OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5

January 30, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Newberry County Magistrate Mark E. English, Respondent.

Opinion No. 26100
Submitted January 4, 2006 – Filed January 23, 2006

PUBLIC REPRIMAND

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

Mark E. English, of Newberry, pro se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or a definite suspension for thirty (30) days pursuant to Rule 7(b), RJDE, Rule 502, SCACR. The facts as set forth in the agreement are as follows.

FACTS

At the time of the submission of the agreement and, on the occasion of the occurrences discussed hereafter, respondent was a

Newberry County magistrate. Respondent has since tendered his resignation as a Newberry County Magistrate effective at midnight on December 31, 2005.

Matter I

For quite some time and long prior to respondent's magisterial appointment, it was standard practice in the Newberry County Magistrate's Court for a representative of the Sheriff's Department to appear at bench trials in criminal cases in lieu of the appearance of the arresting officer and/or complaining witness(es) and to have the Sheriff's Department representative (who had no first hand knowledge of the case) testify for the State by reading the information from the incident report. If the defendant contested the charge, the case would be continued until the arresting officer and/or the complaining witness(es) could be present.[1] Respondent represents he followed the procedure described above as it was used by his predecessors and other Newberry County magistrates.

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

ODC does not contend that it is judicial misconduct for a judge to allow hearsay testimony into a proceeding where there is no objection, even in cases where a defendant is pro se, but, instead, contends that fundamental principles of jurisprudence require some

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

admissible evidence of the commission of a crime as a prerequisite to proceeding with a criminal case. In addition, ODC contends Magistrate's Court should not accommodate the prosecution and deprive pro se defendants of basic constitutional rights.

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

Matter II

Respondent terminated an employee due to her being unable to satisfactorily perform her duties as a result of personal, domestic difficulties. After notice of termination, respondent continued to pay the employee for several weeks for "accumulated sick leave" even though no evidence of illness was presented to respondent. Respondent signed or caused to be signed the employee's name to a time sheet submitted for payment of the sick leave. The actual document from respondent to Newberry County memorializing the termination was not transmitted until the sick leave had been exhausted.

Respondent now recognizes that the right to sick leave did not continue after the employee's termination, particularly in the absence of medical documentation supporting illness and that, at a minimum, he should have printed the employee's name, not had it signed in cursive to indicate the former employee had signed the document.[2] Respondent recognizes that the signing of another person's name in cursive to a time sheet and paying sick leave to a terminated

[2] Respondent represents he had permission to sign the employee's name to the time sheet and that his actions were taken with the acquiescence of and/or instructions from county administrative personnel.

employee who might or might not have been sick constituted judicial misconduct.[3]

Matter III

Respondent loaned a motor vehicle to the same employee mentioned above while she was an employee of the Newberry County Central System.[4] While driving the vehicle, the employee was involved in a motor vehicle accident and was issued a traffic citation by a South Carolina Highway Patrol trooper. The citation charged her with driving too fast for conditions.

Respondent asked the charging trooper if he could "help" the employee with the ticket as respondent believed the fine should have been suspended due to the fact that the employee was "a court employee who assisted troopers daily." According to respondent, the charging trooper indicated he was unwilling to "help" the employee with the ticket at that juncture because of the high visibility of the case, the known relationship between respondent and the employee,[5] existing animosity between respondent and another Newberry County Magistrate, Magistrate Beckham, and the fact that the motor vehicle the employee was driving was owned by respondent. The trooper offered to continue the matter and revisit its disposition if circumstances made doing so less subject to criticism.[6] The employee paid the fine marked

[3] Respondent is romantically involved with the employee. Respondent and the employee have testified under oath that their romantic involvement did not take place until after the employee ceased to be an employee of the Newberry County Central Court System.

[4] Respondent represents the employee was making payments on the vehicle in return for its use.

[5] See Footnote 3.

[6] Respondent represents he would not have normally discussed the matter with the trooper, but the trooper's supervisor

on the ticket and respondent "signed off" on the ticket, causing it to be processed in a routine fashion.

Respondent now recognizes it was judicial misconduct to have had an ex parte communication with the charging trooper and to even suggest the trooper "help" the employee. Respondent further recognizes that employees of the judicial system or law enforcement are not any more entitled to "help" by virtue of their positions than other defendants and should, instead, be treated the same as any other person charged with an offense.

Matter IV

Respondent received a traffic citation for driving too fast for conditions. The ticket was issued by a South Carolina Highway Patrol trooper as a result of a motor vehicle accident. The ticket was returnable before Magistrate Rushton. Respondent felt he was not at fault and planned to contest the ticket.

When the case was called to be heard before Magistrate Rushton, respondent entered a plea of not guilty. No witness appeared and the trooper announced that he did not wish to proceed with the prosecution without witnesses present since he did not witness the accident. Magistrate Rushton ruled the matter should be dismissed and/or found respondent not guilty on the date of trial.

Magistrate Rushton "signed off" so as to indicate "dismissed" or "not guilty" on the copy of the ticket sent to the South Carolina Department of Motor Vehicles (DMV) and on the trooper's copy of the ticket. However, the court record copy of the ticket could not be located until several months after Magistrate Rushton had ceased being a magistrate.

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advised respondent that he felt the ticket should be dismissed and was going to direct the trooper to do so.

Respondent felt it was necessary to cause the court records to conform to the DMV records. For that reason, respondent telephoned Magistrate Rushton and Magistrate Rushton authorized that his name be "signed off" on the court's copy of the ticket. Respondent then instructed the employee mentioned above to sign Magistrate Rushton's name on the ticket showing it as "not guilty" and/or "dismissed" (as it should have originally been marked by Magistrate Rushton had it been available on the trial date). However, Magistrate Rushton was not present when the court copy of the ticket was signed and, in fact, was no longer a magistrate on that occasion.

Respondent now recognizes it was judicial misconduct to authorize the employee to sign Magistrate Rushton's name (even with his permission and only to conform to the actual disposition of the ticket) because a directive from the Chief Justice concerning the "signing off" of tickets only allows court employees to sign a judge's name on traffic tickets in the judge's presence. Respondent recognizes the correct procedure would have been to have Magistrate Ruston sign the court copy nunc pro tunc or, at least, mark it "s/Rushton [printed]" indicating it was being conformed to the original, rather than suggesting Magistrate Rushton had actually signed the ticket or that someone with his authority had signed it in his presence while he was a judge. Respondent now recognizes that, with very few exceptions, no one can sign a judge's name to legal documents.

Moreover, the employee dated the court copy of the ticket as of the date of the trial (which would have been the date on the DMV and trooper's copies of the ticket). Respondent explains that the trial date is generally used by Newberry County magistrates when they "sign off" a ticket, regardless of the date on which the ticket is actually "signed off." ODC does not contest respondent's representation in this regard but provides the better practice would have been to place the notation "See reverse" by Magistrate Rushton's printed name and place an explanation and the actual "sign off" date on the reverse of the ticket.

ODC acknowledges respondent gained no advantage as a result of this matter.

Matter V

A defendant was charged with driving under the influence. The defendant hired an attorney who filed a written request for a jury trial. The writing was placed in the court's case file. Notwithstanding the appearance of the attorney, the matter was scheduled for trial, but the attorney was not notified.

The arresting officer, the defendant, and defense attorney were not present when the case was called for trial. Respondent directed the officer be located. The trial was delayed and the officer was given the opportunity to appear. The officer advised respondent he was not in court when the case was called for trial because he had not been notified of the trial date. No similar effort was made to locate the defendant or to give the defendant an opportunity to be present. The defendant was convicted in his absence. In a later meeting with the defense attorney and the arresting officer it was determined that the defense attorney had not been notified of the trial and respondent, on motion of the defense attorney with consent of the arresting officer, reopened the matter.

Respondent now recognizes that any disparate treatment afforded the State and the accused gives an appearance of impropriety and suggests a bias towards the State. In the future, respondent represents he will be make equal effort to locate absent defendants and absent law enforcement officers. In addition, he represents he will be more careful to determine whether or not defendants are represented by counsel and, if so, give notice to counsel of upcoming proceedings.

Matter VI

A vending machine is operated in the lobby of the Newberry County Central Court for use by employees and the public. The machine is under respondent's supervision. The profits from the

vending machine are applied to a canteen fund and used for miscellaneous office expenses such as flowers for employees who are sick or suffer losses of loved ones and social events to promote camaraderie among the staff at the Central Court.

While this is a fairly minor matter, ODC contends the practice is contrary to the general laws of the State which require that all income from the State and its political subdivisions be paid over to the county treasurer and that the only expenditures that may be made by public officials are those authorized in an annual budget approved by the governing body of the jurisdiction. In addition, ODC contends use of the vending machine proceeds is contrary to the spirit, if not the letter, of prohibitions in published cases of the Supreme Court of South Carolina and subsequent memorandums of the Chief Justice relating to judges using their position to collect money.

Respondent explains it is a common practice for the various departments of Newberry County to use vending machine profits for similar purposes and that no objection had been raised by any officials of the county prior to the complaint here. ODC does not dispute respondent's representation and concedes the infraction is well intended and follows a general practice in the various departments in Newberry County and possibly across the State. Nevertheless, ODC contends it is contrary to the statutory laws of this State. Respondent does not dispute this contention.

Matter VII

When defendants failed to appear for traffic court and did not post bond, respondent would try the defendants in their absence, issue bench warrants, and send the NRVC notice to the DMV.[7] In

[7] "NRVC" is the standard notation to indicate the defendant failed to appear or post bond and the administrative process should suspend the defendant's driver's license in accordance with applicable law.

addition, respondent would either draw or cause to be drawn warrants charging the defendants with violation of South Carolina Code Ann. § 56-25-40 (1991) and then have a Sheriff's Department deputy sign a supporting affidavit.

ODC agrees that the failure to post bond or appear on the date of trial does, in fact, constitute a violation of Section 56-25-40 but contends it is the duty of law enforcement or prosecutors to seek the issuance of warrants, not judges. ODC contends judges should only issue warrants when approached by victims, law enforcement, or prosecutors presenting sufficient evidence for the issuance of warrants.

Respondent now recognizes that, except in the case of contempt of court, it is judicial misconduct for a judge to initiate criminal charges. However, in mitigation, respondent represents the practice of issuing warrants was initiated at the request of the Newberry County Sheriff's Department and that, prior to issuing these warrants, an employee of Court Administration advised him that he could issue warrants under these circumstances. Respondent asserts he issued only a few such warrants and immediately ceased the practice upon receipt of a complaint regarding the matter.

ODC does not dispute respondent's representations. The Court Administration employee confirms respondent's representation but states he did not intend to suggest warrants should be issued sua sponte. ODC contends magistrates should not draw warrants sua sponte and then seek to have a law enforcement officer sign the warrant affidavit. Instead, ODC asserts such warrants should be issued when an affiant with knowledge of a case appears before a judge seeking a warrant for the offense and gives an affidavit setting out probable cause.

Matter VIII

Respondent's friend was charged with having an expired license tag on his motor vehicle. The friend did not appear at trial, but

the records of the proceedings were marked "suspend fine as per [respondent]."

Respondent does not recall the exact details of this event; however, he represents that such a disposition was typical as Newberry County Magistrates suspended fines after defendants demonstrated that they had acquired license tags. Respondent states this procedure is fair since citizens often have problems obtaining tags from DMV in a timely fashion. Nevertheless, respondent acknowledges that, since his friend did not appear for trial, he either received information about his friend obtaining his license tag in an ex parte fashion or suspended the fine without knowing for certain that the tag had been obtained.

Matter IX

Respondent released approximately nine (9) prisoners from the Newberry County Detention Center without any legal basis for doing so except for his own decision that this was necessary. These prisoners were serving sentences, many of which were imposed by other judges, including one serving a sentence imposed by a family court judge. Respondent represents he released these prisoners at the request of law enforcement because the detention center was being renovated and the adjoining county could not accommodate all the prisoners incarcerated at the Newberry County Detention Center. Respondent further represents he reviewed each of the prisoner's sentences and released those with the shortest sentences remaining and only those he felt were non-violent.

ODC does not contest respondent's representations concerning this matter and acknowledges that respondent's intentions were good and had a rational basis. However, respondent now acknowledges that, absent legal proceedings and appropriate authorization, he lacked authority to release the prisoners notwithstanding the county's problems in holding them while the detention center was being renovated.

Matter X

While bond hearings are scheduled two (2) times per day in the Newberry County Central Court in accordance with the direction of the Chief Justice dated November 28, 2000, it is the practice of respondent and other magistrates in Newberry County to hold special, unscheduled bond hearings in the interval between the scheduled bond hearings, making the scheduled bond hearings often unnecessary. Respondent represents that, when the special bond hearings are held, they are held for the entire detention center population in need of a bond hearing and not to benefit any special defendants.

Respondent now recognizes this practice may not fully conform to the directives of the Chief Justice concerning the conduct of bond hearings. In the future, respondent will promptly familiarize himself with the Chief Justice's directive and, thereafter, follow it to the letter or seek permission for a variance in procedures from the Chief Justice.

Matter XI

Matthew Boland (Matthew) was charged by a South Carolina Highway Patrol trooper with driving 85 mph in a 55 mph speed zone. When the case was called for trial before respondent, Matthew was not present; no bond had been posted on his behalf. The trooper was present. Respondent proceeded to find Matthew guilty in his absence, made the notations "$425" (indicative of the amount of the fine imposed) and "NRVC," and had the ticket sent to the DMV. Because of the NRVC notation and $425 fine, the DMV wrote Matthew advising him that his driver's license had been suspended due to his failure to appear at trial or to post bond.

Unknown to respondent, Matthew was under the impression he did not need to appear at trial and that the ticket would be marked "not guilty" in his absence. Respondent reports that Magistrate Beckham later learned Matthew had been found guilty in his

absence and sent word to respondent that the "General Attorney" had wanted the ticket marked "not guilty." Respondent represents the remark remains clear in his mind because of the reference to "General Attorney" rather than the proper reference to "Attorney General."

ODC asserts, and respondent does not dispute, that, prior to the date of trial, Matthew's father (Mr. Boland) called attorney William Franklin "Troup" Partridge, III (Troup) about the ticket. Troup referred the matter to his father, William Franklin Partridge, Jr., (Frank), an attorney practicing in Newberry County. At a regularly scheduled lunch meeting, Frank told Magistrate Beckham (his son-in-law) that Frank needed to talk with the trooper about Matthew's ticket. Magistrate Beckham conveyed the message to the trooper who, according to Magistrate Beckham, responded "tell Frank not to worry about that ticket" or words to that effect. Somehow Matthew came to believe he did not need to appear or post bond in connection with the ticket. For purposes of this agreement, respondent does not contest these findings.

Respondent advises it was common practice in the Newberry County Central Court for the charging officer to fill in the information on tickets after magistrate's court was concluded based on the rulings of the hearing magistrate. To respondent's best knowledge, the trooper incorrectly filled out the information on Matthew's ticket after trial by checking the "appeared" block (when Matthew did not appear) and "not guilty" (when respondent had, in open court, found Matthew guilty as charged).

ODC has further determined:

- Mr. Boland called Troup after receiving notice of Matthew's license suspension from the DMV;

- Troup called Magistrate Beckham (his brother-in-law) and obtained information from the records of the central magistrate's court indicating respondent had found Matthew

"guilty" and obtained copies of the Court's records (which indicates some confusion on the disposition of the ticket);

- Troup then telephoned respondent, purportedly to inquire as to the status of the ticket based on the records of the Newberry County Central Court;[8]

- respondent checked the records and advised Troup that the records indicated Matthew had been found "guilty" in his absence;

- Troup then told respondent that the ticket was supposed to have been marked "not guilty" and had been sent to the DMV in error;

- respondent told Troup that, in his judgment, there was no error, that Matthew had not appeared or posted bond, and that he was not going to change his ruling; and

- respondent reports that, in the telephone conversation, Troup told him something to the effect that "we will just have to file a Writ of Mandamus" (emphasis in original).

ODC has further determined:

- Frank prepared legal pleadings, including an order for a Rule to Show Cause requiring respondent to appear at a hearing before Circuit Court Judge Wyatt Saunders the next business day;

[8] ODC does not contend that respondent's conversation with Troup was an improper ex parte conversation inasmuch as respondent entered into the conversation with Troup only to discuss the status of the ticket, an administrative matter.

- Judge Saunders reports he has been unable to determine how those pleadings came to be in his office and were left on his desk by an unknown person;

- Troup is Judge Saunders' former law clerk and, coincidentally (according to both Troup and Judge Saunders), dropped by Judge Saunders' chambers prior to the closing of the courthouse just to "say hello" to Judge Saunders the same day Judge Saunders signed the Rule to Show Cause order;

- Judge Saunders asked Troup to have the pleadings served on respondent;

- Sheriff Lee Foster reported he received a telephone call from Troup (whom Sheriff Foster knew personally and was aware of his employment by the State of South Carolina) who stated the Attorney General wanted the pleadings served on respondent that evening;

- Sheriff Foster dispatched a deputy sheriff to Frank's house, picked up the pleadings there from Troup, and had a deputy sheriff serve them on respondent; and

- the pleadings required respondent to appear before Judge Saunders the next business day to show cause why Matthew's tickets should not be changed to "not guilty." [9]

Although he prepared the pleadings, Frank did not appear at the hearing before Judge Saunders. Matthew appeared pro se, along with his father. Respondent also appeared pro se. Judge Saunders did not ask Matthew if he appeared for trial or why he believed he would

[9] Respondent has no direct knowledge of many of the conclusions in this list but, for purposes of this agreement, does not dispute them.

be found "not guilty." The transcript from the proceeding indicates Matthew "could not remember" who had given him copies of the materials presented to the circuit court. Judge Saunders asked respondent if it would be proper to "offer this citizen a trial." In response, respondent stated he was willing to "help" Matthew. Judge Saunders noted that pleadings did not bear any docket number and stated on the record that respondent "is willing to assist you" and volunteered that the circuit court was acting "no different in this than it would in other similar matters."

After the case was recessed, respondent, Matthew, and Mr. Boland went into the hallway to discuss the matter. Judge Saunders asked the trooper's supervisor who was also present in the courthouse for other purposes to participate in the discussion between respondent, Matthew, and Mr. Boland. The supervisor agreed that the 85/55 mph ticket (a six point ticket) against Matthew would be reduced to a two point violation (speeding under 10 miles over the posted limit) and the fine would be reduced in accordance with the reduced charges. Judge Saunders was advised the matter had been resolved and, thereafter, caused the records to reflect that Matthew had been convicted, pled guilty, or forfeited bond to a charge of speeding under 10 miles over the posted limit.

The very next day, Matthew appeared before respondent, accompanied by Frank, on two additional traffic charges. Respondent reduced these charges to "help" Matthew because of Matthew's increasingly poor driving record.

Respondent now recognizes it was judicial misconduct to negotiate a settlement with a defendant and his father even if encouraged to do so by the circuit court judge and even in the presence of and with the consent of the trooper's supervisor. Respondent has represented to ODC under oath that he did not feel any pressure by the circuit court judge but, instead, just wanted to "help" Matthew because of the obvious difficulties he would face due to the traffic tickets.

Respondent has been fully cooperative with ODC's inquiries in this and all other matters addressed herein and has amended his procedures to conform with applicable guidelines as he now understands them to be.

LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3(B)(2) (judge shall be faithful to the law and maintain professional competence in it; judge shall not be swayed by public clamor or fear of criticism); Canon 3B(7) (judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending proceeding); and Canon 3B(8) (judge shall dispose of all judicial matters promptly, efficiently, and fairly). Respondent admits that his misconduct constitutes grounds for discipline pursuant to Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct) and Rule 7(a)(7) (it shall be ground for discipline for judge to willfully violate a valid court order issued by a court of this State) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Because respondent no longer holds his magisterial position, a public reprimand is the most severe sanction the Court can impose for the misconduct addressed in this opinion. See In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996). Due to the gravity of respondent's misconduct, he shall no longer serve in any judicial capacity in this state without the Court's permission. Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Lee Nance, Petitioner,

v.

Jon E. Ozmint, Director,
South Carolina Department of
Corrections, Respondent.

ON REMAND FROM THE
UNITED STATES SUPREME COURT

Appeal from Florence County
John Henry Waller, Jr., Circuit Court Judge
Thomas Ervin, Post Conviction Relief Judge

Opinion No. 26101
Heard November 15, 2005 – Filed January 30, 2006

REVERSED

Teresa L. Norris, of Center for Capital Litigation, and William Norman Nettles, both of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney

General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Robert Lee Nance (Petitioner), sentenced to death for murder, appealed from the post-conviction relief (PCR) court's denial of his application for relief. This Court held that the manner in which Petitioner's trial counsel investigated, planned, and conducted his defense constituted a classic example of a complete breakdown in the adversarial process. As a result, this Court granted Petitioner a new trial. However, the United States Supreme Court vacated this Court's judgment and remanded this case for consideration in light of *Florida v. Nixon*.[1]

FACTUAL / PROCEDURAL BACKGROUND

The facts surrounding the incident are not in dispute and are outlined in this Court's previous opinion:

> The victims, Robert and Violet Fraley, were attacked at home where they lived alone.[2] On the night of the intrusion, Mr. Fraley testified that he and his wife went to bed around 9:30 or 10:00 p.m. Mr. Fraley awoke to the sound of someone knocking on the front door of the house. Mr. Fraley testified that he saw a man standing on the porch, and that the man asked him if he could come in to use the phone because his truck had broken down. Mr. Fraley told him he could use the phone outside in his shop. When the man said he did not have a light to see his way to the shed, Mr. Fraley left the door to get him a flashlight. Mr. Fraley testified that when he unlatched the door to hand over the light, the man forced the door open and immediately began stabbing him with a screwdriver.

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[1] *Florida v. Nixon*, 543 U.S. 175 (2004).

[2] Mr. and Mrs. Fraley were 78 and 73 years old respectively at the time of the attack.

> At some point, Mrs. Fraley entered the room and tried to help Mr. Fraley as he tried unsuccessfully to get away from the intruder. Mr. Fraley was bleeding profusely and his wife was trying to wipe up blood while the intruder was demanding money and the keys to their car. Mrs. Fraley retrieved both of their wallets and their keys and gave approximately $194 in cash and the keys to the intruder. Mr. Fraley testified that he pleaded with the intruder not to kill him and his wife, but that the intruder replied that he was going to kill both of them. The intruder then raped and killed Mrs. Fraley. Miraculously, Mr. Fraley survived the attack but was hospitalized for thirteen days.
>
> Petitioner was arrested in the early morning hours following the attack after he was pulled over driving the Fraleys' Cadillac. There was blood on his clothes that was later determined to be Mrs. Fraley's. The car also contained a bank envelope that was taken from the Fraleys' home during the attack. Two people were in the car with Petitioner when he was stopped. One person fled the scene and was never apprehended. The other person, Erskine Green, testified at Petitioner's trial that he did not know Petitioner and that Petitioner had picked him and the other man up on the side of the road.

Petitioner was convicted of murder, criminal sexual conduct (CSC) in the first degree, first-degree burglary, assault and battery with intent to kill (ABIK), and armed robbery. He was sentenced to death on the murder charge. He was also sentenced to life for burglary, thirty years for CSC, twenty years for ABIK, and twenty-five years for armed robbery. His convictions and sentences were affirmed on direct appeal. *State v. Nance*, 320 S.C. 501, 466 S.E.2d 349 (1996). Subsequently, Petitioner filed a PCR application. The PCR court denied relief and Petitioner appealed.

This Court granted relief relying on *United States v. Cronic*[3] because Petitioner did not receive effective assistance of counsel due to the failure of

[3] *United States v. Cronic*, 466 U.S. 648 (1984).

counsel to challenge the prosecution's case against Petitioner. *Nance v. Frederick*, 358 S.C. 480, 596 S.E.2d 62 (2004). The Court held that the case represented "a classic *Cronic* ineffectiveness case, falling under the second *Cronic* scenario because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of Petitioner's trial." *Id*. at 488, 596 S.E.2d at 66.

The United States Supreme Court vacated this Court's judgment and remanded the case in light of *Florida v. Nixon*. In *Nixon*, the Court held that presumed prejudice as outlined by *Cronic* is reserved for cases in which counsel fails to meaningfully oppose the prosecution's case. *Nixon*, 543 U.S. at ___. Accordingly, the following issue is presented to this Court for review:

What is the impact of *Florida v. Nixon* on this case?

LAW/ANALYSIS

Cronic and *Strickland*

Petitioner argues that this Court should hold that counsel was ineffective and grant relief. We agree.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975).

The Sixth Amendment guarantees that every criminal defendant shall receive "Assistance of Counsel" in establishing his defense. U.S. Const. amend. VI. On May 14, 1984, the United States Supreme Court handed down two opinions holding that the Sixth Amendment requires that a criminal defendant receive *effective* assistance of counsel. *United States v. Cronic*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984).

Strickland and *Cronic* are companion cases applying the same analysis, but with a different emphasis. Both *Strickland* and *Cronic* direct

that a defendant must ordinarily make two showings in order to prevail on an ineffective assistance claim. "First, the defendant must show that counsel's performance was deficient." *Strickland,* 466 U.S. at 687; *Cronic,* 466 U.S. at 666 (explaining that absent specific "circumstances mak[ing] it unlikely that the defendant could have received the effective assistance," he can make out an ineffective assistance claim "only by pointing to specific errors made by trial counsel"). This requires the defendant to demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 687-88; *Cronic,* 466 U.S. at 666 n. 41 (noting that "claims based on specified errors ... should be evaluated under the standards enunciated in *Strickland*"). "Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687.

The Supreme Court also recognized in both *Strickland* and *Cronic* that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry ... is not worth the cost." *Strickland,* 466 U.S. at 692 (citing *Cronic,* 466 U.S. at 658). In *Cronic,* the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." *Cronic,* 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id.* Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* (citing *Powell v. Alabama,* 287 U.S. 45 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." *Brown v. French,* 147 F.3d 307, 313 (4th Cir. 1998).

Absent these narrow circumstances of presumed prejudice under *Cronic,* defendants must show actual prejudice under *Strickland*. *See Strickland,* 466 U.S. at 692; *Cronic,* 466 U.S. at 666 and n. 41. Actual

prejudice requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Florida v. Nixon reaffirmed the notion that per-se prejudice occurs infrequently. In *Nixon*, the United States Supreme Court held that entering a guilty plea on behalf of a defendant without his express consent did not constitute ineffective assistance of counsel. *Nixon*, 543 U.S. at ___. The Court opined that the decision to plead guilty was a strategy employed by trial counsel in an effort to present mitigating evidence at sentencing in an attempt to save the defendant's life. *Id*. at ___. Further, the Court held that *Cronic's* presumed prejudice standard was only used for those cases where counsel fails to "function in any meaningful sense as the Government's adversary." *Id*. at ___.

In light of the recent holding in *Nixon*, we believe the present case represents one of the rare cases where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." Moreover, counsel did not act as an adversary to the prosecution's case, but instead helped to bolster the case *against* his client.

This Court's previous opinion set forth the following in an effort to detail the deficiencies in counsel's representation:

> **TRIAL PRESENTATION**
>
> Following Petitioner's arrest, defense counsel was appointed as Petitioner's lead counsel. At the time he was appointed, defense counsel had either recently suffered from or was then suffering from pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure. During the trial he was taking various prescription medications, including Valium, Lopressor, Isocet, and Tenormin. At the PCR hearing, Petitioner's experts testified that the side effects of those medications included impaired memory, lack of sleep, and

sedation. Defense counsel's testimony at the PCR hearing indicated that he remembered very little from the trial that took place 5 years before the PCR hearing.

An attorney, who had only been practicing law for eighteen months, was appointed as co-counsel. Co-counsel testified at the PCR hearing that Petitioner's mother was the only family member who was interviewed prior to trial; that he did not recall that anyone investigated Petitioner's background; and that no one had requested Petitioner's records from the Department of Corrections.

The psychologist who planned to offer expert testimony concerning Petitioner's mental health, Dr. Dewitt (Dewitt), asked defense counsel for Petitioner's medical records, social history, statements from family members, and statements from the Department of Corrections staff but never received them. He received Petitioner's hospital records a few hours before trial.

GUILT PHASE

When introducing himself in his opening statement to the jury, co-counsel said, "I did not ask [to represent the Petitioner], I was simply appointed. [defense counsel], as the public defender, did not ask for this case either. He was just appointed to represent Mr. Nance." In addition, defense counsel presented only three witnesses to testify on behalf of Petitioner's defense: a corrections officer, an unqualified expert, and Petitioner's sister.

Defense counsel's first witness, a Florence County detention center officer, testified that while in prison, Petitioner threw urine at a female corrections officer.[4] On cross-

[4] At the PCR hearing, Petitioner's PCR counsel presented testimony that the reason why Petitioner threw urine at the female office was because she reminded him of his aunt.

examination, the officer testified that this episode was Petitioner's only incident of misbehavior during the seven-month period that Petitioner was under his watch.

The defense's second witness, Dewitt, testified about Petitioner's mental health. Based on only two meetings with the Petitioner, Dewitt opined that Petitioner more closely resembled a criminal who was guilty but mentally ill. Defense counsel was not successful in qualifying Dewitt as an expert.

The defense rested after Dewitt's testimony. The trial judge then granted defense counsel's request to reopen his presentation so that Petitioner's sister could testify. Defense counsel failed to prepare the sister's testimony but asked that she testify about Petitioner's childhood. The sister testified that Petitioner was an abnormal child: pretending to be an undertaker, he buried one of his brothers; pulled a gun on their father; stabbed himself with a broken bottle; and killed their pets.

In sum, the testimony that defense counsel presented in Petitioner's guilt phase defense consisted of testimony of a corrections officer concerning the only incident of misconduct that Petitioner committed while incarcerated; an opinion by an uninformed psychiatrist who was not qualified as an expert; and unprepared testimony of Petitioner's sister about Petitioner's oddities as a child.

SENTENCING PHASE

Defense counsel's mitigation presentation during the sentencing phase of the trial lasted seven minutes. Counsel began by waiving the opening statement and then incorporated the meager amount of defense testimony elicited during the guilt phase.

Defense counsel then presented the testimony of a corrections officer of the Florence Detention Center, who testified

that Petitioner was taking two prescription medications, Cogentin and Haldol, and that Petitioner had taken Haldol that morning.[5] Counsel presented no further testimony, to which the trial judge responded by asking, "Are you ready to go to the jury?" Counsel responded, "We incorporate what we feel, Your Honor -- the doctor and the other testimony by the sister would be repetitious." The judge then replied, "Do you need any time to collect your thoughts? This is rather quick."[6] Co-counsel gave the closing argument, refusing to plead for Petitioner's life and referring to Petitioner as a "sick" man who did "sick things."

We find that this trial presentation, in its entirety, represents a classic *Cronic* ineffectiveness case, falling under the second *Cronic* scenario because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of Petitioner's trial. For the reasons set forth below, we presume Petitioner was prejudiced, and accordingly, grant him a new trial.

First, Petitioner was disadvantaged from the outset because lead defense counsel was in ill health and on heavy medication, and co-counsel had only practiced law for eighteen months.

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[5] The trial judge forbade Petitioner from taking any antipsychotic drugs during trial. Haldol is a very strong antipsychotic drug used in the treatment of acute schizophrenia and acute psychosis, controlling a patient's tendency towards aggression and agitation.
http://www.psyweb.com/Drughtm/halope.html

[6] This is an example of the trial judge's commendable attempt to insure that defense counsel was effectively representing his client. Unfortunately, the trial judge's ability to hold defense counsel to his constitutional obligation to effectively represent his client was greatly limited by (1) the desultory manner in which defense counsel tried this case and (2) the fact that at the time this case was tried, South Carolina common law provided little guidance as to what constituted an attorney's complete failure to provide effective representation. We hope that this opinion provides some clarity as to what does *not* constitute effective representation.

Second, in aid of its claim that Petitioner was mentally ill, the defense had wanted Petitioner to appear in the courtroom in his natural demeanor, unaffected by the administration of psychotropic drugs. The defense was successful in getting the trial judge to order such. Nevertheless, defense counsel failed to inform the jail personnel of the trial judge's order that Petitioner be taken off the anti-psychotic drug, Haldol. Consequently, Petitioner remained in a drug-influenced demeanor during the entire trial, and the jury never observed his natural demeanor.

Third, the trial had just begun when co-counsel communicated to the jury that neither he nor defense counsel wanted to be there.

Fourth, while defense counsel may have been pursuing a defense of guilty but mentally ill (GBMI),[7] he failed to qualify his own expert. Further, by eliciting the unprepared testimony of Petitioner's sister only *after* defense psychologist Dewitt testified, defense counsel failed to give his unqualified expert, at minimum, the opportunity to inform the jury of how the sister's testimony of Petitioner's mental irregularities as a child could lead to a conclusion that Petitioner was mentally ill at the time of the murder.

Fifth, defense counsel presented no adaptability evidence at the sentencing hearing. In fact, by merely incorporating the testimony elicited from the guilt phase, defense counsel gave the impression that Petitioner had not adapted to confinement,

[7] Dewitt testified that Petitioner's mental incapacity did not rise to the level of the *M'Naughten* standard for insanity but did opine that he met the standard for GBMI. Despite evidence of Petitioner's mental incapacity, defense counsel failed to raise the issue of whether Petitioner was competent to stand trial.

because the only evidence that had been presented concerning his confinement was the urine-throwing incident.

During the PCR hearing, Petitioner presented testimony to show that the urine-throwing incident was the only instance of bad behavior during confinement. In fact, Petitioner was selected as the Manning Correctional Institution's inmate of the year and was nominated for the Department of Corrections' inmate of the year. He also sang in the prison choir and participated in other Christian activities. A jail administrator and prison minister testified that Petitioner was a model inmate. Defense counsel could have easily discovered this adaptability evidence prior to trial but failed to do so.[8]

Sixth, defense counsel presented no mitigating social history evidence to explain the Petitioner's odd childhood behavior to which his sister referred to during the guilt phase. Defense counsel failed to reveal that Petitioner was beaten throughout his childhood; his father was an alcoholic who fought with many family members; he was treated with alcohol as a child in lieu of over-the-counter medication; and he grew up in a family of extreme poverty and physical deprivation.

Seventh, defense counsel's seven-minute mitigation presentation failed to provide the jury with *any* insight concerning Petitioner's mental illness. At the PCR hearing, Petitioner introduced evidence that he has a family history of schizophrenia, he has a history of hearing voices in his head, and he has suffered neurological damage.

[8] The United States Supreme Court has recently recognized that defense counsel must conduct a reasonable investigation "to discover *all reasonably available* mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (citation omitted).

> Finally, during the closing argument, co-counsel failed to plead for Petitioner's life and referred to him as a "sick" man.

Nance, 358 S.C. at 485-88, 596 S.E.2d at 65-66.

The above outlined trial presentation details the complete failure to conduct a defense by trial counsel. We hold that this case represents a very rare situation where counsel failed to provide an adversarial challenge to the prosecution. We find it most compelling that in the present case counsel abandoned his role as defense counsel and in fact helped to bolster the case against his client. In particular, counsel's statement that his client was "a sick man" who has done "sick things" points to the fact that he was not acting as defense counsel and failed "to function… as the Government's adversary." *See Jones v. Barnes*, 463 U.S. 745, 758 (1983) (stating that in order to satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) (stating that an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation). In addition, counsel called a defense witness who testified about Petitioner's one incident of misbehavior in jail. Finally, Petitioner's sister testified as to his propensity for killing animals as a child. These witnesses, in addition to counsel's opening and closing statements, helped to further bolster the prosecution's case against Petitioner rather than providing him with a defense.

We again recognize that this type of "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.'" *Nance*, 358 S.C. at 490, 596 S.E.2d at 67. (citing *Frett v. State*, 298 S.C. 54, 56, 378 S.E.2d 249, 251 (1988)). As a result, we hold that counsel was ineffective under *Cronic* and failed to act as an adversary to the prosecution, but instead helped to reinforce the case against his client.

CONCLUSION

Based on the above reasoning, we again reverse the PCR's decision to deny relief after reconsideration of the issue in light of *Florida v. Nixon*.

MOORE, BURNETT, PLEICONES, J.J., and Acting Justice James C. Williams concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marty K. Avant, Employee, Claimant,

v.

Willowglen Academy, Employer, and United Heartland and Travelers Property Casualty Co., Carriers, of which United Heartland is Petitioner,

and Travelers Property Casualty Co. is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Williamsburg County
L. Henry McKellar, Circuit Court Judge

Opinion No. 26102
Heard October 18, 2005 – Filed January 30, 2006

AFFIRMED

Roy A. Howell, III and Kirsten L. Barr, both of Trask & Howell, LLC, of Mount Pleasant, for Petitioner.

Johnnie W. Baxley, III, of Wilson, Jones, Carter & Baxley, LLC, of Mt. Pleasant, for Respondent.

JUSTICE PLEICONES: This is a workers' compensation case. Respondent Travelers Property Casualty Co. (Travelers) moved the Workers' Compensation Commission to identify Petitioner United Heartland (United) as the insurer responsible for the claim of Willowglen Academy (Willowglen). The single commissioner held United responsible. The appellate panel of the commission affirmed in part and reversed in part, holding Travelers and United equally responsible. The circuit court affirmed in part and reversed in part, holding Travelers solely responsible. The Court of Appeals reversed, holding United solely responsible. Avant v. Willowglen Academy, 356 S.C. 181, 588 S.E.2d 125 (Ct. App. 2003). We granted a writ of certiorari to review the Court of Appeals' opinion and now affirm.

FACTS

Travelers insured Marty Avant's employer, Willowglen Academy, through an assigned-risk workers' compensation policy administered by the National Council on Compensation Insurance (NCCI). The policy was effective from August 24, 1996 through August 24, 1997.

Although covered by the assigned-risk policy with Travelers, Willowglen procured voluntary insurance from United, effective July 1, 1997. An employer able to procure voluntary insurance is ineligible for assigned-risk insurance,[1] but Willowglen neither notified Travelers or the NCCI of the voluntary coverage nor attempted to cancel the assigned-risk policy. More important, Willowglen actually renewed the assigned-risk policy with Travelers for the period August 24, 1997 through August 24, 1998 (the renewal policy).

On September 6, 1997, a date within both Travelers' and United's respective stated coverage periods, Marty Avant was injured. Willowglen submitted the claim to Travelers, which remained unaware of the voluntary

[1] S.C. Code Ann. § 38-73-540(A) (2002).

policy with United. Travelers accepted the claim and began providing benefits.

Travelers eventually became aware of the voluntary policy, in January 1998. Travelers issued a notice of cancelation retroactive to July 1, 1997, the date on which Willowglen acquired voluntary insurance from United.[2] Travelers refunded all premiums paid by Willowglen for assigned-risk coverage after that date.

Subsequently, Travelers filed a motion with the Workers' Compensation Commission to identify United as the sole responsible carrier. The single commissioner relied on the South Carolina Workers' Compensation Assigned Risk Plan (the Assigned Risk Plan or the Plan), which was filed with the Department of Insurance by the NCCI and approved by the Director of the Department of Insurance. The commissioner then held that under the Assigned Risk Plan, Travelers' assigned-risk coverage terminated as a matter of law on July 1, 1997, the date on which United began providing voluntary coverage. The commissioner therefore ruled that United was solely responsible for Willowglen's claim.

On appeal, the commission's appellate panel affirmed in part and reversed in part. Preliminarily, the panel held that the Assigned Risk Plan does not "supersede" the workers' compensation regulations. The panel then found that both Travelers and United "intended to have coverage on September 6, 1997" and that "[e]quity, in the light of the circumstances of this case, require[d]" that United and Travelers equally share responsibility.

On further appeal, the circuit court affirmed in part and reversed in part. The court found the Plan inapplicable and held Travelers alone responsible under the workers' compensation regulations. According to the court, Travelers' attempt to retroactively cancel its coverage was ineffective because the regulations do not permit retroactive cancelation. Also under the regulations, Travelers was presumed responsible because the effective date of

[2] Travelers initially issued a notice of cancelation effective March 19, 1998, which is not germane to the issues before us.

its renewal policy (August 24, 1997) was later than that of United's voluntary policy (July 1, 1997). See 25A S.C. Code Ann. Regs. 67-409(A) (1990) (addressing dual coverage); infra, note 5.

On further review, the Court of Appeals reversed. The court held that the Assigned Risk Plan has the force of law and determined that the Plan "should be read in conjunction with the Act and its regulations and be accorded effect under the facts of this case given [the Plan] addresses matters where the Act is silent." Avant, 356 S.C. at 187-89, 588 S.E.2d at 128-29. The Court of Appeals then held that Travelers' coverage terminated as a matter of law as soon as United issued its voluntary policy. Id. Consequently, the court ruled that United was solely responsible.

ISSUES

I. Whether the Assigned Risk Plan has the force of law.

II. Whether Travelers or United is the responsible carrier.

ANALYSIS

We adhere to our holding in Rodriguez v. Romero 363 S.C. 80, 88, 610 S.E.2d 488, 92 (2005), that the Plan has the force of law. In addition, we hold that United is responsible for Willowglen's claim. We therefore affirm.

I. FORCE OF LAW

Under the Administrative Procedures Act, "'[p]olicy or guidance issued by an agency other than in a regulation does not have the force of law." S.C. Code Ann. § 1-23-10(4) (Supp. 2002). None of the provisions of the Assigned Risk Plan has been promulgated as a regulation. United argues that the lack of promulgation requires a finding that the Plan lacks the force of law, meaning only the workers' compensation regulations are controlling. See also Rodriguez, 363 S.C. at 88-89, 610 S.E.2d at 492-93 (Toal, C.J., dissenting); Avant, 356 S.C. at 193-97, 588 S.E.2d at 131-33 (Anderson, J., dissenting). We disagree.

The General Assembly has delegated certain authority over assigned-risk insurance to the Director of the Department of Insurance.[3] South Carolina Code section 38-73-540(A)(1)[4] states that "any mechanism designed to implement" the assigned-risk agreement executed by the state's insurers "must be submitted in writing to the director or his designee for approval prior to use, together with such additional information as the director or his designee may reasonably require." The Code does not require that the implementation mechanism be promulgated as a regulation. Rather, the mechanism attains the force of law when it is approved by the Director of the Department of Insurance.

Moreover, the provisions of the Plan prevail over the workers' compensation regulations. Code section 38-73-540 specifically addresses assigned-risk insurance and the mechanism for implementing assigned-risk agreements, whereas the regulations address workers' compensation generally. The principle that more specific rules prevail over general ones applies, and the Plan is the product of a more specific statute. See Mims v. Alston, 312 S.C. 311, 313, 440 S.E.2d 357, 358-59 (1994) (applying the principle). The Plan controls with respect to issues it addresses.

In comparison, the Court of Appeals held that the Plan "should be read in conjunction with [the Workers' Compensation Act] and its regulations and be accorded effect under the facts of this case given [the Plan] addresses matters where the Act is silent." Avant, 356 S.C. at 189, 588 S.E.2d at 129 (quoted with approval in Rodriguez, 363 S.C. at 88, 610 S.E.2d at 492). Because this passage could be interpreted to mean that the Plan fills gaps in the workers' compensation regulations, we clarify that the regulations fill gaps in the Plan. As discussed below, the Plan resolves the issues in this case, so there is no need to resort to the workers' compensation regulations.

[3] Whether the delegation is lawful is not an issue before us.

[4] S.C. Code Ann. § 38-73-540(A)(1) (2002).

II. RESPONSIBLE CARRIER

As stated above, Marty Avant was injured on September 6, 1997, a date within the stated coverage periods of both Travelers' renewal policy and United's voluntary policy. After becoming aware of Willowglen's voluntary policy with United, Travelers canceled its assigned-risk policy retroactive to July 1, 1997, the effective date of United's voluntary policy, and refunded all premiums paid by Willowglen for assigned-risk coverage after that date.

The first issue is whether Travelers' renewal policy in fact became effective on its stated effective date, August 24, 1997. If it did, then there was dual coverage on September 6, 1997, and because the Plan does not address dual coverage, a workers' compensation regulation applies ... in favor of United.[5] For the reasons stated below, we find that Travelers' renewal policy never became effective, so the dual-coverage issue does not arise.

In Rodriguez, we held that the assigned-risk policy at issue never became effective because the insured, like Willowglen here, procured

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[5] Regulation 67-409(A) states:

> When duplicate or dual coverage exists by reason of two different insurance carriers issuing two policies to the same employer securing the same liability, the Commission shall presume the policy with the later effective date is in force and the earlier policy terminated on the effective date of the later policy.

25A S.C. Code Ann. Regs. 67-409(A) (1990).

Because its policy's stated effective date is later than that of United's policy, Travelers would be presumed responsible if Regulation 67-409(A) were controlling.

voluntary coverage prior to the assigned-risk policy's effective date. Rodriguez involved a more recent edition of the Assigned Risk Plan, however, and that edition contained language different from this edition. That edition stated:

> [A]ny insurer that wishes to insure an employer as voluntary business may do so at any time. If such insurer is not the contract carrier, the contract carrier shall cancel its policy pro rata and the **coverage** shall automatically terminate as of the effective date of the voluntary insurer's policy.

(all but "pro rata" quoted in Rodriguez, 363 S.C. at 85-86, 610 S.E.2d at 491 (emphasis in opinion altered)).

The edition involved in this case states:

> [A]ny insurer that wishes to insure an employer as voluntary business may do so at any time. If such insurer is not the assigned carrier, the assigned carrier shall cancel its policy pro rata and the **assignment** shall automatically terminate as of the effective date of the voluntary insurer's policy.

United argues that the difference is critical. United emphasizes that the *assignment* flows from the insurer's contractual relationship with the other insurers participating in the Assigned Risk Plan, whereas *coverage* flows from the insurance policy, which represents the relationship between the insurer and the insured. According to United, the edition of the Plan involved here plainly addresses the automatic termination of only the assignment. Based on the principle *inclusio unius est exclusio alterius,* United asserts that under this edition of the Plan, assigned-risk *coverage* does not automatically terminate upon the commencement of voluntary coverage. See, e.g., German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 606-07, 576 S.E.2d 150, 153 (2003) (applying the principle); Hodges v. Rainey, 341 S.C. 79, 86-87, 533 S.E.2d 578, 582 (2000) (same). Accordingly, United claims, Travelers' assigned-risk coverage with

Willowglen continued to exist until Travelers affirmatively canceled the renewal policy, after September 6, 1997.[6]

At first glance, United's argument is appealing. This edition of the Plan does say "assignment," not "coverage." Nevertheless, the effect of the automatic termination of the assignment is the automatic termination of coverage. Without the assignment there never would have been any policy or coverage. We therefore hold that Travelers' assigned-risk coverage automatically terminated when United's voluntary coverage commenced. Consequently, coverage under the renewal policy never became effective. Cf. Rodriguez, 363 S.C. at 82-83, 88, 610 S.E.2d at 489-90, 492 (involving an insured who procured assigned-risk insurance after procuring voluntary coverage, and holding that the assigned-risk policy never became effective). There was no dual coverage on September 6, 1997. United was the only carrier.

We see no significance in the issues raised by United related to the timing and retroactivity of Travelers' cancelation of the policy. See Avant, 356 S.C. at 191, 588 S.E.2d at 130 (addressing the issues and holding that the Plan "allows for this retroactive cancellation"). As we have stated, coverage under Travelers' renewal policy never went into effect. United was the only carrier providing workers' compensation coverage on September 6, 1997, so United is solely responsible for the claim.

CONCLUSION

United was the only carrier covering Willowglen when Marty Avant was injured. United is therefore solely responsible for the claim. The decision of the Court of Appeals is

AFFIRMED.

[6] As mentioned above, in 1998 Travelers canceled its policy retroactive to July 1, 1997. As discussed below, United argues that this retroactive cancelation was invalid.

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

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the South Carolina Workers' Compensation Act and the regulations promulgated pursuant to the Act are the sole authorities for determining the responsibility for providing workers' compensation coverage. For this reason, I would reverse the holding of the court of appeals and affirm the circuit court's finding that Travelers, not United, is responsible in this case.

As I stated in *Rodriguez*,[7] the majority misconstrues the law to the extent that it reads the Workers' Compensation Act in conjunction with the guidelines set forth by the National Council on Compensation Insurance (NCCI). The NCCI is not a rulemaking body, and furthermore, the NCCI possesses no authority to promulgate regulations with any binding force in South Carolina.[8] The NCCI is simply an advisory body that provides its subscribers with information and data analysis services.

Like *Rodriguez*, at issue in this case are NCCI provisions regarding how assigned risk insurance policies should be terminated when an insured obtains voluntary coverage at a later time. In my opinion, the majority continues to misinterpret S.C. Code Ann. § 38-73-540(A)(1) to grant the director of the Department of Insurance the discretionary authority to adopt binding regulations governing assigned risk insurance policies. The statute does not grant such power to the director, but instead allows the director to approve agreements made among assigned risk insurance carriers. Any approved agreement would of course bind the agreeing parties, but the question of whether these agreements bind an individual insured is an entirely different matter.

Any agreement that has not undergone the process of regulatory approval called for in the Administrative Procedures Act cannot be viewed as a regulation that carries the force of law. Furthermore, unless these

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[7] *Rodriguez v. Romero*, 363 S.C. 80, 88-89, 610 S.E.2d 488, 492-93 (2005) (Toal, C.J. dissenting).

[8] Under South Carolina law, the Workers' Compensation Commission is responsible for promulgating all regulations relating to the administration of the workers' compensation laws. S.C. Code Ann. § 42-3-30 (1976).

agreements or their terms appear in the individual assigned risk insurance policies, it is clear that the terms of these agreements cannot be viewed as binding contractual provisions. The assigned risk policy at issue in this case says nothing about termination of the policy upon the purchase of a voluntary policy by the insured. Therefore, I would rely solely on the Workers' Compensation act and its corresponding regulations to determine coverage.

The applicable workers' compensation regulation provides that when there are two insurance policies securing the same liability, the policy with the later effective date is responsible for coverage. 25A S.C. Code Ann. Regs. 67-409(A) (1976). In the instant case, Travelers' policy has an effective date of August 24, 1997 and United's policy has an effective date of July 1, 1997. Pursuant to Regulation 64-409(A), I would hold that Travelers is the proper carrier because its policy has the later effective date.

With this decision, the majority has significantly weakened South Carolina's Administrative Procedures Act and, in my view, improperly empowered the head of an administrative agency to promulgate rules having the force of law. The legislature may not empower the head of an agency to unilaterally make declarations carrying the binding force of law; therefore, we cannot interpret § 38-73-540(A)(1) in this manner. I find it extremely telling that the majority would give binding force to these NCCI regulations which do not appear in the State Register, have not been debated in the Legislature, and are published in no public resource. Although the majority is arguably not creating "secret law" in the sense that it existed in several agencies prior to the enactment of the APA, unfortunately, it appears we now must purchase an NCCI subscription to ascertain the particulars of South Carolina workers' compensation law.

Accordingly, I would reverse the court of appeals and affirm the circuit court's finding that Travelers is the responsible carrier.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marion R. McMillan, M.D. and Blue Ridge Medical Specialties, P.A., Respondents/Appellants,

v.

Oconee Memorial Hospital, Inc., Appellant/Respondent,

and

Anesthesiology Consultants of the Upstate, P.A., Respondent/Appellant.

Appeal from Oconee County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26103
Heard May 17, 2005 – Filed January 30, 2006

REVERSED

V. Clark Price, Carroll H. Roe, Jr., and Dana M. Lahey, all of Roe, Cassidy, Coates & Price, of Greenville, for Appellant/Respondent Oconee Memorial Hospital, Inc.

D. Randle Moody, of Roe, Cassidy, Coates & Price, of Greenville, for Respondent/Appellant Anesthesiology Consultants of the Upstate, P.A.

Raymond E. Lark, Jr., of Austin, Lewis & Rogers, of Columbia, for Respondent/Appellant Marion R. McMillan, M.D. and Blue Ridge Medical Specialties, P.A.

Stuart M. Andrews, Jr. and Merritt G. Abney, both of Nelson, Mullins, Riley & Scarborough, of Columbia, for Amicus Curiae South Carolina Hospital Association.

CHIEF JUSTICE TOAL: This case arose out of the events surrounding Oconee Memorial Hospital's (Oconee) decision to offer anesthesiology and internal medical services on an exclusive basis. A jury returned a verdict against Oconee. The trial court reduced the verdict pursuant to the charitable immunity statute. This appeal followed. After certifying this case for review pursuant to Rule 204(b), SCACR, we reverse the trial court's denial of Oconee's motion for judgment notwithstanding the verdict.

FACTUAL / PROCEDURAL BACKGROUND

Oconee is a private eleemosynary (charitable) hospital. Dr. McMillan has been a member of the medical staff at Oconee for almost 13 years and specializes in anesthesiology and internal medicine. Additionally, Dr. McMillan is the sole shareholder of Blue Ridge Medical Specialties, P.A. (collectively referred to as McMillan).

For several years prior to this litigation, McMillan performed anesthesiology services at Oconee alongside the doctors of Anesthesiology Consultants of the Upstate, P.A. (Upstate). But after McMillan formed his own practice group, the two became competitors. During this period, the anesthesiology services at the hospital operated on an open-staff basis,

therefore, all physicians with the appropriate privileges were permitted to practice anesthesiology and pain management. The development of two competing practice groups at Oconee, however, was problematic. As a result, the board at Oconee decided to pursue exclusive contracts for its anesthesiology services.

Oconee sought proposals for the award of an exclusive agreement to provide staff and anesthesiology services. Both Upstate and McMillan submitted proposals providing four physicians and six staff nurses to perform services at Oconee. However, at the time of the proposal, only two of Upstate's anesthesiologists and four of the nurses were available to start immediately at Oconee. In contrast, all of McMillan's personnel were available to start immediately.

Prior to the board at Oconee awarding an exclusive contract, several communications about the new exclusive contract took place between board members and officers at Oconee. Eventually the board awarded the contract to Upstate. McMillan was informed that his privileges at Oconee would end before January of 2002.

As a result of the actions of Oconee and Upstate, McMillan filed suit alleging civil conspiracy, breach of contract, violations of the South Carolina Unfair Trade Practices Act, breach of fiduciary duty, tortious interference with existing contractual relations, tortious interference with prospective contractual relations, denial of due process, wrongful taking, and inverse condemnation. In addition, McMillan sought injunctive relief. The trial court granted summary judgment in favor of Oconee and Upstate as to the claims for breach of fiduciary duty, tortious interference with existing contractual relation, tortious interference with prospective contractual relations, denial of due process, wrongful taking, and inverse condemnation. Further, the trial court granted Oconee and Upstate's directed verdict motions for the claims for breach of contract and violations of the South Carolina Unfair Trade Practices Act. The parties went to trial on the issues of injunctive relief and civil conspiracy. McMillan claimed that Oconee and Upstate conspired to oust him from his privileges at Oconee.

The jury returned a verdict in favor of McMillan for $1,275,000 against Oconee only. As a result, McMillan made a motion to conform the pleadings to the evidence to allege civil conspiracy against Oconee. Oconee filed post trial motions including a motion to reduce the verdict and a motion for judgment notwithstanding the verdict. The trial court granted the motion to reduce the verdict and the verdict was reduced to $300,000 pursuant to the charitable immunity statute. The trial court denied the motion for judgment notwithstanding the verdict. In addition, the trial court granted permanent injunctive relief in favor of McMillan allowing him to perform certain limited services at Oconee. However, the trial court granted Oconee's application for supersedeas of the injunctive relief pending appeal.

Both parties appealed. As a result, the following issues are before the Court for review:

I. Did the trial court err in denying Oconee's motions for directed verdict and judgment notwithstanding the verdict as to the civil conspiracy claims?

II. Did the trial court err in reducing the amount of the judgment?

III. Are the charitable immunity liability limits inapplicable to a claim for civil conspiracy, and as a result, is Oconee not entitled to the statutory protection therein?

IV. Do the statutory caps applicable to charitable organizations violate equal protection?

V. Did the trial court err in granting McMillan injunctive relief?

LAW / ANALYSIS

I. Post Trial Motions

Oconee argues that the trial court erred in denying its motion for judgment notwithstanding the verdict as to the civil conspiracy claim. We agree.

In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Strange v. South Carolina Dep't of Highways and Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). The motions should be denied where either the evidence yields more than one inference or its inference is in doubt. *Id*. The trial court can only be reversed by this Court when there is no evidence to support the ruling below. *Id*.

An action for civil conspiracy is an action at law, and the trial court's findings will be upheld on appeal unless they are without evidentiary support. *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 556, 514 S.E.2d 592, 592-93 (1999). A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *Lawson v. S.C. Dept. of Corrections*, 340 S.C. 346, 352, 532 S.E.2d 289, 261 (2000). Civil conspiracy involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 349, 565 S.E.2d 309, 314 (Ct. App. 2002). However, a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities. *Perk v. Vector Resources Group, LTD*, 485 S.E.2d 140, 144 (Va. 1997).

While this Court has not addressed the issue directly, this Court has held that agents for a corporation acting in the scope of their duties cannot conspire with the corporation absent the guilty knowledge of a third party. *Goble v. Am. Ry. Express Co., et. al.*, 124 S.C. 19, __, 115 S.E. 900, __ (1923). In support of our Court's prior opinion, we believe that it is well settled that a corporation cannot conspire with itself. *See* 16 Am. Jur. 2d

Conspiracy §56 (2005) (stating that a corporation cannot be a party to a conspiracy consisting of the corporation and the persons engaged in the management, direction, and control of the corporate affairs, where the individuals are acting only for the corporation and not for any personal purpose of their own).

In the present case, the jury returned a verdict against Oconee for civil conspiracy. McMillan then made a motion to conform the pleadings to the evidence to allege an Oconee only conspiracy. As a result, McMillan has failed to allege or prove a conspiracy. A civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, conspiring with the corporation. As a result, we hold that no conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment.

Therefore, we reverse the denial of the motion for judgment notwithstanding the verdict.

II. Reduction of the Judgment

McMillan argues that the trial court erred in reducing the judgment. Because we find that no conspiracy took place and a judgment against Oconee was improper, we do not address the issue of whether the judgment was properly reduced.

III. Applicability of Charitable Immunity Provisions

McMillan argues that the charitable immunity provisions are inapplicable to a claim for civil conspiracy, and as a result, damages may not be capped. Because we hold that no civil conspiracy took place, the issue of the applicability of the charitable immunity statute is moot.

IV. Constitutionality of Charitable Immunity Provisions

McMillan argues that the statutory caps for judgments against charitable organizations violate the equal protection clause of the

Constitution. As a result of our holding that no civil conspiracy existed, we do not address this issue.

V. Injunctive relief

Oconee argues that the trial court erred in granting McMillan injunctive relief. We agree. Because McMillan failed to prove a civil conspiracy, the trial judge erred in granting injunctive relief.

CONCLUSION

Based on the above reasoning, we reverse the trial court. McMillan did not properly allege an action for civil conspiracy. As a result, the trial court erred in denying Oconee's motion for judgment notwithstanding the verdict.

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

The Supreme Court of South Carolina

In the Matter of John J. Dodds, Petitioner.

ORDER

Petitioner was suspended on October 24, 2005, for a period of ninety (90) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Gayle B. Watts
Deputy Clerk for Bar Admissions and
Disciplinary Matters

Columbia, South Carolina

January 23, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Civil Action No.: 2001-CP-32-0711 Carolina Water Service, Inc., Appellant,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Civil Action No.: 2001-CP-32-0819 Town of Lexington, Appellant,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Civil Action No.: 2001-CP-32-1527 Carolina Water Service, Inc., Appellant,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Civil Action No.: 2001-CP-32-1534 Town of Lexington, Appellant,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Civil Action No.: 2002-CP-32-0036 Town of Lexington, Appellant,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Civil Action No.: 2002-CP-32-0078 Lexington County Joint Municipal Water and Sewer Commission, Condemnor, Respondent,

v.

Carolina Water Service, Inc., Utilities, Inc., Landowners, Appellants,

Town of Lexington, Other Condemnee, Appellants.

Unknown Claimants Civil Action No.: 2002-CP-32-0083 Carolina Water Service, Inc., Appellant,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 4047
Heard September 13, 2005 – Filed November 21, 2005
Withdrawn, Substituted and Refiled January 20, 2006

AFFIRMED

Clifford O. Koon, Jr., K. Chad Burgess, Paige J. Gossett, John M.S. Hoefer, all of Columbia and Timothy E. Madden, of Greenville, for Appellants.

Joel W. Collins, Jr. and William A. Bryan, Jr. both of Columbia and Nikki G. Setzler, of West Columbia, for Respondents.

PER CURIAM: This case arises out of a condemnation action initiated by Lexington County Joint Municipal Water and Sewer Commission (Joint Commission) to acquire certain facilities owned by Carolina Water Service (Carolina Water) and Utilities, Inc. (Utilities). In response, Carolina Water, Utilities and the Town of Lexington (Town) filed actions challenging the Joint Commission's right to condemn these systems (Challenge Actions). Carolina Water then sought to stay the condemnation proceeding pursuant to section 28-2-470 of the South Carolina Code (1991). The circuit court issued an order staying both the condemnation proceeding and the Challenge Actions until the resolution of a related case then pending before the South

Carolina Administrative Law Court.[1] At issue in this appeal is the authority of the circuit court to lift that portion of the stay relating to the Challenge Actions. We affirm.

FACTS

This case relates to an ongoing dispute concerning water service in Lexington County. Carolina Water is a private wastewater utility company that owns and operates several wastewater treatment facilities, including the I-20 facility and the Watergate facility, which are the subjects of this litigation. Carolina Water is a voting member on the Central Midlands Council of Governments (Council), which is a regional council of county and municipal governments with various planning responsibilities for the Central Midlands region. The Town is also a voting member on the Council.

Section 208 of the federal Clean Water Act provides a framework for states, through local and regional governmental authorities; to create and implement area-wide waste treatment management plans to control water pollution. Pursuant to federal law, the Governor has designated the Council as the area-wide waste treatment-planning agency for the Central Midlands region. Under state law, the South Carolina Department of Health and Environmental Control (DHEC) has been designated the state agency authorized to implement South Carolina's Continuing Planning Process, which must be submitted to the Environmental Protection Agency (EPA) under the Clean Water Act. The Council is responsible for creating and updating a Section 208 Plan for the Central Midlands region. DHEC is responsible for certifying the Section 208 Plan with the EPA.

In 1993, the Section 208 Plan for the Central Midlands region was amended to require the closure of Carolina Water's I-20 and Watergate facilities. A 1997 amendment called for the removal of all domestic

[1] By Act No. 202, effective April 26, 2004, the name of the South Carolina Administrative Law Judge Division was changed to the South Carolina Administrative Law Court.

wastewater discharges into the lower Saluda River and also provided that the I-20 and Watergate facilities be replaced by connection to the Town's regional sewer system.

A dispute erupted between Carolina Water and the Town concerning the financial terms under which Carolina Water would connect the I-20 and Watergate facilities to the Town's regional sewer line. In 2000, Carolina Water and the Town entered into a compromise agreement which would allow the I-20 plant to continue discharging wastewater into the Saluda River on a permanent basis after expanding the plant to handle 990,000 gallons per day. This agreement was submitted to the Council, which adopted the proposed amendment to the Section 208 Plan and transmitted it to DHEC for certification.

DHEC rejected the proposed amendment. Among the reasons for the rejection was the amendment's inconsistency with the existing 208 Plan's focus on providing more cost-effective water service by consolidating small, public or private domestic wastewater facilities into larger public, regional facilities. Additionally, the proposed amendment authorized continued discharges into the lower Saluda River, which has been designated as a unique natural resource qualifying for special protections under the South Carolina Scenic Rivers Act, S.C. Code Ann. § 49-29-230(3) (Supp. 2004). Finally, the proposed amendment did not consider alternative proposals that would allow for implementation of the aims of the existing 208 Plan. One such proposal cited was an effort by the Lexington County Joint Municipal Water and Sewer Commission (Joint Commission) to acquire the I-20 facility through its eminent domain power and then to connect it to the Town's regional sewer line.

An appeal was filed with the Administrative Law Court challenging DHEC's authority to nonconcur in the amendment to the Section 208 Plan. On March 6, 2001, however, before the Council adopted the amendment to the Section 208 Plan, the Joint Commission initiated the instant condemnation action to acquire the I-20 and Watergate facilities. Carolina Water, Utilities, and the Town filed the Challenge Actions and moved for

enforcement of the automatic stay pursuant to section 28-2-470 of the South Carolina Code.

On October 3, 2002, after the DHEC case had been heard before the Administrative Law Judge (ALJ), but before the ALJ issued an opinion, the circuit court issued an order staying all proceedings relating to the condemnation action pending resolution of the matter before the ALJ. The circuit court found that the matter before the ALJ, involving the validity of the Section 208 Plan, would control the future use of the wastewater treatment facility at issue in the instant case, and would therefore have a direct impact on the issue of the Joint Commission's right to condemn Carolina Water's facility.

The ALJ subsequently issued an opinion reversing DHEC's decision. The ALJ found that DHEC had no authority to refuse certification of the plan once it was adopted by the Council. DHEC was therefore ordered to certify the Section 208 amendment allowing Carolina Water's facility to remain in operation. The ALJ's decision was appealed to the Full Board of DHEC.

In the interim, the Joint Commission filed a Rule 59(e) motion requesting that the circuit court reconsider its order imposing the stay in the instant matter. In this motion, the Joint Commission argued that the stay order exceeded the bounds of the automatic stay under section 28-2-470 in that it stayed not only the condemnation action, but the Challenge Actions as well. The Joint Commission maintained that the court's action was improper because it violated the statutory priority given to eminent domain actions under section 28-2-310(C) of the South Carolina Code (1991), in that final resolution of the Section 208 Plan matter before the ALJ would have no bearing on the Joint Commission's condemnation action.

In June of 2003, a status conference was held, and during this conference, the propriety of lifting the stay was discussed. Following the status conference, the circuit court decided to dissolve the stay. On February 4, 2004, the circuit court issued an order lifting the stay and allowing the Challenge Actions to go forward. The automatic stay of the condemnation

action pursuant to section 28-2-470 remained intact, however. The circuit court also issued a scheduling order on the same date.

Carolina Water filed a motion to alter or amend requesting the circuit court reconsider its ruling. A motion for restoration of the stay or, in the alternative, for supersedeas was also filed. While these motions were pending, the DHEC Board issued an order reversing the decision of the ALJ. The circuit court then denied Carolina Water's motions. Carolina Water, Utilities, and the Town (Appellants) have appealed from the order lifting the stay.

STANDARD OF REVIEW

The circuit court has discretion whether to grant a stay of a matter pending before the court. Talley v. John-Mansville Sales Corp., 285 S.C. 117, 119, 328 S.E.2d 621, 623 (1985); City of Spartanburg v. Belk's Dep't Store of Clinton, 199 S.C. 458, 480, 20 S.E.2d 157, 167 (1942). Accordingly, the appropriate standard of review is abuse of discretion. "An abuse of discretion arises where the [circuit] court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999).

LAW/ANALYSIS

The primary issue in this case is whether the circuit court erred in lifting the stay as to the Challenge Actions. However, the Joint Commission raises several preliminary issues relating to the appealability of the stay order. We address each in turn.

I. Appealability of the Stay Order

A. Failure to Provide a Complete Record

The Joint Commission first argues that Appellants' arguments have not been preserved for appeal because they failed to provide an adequate record. However, the Joint Commission fails to explain how the record is deficient. Conclusory arguments constitute an abandonment of the issue on appeal. See Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974). A reference to supporting authority without any discussion of their applicability is conclusory and constitutes an abandonment of the party's reliance on those cases. State v. Tyndall, 336 S.C. 8, 16, 518 S.E.2d 278, 282 (Ct. App. 1999). Therefore, this argument is deemed abandoned.

B. Appellants Lack Standing Because They Are Not Aggrieved Parties

The Joint Commission next argues that Appellants lack standing to bring the appeal because they are not aggrieved parties. We disagree.

Rule 201, SCACR, provides that only parties aggrieved by an order may appeal. "A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001).

The Joint Commission maintains that Appellants have not been aggrieved by the lifting of the stay because the circuit court lifted only that portion of the stay relating to the Challenge Actions, but left the statutory automatic stay of the condemnation action intact. This argument is without merit because it is the actions instituted by each of the Appellants that the lifting of the stay allows to go forward. In the original stay order, the circuit court found that the matter pending before the ALJ would have a direct impact on the issue of the Joint Commission's right to condemn the facility, a matter central to their cases. The resolution of this case in favor of the Joint

Commission and the resulting condemnation of the property would preclude Carolina Water from being able to repurchase the property should the DHEC case be decided in its favor. See Indigo Realty Co., Ltd. v. City of Charleston, 281 S.C. 234, 237, 314 S.E.2d 601, 603 (1984) (holding that there is no equitable right of repurchase once property has been taken through the exercise of the eminent domain power). Accordingly, we find each of the Appellants had standing to appeal as aggrieved parties under Rule 201.

C. Standing of the Town and Utilities to Appeal the Order

The Joint Commission further argues that Appellants lack standing to appeal the order lifting the stay because Appellants do not have a property interest in the subject property of the condemnation action. This argument is not appropriate for review at this juncture as the only issue before us is whether the circuit court abused its discretion by lifting the stay. Any challenge to standing can be lodged when a final order is issued.

D. Interlocutory Nature of the Order

The Joint Commission also argues the order is not appealable because it is an interlocutory order and does not involve the merits. See S.C. Code Ann. § 14-3-330 (1976 & Supp. 2004). In Hiott v. Contracting Services, 276 S.C. 632, 633, 281 S.E.2d 224, 225 (1981), the supreme court found that an order granting a stay was immediately appealable, stating "[i]n this State, a stay is appealable." By inference, an order lifting a stay is also appealable. We therefore proceed to the merits.

II. Merits of the Appeal

Appellants argue that the order lifting the stay was an abuse of discretion because it was not supported by adequate facts and was controlled by an error of law. We disagree.

Section 28-2-470 of the South Carolina Code (1991) authorizes a landowner to bring a separate action challenging a condemnor's right to condemn the subject property. That section also provides that "[a]ll

proceedings under the Condemnation Notice are automatically stayed until the disposition of the action . . . ." Id. Consequently, when the Challenge Actions were filed, the Joint Commission's condemnation proceeding was automatically stayed by operation of law. However, the circuit court went further in its stay order and also stayed the Challenge Actions pending resolution of the related DHEC case then before the ALJ.

The order lifting the stay in this case did not purport to disturb the statutory stay on the condemnation proceeding, but dissolved the stay only as to the Challenge Actions. Therefore, section 28-2-470 is not implicated, and the only question is whether the order lifting the stay prejudiced Appellants in some manner so as to constitute an abuse of discretion.

Appellants first argue the circuit court abused its discretion in lifting the stay because the only thing that happened subsequent to the order granting the stay was the reversal of the ALJ's decision by the DHEC Board. The circuit court cited two pertinent factors in reaching its decision to lift the stay: (1) the long delay in waiting for resolution of the appeals in the DHEC case; and (2) provisions in the South Carolina Eminent Domain Act which assign priority to condemnation cases.

A long delay in waiting for resolution of a related case is not a sufficient reason for refusing to grant a stay when conclusion of the proceeding before the court could act as a bar to relief in the related case. Talley v. John-Mansville Sales Corp., 285 S.C. 117, 118-19 n.2, 328 S.E.2d 621, 622-23 n.2 (1985). The Talley court stressed, however, that such a stay is proper only under the most exceptional circumstances. Id. A stay was also found appropriate before the merger of law and equity when the same parties and the same subject matter were involved in both an action at law and a suit in equity. Rush v. Thompson, 203 S.C. 106, 112, 26 S.E.2d 411, 413 (1943). The court held that the equitable action should be stayed to prevent deprivation of the right to a jury trial on the legal issues. Id. at 112, 26 S.E.2d at 414. It is therefore appropriate to consider whether resolution of the DHEC case will finally determine some aspect of Appellants' case.

Appellants argue that resolution of the DHEC case will have a direct bearing on this case, and this is what the circuit court found in the order granting the stay. However, the Joint Commission argued at the hearing, and continues to argue, that the DHEC case will have no effect on this case because it plans to condemn the property regardless of who owns it.

The General Assembly has found that "[t]he availability of water and sewer services to assist economic development and to provide for the health, safety, and welfare of its people is a very critical matter for this state." S.C. Code Ann. § 6-25-5(1) (2004). Accordingly, the Legislature has granted the Joint Commission the eminent domain power. S.C. Code Ann. §§ 5-7-50 and 6-25-100(u) (2004). Under section 5-7-50, the Joint Commission may condemn property of non-profit water corporations, if it will provide comparable water service, and if it condemns the property for that purpose.

Therefore, the Joint Commission may take property and provide just compensation, so long as it can show a public purpose for its action. Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 388, 175 S.E.2d 805, 810 (1970). A public purpose is one that satisfies the constitutional public use requirement and is reasonably necessary for fulfilling the public aim. Id. at 389, 175 S.E.2d at 810. Legislative determinations that a contemplated use is necessary, permanent, and public are presumptively valid unless sham or fraud can be shown. Id. at 396, 175 S.E.2d at 814. "Public use" is a broad, elastic term. Id. at 391, 175 S.E.2d at 812.

In the case at bar, the Joint Commission asserts there are numerous public purposes for exercising its eminent domain power, some of which have nothing to do with section 208 of the Clean Water Act. Thus, even if the DHEC case were resolved in Appellants' favor, the Joint Commission's condemnation action would not be resolved.

Furthermore, section 28-2-310(C) of the South Carolina Code (1991) provides that an eminent domain proceeding must be given precedence over other civil cases for trial if either the condemnor or the landowner so demands. Because the Joint Commission is seeking to expedite the process,

the circuit court was within its discretion to consider the need to dissolve the stay to avoid unnecessarily delaying the condemnation action.

Appellants further contend that the stay is justifiable because of the rule announced in Indigo Realty Co., Ltd. v. City of Charleston, 281 S.C. 234, 314 S.E.2d 601 (1984). In Indigo Realty the property owner sold a building to the city after being threatened with condemnation. Id. at 235, 314 S.E.2d at 602. Six months later the city decided not to widen the street, thus negating the public purpose for which the property was sold. Id. The property owner sought an injunction ordering the City to reconvey the property. Id. at 235, 314 S.E.2d at 602. The court refused to do so, holding that creating an equitable right of repurchase would place an unnecessary cloud on the title of property taken through eminent domain. Id. at 237, 314 S.E.2d at 603.

Appellants maintain that under the Indigo Realty rule, if the condemnation action proceeds to a conclusion and the property is taken, they will be deprived of the benefit of a decision in their favor in the DHEC case because they would be unable to repurchase the property. However, because we have found that the Joint Commission's condemnation action would proceed even if the DHEC case is resolved in Appellants' favor, the Indigo Realty rule is inapplicable.

We therefore find that this case does not involve the type of "most exceptional circumstances" which would justify a stay that could delay resolution of this case for years. See Talley, 285 S.C. at 119 n.2, 328 S.E.2d 621, 623 n.2. The circuit court's reasons for its decision were sufficient to preclude a finding of abuse of discretion.[2]

[2] We further note that the lifting of the stay can be sustained as an act of discretion within the circuit court's authority to control its docket. Courts have inherent power to stay proceedings in actions pending before them as part of their power to control their own docket. 1A C.J.S. Actions § 244 (2004). The granting or refusing of a stay is discretionary and should be exercised with caution after balancing competing interests. Id.

CONCLUSION

We find the order lifting the stay is immediately appealable. On the merits, we find the circuit court did not abuse its discretion in lifting the stay and allowing the Challenge Actions to go forward. Accordingly, the order is hereby

AFFIRMED.

HEARN, C.J., STILWELL, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

IN THE MATTER OF BETSY M. CAMPBELL AND ROBERT S. CAMPBELL, JR. Mary Schuyler Campbell, Respondent,

v.

Betsy M. Campbell and Robert S. Campbell, Jr., of whom Betsy M. Campbell is Appellant.

Appeal From Cherokee County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4062
Heard November 9, 2005 – Filed December 19, 2005
Withdrawn, Substituted and Refiled January 20, 2006

AFFIRMED

James R. Thompson and William E. Winter, both of Gaffney and R. David Massey and E. Zachary Horton, both of Greenville, for Appellant

Randall S. Hiller, of Greenville, for Respondent.

HEARN, C.J.: This appeal stems from a probate court action in which Mary Schuyler Campbell (Daughter) sought to have herself appointed as conservator of Betsy M. Campbell's (Mother) assets. After appointing two doctors to examine Mother's capacity to handle her own affairs, the probate court denied Daughter's request to be appointed conservator. Daughter appealed to the circuit court, which set the order aside, finding the doctors who examined Mother were not disinterested. We affirm.

FACTS

On February 28, 2002, Daughter filed a petition seeking to be appointed conservator of Mother's assets. According to Daughter, Mother's assets exceeded sixty million dollars, and Mother needed a conservator because she "is no longer mentally capable of caring for [herself] or [her] assets due to Alzheimer disease and/or dementia and [her] assets are being given away to others who are exerting undue influence over [her]." Mother filed an answer, denying her need for a conservator and arguing that in the event she needed a conservator, William W. Brown would have priority over her daughter because he is her attorney in fact.

After filing her petition, Daughter sent a discovery request to Mother, seeking copies of all of Mother's financial transactions from 1999 to 2002, all of Mother's income tax returns from 1999 to 2002, copies of any documents evidencing the transfer of property from Mother to William W. Brown, and all documents evidencing personal property owned by Mother. In response to this request, Mother sent Daughter a copy of a deed, showing Mother had transferred a condominium to Brown for the sum of ten dollars. Other than this deed, Mother refused to comply with Daughter's discovery requests, arguing they were not only overly broad, but also irrelevant because Daughter had not made a prima facie showing of Mother's incompetence.

Because Mother had not fully complied with the discovery request, Daughter filed a motion seeking to compel production. On July 9, 2002, the probate court had a hearing on the motion. After denying Daughter's motion, the probate court directed Mother's counsel to prepare the order. Counsel

complied, and the court signed the order on August 12, 2002. That same day, the probate court also executed an order appointing Dr. Preston Edwards and Dr. John Cathcart as examiners for Mother. Mother had previously designated these very doctors as her expert witnesses.

Daughter argued the doctors were appointed without her input, and she did not learn of their appointment until she received the order, which was sent to her by Mother's counsel rather than by the court. By the time Daughter received the order, arrangements had already been made with the doctors to fly them via private jet to Mother's home in Florida. Mother paid the doctors about $2,000 each for their time and also paid for the cost of their transportation. Brown accompanied the doctors during much of their trip.

Upon learning of the doctors' appointment, Daughter filed a motion to reconsider both the probate court's order denying her motion to compel discovery and its order appointing examiners. The probate court held a hearing on the motions, and at the end of the hearing, Daughter moved that the probate judge recuse himself from the case. Both the motion to reconsider and the motion to recuse were denied.

After denying Daughter's motions, the probate court proceeded to hear the matter on its merits. At the hearing, the doctors each testified that they spent an afternoon with Mother and found her to be completely competent to handle her own financial affairs. In an affidavit he submitted to the court, Dr. Cathcart admitted to being a friend of Mother's for over sixty years, attending her husband's most recent birthday party, and having supper with Mother four months prior to examining her. According to Dr. Edwards' affidavit, he had also eaten supper with Mother four months prior to examining her and before that, she had occasionally consulted him from 1950 to 1995 if she was having medical problems.

Based on the doctors' affidavits and their testimony at the hearing, the probate court found Mother to be mentally competent and therefore capable of handling her own finances. Accordingly, the probate court found there was no need to appoint a conservator for Mother's assets.

Daughter appealed to the circuit court, arguing among other things, that: (1) the order appointing examiners resulted from improper ex parte communications, (2) the probate court erred in appointing the doctors who were not disinterested parties, (3) the probate court judge erred in not recusing himself, and (4) the probate court erred in finding Mother was mentally competent. The circuit court set aside the probate court's order, finding the probate court abused its discretion in naming Drs. Cathcart and Edwards as examiners when Mother had previously designated them as expert witnesses on her behalf. The circuit court also found the probate judge's order and the personal comments he directed at Daughter's counsel demonstrated an improper prejudice against Daughter's case, and therefore, the circuit court recused the probate judge from the case. Because the probate judge who had heard the case was the only probate judge in Cherokee County, the circuit court ordered the case be transferred to Spartanburg County Probate Court. Mother appeals.

LAW/ANALYSIS

Mother argues the circuit court erred in finding the probate court's appointment of Drs. Cathcart and Edwards was an abuse of discretion.[1] We disagree.

According to section 62-5-401 of the South Carolina Code (1987), the probate court may appoint a conservator to the estate and affairs of a person if the court determines: (1) the person is unable to manage his or her affairs due to advanced age or mental deficiency, and (2) the person has property that will be wasted unless proper management is provided. To aid the court in determining whether a person lacks the mental capacity to handle his or

[1] Mother also argues the circuit court erred in recusing the probate judge from further participation in this matter. However, Mother concedes this issue has been rendered moot because the probate judge passed away during the pendency of this appeal. Therefore, we need not address the issue. However, we note that nothing in our opinion hinders Mother from seeking to transfer venue from the Spartanburg County Probate Court back to Cherokee County.

her own affairs, section 62-5-407(b) requires the person "be examined by one or more physicians designated by the court, preferably physicians who are not connected with any institution in which the person is a patient or is detained."

Mother argues the physicians appointed by the probate court were sufficient despite the fact she had previously designated them as her experts because the probate code does not restrict examiners to "disinterested" physicians. Mother points out that the statute merely states a preference for examiners who are not connected with an institution in which the person is a patient or is detained, neither of which are present in this case as Mother is not a patient in any institution.

While the statute does not specifically address whether a physician must be "disinterested" or not, the obvious purpose of appointing examiners is to provide the probate court with a medical opinion regarding the person's mental capacity, and it is inherent that such an opinion come from a neutral physician. The statute's preference that the physician be independent from institutions in which the person is a patient evidences the Legislature's desire for neutralilty. Furthermore, in other court proceedings in which the trial court receives information from an intermediary, independence is required. See, e.g., Doe v. Ward Law Firm, 353 S.C. 509, 519, 579 S.E.2d 303, 308 (2003) (holding that it was in an adopted child's best interests to appoint an intermediary to review law firm's adoption file for information relating to child's physical and psychological problems, and requiring intermediary to be independent of any party to the suit); Wrenn v. Wrenn, 228 SC. 588, 591, 91 S.E.2d 267, 268 (1956) (modifying trial court's order dissolving partnership and remanding case for a "competent, disinterested and impartial person" to be appointed as receiver).

Here, Mother had previously designated Drs. Cathcart and Edwards as experts. Thus, it was a foregone conclusion those doctors would opine Mother was capable of handling her own financial affairs. By appointing such doctors to aid the court in determining Mother's mental capacity, the probate court merely went through the motions of following section 62-5-407. Such a charade was not what the General Assembly intended in

enacting the probate code. We therefore find the probate court erred by appointing Drs. Cathcart and Edwards as examiners. Because this error impacted the probate court's subsequent order finding Mother was not in need of a conservator, the circuit court was correct to set that order aside as well. Accordingly, the order of the circuit court is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phyllis J. Lukich, Appellant,

v.

George Peter Lukich, Respondent.

Appeal From Berkeley County
Wayne M. Creech, Family Court Judge

Opinion No. 4080
Heard November 8, 2005 – Filed January 30, 2006

AFFIRMED

Margaret D. Fabri, of Charleston, for Appellant.

Peter D. DeLuca, Jr., of Goose Creek, for Respondent.

SHORT, J.: Phyllis J. Lukich (Wife) appeals the family court's order barring her from using her decree of annulment of a prior marriage as a defense against George P. Lukich's (Husband) complaint to void their marriage as bigamous. Wife also contends the family court erred by holding

Husband "technically in contempt" but ruling Husband did not have to comply with the temporary order pending the outcome of his motion to vacate that order. We affirm.

FACTS

In March 1985, Husband and Wife participated in a marriage ceremony and lived together as a married couple for eighteen years. In 1999, the parties began to experience difficulties after Wife suffered a debilitating stroke. Thereafter, on August 21, 2002, Wife filed a complaint in Berkeley County for separate support and maintenance, alleging physical cruelty and adultery and seeking spousal support, equitable distribution, and attorneys' fees. After a temporary hearing, Judge Jack Landis issued a temporary order awarding Wife $1350 per month in alimony, $3500 in temporary attorneys' fees, and restraining both parties from encumbering or disposing of marital property.

During the course of discovery, Husband began to suspect Wife never obtained a divorce from Charles Havron, whom she married in 1973. Therefore, Husband made a discovery request that Wife produce a copy of the divorce decree from Havron. Although the South Carolina Department of Health and Environmental Control produced a marriage certificate for Wife and Havron, Wife could not produce a divorce decree for her marriage to Havron. On September 25, 2003 Husband filed a complaint in Berkeley County seeking to void his marriage to Wife on the ground of bigamy, and a hearing was set for November 6, 2003.

On October 21, 2003, Wife filed a complaint in Charleston County to have her marriage to Havron annulled. An uncontested hearing was held on October 31, 2003 before Judge Frances Segars-Andrews. At the hearing Wife produced evidence that she and Havron were married during a night of heavy drinking, had never lived together as husband and wife, and shortly after the marriage Havron moved to Illinois. Havron submitted an affidavit corroborating Wife's testimony and did not contest the annulment. Judge Segars-Andrews granted Wife an annulment from Havron, declaring the marriage void ab initio.

After Wife faxed a copy of the order of annulment to Husband, Husband made a motion to intervene in Wife's annulment proceeding. Husband argued he had standing due to the effect the annulment would have on his pending action against Wife to void their marriage on the ground of bigamy. Judge Segars-Andrews denied Husband's motion to intervene, finding he did not have standing because he was not a party to the marriage.

On November 5, 2003, Wife filed a motion to dismiss Husband's complaint to void the marriage. Wife asserted that because her marriage to Havron had been annulled, Husband could no longer prove their marriage was bigamous, and, alternatively, Husband's complaint was procedurally defective. Judge Wayne Creech granted the motion to dismiss on the ground that Husband filed his complaint under the same case number as Wife's complaint for separate support and maintenance. However, Judge Creech ruled Wife was barred from using her order of annulment from Havron as a defense to Husband's action to void their marriage as bigamous. Wife appeals the ruling.

On January 14, 2004 Wife filed a rule to show cause, alleging Husband had failed to pay temporary support and was in violation of the temporary order. Judge Creech ruled that Husband was "technically" in contempt for failure to make support payments. However, Judge Creech (hereafter "the family court") ordered Husband "should not be sanctioned or required to make payment under the Temporary Order until his Motion to vacate the alimony award is heard and determined by the Court." Wife's motion to alter or amend the order was denied. Wife appeals.[1]

LAW/ANALYSIS

I. ANNULMENT DECREE

Wife argues the family court erred by barring her from using the order of annulment from Havron as a defense to Husband's action to void their

[1] The parties made a motion to consolidate the two appeals and we granted the motion.

marriage as bigamous. Wife contends the annulment decree rendered her marriage to Havron void ab initio, which creates the legal fiction that the marriage never existed. Wife asserts that because her marriage to Havron was rendered a non-occurrence in the eyes of the law, her marriage to Husband is not bigamous even though she was, in reality, married to Havron at the time she and Husband participated in the marriage ceremony. We disagree.

Section 20-1-80 of the South Carolina Code Annotated sets forth the principle that "[a]ll marriages contracted while either of the parties has a former wife or husband living shall be void." This statute codifies the overriding public policy of this state against bigamy. Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992) (holding the public policy of not recognizing bigamous marriages overrides the public policy supporting the finality of judgments). A person who is married cannot enter into a valid marriage by participating in a marriage ceremony with a new person. Day v. Day, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable.").

Therefore, we are left to consider the question of whether an annulment which decrees a pre-existing marriage void ab initio can be used as a defense to an action to void a marriage as bigamous because the annulment relates back so as to give validity to a prior bigamous marriage. Although our courts have not specifically addressed this issue, we have generally held that because a bigamous marriage is void at its inception and not merely voidable, it cannot be ratified or confirmed and thereby made valid. Johns, 309 S.C. at 201, 420 S.E.2d at 858; see also Callen v. Callen, 365 S.C. 618, __, 620 S.E.2d 59, 62 (2005) (holding when there is an impediment to marriage, such as one party's existing marriage to a third person, no common-law marriage may been formed and the relationship is not automatically transformed into a common-law marriage once the impediment is removed); Prevatte v. Prevatte, 297 S.C. 345, 349, 377 S.E.2d 114, 117 (Ct. App. 1989) (holding a relationship illicit at its inception does not ripen into a common-law marriage once the impediment to marriage is removed and the parties must agree to

enter into a common-law marriage after the impediment is removed) (quoting Yarbrough v. Yarbrough, 280 S.C. 546, 551, 314 S.E.2d 16, 19 (Ct. App. 1984)); Kirby v. Kirby, 270 S.C. 137, 140 , 241 S.E.2d 415, 416 (1978) (same).

Wife argues Joye v. Von, 355 S.C. 452, 586 S.E.2d 131 (2003), supports her position in the case at bar. In Joye, the parties divorced and Husband was ordered to pay Wife periodic alimony. Id. at 454, 586 S.E.2d at 132. Thereafter, Wife entered into a new marriage with Vance, so Husband stopped making alimony payments to Wife. Id. However, two months into the marriage, Wife discovered that Vance had never divorced his former spouse, so she had the marriage annulled. Id. Wife then brought a contempt action against Husband for failure to make alimony payments, arguing that because her subsequent marriage was void ab initio, Husband's obligation to make alimony payments never terminated. Id. The supreme court considered the novel issue of whether an annulment of a remarriage reinstates a previous spouse's periodic alimony obligation. Id. at 454, 586 S.E.2d at 133.

After discussing several approaches taken by other jurisdictions, our supreme court held the family court should apply the principles of equity and utilize a case by case approach to determine whether the payor spouse's periodic alimony obligation is revived after the payee spouse's subsequent marriage is annulled. Id. at 456, 586 S.E.2d at 134. The court also held that regardless of whether the family court determined to reinstate periodic alimony or not, Husband had no obligation to pay retroactive alimony to Wife for the time period that Wife was married to her bigamous Husband. Id. at 457, 586 S.E.2d at 134.

The Joye case, though not directly applicable to the facts in the instant case, leaves open the possibility that an annulment may operate to revive a previous spouse's alimony obligation. However, the supreme court did not hold the annulment created the presumption that the Husband's alimony obligation never terminated. Id. at 456, 586 S.E.2d at 134. Instead, the supreme court explicitly stated that Husband had no obligation to pay alimony for the time period Wife thought she was married to Vance, even

though the marriage was void ab initio. Id. at 457, 585 S.E.2d at 134. Therefore, Joye does not support Wife's position and is not controlling.

As this case involves a novel issue of law in South Carolina, "we look to other jurisdictions for edification, enlightenment, and guidance." State v. Mitchell, 362 S.C. 289, 299-300, 608 S.E.2d 140, 145 (Ct. App. 2005). In Scarboro v. Morgan, 233 N.C. 449, 64 S.E.2d 422 (N.C. 1951), the North Carolina Supreme Court addressed the issue in a factually similar case. In Scarboro, Wife entered into a marriage with Husband while the Wife was lawfully married to another man. 233 N.C. at 451, 64 S.E.2d at 423. After Husband died, his heirs brought suit to declare his marriage to Wife void as bigamous. Id. at 450, 64 S.E.2d at 422. Wife argued her motion for nonsuit should have been granted for failure to make out a case of bigamous marriage against her. Id. at 451, 64 S.E.2d at 423. She asserted the trial court erred in refusing to permit her to offer into evidence an annulment decree that declared her previous marriage void ab initio. Id. at 451-52, 64 S.E.2d at 423. As in the case at bar, the judgment granting Wife an annulment from her previous marriage was rendered after the suit to have her marriage to Husband declared void was instituted. Id. at 452, 64 S.E.2d at 423. The North Carolina Supreme Court held that the underlying annulment decree was invalid because it was in conflict with a controlling statute. Id. at 452, 64 S.E.2d at 423-24. However, the court also stated: "But should we concede, arguendo, that the judgment is valid, it would be effective only from the date of rendition and would not affect the instant case so as to give retroactive validity to a prior bigamous marriage." Scarboro, 233 N.C. at 452, 64 S.E.2d at 424.

Additionally, the general rule applicable in situations as before us is stated in 52 Am.Jur. 2d Marriage §57:

> [A]part from statute, bigamous marriage does not acquire validity when the prior subsisting marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting marriage is annulled after the second marriage is contracted, even though the

> purpose of an annulment proceeding is to declare that no valid marriage ever took place between the parties or that no valid marriage relation ever existed between the parties. Even where the annulment decree expressly declares the first marriage null and void ab initio, it does not relate back so as to validate the second marriage. In order for the subsequent marriage to be valid, it has been held that there must be a new ceremony following the termination of the earlier marriage.

Based on our strong public policy against recognizing bigamous marriages and our reading of relevant authority, we find an annulment that declares a pre-existing marriage void ab initio does not relate back so as to give validity to a marriage that was bigamous before the annulment was granted.[2] Here, Wife had a living spouse at the time she contracted for marriage with Husband. Because Wife's annulment was not granted until after she contracted for marriage with Husband, the annulment does not validate her marriage with Husband. Therefore, we hold the trial court did not abuse its discretion in barring Wife from using her annulment decree as a defense to Husband's bigamy action.

Additionally, Wife's argument that she had a good-faith belief she was not married to Havron does not change the rule that the bigamous marriage was void. Even if Wife was acting under a good-faith belief, South Carolina will not recognize her bigamous second marriage because to do so would

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[2] We note that our holding is limited to the facts of the case at bar, e.g. the situation where the annulled marriage would be valid but for an annulment decree declaring the marriage ab initio. Our holding is not meant to affect a party who enters into one of the three types of marriages that never have legal validity in South Carolina, namely marriages that are void ab initio by operation of statute: (1) bigamous marriages, S.C. Code Ann. §20-1-80 (Supp. 2004); (2) same sex marriages, S.C. Code Ann. § 20-1-15 (Supp. 2004); and (3) marriages of minors under the age of 16, S.C. Code Ann. § 20-1-100 (Supp. 2004).

violate public policy. See Johns, 309 S.C. at 202-03, 420 S.E.2d at 858-59 (citations omitted).

Wife contends the family court should have considered additional information in her motion to alter or amend because to do so would have shed light on the circumstances surrounding her marriage to Havron. Wife also argues the family court, without explicitly stating so, barred her from using her annulment decree as a defense to Husband's action to void the marriage because she did not notify Husband she was not divorced from Havron and she did not notify Husband of the annulment hearing. However, it is undisputed Wife had not divorced or obtained an annulment from Havron at the time she contracted for marriage with Husband. Having held Wife may not use her annulment decree as a defense to Husband's bigamy action on the basis that an annulment that declares a pre-existing marriage void ab initio does not relate back so as to give validity to a marriage that was bigamous at the time the annulment was granted, we need not address these issues. Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal."); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000).

II. CONTEMPT

Wife argues that although the family court ruled Husband was "technically in contempt for failure to make support payments as ordered," the ruling was tantamount to finding Husband was not in contempt because the court ordered Husband was not required to comply with the temporary order pending the outcome of his motion to vacate that order. We disagree.

A decision on contempt rests within the sound discretion of the trial court. Tirado v. Tirado, 339 S.C. 649, 654, 530 S.E.2d 128, 131 (Ct. App. 2000). "On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion." Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 840 (1988). Our review of the order reveals the family court found Husband in contempt. The court declined to impose sanctions against Husband because the validity of

his alimony obligation was in question and Husband had a pending motion to vacate the alimony award. Because there is no requirement that sanctions be imposed upon the finding of contempt, we find no abuse of discretion in the family court's ruling. Sutton v. Sutton, 291 S.C. 401, 409, 353 S.E.2d 884, 888-89 (Ct. App. 1987) ("Although the Family Court is empowered to find and punish for contempt, there is no requirement that sanctions be imposed upon a finding of contempt.").

The family court ordered Husband "should not be . . . required to make payment under the Temporary Order until his Motion to Vacate the alimony award is heard and determined by the Court." The court also ruled that alimony would continue to accrue in the meantime and retained personal jurisdiction to determine whether the temporary order should be vacated. Wife also contends the family court was without authority to stay enforcement of the temporary order sua sponte. We disagree.

Wife contends the court had no authority to stay the enforcement of the temporary order because the only issue before the court was whether Husband was in contempt. However, Wife essentially raised the issue in bringing the rule to show cause. Wife claimed Husband was in contempt for failing to make alimony payments in violation of the temporary order. Husband defended, asserting he had filed a motion to vacate the award approximately four months earlier, but the matter had not been set for hearing. Based on these facts, the issue of whether the temporary order should be enforced pending the outcome of Husband's motion to vacate the alimony award was incidental to the court's determination of contempt. See Taylor v. Taylor, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) (holding the issue of child support arrearages was necessarily raised by a rule to show cause; therefore, the family court had authority to find father had purged himself of arrearages in the contempt proceeding). Therefore, we find the family court did not err in staying the enforcement of the temporary order.

AFFIRMED.

GOOLSBY J., concurs.

ANDERSON, J., dissents in a separate opinion.

ANDERSON, J. (dissenting): I disagree with the reasoning and analysis of my fellow judges in the case sub judice. I VOTE to reverse and remand for a new trial.

After perturbation and disquietude resulting from my analysis of the evidentiary record, I have come to the ineluctable conclusion to dissent. My concernment is nexed to the lack of viability given to the annulment declaring the marriage "void ab initio" by the majority.

The annulment ruling the marriage "void ab initio" was an arbitrament by a family court judge. The family court had subject matter jurisdiction at the time of the issuance of the annulment.

The majority has misconstrued and misapplied the efficacy of the annulment order of the family court. The Latin phrase "ab initio" has definite and certain meaning. "Ab initio" in Latin means "from the beginning." An agreement is said to be "void ab initio" if it has at no time had any legal validity.

The majority opinion fails to recognize that the family court judge had the authority and power to issue the annulment and to order the marriage "void ab initio."

I **VOTE** to **REVERSE**.