The Supreme Court of South Carolina

RE: Amendments to Court Rules

O R D E R

To ensure that the practicing bar and the general public are aware of changes to the rules governing the practice of law and the rules governing practice and procedure in the trial courts of the State, the Court has determined that unless otherwise ordered, rule changes shall become effective on either March 1 or September 1 of each year. The Court will continue to issue orders amending rules throughout the year and these amendments will be posted on the Judicial Department's Web site to enable practitioners and the public to be aware of upcoming rule amendments and their effective dates.

IT IS SO ORDERED.

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.

Columbia, South Carolina

September 18, 2002

The Supreme Court of South Carolina

In the Matter of Harvey
William Burgess, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Burgess and the interests of Mr. Burgess' clients.

IT IS ORDERED that John R. Lester, Esquire, is hereby appointed to assume responsibility for Mr. Burgess' client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Burgess may have maintained. Mr. Lester shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Burgess' clients and may make disbursements from Mr. Burgess' trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Harvey

William Burgess, Esquire, shall serve as notice to the bank or other financial institution that John R. Lester, 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 John R. Lester, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Burgess' mail and the authority to direct that Mr. Burgess' mail be delivered to Mr. Lester's office.

This appointment shall be for a period of no longer than nine months unless application is made to this Court to extend the period of appointment. See Rule 31(c), RLDE, Rule 413, SCACR.

Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

September 12, 2002

The Supreme Court of South Carolina

In the Matter of
Billie C. Blackmon, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mrs. Blackmon and the interests of Mrs. Blackmon's clients.

IT IS ORDERED that Frederick A. Hoefer, II, Esquire, is hereby appointed to assume responsibility for Mrs. Blackmon's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mrs. Blackmon may have maintained. Mr. Hoefer shall take action as required by Rule 31, RLDE, to protect the interests of Mrs. Blackmon's clients and may make disbursements from Mrs. Blackmon's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Billie C. Blackmon, Esquire, shall serve as notice to the bank or other financial institution that Frederick A. Hoefer, II, 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 Frederick A. Hoefer, II, Esquire, has been duly appointed by this Court and has the authority to receive Mrs. Blackmon's mail and the authority to direct that Mrs. Blackmon's mail be delivered to Mr. Hoefer's office.

James E. Moore J.
FOR THE COURT
Toal, C.J., not participating

Columbia, South Carolina

September 11, 2002

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
E-MAIL: dshearouse@scjd.state.sc.us

N O T I C E

IN THE MATTER OF GEORGE EUGENE LAFAYE, IV, PETITIONER

On December 3, 2001, Petitioner was definitely suspended from the practice of law for a period of one year. In the Matter of Lafaye, 347 S.C. 441, 556 S.E.2d 390 (2001). He has now filed a petition to be reinstated.

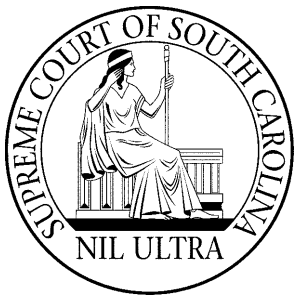
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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

These comments should be received no later than November 18, 2002.

Columbia, South Carolina

September 19, 2002



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

September 30, 2002

ADVANCE SHEET NO. 33

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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3466 - State v. Kenneth Andrew Burton	Pending
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2002-UP-038 - State v. Corey Washington	Pending
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2002-UP-066 - Barkley v. Blackwell's	Pending
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2002-UP-131 - State v. Lavon Robinson	Pending
2002-UP-146 - State v. Etien Brooks Bankston	Denied 9/19/02
2002-UP-148 - Marsh v. Springs Industries	Pending
2002-UP-151 - National Union Fire Ins. v. Houck	Pending
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2002-UP-198 - State v. Leonard Brown	Pending
2002-UP-208 - State v. Andre China & Samuel A. Temoney	Pending
2002-UP-220 - State v. Earl Davis Hallums	Pending
2002-UP-223 - Miller v. Miller	Pending
2002-UP-230 - State v. Michael Lewis Moore	Pending
2002-UP-231 - SCDSS v. Temple	Denied 9/19/02
2002-UP-233 - State v. Anthony Bowman	Pending
2002-UP-236 - State v. Raymond J. Ladson	Pending
2002-UP-250 - Lumbermens Mutual v. Sowell	Pending
2002-UP-256 - Insurit v. Insurit	Pending
2002-UP-258 - Johnson v. Rose	Denied 9/19/02
2002-UP-259 - Austin v. Trask	Pending

2002-UP-266 - State v. John Lipsky	Pending
2002-UP-281 - State v. Henry James McGill	Pending
2002-UP-284 - Hiller v. SC Board Architectural	Pending
2002-UP-288 - Yarbrough v. Rose Hill Plantation	Pending
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2002-UP-313 - State v. James S. Strickland	Pending
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2001-UP-238 - State v. Michael Preston	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of:
Michael H., a minor
under the age of
seventeen years, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Richard W. Chewning, III, Family Court Judge

Opinion No. 25529
Heard July 23, 2002 - Filed September 16, 2002

AFFIRMED AS MODIFIED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Melody J. Brown, all of Columbia, for petitioner.

Tara D. Shurling, of Columbia, for respondent.

CHIEF JUSTICE TOAL: The State appeals the decision of the Court of Appeals reversing Michael H.'s ("Respondent") juvenile conviction for criminal sexual conduct ("CSC") with a minor.

FACTUAL / PROCEDURAL BACKGROUND

Respondent was charged, by juvenile petition filed in Lexington County family court, with CSC in the first degree, kidnapping, and CSC with a minor. Respondent is the victim's uncle, although he is only eight years older than the victim. At the time of the alleged assault, Respondent was twelve or thirteen and the victim was four or five. Due to premature birth and complications, Respondent is developmentally impaired and exhibits a maturity level below others his age.[1] The victim often spent time at Respondent's house (the home of victim's paternal grandmother) where Respondent, his younger brother, and victim played together and also took baths and showers together when victim spent the night.[2] It was during one of these showers that the victim claimed Respondent "raped" him.

The allegation arose in March 1999, in response to a story on the local news about a man arrested for indecent exposure. The victim's mother testified that the victim saw the report and asked her why the man had "robbed" the children. The mother responded that the man had not "robbed" the children, but had "raped" the children, and then explained to her son what

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[1] Respondent's verbal IQ is 84 (just below average), but his performance IQ lags behind at 70, indicating he has a learning disability. His counselor stated he did not learn like other kids and experienced delays in gross motor development as he grew up.

[2] Respondent's mother (victim's grandmother) testified the door to the bathroom always remained open when the boys were bathing, and she checked in on them frequently, and remained in earshot continuously during their baths and showers.

rape was.[3] The victim's mother testified she told her son that rape of a boy "would be if someone was to touch him in an area that was covered by his swimsuit or his underwear, if someone was to touch his penis or play with his penis, or someone may try and stick [his] penis or something into his behind." Immediately upon hearing this explanation, the victim's mother said her son's expression changed, and he told her, "well, [Respondent's] done that to me before."

Victim's mother then testified she asked her son when and where this happened, and he responded that it had happened a while ago when he was in the shower with Respondent. Victim's mother called her mother-in-law, Respondent's mother, to inform her of her son's accusation. Respondent's mother put Respondent on the phone with the victim's mother, and Respondent denied ever having done anything like that to the victim.

The victim's mother filed a report with the police, and took victim to the Lexington County Children's Center where a rape protocol was performed and counseling began. The doctor performing the rape protocol found no evidence of sexual assault, but testified this was not unusual with anal rape after significant time had passed. Victim's counselor, Dr. Lake, a clinical psychologist, testified she believed Respondent had sexually assaulted victim.[4] During cross-examination of Dr. Lake, Respondent's

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[3] Although, apparently, the news story was about indecent exposure (not rape), the victim's mother testified her son had confused the word "raped" with the word "robbed," and so she explained rape to him.

[4] Respondent's counselor, John Higgins, certified as an expert in the field of sex offender risk assessment, testified he had counseled Respondent in 20 sessions during which Respondent had consistently denied sexual contact with the victim. Mr. Higgins testified, based on his extensive experience with sex offenders, that he did not believe Respondent had any sexual contact with the victim. He explained that Respondent did not fit the profile for a sex offender, and in fact was naïve about sex and the sexual function of his own body parts. Further, Mr. Higgins testified that Respondent had admitted

counsel discovered he had not received notes from the victim's last four sessions with Dr. Lake. Respondent asked the judge for time to review them and then completed his cross-examination. In these last four sessions, victim reported he had been hearing voices in his head for some time. Victim told Dr. Lake he began hearing the voices of two men on his fourth birthday, and they continued until a month or so before trial. Victim told Dr. Lake the voices told him to say mean things to his friends and to hurt them, and that the voices told him he should have raped Respondent like Respondent had raped him.

Dr. Lake thought the voices might be auditory hallucinations and suggested to victim's mother that he see a physician or a psychiatrist for diagnosis or treatment. Dr. Lake's notes reflected, however, that the voices stopped shortly before trial. Dr. Lake attributed this change to medication victim began taking for attention-deficit and hyperactivity. The victim never saw a physician or a psychiatrist about the voices.

Prior to the hearing, Respondent filed a motion to have victim submit to a psychological evaluation. Apparently, that motion was denied. Following Dr. Lake's testimony, Respondent moved again to have victim submit to a psychological evaluation based on the revelation that victim had been hearing voices during the period of time he alleged the assault occurred. That motion was denied. Respondent's counsel also moved to have the victim's testimony stricken as incompetent, based on the report of hearing voices. That motion was denied, as well.

At trial, the victim testified that Respondent raped him, explaining, in his own words, that Respondent "stuck his penis up my butt." Respondent also testified at trial and denied that he had sexually assaulted the victim in any way.

The trial judge granted Respondent's motion for directed verdict on the first degree CSC and kidnapping charges based on insufficient evidence, but

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other serious wrongdoing, such as calling in a bomb threat and stealing earrings, but had consistently denied any sexual contact with the victim.

found Respondent guilty of CSC with a minor and ordered him committed to the Department of Juvenile Justice ("DJJ") until his twenty-first birthday. Respondent appealed and the Court of Appeals reversed and remanded for a new trial. *In the Interest of Michael H.*, Op. No. 2002-UP-050 (S.C. Ct. App. Filed January 18, 2002).

The State then filed a Petition for Rehearing and Suggestion for Rehearing En Banc. In response, Respondent filed a Petition for Appeal Bond or in the Alternative for Writ of Supersedeas. By handwritten order, the Court of Appeals denied the Petition for Rehearing, but granted Respondent's Petition for Appeal Bond. The Court of Appeals ordered Respondent to enter into a recognizance in the amount of $1000, with no less than one surety. The Court of Appeals provided further that the form of the bond and each surety thereon was to be approved by the Clerk of Court for Lexington County or the Clerk's designee. The matter was remanded to the family court to set special conditions for the bond.

Subsequently, the State petitioned this Court for a stay of the Court of Appeals' order granting bond, and for supersedeas review of the order. Justice Moore denied the petition on behalf of the Court on the ground that the Court of Appeals' order was not appealable. On the same day, the family court set the conditions of the bond.

The Court granted certiorari to address the following issues:

I. Did the Court of Appeals err in holding that the family court judge abused his discretion in failing to order the victim to submit to a psychological examination, based on the report of auditory hallucinations discovered at trial?

II. Did the Court of Appeals act beyond its jurisdiction when it granted Respondent's Appeal Bond?

LAW ANALYSIS

I. Psychological Examination

The State argues the Court of Appeals erred in holding that the family court judge abused his discretion in failing to order the child victim to submit to a psychological examination. We disagree.

As a preliminary matter, the State argues that this issue is not preserved for review. The State asserts trial counsel's complaint was grounded in perceived discovery violations concerning the notes of Dr. Lake's that had not been turned over to him. We disagree with this characterization of Respondent's motions following Dr. Lake's testimony. Critical information regarding the mental health of the child victim was uncovered in Respondent's cross-examination of Dr. Lake. At the close of the State's case, Respondent moved for a psychological evaluation based on this evidence. Obtaining the psychological evaluation, not pursuing the discovery violation, was the primary objective of Respondent's motion. "Now we'd move, for one, to have this child go through a psychological evaluation prior to continuing with this case because, based upon testimony we've heard and what we've been given today, it's highly likely that some voice told [victim] to say [Respondent] did this."

It is well settled that an issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court. Toal, Vafai, & Muckenfuss, *Appellate Practice in South Carolina*, at 66 (S.C. Bar 1999). In this case, Respondent's counsel raised the issue before trial, and then again during trial, at which point the trial judge explicitly denied the motion to have the victim submit to a psychological examination.

Whether or not a court can order a victim in a sexual assault prosecution to submit to a psychological examination is an issue of first impression in South Carolina. There is a split of authority in other

jurisdictions on whether a court has the power to order a victim to submit to a psychological examination, and, then, if so, under what circumstances.

Several jurisdictions give the trial judge discretion to order a victim to submit to a psychological evaluation when the defendant can show compelling need for such an evaluation. The trial court's denial or grant of the defendant's request is then reversed only if the trial judge abused his discretion. *Pickens v. State*, 675 P.2d 665 (Alaska App. 1984); *Koerschner v. State*, 13 P.3d 451 (Nev. 2000); *State v. Michaels*, 642 A.2d 1372 (N. J. 1994)[5]; *Forbes v. State*, 559 S.W.2d 318 (Tenn. 1977); *State v. Delaney*, 417 S.E.2d 903 (W. Va. 1992). In *Delaney*, the West Virginia Supreme Court adopted the following guidelines for the trial judge to employ in balancing the defendant's need for the examination against the victim's right to privacy:

> [I]n order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence he has a compelling need or reason for the additional physical or psychological examinations. In making the determination, the judge should consider (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.

[5] The New Jersey court discussed the various ways a child's testimony could become "tainted" by interview tactics and adult influence, and held that the defendant bears the initial burden of showing *some* evidence that the victim's statements were the product of suggestive or coercive interview techniques. If the defendant meets that burden, a pretrial "taint" hearing is held in which the defendant can offer testimony of experts to counter the state's experts' testimony.

Delaney, 417 S.E.2d at 907. In *Delaney*, the trial judge denied the defendant's request for a psychological examination of the victims (three small girls). The *Delaney* court affirmed because the defendant failed to present "any reason, compelling or otherwise, to justify the examination," although the court indicated "in many cases with similar circumstances, the trial court would be justified in allowing the examination." *Id.* at 908. The defendant simply did not meet his burden of setting forth a compelling need.

Other courts have taken the position that compelling a victim to submit to a psychological examination violates the public policy designed to protect the victim's right to privacy and to prevent further trauma to the victim. *People v. Espinoza*, 95 Cal. App. 4th 1287 (Cal. App. 2002);[6] *State v. Horn*, 446 S.E.2d 52 (N.C. 1994). The North Carolina Supreme Court considered many of the same factors as the *Delaney* court, including the conflicting interests of the defendant and victim, before concluding "'the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses.'" *Horn*, 446 S.E.2d at 452 (quoting *State v. Looney*, 240 S.E.2d 612, 627 (1978)). The court commented further, "in balancing the rights of the victim and the defendant, . . . 'zealous concern for the accused is not justification for a grueling and harassing trial of the victim.'" *Id.*

Although *Horn* raises valid concerns, we believe giving the judge discretion to order a *child* complainant to submit to an independent

[6] The California Supreme Court wrote the seminal case giving trial judges discretion to order psychological evaluations of a victim upon a defendant's showing of compelling need in sexual assault cases. *Ballard v. Superior Court*, 410 P.2d 838 (Cal. 1966). California courts adhered to this rule until 1980 when the legislature prohibited psychiatric examinations of complaining witnesses in sex crime cases. Cal. Pen. Code Ann. § 1112 (2002). The opinions cited in support of a trial court's discretion to order psychiatric examinations of sexual assault victims based on showing of compelling need are not based on the California case law.

psychiatric evaluation, but only upon a showing of *compelling need*, sufficiently protects victims from unnecessary or traumatizing invasions of their privacy. Adopting the guidelines set out by the *Delaney* court, but limiting a trial judge's discretion to ordering *psychological* evaluations of *child* victims, provides boundaries for the exercise of discretion that protect the child victim's rights to privacy *and* the defendant's rights to a fair trial. We believe cases involving child victims could raise unique concerns that may necessitate a psychiatric examination of the child victim in order to protect the defendant's right to a fair trial.[7] When the case against the defendant hinges on the testimony of a young child and there is some reason to question the child's competence, a trial judge has discretion to order a psychiatric evaluation of the child victim after applying the *Delaney* factors to the facts of the particular case.

In the present case, Respondent's counsel offered the questionable mental health of the *child* victim as the main reason he wanted the victim to submit to a psychiatric evaluation. Specifically, Respondent's counsel cited the child victim's admission of hearing voices in his head that told him to say and do mean things to his friends as justification for compelling the victim to undergo a psychiatric examination. Examined in light of the *Delaney* factors, the victim's very young age (4 at the time of alleged assault and 6 at trial), the fact that the victim was undergoing counseling, and spoke freely of the incident (indicating he would not be further traumatized by another examination), and the fact the victim's counselor testified victim was hearing voices during the year when victim alleged the assault occurred, the judge would have been within his discretion in ordering the victim to submit to an independent psychological examination.

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[7] For a discussion of the dangers associated with the testimony of child witnesses in the sexual assault context, *see* Jeffrey P. Bloom, *Post–Schumpert Era Independent Interviews and Psychological Evaluations of Child Witnesses*, July/Aug S.C. Law. 40 (1998) (arguing that denying the defense an opportunity to evaluate a child witness, while allowing the state such an opportunity, provides the state with an evidentiary advantage that amounts to a violation of due process and fundamental fairness).

Considering these circumstances, particularly the evidence regarding the victim's possible auditory hallucinations, we affirm the Court of Appeals order to reverse Respondent's conviction and remand for a new trial, but modify it by limiting the trial judge's discretion to order a psychological examination to cases in which a child is the complaining victim. Upon remand, the court should consider any motion by Respondent for a psychological examination of the child victim in light of the Court's resolution of this novel issue, applying the test developed in *Delaney*.

II. Appeal Bond

The State argues the Court of Appeals acted beyond its jurisdiction in granting Respondent's motion for bond pending his appeal. We disagree.

South Carolina Code Ann. § 14-8-200(a) (Supp. 2001) states that the Court of Appeals shall have the same authority to grant petitions for bail as this Court would have in a similar case. Under South Carolina Code Ann. § 18-1-90 (1985), bail shall be allowed to the defendant in all cases in which the appeal is from the trial, conviction or sentence for a criminal offense.

Rule 221(b), South Carolina Appellate Court Rules ("SCACR") indicates that the Court of Appeals retains jurisdiction until this Court grants or denies a petition for certiorari.

> Where a petition for rehearing has been denied, the Court of Appeals shall not send the remittitur to the lower court until the time to petition for a writ of certiorari under Rule 226(b) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.

Rule 221(b), SCACR (2002).

The State filed a Petition for Rehearing before the expiration of the fifteen days allotted in Rule 221, on February 4, 2002. On February 7, the

Respondent filed a Petition for Appeal Bond pending the outcome of the State's appeal from the Court of Appeals' decision. The Court of Appeals denied the State's Petition for Rehearing on February 21, 2002, and granted Respondent's Petition for Appeal Bond on the same day. The Court of Appeals had not returned the remittitur when it granted the Respondent's Petition for Appeal Bond, and this Court had not granted certiorari over the case yet. Therefore, we find the Court of Appeals retained jurisdiction over Respondent's case, and acted within its authority when it granted Respondent's petition.

Additionally, the State argues the Court of Appeals abused its discretion in admitting Respondent to bail by failing to consider what guidelines would be necessary to attempt to prevent Respondent from violating bond. We disagree.

The factors to be considered in admitting a person to bail pending appeal include the probability of reversal, the nature of the crime, the possibility of escape, and the character and circumstances of the appellant. *Nichols v. Patterson*, 202 S.C. 352, 25 S.E.2d 155 (1943). The Court of Appeals set the amount of Respondent's bond ($1,000), and then remanded the matter to the family court of Lexington County for that court to set the conditions of his bond. The family court set numerous restrictive conditions on Respondent's bond, including prohibiting Respondent from having unsupervised contact with children younger than twelve, and requiring him to take his prescribed medications, attend school, be under the supervision of his mother, school officials, or other responsible adult *at all times*, and to abide by a 6:00 p.m. curfew.

In our opinion, the conditions set by the family court indicate the guidelines for bail were considered before Respondent was released on bail.

CONCLUSION

For the foregoing reasons, we **AFFIRM AS MODIFIED** the Court of Appeals decision, reversing Respondent's conviction and granting Respondent a new trial. In addition, we **AFFIRM** the Court of Appeals

decision denying the State's request to declare the appeal bond issued by the Court of Appeals null and void.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Vannie Williams, Jr., Respondent.

Opinion No. 25530
Submitted July 30, 2002 - Filed September 23, 2002

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Clifford Scott, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction within the range of sanctions set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and find an indefinite suspension from the practice of law is the appropriate sanction.

Facts

Since 1997, respondent has failed to maintain client ledger cards or monthly reconciliation sheets reflecting the receipt, disbursement and balance of funds in his trust account. Respondent has also failed to maintain any other register, log or document reflecting the accurate balance or existence of accumulated attorney's fees in his trust account.

A review of respondent's trust account from January 1, 2001 until December 31, 2001, found the account had a negative balance on three occasions and eight checks were returned for non-sufficient funds. Deposits were made without information necessary to identify the case file number, client name or source of the funds, nor was respondent able to provide that information upon examination of his own financial records. Moreover, forty-six checks, payable to respondent and marked "attorney's fees," were written on the account, and one telephone transfer of funds for attorney's fees was made out of the account without any information regarding the case file number or client from which they were earned. Respondent was unable to provide that information upon examination of his financial records. He was also unable to identify client funds, or distinguish attorney's fees, if any, from client funds, in the trust account upon examination of a monthly bank statement.

To further confuse matters, respondent deposited personal funds into his trust account in an effort to conceal assets from the Internal Revenue Service, which had attached liens to his personal banking accounts. He also paid personal debts and expenses from the trust account, including restitution ordered by this Court in In the Matter of Williams, 336 S.C. 578, 521 S.E.2d 497 (1999).

Prior to and during the one year review period, respondent received funds on behalf of six clients and deposited the funds into his trust account. In four of those matters, respondent did not pay the clients, or third party providers he had agreed to pay on behalf of a client, the amounts owed them for anywhere from three to seventeen months after he received the

funds. Between the time that he received the funds and the time he paid the clients or third party providers, respondent's trust account often had a negative balance, thereby indicating the client funds had been misappropriated or converted for purposes other than those for which they were intended.[1] The funds eventually used to pay the clients and third party providers came from a source other than the funds that had been held in trust for them. In the remaining two matters, respondent has failed to pay the clients all of the funds owed them.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15(a) (a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 1.15(b) (upon receiving funds in which a client or third person has an interest, a lawyer shall promptly notify the client or third person, shall promptly deliver to the client or third person any funds or other property the client or third person is entitled to receive and, upon request, shall promptly render a full accounting regarding such funds); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits that he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to

[1] In one matter, respondent issued a check to the client but it was returned due to insufficient funds.

violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or to engage in conduct demonstrating an unfitness to practice law).

Conclusion

In our opinion, respondent's misconduct warrants an indefinite suspension from the practice of law. Respondent shall not be entitled to seek reinstatement to the practice of law until he has paid in full the amounts owed to the two clients referenced above or repaid the Lawyers' Fund for Client Protection if it has paid the amounts respondent owed to those clients. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronald Tate, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Frank Eppes, Trial Judge
Larry R. Patterson, Post-Conviction Relief Judge

Opinion No. 25531
Submitted June 26, 2002- Filed September 30, 2002

AFFIRMED IN PART; REVERSED IN PART

Assistant Appellate Defender Robert M. Dudek, of S.C. Office Appellate Defense, of Columbia, for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General William Bryan Dukes, all of Columbia, for Respondent.

JUSTICE WALLER: Petitioner was convicted of murder, assault and battery with intent to kill (ABIK), attempted armed robbery, housebreaking, and grand larceny of a motor vehicle. He was sentenced to imprisonment for life for murder, twenty years for ABIK, twenty years for attempted armed robbery, five years for housebreaking, and ten years for grand larceny of a motor vehicle, the sentences to run consecutively. No direct appeal was taken.

Petitioner's application for post-conviction relief (PCR) was denied. This Court granted petitioner's request for a writ of certiorari to determine whether petitioner's trial counsel was ineffective in failing to object to the trial judge's presumption of malice charges. We find that counsel was ineffective and reverse the order of the PCR judge as to the ABIK charge.

FACTS

Shortly before 4:00 a.m. on August 13, 1982, petitioner broke into Hack Motor Company and stole an automobile. He then drove to the Travel Inn Motor Lodge where sixty year old Jean DeBelli was working as the motel desk clerk. The owners of the motel, the Baileys, lived in an apartment behind the office. Petitioner entered the office of the motel, pulled out a gun, and stated to Mrs. DeBelli, "Give me the money." Mrs. DeBelli refused, and petitioner stated, "Please, please give me the money." When Mrs. DeBelli raised a pair of scissors she had in her hand, petitioner shot her in the chest. Mrs. DeBelli died from the gunshot wound.

Petitioner attempted to exit the motel, but discovered that the front door was locked. He then noticed the door to the Baileys' apartment and went up the steps towards that door in an attempt to exit the motel. At that point, fifteen year old Jimbo Bailey, who had heard yelling and a gunshot, opened the apartment door. Blitz, the Baileys' German shepherd, began barking and attacked petitioner, biting him on his leg. Petitioner fired a shot into the apartment which hit Jimbo in the back of the leg. Blitz was shot twice by petitioner.

Robert Bailey was awakened by the gunshots. He retrieved his pistol and went into the living room of the apartment where he saw a gun being pointed into the room. When Bailey yelled, "Get the hell outta here," petitioner moved down the steps. Bailey then reached around the corner and fired his weapon into the office, hitting a vending machine. Petitioner moved back towards the apartment, and Bailey closed the apartment door. Petitioner then shot out the glass door of the motel office and exited the building. Bailey shot at petitioner as he drove away from the motel.

When petitioner was arrested, he stated that he "did not mean for anyone to get hurt at the motel." In his statement, petitioner told police, "they were just coming at me from everywheres [sic]. . . . I didn't know which way to go or what to do." Petitioner confessed to police and agreed to participate in a videotaped reenactment of the crimes at the motel.

The trial judge charged the jury on voluntary manslaughter, as a lesser included offense of murder, and assault and battery of a high and aggravated nature (ABHAN), as a lesser included offense of ABIK. In his charge to the jury, the trial judge initially instructed the jury on express and implied malice as follows:

> Now, malice is said to be express when there is manifested a violent, deliberate intention, unlawfully to take away the life of a human being. And malice is implied where one intentionally and deliberately does an unlawful act, which he then knows to be wrong and in violation of his duty to another, and where no excuse or legal provocation appeared.

Following the charge, the solicitor informed the judge that he did not believe a charge that malice may be implied from the use of a deadly weapon had been given. The trial judge erroneously indicated that he had given the charge. However, the jury was then called back into the courtroom, and the court reporter noted that one of petitioner's attorneys "objected as giving undue emphasis." In his supplemental charge to the jury, the trial judge stated that "[m]alice is implied and presumed from the use of a deadly

weapon." After the charge, counsel did not object to the presumption of malice instruction.

After one and a half hours of deliberation, the jury asked for a definition of malice aforethought and ABIK. The trial judge again charged the jury that malice is presumed from the use of a deadly weapon. Following this charge, counsel stated, "Your Honor, I wasn't in the courtroom when the presumption of malice was previously charged, . . . but I believe we did enter an objection to that. We want that to continue." When the assistant solicitor indicated that he did not recall an objection, the trial judge stated, "She noted it for the record."

The jury later asked for an explanation of murder and manslaughter. In that charge, the trial judge repeated the instruction that malice is presumed from the use of a deadly weapon. Later in the charge, the trial judge stated, "Now, in speaking of implied malice, that's for the jury. The implication is to require the jury - - does not require the jury to infer malice, but only permits it to consider it." When the jury foreman asked for the trial judge to review the portion of the charge about "wicked heart," the judge repeated his malice charge without including the language regarding the presumption of malice from the use of a deadly weapon.

On PCR, petitioner alleged that his trial counsel was ineffective in failing to object to the presumption of malice charges as erroneous burden shifting instructions. The PCR judge found that counsel noted a continuing objection to the malice charge.[1] In addition, the judge found that petitioner failed to show he was prejudiced by the charge.

[1] This finding is not supported by the record. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (the PCR judge's findings will not be upheld if there is no probative evidence to support them). The only objection to the charge was one of "undue emphasis" made before the charge was given. Although counsel indicated after the presumption was charged for a second time that an objection had been made, counsel never objected to the charge on the ground that it unconstitutionally shifted the burden of proof.

ISSUE

Was petitioner's trial counsel ineffective in failing to object to the presumption of malice charges?

DISCUSSION

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, supra; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

The State concedes that the trial judge's charges that malice is presumed from the use of a deadly weapon were unconstitutional burden shifting instructions. See Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 49 (1979). Because the presumption of malice charges were erroneous charges to which counsel did not object on the ground that they constituted unconstitutional burden shifting instructions, counsel's performance was deficient. Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) (counsel was deficient in failing to object to a jury charge which shifted the burden of proof to the defendant).

As to the PCR judge's finding that petitioner was not prejudiced by the malice charges, an unconstitutional burden shifting instruction is not reversible error if the error was harmless beyond a reasonable doubt. Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992). This Court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution. Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), cert. denied, 532 U.S. 1027, 121 S.Ct. 1974, 149 L.Ed.2d 766 (2001).

An erroneous malice instruction is harmless if, based on all of the evidence presented to the jury, it did not contribute to the verdict. Plyler v. State, supra. In making this determination, the Court must review the evidence the jury considered in reaching its verdict and weigh the probative force of the evidence against the probative force of the presumption standing alone. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), cert. denied, 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed.2d 691 (1993).

Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987). It is the doing of a wrongful act intentionally and without just cause or excuse. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991), cert. denied, 502 U.S. 1038, 112 S.Ct. 888, 116 L.Ed.2d 791 (1992).

As to the shooting of Mrs. DeBelli, the jury need not have relied on the presumption of malice from the use of a deadly weapon in order to find that petitioner acted with malice in shooting Mrs. DeBelli. Petitioner shot Mrs. DeBelli when she refused to give him the money from the motel and threatened him with a pair of scissors. Although the trial judge instructed the jury on voluntary manslaughter, the evidence did not support the charge. Mrs. DeBelli's attempt to resist or defend herself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, cert. denied, ___ U.S. ___, 122 S.Ct. 404, 151 L.Ed.2d 306 (2001). Therefore, the erroneous malice instructions were harmless with regard to the jury's consideration of voluntary manslaughter.

In addition, although petitioner indicated regret over killing Mrs. DeBelli, the evidence showed that the shooting was a wrongful act intentionally committed without just cause or excuse. State v. Bell, supra. Because all of the evidence showed that petitioner acted with malice in shooting Mrs. DeBelli, the erroneous presumption of malice charges did not contribute to the murder verdict.

However, there is a reasonable likelihood that the erroneous charges did affect the jury's consideration of the charges of ABIK and ABHAN for the shooting of Jimbo Bailey. ABIK is an unlawful act of violent injury to the person of another with malice aforethought, either express or implied. State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000). ABHAN is the unlawful act of violent injury to another accompanied by circumstances of aggravation. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. Id. A defendant may be convicted of ABHAN regardless of whether malice is present. Id.

Absent the erroneous presumption of malice charges, the jury could have found petitioner guilty of ABHAN rather than ABIK for shooting Jimbo Bailey. The evidence of malice in that shooting was not overwhelming. In fact, according to petitioner's statement, he shot into the apartment when Blitz attacked him and was not shooting at Jimbo.

The State argues that petitioner was not prejudiced by the erroneous presumption of malice charges because the trial judge adequately informed the jury of the State's burden of proof. The trial judge did instruct the jury that the State had the burden of proving guilt beyond a reasonable doubt in his original charge. However, the presumption of malice from the use of a deadly weapon was charged three times in the judge's supplemental instructions. The term "reasonable doubt" was mentioned only once in these supplemental instructions when the trial judge instructed the jury to resolve any doubt in favor of the lesser included offense. Therefore, the correct instructions on the State's burden of proof did not render the erroneous presumption of malice charges harmless.

The State further argues that the trial judge cured any error by charging the jury that the inference of malice was a question for the jury. The trial judge's instruction that there was an inference of malice which

permits, but does not require, the jury to infer malice was not given immediately following the malice charges. In addition, the charge was given only once, whereas the erroneous presumption of malice charge was repeated three times. This charge did not cure the error in the presumption of malice charges.

CONCLUSION

Because the presumption of malice instructions were erroneous burden shifting instructions which were not harmless error as to the ABIK charge, petitioner met his burden of proving that counsel was ineffective in failing to object to the instructions. Accordingly, the PCR judge's finding that counsel was not ineffective in failing to object to the instructions is reversed as to the ABIK conviction. Ingle v. State, supra (the PCR judge's findings will not be upheld if there is no probative evidence to support them). We affirm the order of the PCR judge as to the murder conviction.

AFFIRMED IN PART; REVERSED IN PART.

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

The South Carolina Court of Appeals

Henry C. Chambers,

Respondent,

v.

Sumner Pingree, Jr.,

Appellant.

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied. However, Opinion No. 3518, filed on June 17, 2002, is hereby withdrawn and the attached opinion is substituted therefor.

Jasper M Curteon , J.
H. Samuel Stilwell , J.
M. Duane Shuler , J.

Columbia, South Carolina

September 30, 2002.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Henry C. Chambers,

Respondent,

v.

Sumner Pingree, Jr.,

Appellant.

Appeal From Beaufort County
Raymond E. McKay, Jr., Special Referee

Opinion No. 3518
Heard January 8, 2002 - Filed June 17, 2002
Withdrawn, Substituted and Refiled September 30, 2002

REVERSED IN PART AND
MODIFIED IN PART

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, of Columbia; James H. Moss and H. Fred Kuhn, Jr., of Beaufort, for appellant.

A. Parker Barnes, Jr., of Beaufort; and James B. Richardson, Jr., of Columbia, for respondent.

STILWELL, J.: Henry Chambers filed this action for a real estate commission, and Sumner Pingree, Jr. counterclaimed for recovery on a promissory note. The special referee found Chambers was entitled to the commission and Pingree was entitled to attorney's fees, though nothing on the promissory note. Pingree raises three issues on appeal. We reverse in part and modify in part.

FACTUAL/PROCEDURAL BACKGROUND

Pingree owned a 5,300 acre tract of land on the Beaufort County coast know as Brays Island. He decided to sell the entire tract, and granted Chambers, a real estate broker, an exclusive agency agreement with a minimum sales price of $12,000,000.[1] The agreement provided Chambers would receive a commission of 9% of the sale proceeds, or $1,080,000. Special Stipulation 6 of the agreement provided the commission "of 9% herein provided for shall be paid only if the Sale of the Property is consummated, and only out of the proceeds of such Sale." During the exclusive agency agreement, Pingree decided to develop the property himself with Chambers' help.[2] Pingree created Brays Island Company, Inc. (Company), wholly owned by Pingree, and conveyed the property to Company for development. The plan was to create 325 circular one-acre residential lots, with the remaining acreage conveyed to the property owners' association, the Colony Club, for outdoor pursuits, including equestrian sports, dog kennels, a gun club, a shooting course, a private golf course, and a multi-million dollar clubhouse.

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[1] A more detailed account of the underlying facts may be found in this court's prior opinion. Chambers v. Pingree, 334 S.C. 349, 513 S.E.2d 369 (Ct. App. 1999).

[2] Chambers was in charge of marketing and was instrumental in obtaining necessary permits. Pingree gifted one lot to Chambers independent of the brokerage agreement, which he later repurchased at Chambers' request.

In October 1988, Chambers and Pingree executed a "Memorandum of Agreement" (October Agreement) in which Pingree acknowledged owing Chambers a commission of $1,080,000 as a result of the conveyance of the property from Pingree to Company. The agreement further provided Pingree personally would not receive any money from Company for payment of the purchase price of the property until Company sold lots. Because Pingree expended $3,000,000 of his own money in developing Brays Island, the agreement provided:

> [a]fter Pingree has recovered from the sale of lots his development expenditures and the agreed interest thereon, he will pay the commission to Chambers as he receives money from the sale of lots, such payments to be at the rate of 9%, which is the relationship of $1,080,000 to the $12,000,000 sale price. These commissions will continue to be paid on a quarterly basis from Pingree's cash receipts from lot sales until Chambers has received the full $1,080,000.

Pursuant to the agreement, Chambers also received a prepaid commission of $38,000. The closing took place on January 10, 1989. The total purchase price was $12,000,000, and as part of the purchase agreement, Company paid off the $1,301,741.67 mortgage encumbering the property. Pingree paid Chambers a commission equaling 9% of the mortgage payoff, or $117,156.75.

In February 1989, the parties executed another "Memorandum of Agreement" (February Agreement) in which they agreed that the unpaid portion of the $1,080,000 would begin to draw interest at a rate of 10% per annum. The agreement provided the commission would become payable "only if, as and when Pingree is actually paid for the Plantation by the Company." It specifically provided that Pingree would have no obligation to pay the commission except from payments actually received by him "on account of such Sales Price." The parties agreed that since a development loan was outstanding to South Carolina National Bank (SCN), and to comply with SCN's requirements, Pingree would only be paid $40,000 from the sale of each lot.

In May 1989, Chambers executed a promissory note payable to Pingree for $250,000. The note provided that interest would accrue at 10% per annum and payment in full was due by January 2, 1995. The note further provided that all interest payments due by Pingree to Chambers on his commission would be applied to the payment of the note as the interest became payable. Later, an additional $80,000 was added to the note, increasing the amount due to $330,000.

Nearly ninety-four lots were sold while Chambers was broker-in-charge from January 1989 to April 1992. During the year and a half after Pingree took over the management of lot sales, six more lots were sold. By January 1993, Pingree had been paid over $7,400,000 toward the purchase price and Chambers had been paid $462,356.75 toward his original commission. December 29, 1992 was the last date Company paid Pingree for the sale of lots, and Pingree paid Chambers his final commission on January 7, 1993. As lot sales began to slow, the enormous expenses of developing and operating the amenities began to mount. By 1993, Company owed SCN nearly $3,700,000 on the development loan. Pingree, as guarantor of the loan, sought a single buyer for the remaining lots. In July 1993, Pingree sent letters to homeowners informing them of the financial difficulties Company was experiencing and assuring them that he would not seek an auction or a "fire sale" of the remaining lots because it would adversely affect property values. In response, a group of homeowners formed a limited partnership called Shelbray Associates to purchase 180 of the remaining 195 lots from Company. The total consideration for the sale of the 180 lots was approximately $4,800,000. However, Pingree received the consideration in the form of loan forgiveness and the assumption of tax obligations. Pingree did not receive cash for the purchase.

Chambers sued Pingree to recover the remainder of his commission, and Pingree counterclaimed for repayment of the $330,000 promissory note. The court granted Pingree's motion for summary judgment on his counterclaim, but this court reversed on appeal. Chambers v. Pingree, 334 S.C. 349, 513 S.E.2d 369 (1999). On remand, the special referee ruled Chambers was entitled to the remaining unpaid portion of his commission

plus accrued interest for a total of $916,500.93. The special referee further found that although Chambers owed Pingree on the promissory note, the interest accruing on the unpaid commission had paid off the balance of the promissory note by December 1995. He found Pingree was entitled to attorney's fees of $17,000 for pursuing payment of the promissory note and applied this amount as a setoff to Chambers' commission.

STANDARD OF REVIEW

An action for a broker's commission is an action at law. See United Farm Agency v. Malanuk, 284 S.C. 382, 383, 325 S.E.2d 544, 545 (1985). An action to recover on a promissory note is also an action at law. See Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 95, 394 S.E.2d 5, 6 (Ct. App. 1990). In law actions tried before a special referee, our review is limited to correcting errors of law, and we are required to uphold the special referee's findings of fact unless there is no evidence to support it. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Where mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference. Cf. Hamrick v. Cooper River Lumber Co., 223 S.C. 119, 126, 74 S.E.2d 575, 578 (1953) (where meaning of words in contract presented a purely legal question, the appellate court drew its own conclusions without particular deference to the judge below).

LAW/ANALYSIS

I. Commission Agreement

Pingree first argues the special referee erred in finding Chambers was entitled to the unpaid portion of his broker's commission. We agree.

Chambers argues the agreement only affected the timing of commission payments, not whether they were due. The special referee found the February agreement created a condition precedent to payment of the broker's commission. Neither party has appealed this finding, and it is therefore the law of the case. Charleston Lumber Co. v. Miller, 338 S.C. 171, 175, 525

S.E.2d 869, 871 (2000) (an unchallenged ruling, right or wrong, is the law of the case). Thus, the sole issue before us is whether Pingree prevented or hindered the occurrence of the condition precedent.

The special referee found Pingree's decision to assign to Shelbray his note and mortgage from Company and to receive forgiveness on his note to SCN as compensation for the sale of the remaining lots to Shelbray prevented his receipt of cash for the sale of the remaining lots. Thus, the special referee reasoned that by preventing the occurrence of the condition precedent to Chambers' right to collect his commission, Pingree effectively or impliedly waived or excused the occurrence of the condition. The special referee based his findings on the monetary benefits Pingree received from the transaction: (1) Shelbray purchased from SCN and then forgave Pingree's $3,750,000 note; (2) Pingree realized a capital loss of $4,670,000 for income tax purposes when he conveyed his purchase money note and mortgage from Company to Shelbray and then used the loss to offset a capital gain of $3,490,000 from an unrelated sale of low-basis stock; and (3) Company was able to retain fifteen unencumbered lots.[3] Because Pingree rejected the possibility of an auction of the remaining lots instead of the sale to Shelbray and voluntarily relinquished his mortgage on the fifteen lots retained by Company, the special referee concluded Pingree prevented the receipt of cash for the lots. Because the special referee found Pingree waived the condition precedent, the nonoccurrence of the condition precedent was excused.

Generally, a broker is entitled to a commission "when he procures a purchaser who is accepted by the owner of the property and with whom the latter enters into a valid and enforceable contract." Champion v. Whaley, 280 S.C. 116, 119, 311 S.E.2d 404, 406 (Ct. App. 1984). A broker and the owner of the property may "'make the payment of the broker's commission dependent upon the full performance of the contract of purchase or sale, or postpone the payment of the commission, or make the broker's right to the commission contingent upon the happening of future events.'" Hamrick at

[3] Company eventually sold the lots for $1,913,381. These proceeds were used to pay legitimate corporate debts, and Pingree did not personally receive any proceeds from these sales.

124, 74 S.E.2d at 577. A broker assumes the risk of the purchaser's nonperformance where the purchaser's performance is a condition precedent to the owner's duty to pay the broker's commission. Champion, 280 S.C. at 119, 311 S.E.2d at 406. A broker suing to recover his commission has the burden of proving all the conditions precedent to his right to performance have occurred. Champion, 280 S.C. at 120, 311 S.E.2d at 406. Where a seller prevents or hinders the condition from occurring, the lack of occurrence of the condition precedent is excused and the seller's obligation to pay the broker's commission becomes unconditional. Id.

In Champion, a broker had an exclusive agency with the sellers of a house which provided that the broker would be entitled to his commission if he sold the house. The broker presented the sellers with an acceptable purchaser, and a contract of sale was executed which was conditioned upon the purchaser obtaining a loan. The sellers subsequently sold the house to a third party who refused to allow appraisers for the original purchaser into the home. Because the home could not be appraised, the original purchaser did not obtain a loan and the original contract of sale became void. The sellers argued the broker was not entitled to his commission because the condition precedent, completing the sale, did not occur.

> It is sufficient for the plaintiff to present evidence that the defendant's prevention "substantially contributed" to the nonoccurrence of the condition. Once he has made such proof, the burden shifts to the defendant. If the defendant can show that the condition would not have occurred regardless of the prevention, then the prevention did not contribute materially to its nonoccurrence and the condition is not excused.

Champion, 280 S.C. at 122, 311 S.E.2d at 407 (citation omitted). Here, the special referee improperly shifted the burden of proof to Pingree, citing Champion for the proposition that he created "uncertainty . . . by his wrongdoing." As noted above, Chambers bears the burden of proving Pingree's actions substantially contributed to the prevention of the occurrence of the condition precedent. Only after Chambers satisfied this requirement

would Pingree be required to defend his actions and prove that the condition precedent would have occurred regardless.

There is no question the condition precedent did not occur. Although Pingree received benefits in the form of the SCN loan forgiveness from Company's sale of the lots to Shelbray, this did not amount to actual proceeds for payment on the sale of the lots. Company was primarily responsible on the loan, which was used to pay the substantial upkeep costs of the amenities, and Pingree was only secondarily liable as a guarantor. Thus, while Pingree obtained some benefit by being relieved of contingent personal liability, the benefit inured primarily to Company. Because Pingree's personal liability would be triggered only if Company failed to make lot sales, the very event which would result in an actual financial benefit to Pingree would also serve to defeat the condition precedent to payment of Chambers' commission.

Further, there is no evidence in the record to support the special referee's finding that Pingree intentionally conveyed his purchase money note and mortgage to Shelbray so that he would receive a tax loss to offset capital gains. Pingree testified that the purchase money mortgage he waived had no real value, and Shelbray required the assignment to close the deal and obtain clear title. The tax loss does not count as proceeds from the sale of lots. Pingree utilized the sizeable capital loss which resulted from the sale to Shelbray to offset the substantial capital gain he incurred from the sale of stock in which he had a low basis. Good tax planning does not make this any less of a loss or any more of a benefit. Neither party envisioned this scenario in drafting the agreement, and Pingree's primary purpose was not to defeat Chambers' commission. That is merely a collateral effect, on which the broker bore the risk.

Finally, allowing Company to retain the fifteen lots free and clear of any mortgage was part of the business transaction between Company and Shelbray which did not amount to proceeds to Pingree. The fifteen lots were retained by Company at Shelbray's insistence to prevent any successful claim by Company's creditors that the transaction was fraudulent and thereby set

aside the sale or reach Shelbray's assets. Additionally, the transaction allowed Company to retain enough assets to pay off its remaining debts.

For the condition precedent to be waived or excused, the burden was on Chambers to show that the sale of lots to Shelbray "substantially contributed" to the nonoccurrence of that condition. Chambers failed to meet this burden. We do not find Pingree's actions "substantially contributed" to the nonoccurrence of the condition precedent. The decision to sell to Shelbray was clearly a valid business decision and prevented the imminent possibility of bankruptcy. Champion clearly implies that the prevention of the condition precedent must be intentional or entail wrongdoing. There is no such wrongdoing here. Whereas the sellers in Champion deliberately repudiated their contract to pay a commission to the broker by preventing the fulfillment of the contract, Pingree continued to abide by the commission agreement by paying Chambers each time Pingree received proceeds from the sale of lots. It was only after the lots failed to sell that Pingree, as chairman for Company, decided to sell the remaining lots to Shelbray.

We decline to impose an obligation on Pingree to do everything in his power to maximize Chambers' commission. In our view, the law does not so require. He does not have to put all his assets at risk to assure Chambers is paid his commission. The special referee found that Pingree's disposition was reasonable and preserved his vision for the development. We find no indication of bad faith. The law does not require that the highest possible price be Pingree's exclusive or even primary concern. The seller is not required to put the broker's interests ahead of his own. In a case with virtually identical facts, another court reached this same conclusion. See Brown v. Watt, 63 Cal. Rptr. 815 (Cal. Dist. Ct. App., 1967) (Where agreement provided broker would receive commission only as and when lots were sold, no further commissions were due where broker failed to prove condition precedent occurred or was excused and unanticipated rapid decline of local housing market was beyond control of either party.). We find the good faith decision to prevent the bankruptcy of Company and to attain Pingree's vision for the completion of this unique development was a valid business decision and did not amount to interference in the occurrence of the condition precedent.

Breach of contract is an action at law, and we must adopt the special referee's findings of fact if they are supported by any evidence. However, where the wrong legal conclusions are drawn or the law misapplied, we are obligated under our standard of review to correct such errors.[4] These are two sophisticated businessmen, each capable of protecting his own interests. Chambers assumed the risk that Company would be unable to sell the lots, thus preventing Pingree from receiving payments from the proceeds and preventing Chambers from receiving further commissions. Because we find Pingree did not purposefully interfere with or avoid Chambers' commission, we reverse the judgment in favor of Chambers.

II. Promissory Note

Pingree argues the special referee erred in finding Chambers owed nothing on the promissory note. We agree.

The terms of the promissory note specified that the interest payments owed to Chambers on his commission would be applied to the payment of the promissory note "as that interest became payable." Otherwise, payment on the promissory note was due in full by January 2, 1995. The promissory note also provided that Pingree would be entitled to recover attorney's fees if he had to seek the services of an attorney to collect payment on the promissory note. The special referee awarded Pingree $17,000 as attorney's fees, but used that sum as an offset against the amount Chambers was awarded against Pingree.

The special referee calculated the balance remaining on the promissory note was $119,793.01 as of January 7, 1993, when the last commission payment was made by Pingree to Chambers. The special referee then had to

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[4] Normally we are limited by our scope of review to correcting errors of law. However, in the special referee's order, he noted that some items listed in the findings of fact may be better considered conclusions of law. Where the special referee made conclusions of law in his findings of fact, we have so construed them.

determine, consonant with his other rulings, when that promissory note would have been paid off by applying accrued but unpaid interest due on the remaining commission. Since we have determined that no future commission payments were due, that is unnecessary. We agree with the special referee that interest payments were due as the commission payments were due. Since no commission payments were due after January 7, 1993, no interest payments were due.

The parties do not dispute that the only payments made on the note were the interest applied by virtue of commissions paid by Pingree to Chambers. Because the commission interest only became payable on the promissory note as Chambers received commission payments, the amount due on the promissory note as of January 7, 1993, $119,793.01, is still owed by Chambers to Pingree, plus accrued interest from that date, together with the attorney's fees awarded by the special referee. We accordingly modify the special referee's order to award judgment to Pingree in such amount.

REVERSED IN PART AND MODIFIED IN PART.[5]

CURETON and SHULER, JJ., concur.

[5] Pingree's remaining issue on appeal concerns the admissibility of a legal research memo produced in discovery to show Chambers' understanding of when the commission was due under the parties' agreement. Because we reverse, we decline to reach this issue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William B. Stokes, Respondent,

v.

Metropolitan Life Insurance Company and James Drake, Appellants.

Appeal From Florence County
Paul M. Burch, Circuit Court Judge

Opinion No. 3551
Heard June 6, 2002 – Filed September 23, 2002

REVERSED

Joseph C. O'Keefe, of Newark; Scott T. Justice, of Columbia; for Appellants.

John F. Hardaway, of Columbia; for Respondent.

STILWELL, J.: After being terminated from his position at Metropolitan Life Insurance Company (Met Life), William B. Stokes filed suit against Met Life and Met Life employee James Drake, asserting breach

of contract, trespass, and conversion. The defendants moved to compel arbitration and stay all proceedings. The circuit court granted the motion to compel arbitration as to the breach of contract but denied it as to the trespass and conversion actions. The court also denied the defendants' motion for a stay and granted Stokes' motion to compel discovery on the remaining claims. Drake and Met Life appeal. We reverse.

BACKGROUND

Stokes worked for Met Life as an account representative for approximately thirteen years. During his employment, Stokes applied to be registered with the National Association of Securities Dealers (NASD) as an "Investment Company and Variable Contracts Products Representative" by filing an industry application commonly known as a Form U-4. The fourth page of the U-4 form contains a series of statements the applicant must agree to which are listed under a heading admonishing: "The applicant must read the following very carefully." Stokes signified his agreement thereto by signing immediately under this list. The fifth paragraph of the list reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

The only box marked under Item 10 was for registration with the NASD.

In his suit, Stokes asserted his termination by Met Life constituted a breach of his employment contract. Regarding his trespass and conversion claims, Stokes alleged that on the approximate date of his termination, Drake, acting as Met Life's agent, broke into Stokes' rented business office without his permission and converted files and other personal property, depriving Stokes of their use.

In lieu of answering Stokes' complaint, the defendants filed a motion to compel arbitration and stay proceedings pursuant to the Federal Arbitration Act.[1] They submitted a supporting memorandum as well as a copy of Article I of the NASD's By-laws, copies of two arbitration rules under the NASD Code, and a copy of the Form U-4 signed by Stokes.

In the circuit court, Stokes conceded his breach of contract action was subject to arbitration. However, he argued he was entitled to a jury trial on the trespass and conversion actions and requested the court compel Met Life to respond to Stokes' discovery requests pertaining to those actions.

After a hearing, the court ordered arbitration of Stokes' breach of contract action but refused to order arbitration of his trespass and conversion actions, reasoning:

> The factual issues in the second and third causes of action are distinct from those alleged in the first. Any determination of issues in the first cause of action will not be determinative of or preclusive of any issues in the second and third. The issues to be determined in the second and third causes of action are not directly related to any issues relating to plaintiff's employment. For these same reasons I also find that there is no compelling reason to stay the trial of the second and third causes of action pending the arbitration of the first. No prejudice would inure to the defendants allowing them to go forward and the Plaintiff would be prejudiced by being denied his day in court.

The court also granted Stokes' motion to compel discovery for the trespass and conversion causes of action.

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[1] 9 U.S.C. §§ 1 to 307 (2000).

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review. U.S. v. Bankers Ins. Co., 245 F.3d 315, 319 (4th Cir. 2001); see also General Equip. & Supp. Co. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (determination whether a party waived its right to arbitrate is a legal conclusion subject to de novo review). However, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664-665, 521 S.E.2d 749, 753 (Ct. App. 1999).

DISCUSSION

I. Arbitration of Trespass and Conversion Claims

Drake and Met Life argue the Federal Arbitration Act ("FAA") mandates arbitration of Stokes' trespass and conversion actions. We agree.

"Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (footnote omitted). Neither party disputes the FAA applies to claims arising under the Form U-4 Stokes signed in 1992. See Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 660 (5th Cir. 1995) (holding arbitration clause under a U-4 Registration is enforceable under the FAA).

Section 2 of the FAA provides that an arbitration clause in a contract involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). The United States Supreme Court has held this provision "is a congressional declaration of a liberal federal policy favoring

arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Memorial Hospital v. Mercury Const. Corp., 460 U.S. 1, 24 (1983). In interpreting agreements within the scope of the FAA, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." Volt Info. Scis., Inc. v. Bd. of Tr. of the Leland Stanford Junior Univ., 489 U.S. 468, 475-76 (1989); see also Moses H. Cone, 460 U.S. at 24 (holding "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."). However "the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." Zabinski v. Bright Acres Assocs., 346 S.C. at 591-592, 553 S.E.2d at 116 (citation omitted). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Volt, 489 U.S. at 478.

In his Form U-4, Stokes "agree[d] to arbitrate any dispute, claim or controversy that may arise between [him] and [his] firm, or a customer, or, any other person that is required to be arbitrated under the rules, constitutions, or by-laws" of the NASD. The NASD Code of Arbitration Procedure was created for the

> arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member . . .
>
> . . . .
>
> (b) between or among members and associated persons.

NASD Code, Rule 10101.

Rule 10201 of the NASD Code requires arbitration upon the request of a member or associated person. Met Life is a member of the NASD. As an employee of Met Life, Drake is an associated person as defined in Article I of the NASD By-Laws. Stokes does not challenge either of the defendants'

status to demand arbitration. Thus because Met Life and Drake have clearly demanded arbitration pursuant to Rule 10201, we must determine whether Stokes' conversion and trespass claims arise out of his employment with or termination by Met Life.

Stokes alleges Drake, acting as an agent of Met Life, broke into his personal rented office and took files and other personal property. Stokes used this office "to perform his responsibilities as a Met Life account representative." Absent his employment with Met Life, Stokes would not have had this office. Furthermore, as the alleged trespass and conversion occurred simultaneously with his termination, they appear to have arisen out of, and would not have occurred but for, Stokes' termination.

Stokes urges us to adopt the "significant aspects" test applied by the Fourth Circuit Court of Appeals in Zandford v. Prudential-Bache, 112 F.3d 723, 728-29 (4th Cir. 1997). Because numerous opinions on the subject of the arbitrability of disputes have been handed down both by this court and the South Carolina Supreme Court since 1997 and none have adopted the "significant aspects" test, we do not see the need to do so here. In any event, the "significant aspects" test as applied by the Fourth Circuit in Zandford differs little if at all from the analysis employed here–that is, in summary, whether the source of the dispute arises from the employment or termination of employment.

As the alleged trespass and conversion appear inextricably linked to Stokes' employment and termination, we conclude they fall within the scope of the arbitration clause in Stokes' Form U-4. See Volt, 489 U.S. at 476 (holding any ambiguity regarding scope of arbitration clause must be resolved in favor of arbitrability); Zabinski, 346 S.C. at 597, 553 S.E.2d at 118 ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.") (citations omitted).

II. Stay

Having determined that Stokes' trespass and conversion actions are subject to arbitration, we next turn to the issues of the automatic stay and the trial court's order to compel discovery. The FAA clearly requires a court stay "any suit or proceeding" pending the arbitration of "any issue referable to arbitration under an agreement in writing for such arbitration" upon the application of one of the parties. 9 U.S.C. § 3 (2000). As the FAA applies to all of Stokes' causes of action, all related state court proceedings are stayed pending resolution of the arbitration.

REVERSED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tamera Jean Bergstrom,

Appellant,

v.

Palmetto Health Alliance d/b/a Palmetto Baptist Medical Center of Columbia and d/b/a Baptist Medical Center,

Respondent.

Appeal From Richland County
Costa M. Pleicones, Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

Opinion No. 3552
Heard September 11, 2002 – Filed September 30, 2002

AFFIRMED

William Isaac Diggs, of Myrtle Beach, for Appellant.

William L. Pope, of Columbia, for Respondent.

ANDERSON, J.: Tamera Bergstrom sued Palmetto Health Alliance ("the hospital") alleging the hospital was negligent and committed the tort of intentional infliction of emotional distress regarding her purported adoption in 1979. The hospital moved to dismiss the claims and filed a motion to cap the hospital's liability at $100,000. The Circuit Court granted the hospital's motion to dismiss the intentional infliction of emotional distress claim and the motion to cap damages to $100,000. The Circuit Court denied the hospital's motion to dismiss the negligence claim.

At trial, the hospital moved for directed verdict on the negligence claim at the close of the presentation of Bergstrom's evidence. The Circuit Court granted the directed verdict motion. Bergstrom appeals the grant of the hospital's motions for: (1) directed verdict on the negligence claim; (2) dismissal of the intentional infliction of emotional distress claim; and (3) limitation on the hospital's liability to $100,000. We affirm.

FACTS/PROCEDURAL BACKGROUND

Tamera Bergstrom was born on November 16, 1979, at Baptist Medical Center in Columbia. In early 1979, Debbie Daly,[1] Bergstrom's natural mother, became pregnant. Daly was seventeen years old, unmarried, and living at Murrells Inlet. Daly discussed her predicament with a coworker who introduced her to Mary Andrews, the coworker's mother. After speaking with Andrews, Daly began considering placing the baby for adoption. When Daly was six and one-half months into her pregnancy, she visited Andrews in Columbia and lived with her for one week.

During the week Daly lived with Andrews, Andrews took Daly to meet with attorney Joel Padgett where they discussed placing the baby for adoption. Daly did not remember signing any adoption papers at this meeting. Padgett

[1] Debbie Daly's last name is spelled two different ways in the record. It is spelled "Daly" and "Daley." In the appellant's brief, her last name is spelled "Daley." In the respondent's brief, her last name is spelled "Daly." We use the "Daly" spelling throughout the opinion.

suggested Daly move in with Claire Wilson. Wilson allowed Daly to stay with her in her home rent and expense free until Daly went to the hospital to deliver the baby. While living with Wilson, Daly was told the baby was to be adopted by a hospital administrator and his wife, who was a nurse. Daly was informed that this couple had already adopted three children and would be good parents for the baby.

Daly went to Baptist Medical Center to deliver the baby. Daly testified that the choice of hospital and medical doctors was arranged by Padgett and she had no input in the decision. She stated she never discussed adoption with any of the doctors prior to going to the hospital to deliver the baby. Daly delivered Bergstrom at 7:57 p.m. She was administered anesthesia in the delivery room. Daly never saw Bergstrom.

The hospital had procedures in place at the time to govern the conduct of hospital employees in adoption situations. These policies read:

> ADOPTION
>
> DEFINITION AND PURPOSE
>
> To provide service for those mothers who wish to consider adoption for their newborn.
>
> POLICY
>
> 1. Have the mother sign "Permit" to Release Baby for Adoption.
> 2. The mother and/or her immediate family may see the infant at any time prior to discharge.
> 3. Adoptive parents are not to see the infant while the baby is in the hospital.
> 4. A social service referral should be made if the mother has not made previous arrangements.
> 5. Have attorney or caseworker sign circumcision permit for male infants.

RESPONSIBLE PERSONS
RN, LPN, Unit Manager

GENERAL INSTRUCTIONS

1. Call Social Service Department at BMCC if there are questions about adoption.
2. In private adoptions, have attorney ask adoptive parents if they would like a Home Health Referral for baby care instructions.
3. Mother may view infant through the nursery window or in her room if she requests.
4. Mother's immediate family may view the infant through the nursery window.

PROCEDURE

. . . .

1. Notify the Unit Manager when mother is ready to sign "Permit for Release of Baby for Adoption."
2. Two original forms must be signed. Place one copy on the mother's chart and one copy on the baby's chart.
3. Give discharge instruction to attorney or caseworker.
4. Release baby to attorney or caseworker following Dismissal of Newborn Procedure.

On the day following Bergstrom's birth, Daly began to have second thoughts about placing Bergstrom for adoption. On the third day after the delivery, the day Daly was to leave the hospital, she decided she wanted to see Bergstrom. When Daly asked whether she could see the baby, the nurse responded, "[a]re you the adopting parent?" When Daly answered no, the nurse told her "the baby was being placed up for adoption and that [she] couldn't see the child."

Daly returned to her room and began crying. When Wilson arrived to pick Daly up, she asked why Daly was crying. Daly told her the hospital would not let her see the baby and that she did not want to give the baby up for adoption. Wilson told Daly there was nothing Daly could do at that point, the papers had already been signed, and the adoption was final. Daly testified that, during the length of her stay at the hospital, none of the hospital staff came and spoke with her about the adoption. Daly stated Wilson told her she needed to sign a release form before she left the hospital. As Daly was leaving the hospital, she signed the form, which provided:

> PERMISSION TO RELEASE BABY TO PARTY OTHER THAN MOTHER
>
> I, the undersigned, mother of Baby Gardner, [Daly's maiden name] who was born in the South Carolina Baptist Hospital, Columbia, South Carolina on 11/16/79, hereby authorize and direct the . . . [h]ospital to release and deliver said baby to Joel Padgett (Atty) or his or her agents and release and discharge [the hospital] from any claims on account of such release and delivery.
>
> It has been fully explained to me and I understand that this does not in any way affect the permanent custody of my child and is given for the purpose of authorizing the [hospital] to permit the person named above to remove my child from the hospital as an accommodation to me.

After signing the form, Daly left the hospital and stayed with Wilson for three weeks before returning to Murrells Inlet. Daly did not see Bergstrom before leaving.

Padgett's initial plan to have the baby adopted by the hospital administrator fell through and he began to look for someone to adopt her. He found the Bergstroms. Padgett did not file adoption papers and the Bergstroms never obtained legal custody of the baby. Bergstrom declared that she lived in an R.V. with the Bergstroms and their two other children. They moved from campground to campground in various states.

The Colorado state authorities placed Bergstrom in protective custody when she was eleven years old because Mrs. Bergstrom's boyfriend had taken nude photographs of her. When Bergstrom was fourteen, Colorado authorities found that her birth certificate had been fraudulently altered and referred the case to South Carolina authorities to investigate. Detective David Cribb began investigating the birth certificate and found that Daly was Bergstrom's natural mother. After conducting DNA tests to verify that Daly was the mother, the Colorado authorities released Bergstrom to Daly's custody when Bergstrom was fifteen years old.

Bergstrom filed suit against the hospital seeking to recover damages under theories of negligence and intentional infliction of emotional distress. The hospital filed a Rule 12, SCRCP motion to dismiss the claims. The Circuit Court granted the hospital's motion to dismiss the intentional infliction of emotional distress cause of action, denied the motion to dismiss the negligence claim, and found that any recovery available to Bergstrom was limited to $100,000 pursuant to S.C. Code Ann. § 44-7-50. During the trial, the Circuit Court granted the hospital's directed verdict motion on the negligence claim.

LAW/ANALYSIS

I. Bergstrom's Negligence Claim

Bergstrom argues the Circuit Court erred when it granted the hospital's directed verdict motion on her negligence claim. We disagree.

When reviewing a grant of directed verdict, this Court must determine whether a verdict for the nonmoving party would have been reasonably possible under the facts of the case. Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997). This Court should view the evidence and all the reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party but must also consider facts which are unfavorable to the nonmoving party. Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876 (Ct. App. 1994). The issue must be submitted to a jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. Hanahan, 326 S.C. at 149, 485 S.E.2d at

908. However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. Id. When only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. Id.

In order to establish a claim for negligence, the plaintiff must prove the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant's negligent act or omission; (3) resulting in damages to the plaintiff; and (4) the damages proximately resulted from the breach of duty. Thomasko v. Poole, 349 S.C. 7, 561 S.E.2d 597 (2002). An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998).

Bergstrom contends the hospital policies governing adoptions created a special relationship between her and the hospital thereby imposing a duty upon the hospital to follow the procedures. She alleges the hospital breached its duty when it failed to allow Daly to see her, failed to have Daly sign a permit to release the baby for adoption, and failed to make a special service arrangement which it was required to do if the mother had not made previous arrangements. We disagree. Any duty which the policies created was between the hospital and the mother, not the hospital and the child.

Bergstrom cites several cases in support of her argument. The cited cases are not persuasive. Adoptive Parents v. Biological Parents, 315 S.C. 535, 446 S.E.2d 404 (1994), interprets the special and unusual circumstances clause contained in the South Carolina Adoption Act which must be satisfied in order for prospective out-of-state adoptive parents to adopt a baby born in South Carolina. The case does not discuss duties of a hospital to a baby who may be placed for adoption.

Bergstrom relies on Sloan v. Edgewood Sanatorium, Inc., 225 S.C. 1, 80 S.E.2d 348 (1954), which held a psychiatric hospital owed a duty of care to properly supervise and treat a suicidal patient and was potentially liable for damages when the patient committed suicide while under its care. This case

fails to support the argument that the hospital owed a duty to Bergstrom under the facts of the present case.

Although certain adoption policies were not followed by the hospital, the hospital believed it was acting in accordance with Daly's wishes. The medical charts for Daly indicated that Padgett was the attorney who was handling the adoption, obviating the need for the hospital to make a "social service referral" if the mother had not made other arrangements. Alice Rawlinson, the Director of Women and Children's Services for the hospital, conceded the hospital had an obligation to the baby to make certain the baby was released to the birth mother or her designated agent. That was done in this case. Daly signed a form which allowed the baby to be released to Joel Padgett as her designated representative and the hospital did not breach this duty. Any liability the hospital may have for not allowing Daly to see the baby in accordance with its policies is a possible cause of action which lies with Daly and not with Bergstrom.

The duty between the hospital and Bergstrom was to make certain the hospital followed the wishes of Daly regarding the placement of Bergstrom. Daly indicated she had an attorney who was handling the adoption, never asked any employee or representative of the hospital for aid regarding the adoption, and signed a form authorizing the release of Bergstrom to Padgett. The hospital satisfied its duty.

II. Proximate Cause

Even if we were to find the hospital breached a duty that existed between it and Bergstrom, Bergstrom could not satisfy the requirement that she prove her damages were proximately caused by the hospital.

Negligence is not actionable unless it is a proximate cause of the injury. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). To prove proximate cause, the plaintiff must demonstrate both causation in fact and legal cause. Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001). Causation in fact is proved by establishing the

injury would not have occurred but for the defendant's negligence. Russ v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993).

The law regarding legal cause has been recently summarized in Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001):

> Legal cause turns on the issue of foreseeability. An injury is foreseeable if it is the natural and probable consequence of a breach of duty. Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. It is not necessary for a plaintiff to demonstrate the defendant should have forseen the particular event which occurred but merely that the defendant should have forseen his or her negligence would probably cause injury to someone.

Id. at 136, 558 S.E.2d at 276 (citations omitted).

In Works v. Arlington Memorial Hospital, 782 S.W.2d 309 (Tex. App. 1989), a child's adoptive parents brought a negligence action against the hospital alleging the child was abused by other prospective adoptive parents after the child's release from the hospital. The specific allegations of wrongdoing in Works are similar to this case and are as follows:

> Arlington Memorial Hospital records and bills, available to the hospital employees at the time of Baby Doe's birth, indicated that [an attorney at law] had agreed to be responsible for the biological mother's hospital expenses and that the child was to be put up for adoption. Though this information was known, the hospital failed to refer the biological mother to any proper child placement agency or social service agency. After its birth, the child was taken from the hospital grounds by [the attorney] . . . . Hospital personnel were present at the time the [attorney] . . . took the baby. After being turned over to [third parties] by [the attorney], the baby was severely abused. The hospital failed to involve its own social work department at any point while the natural mother was in the hospital. The hospital failed to investigate the circumstances

> surrounding the discharge of the biological mother. The hospital failed to ascertain that proper conservatorship papers were held by those persons taking the baby from the hospital grounds. It is asserted that had the hospital acted properly, the opportunity would not have arisen for the child to be abused.

Id. at 311.

Additional facts in the Works case indicated the biological mother signed the release form for the child and turned the baby over to the attorney, that no person affiliated with the hospital had any involvement with the adoption of the child, and no one at the hospital attempted to influence the biological mother in connection with her decision about the adoption. Id. The Court of Appeals of Texas relied upon expert testimony and determined:

> [A] hospital is not supposed to be able to see the future like a fortune teller with a crystal ball; . . . [the expert] was not capable of seeing the future like a fortune teller with a crystal ball--that even she could not have predicted, based on the type of information available at the time the child . . . left the hospital, that it would be mistreated in the way it allegedly was according to the Works' pleadings. . . . [The expert] "wouldn't have tried to" make such predictions. [The expert] agreed that for any two people to take a little, innocent baby and beat it up would be aberrational and abnormal behavior and that it would be unforeseeable to [the expert], or to anybody, including the people at the hospital . . . that this would occur.

Id. at 314.

In ruling that the plaintiff failed to establish proximate cause, the Works court articulated: "we conclude as a matter of law that, in light of all the attending circumstances . . ., the injuries suffered by the [child] could not reasonably have been anticipated by the hospital as a consequence of any asserted negligent act or omission alleged against it. In short, we conclude that the hospital could not have foreseen the danger to [the child]." Id.

We are persuaded by the analysis in the Works case and find Bergstrom failed to establish the hospital's actions were the cause of her injury. At the time Bergstrom was born, the hospital could not have foreseen that following Daly's instructions to release Bergstrom to Padgett would result in her failed adoption by nomadic parents who sexually exploited her. Bergstrom failed to establish legal cause. Concomitantly, the Circuit Court did not err when it granted the hospital's directed verdict motion.

III. Bergstorm's Intentional Infliction of Emotional Distress Claim

Bergstrom maintains the Circuit Court erred when it granted the hospital's Rule 12, SCRCP motion to dismiss the intentional infliction of emotional distress claim. We disagree.

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Id.; Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). If the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Baird, 333 S.C. at 527, 511 S.E.2d at 73. In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. Id.

A plaintiff must satisfy the following elements to state a claim of intentional infliction of emotional distress: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be

regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. Upchurch v. New York Times Co., 314 S.C. 531, 431 S.E.2d 558 (1993); Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

Even viewing the facts and inferences therefrom alleged in the complaint in the light most favorable Bergstrom, we find the complaint failed to state the elements necessary to sustain an intentional infliction of emotional distress cause of action. As stated above when discussing Bergstrom's negligence claim, the facts failed to show that the hospital's conduct was the proximate cause of Bergstrom's injuries. There was no way the hospital was certain or substantially certain that releasing Bergstrom to Padgett as Daly instructed on the release form would result in Bergstrom's abuse by her putative adoptive parents. Furthermore, we cannot say that the hospital's conduct of releasing the baby per Daly's instruction exceeded the bounds of common decency. The Circuit Court did not err when it granted the hospital's motion to dismiss the intentional infliction of emotional distress cause of action.

CONCLUSION

We rule that, in light of all the attending circumstances, the hospital did not owe a duty of care to Bergstrom. Additionally, Bergstrom failed to establish that any alleged damages were proximately caused by the hospital.

Elementally, the complaint of Bergstrom did not state a cause of action for intentional infliction of emotional distress.

Because we have ruled the hospital is not liable to the plaintiff on any theory, we do not reach the issue in regard to capping the hospital's liability at $100,000. Accordingly, we

AFFIRM.

CONNOR and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rebecca M. Blanton,

Respondent,

v.

Jimmy P. Stathos,

Appellant.

Appeal From Pickens County
Charles B. Simmons, Jr.,
Special Circuit Court Judge

Opinion No. 3553
Heard September 11, 2002 – Filed September 30, 2002

AFFIRMED

James M. Robinson, of Easley, for Appellant.

Craig H. Allen, of Greenville, for Respondent.

ANDERSON, J.: Jimmy P. Stathos appeals the Circuit Court's finding that the agreement between him and Rebecca M. Blanton involves interstate commerce and, therefore, is subject to the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 2 (1970). We affirm.

FACTS/PROCEDURAL BACKGROUND

Stathos contracted with Blanton, whereby Blanton agreed to provide design, drawing, and architectural services for Stathos in the construction of a restaurant in Seneca, South Carolina. The contract was a standard American Institute of Architects ("AIA") contract, which contained a clause providing for the arbitration of disputes. Both parties agree the contract does not contain the notice of arbitration required by S.C. Code Ann. § 15-48-10(a) (Supp. 2001).

Blanton began drafting the designs and drawings for the construction of the restaurant. In performing this service, she consulted with several out-of-state companies regarding specifications of components that would be required for the project. However, prior to Blanton's completion of her duties under the contract, Stathos terminated the contract. Procurement of the materials and construction of the restaurant had not begun at the time of the breach of contract.

Blanton submitted her claim to the American Arbitration Association pursuant to the terms of the arbitration provision of the AIA contract. Notice was served on Stathos by certified mail. Stathos did not reply to the notice nor did he participate in the arbitration process. The arbitrator awarded Blanton her requested damages of $9,669.80 and assessed Stathos $243.98 in arbitrator's fees.

Blanton, pro se, filed a copy of the arbitration award with the Pickens County Clerk of Court. The award was erroneously entered on the Judgment Roll. Thereafter, Stathos filed a Motion to be Relieved from Judgment, and

Blanton filed a Motion for Confirmation of the Arbitration Award.

The Circuit Court found the contract between Stathos and Blanton evidenced a transaction involving interstate commerce and concluded the FAA applied. Stathos' Motion to be Relieved from Judgment was denied and Blanton's Motion for Confirmation of the Arbitration Award was granted. The Circuit Court judge entered a judgment in favor of Blanton for the $9,669.80 awarded by the arbitrator, plus the $243.98 in arbitrator's fees. Stathos' Motion to Reconsider was denied.

LAW/ANALYSIS

I. Section 15-48-10(a)

Stathos asserts the AIA contract does not meet the standard of the South Carolina Arbitration Act and its notice provision, which is found in § 15-48-10(a) (Supp. 2001). We agree.

Section 15-48-10(a) requires:

> Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

These elements are to be strictly adhered to in order to satisfy the notice requirements. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). No other variation is acceptable. Zabinski, 346 S.C. at 589, 533 S.E.2d at 114.

The contract in this case contains an arbitration clause for settling disputes. Both parties concede the contract contains no notice that it is subject

to arbitration as required by section 15-48-10(a). Under South Carolina law, the arbitration provision would not be enforceable.

II. The Preemption Mandate of FAA

The inquiry does not conclude with the application of South Carolina law. "Inextricably linked with the question of the applicability of section 15-48-10(a), is the impact of the FAA." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). One must determine whether the federal act preempts the state requirements.

The FAA reads, in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2.

"The FAA preempts state laws that invalidate the parties' agreement to arbitrate '[b]ut it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself.'" Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538 n.2, 542 S.E.2d 360, 363 n.2 (2001) (quoting Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). Relying on Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), the South Carolina Supreme Court, in Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996), determined § 15-48-10(a) conflicted with the FAA because it singled out arbitration agreements and rendered them invalid if its notice provisions were not strictly followed. Soil Remediation Co., 323 S.C. at 459, 476 S.E.2d at 152.

Concomitantly, the notice provision in § 15-48-10(a) is preempted by the FAA. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001).

We must now determine if the FAA applies to the contract in the case sub judice. The United States Supreme Court has held that the phrase "involving commerce" is the same as "affecting commerce," which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). However, Stathos claims the contract does not evidence interstate commerce and, therefore, the FAA does not apply. We disagree.

"To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117. Stathos argues, because construction had not yet begun, and all work was done by individuals residing in South Carolina, the contract did not evidence interstate commerce.

Yet, Blanton submitted an affidavit in which she asserted the contract affected interstate commerce. She stated that, in performing her duties of drafting and designing the plans for the restaurant, she communicated with various technicians outside of South Carolina. She had consultations with an HVAC subcontractor in Georgia, a truss manufacturer in Georgia, and a hood and exhaust manufacturer in North Carolina. Additionally, she maintained that all drafting and designs were done to meet national building codes and specifications.

As summarized by this Court in Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986):

> In [Episcopal Housing Corp. v. Federal Insurance Co., 269 S.C. 631, 239 S.E.2d 647 (1977)], the contract for the construction of a housing project for the elderly contained a provision for arbitration. The Court affirmed a Circuit Court order enforcing this provision of the contract under the Act, giving two reasons for holding that the

> contract evidenced a transaction involving commerce: (1) contract documents referred to equipment and materials to be furnished from outside South Carolina as well as subcontractors which were from outside this state, and (2) the nature of the project and the actual work to be performed were sufficient to give notice that materials, equipment and supplies from outside South Carolina would be required.

Id. at 430-31, 343 S.E.2d at 46.

Blanton averred that her "design and drawings contemplated the purchase or acquisition of materials and labor from states other than South Carolina, particularly the state of Georgia, due to the proximity of Seneca to the state of Georgia." Importantly, she explained:

> [T]he restaurant plans designed, drawn, and submitted by [Blanton] to Mr. Stathos pursuant to the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce.

Stathos did not dispute Blanton's affidavit. The nature of the project and the affidavit by Blanton are sufficient to uphold the decision of the Circuit Court that the contract evidences a transaction involving interstate commerce. Accordingly, we conclude the Circuit Court judge was correct in confirming the arbitration award.

III. Procedural Due Process

Stathos contends that he did not receive due process in regard to the filing of the judgment emanating from the arbitration proceeding.

Due process is flexible and calls for such procedural protections as the particular situation demands. Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control, 305 S.C. 90, 406 S.E.2d 340

(1991); Brown v. Malloy, 345 S.C. 113, 546 S.E.2d 195 (Ct. App. 2001). Procedural due process mandates that a litigant be placed on notice of the issues which the court is to consider. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). The Due Process Clause demands notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Murdock, 338 S.C. at 334, 526 S.E.2d at 248. It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. Murdock, 338 S.C. at 334, 526 S.E.2d at 248. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on. Id.

Procedural due process requires notice, the opportunity to be heard in a meaningful way, and judicial review. Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914); Cameron & Barkley Co. v. South Carolina Procurement Review Panel, 317 S.C. 437, 454 S.E.2d 892 (1995); Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002). Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal. South Carolina Dep't of Health and Envtl. Control v. Armstrong, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. South Carolina Dep't of Social Servs. v. Holden, 319 S.C. 72, 459 S.E.2d 846 (1995).

Stathos received procedural due process to the fullest extent in the hearing conducted by the Circuit Court judge on the motion by Blanton to confirm the arbitration award.

CONCLUSION

We rule the contract between Blanton and Stathos evinces a transaction involving commerce for essentially the same reasons as the contracts in Circle S. Enterprises v. Stanley Smith & Sons, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986), and Episcopal Housing Corp. v. Federal Insurance Co., 269 S.C. 631, 239 S.E.2d 647 (1977). We hold the nature of the project, as well as Blanton's reliance on expertise from individuals outside of South Carolina, demonstrate a transaction involving interstate commerce. Apodictically, the FAA applies to the contract, thereby trumping the South Carolina notice provision, § 15-48-10(a). In addition, Stathos received procedural due process because, in a hearing before the Circuit Court judge, he was given a reasonable opportunity to be heard at a meaningful time and in a meaningful manner. We conclude the provision compelling arbitration is enforceable. Accordingly, the judgment of the Circuit Court is

AFFIRMED.

CONNOR and STILWELL, JJ., concur.