was a three-month gap between the City's granting the petition to rezone the Small Parcel and the filing of the petition to rezone the rest of the City Tract. The City engaged in two separate courses of conduct, one being the eleven-month delay of the decision whether to rezone the Small Parcel; the other being the two-month delay of the decision whether to rezone the remainder of the City Tract. We separately address the takings issue with respect to these two delays.

II. TAKING

First, we find that this case is governed by Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). We then address the nature of the Penn Central inquiry in the context of regulatory delay. Last, we find that Byrd is unable to prove a taking.

A. Penn Central Governs This Case

Byrd's regulatory-inverse-condemnation action is governed by Penn Central because it stems from Byrd's having suffered a temporary denial of less than all economically viable use of his property.[8] Until recently, there might have been some confusion as to whether a case like Byrd's was governed by Penn Central, Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), or both. In light of the United States Supreme Court's decision in Lingle v. Chevron U.S.A., Inc., which overruled Agins, it is clear that Penn Central controls. No. 04-163 (decided May 23, 2005), 73 USLW 4343, 2005 WL 1200710. To the extent that some of our previous cases have applied Agins alone or both Agins and Penn Central, we overrule them. Infra, note 9.

The general rule is that regulatory-takings cases require "essentially ad hoc, factual inquiries," balancing all relevant circumstances to determine whether the government has taken property. Penn Central, 438 U.S. at 124, 98 S. Ct. at 2659, 57 L. Ed. 2d at 648. Two circumstances are especially important: (1) "the economic impact on the claimant, and, particularly, the extent to which the [government] has interfered with distinct investment-backed expectations;" and (2) "the character of the governmental action."

[8] It was less than all use because Byrd was able, and periodically did, farm his property throughout the delay. This use was permitted because the land was then zoned for agricultural use.

Penn Central, 438 U.S. at 124, 98 S. Ct. at 2659, 57 L. Ed. 2d at 648;[9] see also Denene, Inc. v. City of Charleston, 359 S.C. 85, 98-99, 596 S.E.2d 917, 924 (2004); Sea Cabins on the Ocean IV Homeowners Ass'n v. City of North Myrtle Beach, 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001).

When, however, it has been factually determined that a property owner has been deprived of all economic use of his property, there is a taking *per se*.[10] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-19, 112 S. Ct.

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[9] Agins was decided two years after Penn Central, and the Agins Court used different language to describe the takings test. The Court held that a taking was effected if: (1) a legitimate state interest was not substantially advanced; or (2) the landowner was denied economically viable use of his or her property. Agins, 447 U.S. at 260, 100 S. Ct. at 2141, 65 L. Ed. 2d at 112.

After Agins was decided, some courts separately applied Penn Central and Agins to determine whether a taking had occurred. See, e.g., Main v. Thomason, 342 S.C. 79, 88, 535 S.E.2d 918, 922 (2000) (stating that federal courts use Penn Central, while the "South Carolina" test is Agins, and applying the two separately) (subsequent history omitted); Westside Quik Shop, Inc., 341 S.C. at 305-06, 534 S.E.2d at 274 (applying the two separately). Other courts found that the tests were essentially the same and made only one inquiry. See, e.g., Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 132 (2d Cir. 2003) (noting that "*Agins* is easily reconciled with *Penn Central*"), cert. denied, 125 S. Ct. 104, 160 L. Ed. 2d 126 (2004). As noted above, the United States Supreme Court has now overruled Agins and clarified that Penn Central is the test to be applied when no *per se* taking is involved. Lingle v. Chevron U.S.A., Inc., No. 04-163 (decided May 23, 2005), 73 USLW 4343, 2005 WL 1200710.

[10] There is an exception: the government need not compensate for a total economic loss if "the proscribed use interests were not part of [the owner's] title to begin with." Lucas, 505 U.S. at 1027, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820; see also Lucas v. S.C. Coastal Council, 309 S.C. 424, 424 S.E.2d 484 (1992) (finding on remand that the exception did not apply to the case).

2886, 2892-95, 120 L. Ed. 2d 798, 812-15 (1992). Because Byrd's loss was only temporary, and because Byrd was able to farm his property, no taking *per se* occurred here.

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the Court held that Lucas does not apply when the property owner has suffered a temporary loss of all economically viable use. 535 U.S. 302, 331-32, 122 S. Ct. 1465, 1484, 152 L. Ed. 2d 517, 546-47 (2002). Because time is a component of an interest in property, the property owner in that situation has suffered a partial loss, not a total one. Once the temporary restriction is lifted, value will return. Tahoe-Sierra, 535 U.S. at 331-32, 122 S. Ct. at 1484, 152 L. Ed. 2d at 546. In such a case, the court must apply Penn Central to determine whether there has been a taking.

The City argues that Byrd's case is distinguishable from Tahoe-Sierra in that Byrd has not alleged a temporary loss of *all* economically viable use. As a matter of law, the City asserts, there is no taking if the property owner has suffered a temporary loss of only part of the economically viable use of the property. We disagree. While this case might be factually different from Tahoe-Sierra, there the United States Supreme Court expressly rejected the adoption of categorical rules in the context of regulatory takings. If Lucas does not apply, then Penn Central does.[11] That is the case here.

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[11] We overrule our prior suggestions that a property owner cannot demonstrate a taking unless he has been denied all economically viable use of his property. See Glover v. County of Charleston 361 S.C. 634, 640, 606 S.E.2d 773, 777 (2004) (holding that the property owners involved could not demonstrate a taking because they had not been, "even temporarily, denied all economically viable use of their land"); Greenville County v. Kenwood Enterprises, Inc., 353 S.C. 157, 176, 577 S.E.2d 428, 438 (2003) (holding that that there was no taking because the property owner had not been deprived of "all economically viable use of its land"). Nevertheless, the results reached in these cases were correct.

B. Penn Central And Regulatory Delay

In the context of regulatory delay, the Penn Central inquiry is whether the delay ever became unreasonable. Byrd is not entitled to compensation merely because he had to obtain a zoning change to develop his property. See Tahoe-Sierra, 535 U.S. at 334-35, 122 S. Ct. at 1485, 152 L. Ed. 2d at 548 (stating that "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like … have long been considered permissible exercises of the police power") (quotation omitted); Sea Cabins, 345 S.C. at 436, 548 S.E.2d at 604.[12] Until regulatory delay becomes unreasonable, there is no taking. See First English, 482 U.S. at 320, 107 S. Ct. at 2388, 96 L. Ed. 2d at 267; Agins, 447 U.S. at 263, 100 S. Ct. at 2143, 65 L. Ed. 2d at 113 n. 9. The length of the delay alone is not determinative. Tahoe-Sierra, 535 U.S. at 342, 122 S. Ct. at 1489, 152 L. Ed. 2d at 553. Rather, we consider all relevant circumstances, including the reasons for the delay and the economic impacts on Byrd. And under the "parcel as a whole" doctrine, we must consider those impacts in relation to Byrd's entire interest in the City Tract.[13] See Tahoe-Sierra, 535 U.S. at 331, 122 S. Ct. at 1483, 152 L. Ed. 2d at 546; Penn Central, 438 U.S. at 130-31, 98 S. Ct. at 2662, 57 L. Ed. 2d at 652; Beard v. S.C. Coastal Council, 304 S.C. 205, 207-08, 403 S.E.2d 620, 622 (1991).

C. The Eleven-Month Delay

As mentioned above, for eleven months the City delayed action on the petition to zone the Small Parcel for commercial use. Byrd has presented no evidence that this delay effected a taking of the City Tract.

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[12] We can thus immediately dispose of Byrd's claim that a taking commenced when the petition to rezone the Small Parcel was filed.

[13] The City argues that under the parcel-as-a-whole doctrine, the Court should treat the City Tract and the portion of Byrd's property in the County as one tract because the two were contiguous. We disagree. The City had no jurisdiction over the property in the County.

Preserving the NHL designation was a legitimate governmental interest,[14] and delaying the zoning decision was a reasonable means of furthering that interest. Commercial development might have caused the National Park Service to remove the designation.[15]

Further, there is no evidence that the City's interest ever became disproportionate to the economic impacts on Byrd.[16] First, the delay did not affect the use to which Byrd was putting the City Tract before the rezoning petition was filed. The land was zoned for agricultural use, and Byrd's ability to farm the land was never disturbed. See Penn Central, 438 U.S. at 136, 98 S. Ct. at 2665, 57 L. Ed. 2d at 656 (calling the existing use of the property the owner's "primary expectation"). Second, Byrd's only

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[14] In fact, preserving landmark status was the interest involved in Penn Central, and the landowners did not challenge the legitimacy of the interest. 438 U.S. at 128-29, 98 S. Ct. at 2661-62, 57 L. Ed. 2d at 651-52.

[15] The dissent raises valid concerns regarding government interference with private property that is related to no legitimate interest. In our view, however, preserving the NHL designation was a legitimate interest. Further, a careful review of the record reveals that Byrd has presented no evidence that at any point during the eleven-month delay, the City's fear of losing the NHL designation was unreasonable. In fact, the only evidence in the record is to the contrary.

In addition, contrary to Byrd's claim, there is no evidence that the delay was the result of bad faith on the part of the City. See, e.g., Bass Enter. Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004) (noting that a relevant consideration under Penn Central is whether the government has acted in bad faith).

[16] The dissent focuses on the duration of the delay without considering the economic impact, as required under Penn Central. As explained above, the duration of the delay is not determinative. Tahoe-Sierra, 535 U.S. at 342, 122 S. Ct. at 1489, 152 L. Ed. 2d at 553.

investment-backed expectation concerned the sale of the Small Parcel. The delay's interference with this expectation arguably impacted the value of the entire City Tract, but even with the evidence viewed in a light most favorable to Byrd, any such impact was too slight to render the delay unreasonable.

In sum, there is no issue of material fact regarding the legitimacy of the City's conduct or the slight nature of the economic impact on Byrd. Byrd therefore cannot demonstrate that the delay ever became unreasonable, which means that he cannot demonstrate a taking.

D. The Two-Month Delay

Similarly, there is no evidence that the two-month delay of the decision to rezone the rest of the City Tract ever became unreasonable. Byrd does not even argue that the City should generally grant a zoning petition in less than two months. Further, it is undisputed that the delay did not affect Byrd's ability to farm the property or that Byrd had no investment-backed expectations with which the delay interfered. Consequently, Byrd cannot demonstrate that the two-month delay effected a taking.

CONCLUSION

The evidence presented demonstrates that no material issue of fact exists and that the City is entitled to judgment as a matter of law. Byrd cannot demonstrate that the City inversely condemned his property through regulatory delay. Accordingly, the grant of summary judgment for the City is

AFFIRMED.

MOORE, WALLER and BURNETT, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. The majority asserts that the City acted reasonably in delaying Appellant's investment-backed zoning request for a period totaling eleven months. I disagree.

Both the Fifth and Fourteenth Amendments to the United States Constitution recognize that the government has the authority to interfere with a private citizen's property rights to promote the common good. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994) (recognizing the government's powers of eminent domain). However, when the government interferes with a private citizen's property rights and this interference is not related to any legitimate public interest, the government has acted beyond the scope of its authority. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1980).

In my opinion, the City's decision to delay the land's rezoning was *ultra vires* and unreasonable. The record indicates that rezoning the land for commercial purposes would not have affected the NHL status of the land. In addition, the City had ample opportunity to determine that rezoning the land would not have affected the land's NHL status.

The majority focuses on the City's concern that the rezoning would likely cause the land to lose its NHL status. In my opinion, under the facts of this case, eleven months was more than enough time for the City to investigate and determine whether it had a legitimate public interest in delaying rezoning. In my view, according to the facts of this case and the United States Supreme Court's ruling in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), Appellant is entitled to just compensation for the temporary, regulatory taking of his land. I would therefore reverse the trial court's decision and award reasonable compensation accordingly.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Page D. Callen, Respondent,

v.

Sean R. Callen, Appellant.

Appeal From Charleston County
Frances P. Segars-Andrews, Family Court Judge

Opinion No. 26041
Heard June 1, 2005 - Filed September 19, 2005

REVERSED AND REMANDED

Emma I. Bryson, John O. McDougall, and Peter G. Currence, all of McDougall & Self, of Columbia, for Appellant.

Lori Dandridge Stoney and Paul E. Tinkler, both of Charleston, for Respondent.

Jon A. Mersereau, of Charleston, for Guardian Ad Litem.

JUSTICE PLEICONES: At issue in this case is whether Appellant Sean Callen (Sean) and Respondent Page Durkee Callen (Page) entered into a common-law marriage. Page filed an action for divorce, and Sean answered that the parties were never married. The family court bifurcated the case and held a hearing to determine whether a common-law marriage existed. The court ruled that there was a marriage and, further, that Page was entitled to

attorney fees. Sean appealed, and we certified the case pursuant to Rule 204(b), SCACR. We reverse the family court's decision and remand the case for a new hearing.

BACKGROUND

Sean and Page's relationship began in Florida when the parties were in college, about fifteen years before Page brought the divorce action. During the relationship, Sean and Page had two children. The first was born at a fairly early point in the relationship, and the second was born five years later.

According to Page, the parties considered themselves married almost from the beginning. Sean denies that they ever did. According to Sean, the relationship was purely sexual until they conceived their first child. He says that thereafter, sharing children was the only reason that the parties maintained any relationship.

Throughout the course of the relationship, Sean lived in various jurisdictions, including Florida, New York, Massachusetts, and Ireland. Page claims that she lived with Sean in all of these places. Sean says that he lived alone in each and that Page just visited him from time to time.

Eventually, Sean purchased a residence in Savannah, Georgia. Page asserts that Sean did this so that he had a place to stay when he was working there. According to Page, Sean was actually residing with her and the children in Florida. Conversely, Sean argues that his residence in Savannah was permanent and that he never lived with Page and the children in Florida.

In August 2000, Page and the children moved from Florida to Charleston. Page claims that Sean moved to Charleston with them and that they lived together there as a family. Sean denies this, saying that he maintained his residence in Savannah and that any time spent in Charleston was for visiting his children.

The family court ruled that Sean and Page had a common-law marriage, meaning that Page could proceed with the divorce action. The family court also ordered Sean to pay Page $113,405.98 as attorney fees.

ISSUES

I. Whether the family court erred in finding that Sean and Page entered into a common-law marriage.

II. Whether the family court erred in admitting the testimony of witnesses whose names were not disclosed in answers to interrogatories.

III. Whether the family court erred in awarding attorney fees to Page.

ANALYSIS

Whether a common-law marriage exists is a question of law. Campbell v. Christian, 235 S.C. 102, 104, 110 S.E.2d 1, 2 (1959). The proponent of the alleged marriage has the burden of proving the elements by a preponderance of the evidence. Ex parte Blizzard, 185 S.C. 131, 133, 193 S.E. 633, 634 (1937). The trial court's findings of fact will be upheld if they are supported by any evidence in the record. Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005) (stating that in law actions tried without a jury, the factual findings of the trial judge are to be upheld if supported by any evidence). In this case we do not address the sufficiency of the evidence, because the family court's findings of fact are so tainted by errors of law as to require us to reverse the court's decision and remand the case for a new hearing.

I. COMMON-LAW MARRIAGE

The family court failed to apply the proper standard for determining whether Sean and Page entered into a common-law marriage.

A common-law marriage is formed when two parties contract to be married. Johnson v. Johnson, 235 S.C. 542, 550, 112 S.E.2d 647, 651 (1960). No express contract is necessary; the agreement may be inferred from the circumstances. Id.; Kirby v. Kirby, 270 S.C. 137, 140, 241 S.E.2d 415, 416 (1978). The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent. Consideration is the participation in the marriage. If these factual elements are present, then the court should find as a matter of law that a common-law marriage exists.

Further, when the proponent proves that the parties participated in "apparently matrimonial" cohabitation, and that while cohabiting the parties had a reputation in the community as being married, a rebuttable presumption arises that a common-law marriage was created. Jeanes v. Jeanes, 255 S.C. 161, 166-67, 177 S.E.2d 537, 539-40 (1970). This presumption may be overcome by "strong, cogent" evidence that the parties in fact never agreed to marry. Jeanes, 255 S.C. at 167, 177 S.E.2d at 540.

When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, no common-law marriage may be formed, regardless whether mutual assent is present. Further, after the impediment is removed, the relationship is not automatically transformed into a common-law marriage. Instead, it is presumed that relationship remains non-marital. For the relationship to become marital, "there must be a new mutual agreement either by way of civil ceremony or by way of recognition of the illicit relation and a new agreement to enter into a common law marriage." Kirby, 270 S.C. at 141, 241 S.E.2d at 416 (citing Byers v. Mount Vernon Mills, Inc., 268 S.C. 68, 231 S.E.2d 699 (1977)); see also Johns v. Johns, 309 S.C. 199, 201-03, 420 S.E.2d 856, 858-59 (Ct. App. 1992) (involving the impediment of one party's marriage to a third person); Bochette v. Bochette, 300 S.C. 109, 111-12, 386 S.E.2d 475, 476-77 (Ct. App. 1989) (same); Prevatte v. Prevatte, 297 S.C. 345, 348-49, 377 S.E.2d

114, 116-17 (Ct. App. 1989) (same);[1] Yarbrough v. Yarbrough, 280 S.C. 546, 551-52, 314 S.E.2d 16, 18-19 (Ct. App. 1984) (same).

Even assuming, as Page urges, that the parties lived together in Florida, New York, Massachusetts, and Ireland, and further assuming that they moved together from Florida to South Carolina in August 2000,[2] no common-law marriage could have been formed, if at all, until after the move. Since none of those other jurisdictions sanctions common-law marriages, there was an impediment to marriage until the parties took residency here. It must be presumed that Sean and Page's relationship remained non-marital after the move, after the impediment disappeared. See Kirby, 270 S.C. at 141, 241 S.E.2d at 416. Consequently, Page has the burden of proving that the parties entered into a marital agreement after moving to South Carolina. See Kirby, 270 S.C. at 141, 241 S.E.2d at 416.

The family court did not place this burden on Page, however, because the court failed to recognize the impediment to marriage. Instead, the family court considered Page and Sean's relationship in its entirety, relying heavily on the parties' conduct prior to coming to South Carolina. This constitutes reversible error.

In addition, the family court misapprehended the meaning of intent to marry. The family court's order includes the following passage:

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[1] In Prevatte, the Court of Appeals raised the split of authority "as to whether the parties must have knowledge that the impediment has been removed." 297 S.C. at 349, 377 S.E.2d at 117 (citations omitted). The court decided that it need not resolve the issue because the parties there were aware of the impediment and its removal. Id. The issue becomes important in cases in which the parties are aware of the impediment but not its removal. The determination that must be made there is whether the parties truly intended to enter into a valid marriage. We need not resolve the issue here, because Page admits that she was never aware of the impediment in the first place.

[2] As explained above, we do not comment on the sufficiency of the evidence to support the family court's findings of fact.

> Analysis of the intent to be married is a separate consideration from the actual understanding from the parties regarding a legally binding marital relationship. Otherwise, we would not have the rich history of South Carolina common law marriage law. I find the Callens' intent to be as a married couple clear, even though they may not have understood the legal consequences of their intentions and actions.

(emphasis added).

The family court cited no authority for this proposition, and the proposition is irreconcilable with precedent.

A party need not understand every nuance of marriage or divorce law, but he must at least know that his actions will render him married as that word is commonly understood. If a party does not comprehend that his "intentions and actions" will bind him in a "legally binding marital relationship," then he lacks intent to be married. A lack of intent to be married overrides the presumption of marriage that arises from cohabitation and reputation. South Carolina does not impose marriage upon a couple merely because they intend to be together forever. See Jennings v. Hurt, 554 N.Y.S.2d 220, 220 (N.Y. Sup. Ct. 1990) (applying South Carolina law and noting that "[o]ne cannot be married unwittingly or accidentally") (quotation omitted). Like the failure to recognize the impediment to marriage, the family court's definition of "intent to marry" constitutes reversible error.

II. ADMISSION OF TESTIMONY

The family court also committed reversible error in admitting the testimony of three witnesses. At the hearing, Sean objected to the admission of the testimony of these witnesses on the ground that each came as a surprise. Sean argued that none of the witnesses' names had been timely disclosed in answers to interrogatories and that he therefore had insufficient time to depose any of them. Page had no explanation for the failure to reveal these witnesses sooner. Nevertheless, the family court overruled Sean's

objection. The court ruled that because there existed no pre-trial order which provided a specific date by which the parties had to disclose witnesses, the court had no discretion and had to admit the testimony. This was error.

A "trial court is under a duty, when the situation arises, to delay the trial for the purpose of ascertaining the type of witness involved and the content of his evidence, the nature of the failure or neglect or refusal to furnish the witness' name, and the degree of surprise to the other party, including prior knowledge of the name by said party." Laney v. Hefley, 262 S.C. 54, 59-60, 202 S.E.2d 12, 14 (1974) (quoting with approval Wright v. Royse, 43 Ill. App. 2d. 267, 193 N.E.2d 340 (1963)). The trial court is under such a duty regardless whether the proponent of the testimony is allegedly in violation of a pre-trial order or a court rule. Jumper v. Hawkins, 348 S.C. 142, 150, 558 S.E.2d 911, 915-16 (Ct. App. 2001). After inquiring, the court has discretion whether to admit or exclude the testimony.

Here, there was no pre-trial order, but Page allegedly violated Rules 26(e) and 33(b) of the South Carolina Rules of Civil Procedure[3] by failing to supplement her answers to interrogatories in a timely fashion. After Sean objected to the admission of the testimonies at issue, the family court's duty to inquire arose. The family court failed to make the inquiry required under Laney and Jumper and therefore failed to exercise its discretion. "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987); see also In re Robert M., 294 S.C. 69, 70-71, 362 S.E.2d 639, 640-41 (1987); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). Sean was prejudiced by the family court's ruling, requiring reversal and a new hearing. We do not mean to imply that the family court is precluded from admitting the same testimony at the new hearing. We hold only that the court's failure to exercise discretion below requires the new hearing.

[3] Rules 26(e) and 33(b), SCRCP.

III. ATTORNEY FEES

As stated above, the family court ordered Sean to pay Page's attorney fees, $113,405.98. One basis for the award was the beneficial result achieved by Page's attorneys. Because we reverse the finding of a common-law marriage, we also reverse the award of attorney fees.

CONCLUSION

The family court failed to apply the proper standard for determining whether Sean and Page entered into a common-law marriage. The court also committed reversible error in admitting the testimonies of allegedly surprise witnesses without first making the required inquiry and exercising discretion. Consequently, the family court's finding a common-law marriage and awarding attorney fees to Page are reversed and the case is remanded for a new hearing.

REVERSED AND REMANDED.

MOORE, WALLER and BURNETT, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, Sean and Page entered into a common-law marriage. Therefore, I would affirm the family court's decision.

In my view, the majority misconstrues the law to the extent that the majority views the fact that the couple lived outside of South Carolina as an impediment to marriage. The prohibition of common-law marriage in other jurisdictions does not prevent a South Carolina court from recognizing the marriage when the couple moves to this state. In my opinion, a marriage that may be invalid in the state where the parties contracted the marriage, would be valid in South Carolina if the marriage otherwise comports with our state's marriage laws. *See Estate of Murnion*, 686 P.2d 893, 899 (Mont. 1984) (holding that a marriage that may be invalid where contracted will be recognized under Montana law if the marriage does not conflict with Montana law).

Further, the majority ignores the proper standard of review in this case. The issue whether a couple is common-law married is a question of law. Tarnowski v. Lieberman, 348 S.C. 616, 619, 560 S.E.2d 438, 440 (Ct. App. 2002). Therefore, our review in this case is limited to a determination of whether there is any evidence to support the trial judge's findings. Id. The question is not what conclusion this Court would have reached after reviewing the facts, but whether the facts as found by the family court are supported by the evidence. Id.

In the present case, the family court found that a common-law marriage existed. The family court relied on evidence that the couple had cohabited for several years over the course of the relationship, most recently in South Carolina. The family court also found that the couple held themselves out to the community as husband and wife. In fact, Sean knew that Page used the name Callen for many years, he did not object.

Therefore in my opinion, there is evidence in the record supporting the family court's findings. Accordingly, I would uphold the family court's ruling finding that a common-law marriage existed.

The Supreme Court of South Carolina

In the Matter of Peter L. Murphy, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the suspension.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

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

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

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

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

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

Columbia, South Carolina

September 16, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Blind Tiger, LLC, Appellant,

v.

City of Charleston, Respondent.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4025
Heard June 7, 2005 – Filed September 19, 2005

AFFIRMED

James Lee Bell, of Charleston, for Appellant.

Charlton Desaussure, Jr., Timothy A. Domin, both of Charleston, for Respondent.

HEARN, C.J.: In this civil action, Blind Tiger, L.L.C. argues the circuit court erred in dismissing its appeal from the decision of the Charleston County Board of Architectural Review (the Board) as untimely. We affirm.

FACTS

The Blind Tiger is a pub located at 36-38 Broad Street in the heart of Charleston's old and historic district. City ordinances require prior approval for alterations to the "exterior architectural appearance" of buildings located in this area of Charleston.[1] However, prior to applying for approval from the Board, the Blind Tiger hired a local artisan to install a tinted window film and tiger design on the interior front, street-level window facing Broad Street. The Charleston Department of Design, Development, and Preservation became aware that the design and tinted film had not been approved and asserted the Board of Architectural Review must approve any such alterations. Blind Tiger filed a formal application with the Department of Design, Development, and Preservation for "after-the-fact" approval of its window film and tiger design. The application was denied. Blind Tiger appealed to the Board.

On November 12, 2003, the Board conducted a hearing at which representatives of both Blind Tiger and the city were present. At the hearing, Blind Tiger argued the Board lacked authority to regulate alterations to the interior of windows of a business located in the old and historic district. At the conclusion of the hearing on November 12, 2003, the Board issued an oral ruling upholding the department's decision and ordering removal of the window film and tiger design within ten days. Also, at the time the decision was rendered, a member of the commission placed an "X" in the box of the application next to "Denial."

Blind Tiger did not file an appeal of the Board decision until February 2, 2004, eighty-two days after the hearing. The circuit court dismissed Blind

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[1] See Charleston Zoning Code § 54-232. Section 54-231 defines "exterior architectural appearance" as "the type and character of all windows, doors, light fixtures, signs and appurtenant elements, visible from a street or public thoroughfare."

Tiger's appeal as untimely under section 6-29-900 of the South Carolina Code (2004). This appeal followed.

STANDARD OF REVIEW

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by the evidence. Gurganious v. City of Beaufort, 317 S.C. 481, 486, 454 S.E.2d 912, 915 (Ct. App. 1995). Furthermore, our standard of review of a board of architectural review's decision is the same as that of the trial court. Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct. App. 1988) (holding the appellate court will not reverse the circuit court's affirmance of the board unless the board's findings of fact have no evidentiary support or the board commits an error of law).

LAW/ANALYSIS

Blind Tiger alleges the circuit court erred in dismissing its appeal as untimely. We disagree.

Section 6-29-900 of the South Carolina Code controls the appeal requirements from a board of architectural review to the circuit court. Section 6-29-900 provides, in pertinent part:

> A person who may have a substantial interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the affected party receives actual

> notice of the decision of the board of architectural review.

S.C. Code § 6-29-900(A) (2004) (emphasis added).

Blind Tiger contends it complied with the requirement contained in section 6-29-900 as it appealed within thirty days of receipt of the Board's written notice of the decision. Blind Tiger alleged it received written notice of the decision on January 30, 2004, and filed the appeal to the circuit court on February 2, 2004, which was within the thirty-day period prescribed in section 6-29-900.

However, Blind Tiger's argument ignores the plain meaning of Section 6-29-900. That section mandates an appeal to the circuit court must be made "within thirty days after the affected party receives actual notice of the decision." Thus, the triggering mechanism for filing an appeal is actual notice of the adverse decision, not receipt of the written notice.

Actual notice is synonymous with knowledge. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 63 n.6, 504 S.E.2d 117, 122 n.6 (1998). "Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him." Id.

Blind Tiger acknowledged its representatives were present at the November 12, 2003 hearing of the Board when the decision was rendered ordering Blind Tiger to remove the film within ten days. Therefore, we find Blind Tiger had actual notice of the Board's decision on November 12, 2003, and Blind Tiger's failure to file an appeal until February 2, 2004, some 82 days after actual notice under section 6-29-900, renders its appeal untimely.

CONCLUSION

Based on the foregoing, the order of the circuit court dismissing Blind Tiger's appeal as untimely is hereby

AFFIRMED.

BEATTY and SHORT, JJ., concur.