The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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N O T I C E

IN THE MATTER OF WARREN STEPHEN CURTIS, PETITIONER

Warren Stephen Curtis, who was definitely suspended from the practice of law for a period of two years, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, April 16, 2004, beginning at 11:00 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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

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

Columbia, South Carolina
March 12, 2004

The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF FRANCIS A. HUMPHRIES, JR., PETITIONER

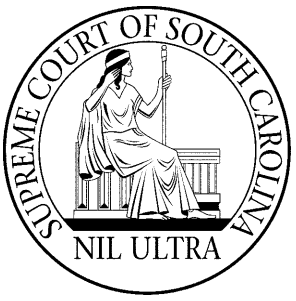
Francis A. Humphries, Jr., who was definitely suspended from the practice of law for a period of one year, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, April 16, 2004, beginning at 10:00 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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

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

Columbia, South Carolina
March 12, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

March 15, 2004

ADVANCE SHEET NO. 10

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John T. Black, Jr., and Jeanne Jones, as Personal Representatives of the Estate of Dorothy Carter, and also as Trustees of the Trust of Melissa Lynne Carter and Cynthia Anne Carter, Sylvia Carter, Otis Calvin Carter, III, Suzanne Carter Riley, Lacy Rebecca Rhode, and John Duncan Carter, Plaintiffs,

v.

Jagdish M. Patel and Usha M. Patel, Petitioners,

v.

Dr. Abraham Karrottukunnel, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Roger M. Young, Master-In-Equity

Opinion No. 25790
Heard January 8, 2004 - Filed March 8, 2004

AFFIRMED AS MODIFIED

G. Dana Sinkler, of Warren & Sinkler, L.L.P., of Charleston, and Stephen A. Spitz, of Columbia, for Petitioners.

Michael S. Church, of Turner, Padget, Graham & Laney, P.A., of Columbia, for Respondent.

JUSTICE WALLER: We granted the petition for a writ of certiorari to review the Court of Appeals' decision in Black v. Patel, 352 S.C. 76, 562 S.E.2d 295 (Ct. App. 2002). We affirm as modified.

FACTS

By general warranty deed dated January 1, 1988, respondent Dr. Abraham Karrottukunnel conveyed to petitioners Jagdish and Usha Patel a tract of land for the sum of $460,000. The general warranty deed contains the following standard language:

> And the Grantor does hereby bind himself and his Heirs, Executors and Administrators, **to warrant and forever defend** all and singular the said premises unto the said Grantee and the Grantee's Heirs and Assigns, against the Grantor and the Grantor's Heirs and against every person whomsoever **lawfully** claiming, or to claim, the same or any part thereof.

(Emphasis added.)

In 1989, petitioners added a one-story motel building to the property. Plaintiffs, the heirs of a neighboring landowner, brought the instant action for trespass and nuisance against petitioners in 1997, asserting that the one-story building encroached on their land. Plaintiffs sought to demolish the

encroaching portion of the building and recover from petitioners a proportion of the rents and profits generated by the motel.

Petitioners informed respondent about the lawsuit and, pursuant to the terms of the general warranty deed, requested he provide a defense; no response was made to their letter. Consequently, petitioners answered plaintiffs' complaint and brought a third-party complaint against respondent wherein petitioners sought an order that respondent defend the action brought by plaintiffs. Petitioners also requested recovery of any costs, expenses **and attorneys' fees** incurred by them to defend plaintiffs' lawsuit.

The case went to trial in front of a Master-in-Equity. Although respondent never "took over" the defense of the action for petitioners, he participated at the trial as third-party defendant. Plaintiffs presented two surveyors on their behalf who relied primarily on courses and distances to establish paramount title to the disputed property; respondent presented expert testimony from his own surveyor who relied on several artificial markers to determine that the property line was as respondent had conveyed in the deed. Finding artificial markers control over a survey using courses and distances, the Master decided that petitioners successfully defended their title to the land.

In a separate order, the Master granted petitioners' request for costs against respondent, but denied attorneys' fees, citing Jeter v. Glenn, 43 S.C.L. (9 Rich.) 374 (1856). Petitioners appealed, and the Court of Appeals affirmed. Black v. Patel, supra. The Court of Appeals agreed with the Master that this Court's 1856 decision in Jeter v. Glenn prevented it from awarding attorneys' fees to petitioners. Petitioners now appeal to this Court.[1]

ISSUE

Did the Court of Appeals err in affirming the denial of attorneys' fees?

[1] The amount of attorneys' fees at issue is $24,119.02.

DISCUSSION

Petitioners argue it was error to deny their request for attorneys' fees. Specifically, they contend that Jeter v. Glenn is distinguishable from the instant case because the issue here is a breach of the duty to defend, whereas in Jeter, the issue involved the breach of the warranty of freedom from encumbrances. In addition, petitioners argue that Jeter should be reconsidered and overruled because the warranty to defend is hollow without the availability of the remedy of attorneys' fees.

In Jeter, the defendant (Glenn) had conveyed property by a general warranty deed to Ferdinand Scaife, who in turn later conveyed the land to the plaintiff (Jeter). The widow of an adjoining landowner **successfully** brought suit against Jeter and recovered her dower plus costs.[2] Jeter then sued Glenn for breach of warranty. The jury found in Jeter's favor and awarded him the amount of the dower, but not any costs.

Both parties appealed. The Jeter Court made several observations regarding the general warranty deed. For example, the Court stated that there are five covenants in the general warranty deed, to wit: (1) the vendor is seised in fee (i.e., the covenant of seisin); (2) the vendor has the right to convey; (3) the vendee, his heirs and assigns, shall quietly enjoy; (4) the property is free from all encumbrances; and (5) the covenant for further assurances. In addition, the Court noted the following regarding the warranty to defend:

> But taking our general warranty according to its words, without any reference to the usual covenants for title, and interpreting the word warrant according to its modern sense, we see that a covenant "to warrant and forever defend all and singular the

[2] The facts of Jeter indicate that the widow "vouched" Glenn "to defend the suit," but it is not clear whether he participated in any way in the widow's lawsuit. As the Court of Appeals noted, "vouching in" is a common law procedural device which has now been replaced by third-party practice. See Black v. Patel, 352 S.C. at 79 n.2, 572 S.E.2d at 297 n.2.

> premises against all persons lawfully to claim the same or any part thereof," binds the covenantor to defend every portion of the land conveyed, against all suits of which due notice shall be given to him, and in case of the lawful eviction of the vendee or his assigns, to pay the legal damages occasioned thereby.

Jeter, 9 Rich. at 379.

Finding that Jeter's right to quietly enjoy his land and to be free from encumbrances had been breached, the Jeter Court affirmed the decision in favor of Jeter. As to Jeter's claims for costs and attorneys' fees, the Court agreed he was entitled to costs, but **not** to attorneys' fees, stating there was "no authority for including counsel fees in the damages recoverable upon contracts." Id. at 380-81.

As to petitioners' argument that Jeter is distinguishable from their case because this is one based upon the general warranty to defend, the Court of Appeals refused to "read Jeter so narrowly." Black v. Patel, 352 S.C. at 79, 572 S.E.2d at 297. The Court of Appeals found Jeter was not distinguishable on this basis, and we agree.

Petitioners also argue that the law set out in Jeter is antiquated and inequitable and therefore should be overruled. On the contrary, however, the analysis apparently used by the Jeter Court appears to reflect the general rule today: attorneys' fees are not recoverable unless authorized by contract or statute. E.g., Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). In the instant case, the "contract" at issue is the general warranty deed, and thus we must determine whether, under the language of the deed, attorneys' fees are authorized.[3]

The general rule for cases in this context is that only "lawful" – that is, successful – claims asserted against title justify an award of attorneys' fees where the covenantor has failed to defend. See Outcalt v. Wardlaw, 750

[3] We note the language in the general warranty deed is based upon state statute. See S.C. Code Ann. § 27-7-10 (1991).

N.E.2d 859, 863 (Ind. Ct. App. 2001) ("Because the covenant of warranty does not protect against every adverse claim, 'the covenantee is not entitled to demand of his covenantor expenses incurred in the defense of a suit which sustains the conveyed title as valid.'") (citation omitted); 20 Am.Jur.2d *Covenants* §§ 139, 140 (1995) (reasonable attorneys' fees are recoverable in an **unsuccessful** attempt to defend the title to the premises); 21 C.J.S. *Covenants* § 22 (1990) ("A covenant of warranty in a deed has been defined as … an obligation to defend and protect the covenantee against any **rightful** claims and demands.") (footnotes omitted, emphasis added); see also id. at § 60(b). The covenantor must, of course, have been notified of the action and have failed to defend. See Outcalt, 750 N.E.2d at 863; 20 Am.Jur.2d *Covenants* § 140; see also 21 C.J.S. *Covenants* § 60(c) (liability of covenantor is generally dependent on giving proper notice of the litigation).[4]

We believe this rule makes logical sense. First, the covenantor has not conveyed bad title in any way, so it seems unfair to shift the burden of the costs of defense to him. Moreover, if the covenantor decides against taking over a defense of title after being notified of litigation, that is his risk to bear because if title is **unsuccessfully** defended by the covenantee, then the covenantor would be liable for breach of the general warranty deed.

Second, and more importantly, the language in the general warranty deed itself (which is based upon state statute) compels application of this rule. The general warranty deed specifically states that the duty to defend goes to defending only against those people "**lawfully** claiming" the land. The court in Outcalt held that "in the context of the covenant of warranty, a 'lawful claim' necessarily means a successful claim." Outcalt, 750 N.E.2d at 864. We agree that in this context, the language that a claim to title must be "lawful" in order to trigger the duty to defend indicates that the duty extends only to claims which are ultimately successful. Cf. Murchie v. Hinton, 848

[4] There are exceptions to this rule, for example, where it is the wrongful act of the covenantor which causes the covenantee to be in litigation with the third party, then the covenantor would be liable for costs despite the fact that the covenantee prevailed. Outcalt, 750 N.E.2d at 864; 21 C.J.S. *Covenants* § 60(a).

S.W.2d 436 (Ark. Ct. App. 1993) (where the court allowed appellant attorneys' fees after successfully defending her title since the covenant to warrant and defend **specifically** stated that "**all** claims whatever" would be defended). In other words, a covenant of warranty simply "does not protect against every **unfounded** adverse claim." 20 Am.Jur.2d *Covenants* § 139 (emphasis added).

Accordingly, we find that attorneys' fees were correctly denied to petitioners since title was **successfully** defended against plaintiffs' claims.[5]

Nonetheless, petitioners argue there is South Carolina precedent that establishes a duty to defend **any** claim of paramount title. See Greer v. McFadden, 295 S.C. 14, 366 S.E.2d 263 (Ct. App. 1988). We disagree.

In Greer v. McFadden, the Court of Appeals stated the following:

> It is admitted that Greer gave McFadden notice of the prior suit and demanded that he come in and defend. And it is the general law of the land that whenever an action is brought upon a paramount claim against any person who is entitled to the benefit of a general warranty deed, for the grantee of the general warranty deed to give proper notice to his grantor of the pendency of the suit, requiring him to come in and defend it, and thus to relieve himself from the burden of proving, in an action for the breach of the covenant, the validity of the alleged paramount claim. See 21 C.J.S. *Covenants* Section 89 (1940) and the cases therein cited. The purpose of the notice is that the grantor of a general warranty deed shall understand that a suit is pending asserting a superior title to the one he has warranted, and by which it is or may be in peril, and to inform him that it is for

[5] We note that the Jeter Court actually deviated from the general rule. As stated above, Jeter **unsuccessfully** defended title in the lawsuit with the widow. While the Court awarded costs, it did not allow Jeter to recover his attorneys' fees from Glenn. Therefore, to the extent Jeter is inconsistent with our holding in the instant case, it is hereby overruled.

> the recovery of the property he sold and that he is thereby called on to defend the title.

Greer, 295 S.C. at 19, 366 S.E.2d at 266.

While this language in Greer does seem to state there is an absolute duty to defend any claim of paramount title, we note the Court of Appeals in Greer also emphasized that the obligation to defend under the general warranty deed was against **lawful** claims. Id. Furthermore, Greer is both legally and factually distinguishable from the instant case. First, it did not deal with what was the appropriate measure of damages allowed by a breach of this duty. As we have just discussed, this damages question is controlled by whether title is successfully defended. Second, the Greer court concluded its discussion about the duty to defend by stating that the covenantor was "bound by the results" of the lawsuit between the third party and the covenantee **where the third party prevailed**. Id. at 20, 366 S.E.2d at 267. In other words, the facts of Greer involved a prior suit where paramount title had been established, which is not the instant case. Thus, Greer is unavailing to petitioners.[6]

CONCLUSION

In sum, we follow the general rule that where a covenantee successfully defends title, he is not entitled to attorneys' fees from the covenantor. Consequently, the Court of Appeals' decision affirming the denial of attorneys' fees is

[6] In any event, we note that under the somewhat unusual facts of the instant case, respondent was brought into the case as a third party defendant and actually participated in the defense of title by providing his own surveyor at trial. This testimony proved crucial to petitioners' success in defending title. Therefore, to some extent, respondent did "relieve" petitioners of "the burden" of proving their valid title. Greer, 295 S.C. at 19, 366 S.E.2d at 266. Stated differently, respondent ultimately provided a meaningful defense of the premises he had conveyed against plaintiffs' claims to paramount title.

AFFIRMED AS MODIFIED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice James R. Barber, III., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kevin Cowan and Jimmy Blanding, Petitioners,

v.

Allstate Insurance Company, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25791
Heard January 7, 2004 - Filed March 15, 2004

REVERSED

Samuel Darryl Harms, of Harms Law Firm, PA, of Greenville, for Petitioners.

Robert D. Moseley, Jr., and Paul E. Hammack, both of Leatherwood, Walker, Todd & Mann, of Greenville, for Respondent.

Alford Haselden, of Haselden, Owen & Boloyan, of Clover, and John S. Nichols, of Bluestein & Nichols, LLC, of Columbia, for Amicus Curiae S.C. Trial Lawyers Association.

C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough, of Columbia, for Amicus Curiae S.C. Defense Trial Attorney's Association.

JUSTICE PLEICONES: In 1993, the Court of Appeals held that an insured's violation of a cooperation clause in his insurance policy did not void the policy as to an innocent third party, to the extent the policy provided statutory minimum limits coverage. Shores v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993) *cert. denied* March 18, 1994. In 1997, the legislature amended many of the automobile insurance statutes, and adopted § 38-77-142, effective March 1, 1999.

We granted certiorari to consider a Court of Appeals' decision holding that § 38-77-142(B) (2002) modified the holding in Shores. Cowan v. Allstate Ins. Co., 351 S.C. 626, 571 S.E.2d 715 (Ct. App. 2002). We reverse.

FACTS

Respondent (Allstate) issued an automobile liability policy to Griffis. Griffis permitted Johnson to drive the car.[1] While Johnson was operating Griffis' car, she was involved in an accident with petitioners. Petitioners sued Johnson, who failed to answer. Johnson was subsequently held in default.

The summons and complaint in the Johnson suit were filed October 13, 1999, and served on Johnson on December 13, 1999. On October 22, 1999, petitioners' law firm notified Allstate that it represented petitioners with regard to the Johnson accident; on November 11, 1999, Allstate acknowledged receipt of the representation letter and informed petitioners' firm which adjusters were handling the file. The October letter to Allstate did not mention that a summons and complaint had been filed but not yet

[1] As a permissive user, Johnson was an 'insured' under Griffis' Allstate policy.

served. In fact, the pleadings were not served on Johnson until more than a month after Allstate's response to the letter of representation.

In April 2000, petitioners moved for a default judgment in the Johnson suit, and a default order was filed in May 2000. In June 2000, petitioners' attorney notified Johnson of the damages hearing scheduled for July 5, 2000. Following that hearing, a default judgment was filed July 11, 2000. Allstate's first notice of the Johnson suit and judgment was a letter from petitioners' attorney requesting payment of the judgment. That letter is dated August 11, 2000. Allstate refused to pay.

Petitioners then brought this declaratory judgment action seeking an order declaring that Allstate was liable for the judgment.[2] Allstate denied liability, citing § 38-77-142(B), contending that Johnson's failure to give it notice of the filing of the suit, of the default motion, and of the damages hearing relieved it of responsibility for the judgment under this statute.

Petitioners and Allstate filed cross-motions for summary judgment in the declaratory judgment action. The trial court granted Allstate's motion, finding it had no obligation to pay the Johnson judgment in light of § 38-77-142(B), which it held modified Shores v. Weaver. Petitioners appealed, and the Court of Appeals affirmed.

ISSUE

Does § 38-77-142(B) relieve an insurance company of its obligation under Shores v. Weaver to pay a judgment up to the minimum limits where its insured failed to notify the company of the suit and/or motion for judgment?

ANALYSIS

In Shores v. Weaver, the Court of Appeals held that "a liability insurance policy required by statute before one can register a motor vehicle may not be defeated or voided after a loss by the insured's failure to forward

[2] The judgment awarded petitioner Cowan $9,600, and petitioner Blanding $4,500.

to the insurer the pleadings in an action brought against the insured by a third party victim of the insured's negligence." Id. at 351, 433 S.E.2d at 915. The Court held that since South Carolina was a mandatory insurance state, public policy required that an insured's failure to cooperate not void mandatory minimum coverage for an innocent third party.

Approximately four years later, the General Assembly enacted § 38-77-142, effective March 1, 1999. This statute, entitled "Policies or contracts of bodily injury or property damage liability insurance covering liability; required provisions" includes the following sentence:

> If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.
> § 38-77-142(B).

The Court of Appeals held that while this statutory language addressed only the situation where the insurance company has actual knowledge of the suit, it clearly implied that where neither the insured nor the innocent third party gave notice to the company, a cooperation clause was enforceable against that third party. Cowan v. Allstate Ins. Co., *supra*. The Court found that in enacting this statute, the legislature balanced the rights of the innocent third party against those of the uninformed insurance company, and created an incentive for the third party to inform the insurer of the suit, and to keep it informed of the suit's status. Id.

We disagree with the Court of Appeals' interpretation of § 38-77-142(B). In plain and ordinary terms, this sentence in § 38-77-142(B) governs only the relationship between an insurer and its insured. It provides that despite an insured's failure to comply with a cooperation clause requiring him to forward pleadings, the insurer must honor all its obligations under the policy if it has actual notice of those pleadings. The sentence also provides

that if the insured fails to cooperate in other ways to the prejudice of the insurance company, those acts may relieve the company "of its obligation to the **insured**." (emphasis supplied).

Our construction of the sentence involves only the two entities named in it: the insured and the insurer. The trial court and the Court of Appeals exceeded the bounds of statutory construction when they inverted the statute and interpolated the term 'third party' into it. Further, by its terms, the statute is intended to deal with an insured's "mere failure…to turn the motion or complaint over to the insurer…." By providing that actual notice is sufficient, the statute effects a "common sense" resolution where, for example, an insured notifies its insurer by phone, but neglects to forward the pleadings.

CONCLUSION

We hold that § 38-77-142(B) does not impact the holding in Shores v. Weaver, *supra*. We reverse the Court of Appeals' decision affirming the trial court order granting Allstate summary judgment on that basis. Further, we reject the suggestion made in the Court of Appeals' opinion that petitioners' attorney acted unethically. We find no suggestion of unethical conduct in this record.

REVERSED.

TOAL, C.J., WALLER and BURNETT, JJ., and Acting Justice Thomas L. Hughston, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Pratt, Petitioner,

v.

Morris Roofing, Inc., Employer, and Transportation Insurance Company, Carrier, Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Jasper County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 25792
Heard January 21, 2004 - Filed March 15, 2004

AFFIRMED AS MODIFIED

Darrell Thomas Johnson, Jr., of Hardeeville, and R. Thayer Rivers, Jr., of Ridgeland, for petitioner.

W. Hugh McAngus, of McAngus, Goudelock & Courie, LLC, of Columbia, for respondents.

ACTING CHIEF JUSTICE MOORE: We granted this writ of certiorari to determine whether the Court of Appeals erred by affirming the

workers' compensation commission's denial of benefits.[1] We affirm as modified.

FACTS

Petitioner was injured in a single car accident while driving one of respondents' (Morris Roofing) trucks to work from his home to a job site. He filed a workers' compensation claim.

At the hearing, petitioner testified he often drove one of Morris Roofing's vehicles to and from work, but sometimes he was a passenger in a Morris Roofing van. Morris Roofing subtracted thirty-five dollars from his paycheck every week for transportation, regardless of whether he was allowed to drive a company vehicle home or whether he was transported in a company vehicle.

George Morris (George), one of the owners of Morris Roofing, testified petitioner was not supposed to take the truck home the night before the accident. He testified petitioner called him the day before the accident and acknowledged that Paul Morris (Paul), the other owner of Morris Roofing, told petitioner he could not take the truck home. Petitioner told George that Paul instructed him not to take the truck home anymore because he was late almost every day. George testified he told petitioner he would not contravene Paul's orders. When petitioner was finished working, he was supposed to report to another job site and someone from that location would have driven him home with the rest of the employees. George testified petitioner never showed up at the other job site, though the workers at the site waited for him. Paul and a former Morris Roofing employee corroborated George's testimony.

The full commission affirmed the single commissioner's decision finding that, at the time of the accident, petitioner was not within the scope of

[1]Pratt v. Morris Roofing, Inc., 353 S.C. 339, 577 S.E.2d 475 (Ct. App. 2003).

his employment because he violated an order not to take the company truck. The circuit court and the Court of Appeals affirmed the full commission.

ISSUE I

Did petitioner leave the scope of his employment by violating orders not to drive a company vehicle home?

DISCUSSION

In a workers' compensation case, the full commission is the ultimate fact-finder. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). It is not the task of this Court to weigh the evidence as found by the full commission and we must affirm the findings of fact made by the commission if they are supported by substantial evidence. *Id.*; McCraw v. Mary Black Hosp., 350 S.C. 229, 565 S.E.2d 286 (2002). Substantial evidence is not a mere scintilla of evidence, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. *Id.* The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the full commission. Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994).

The controlling question in this case is whether petitioner left the scope of his employment by violating his employer's direct instructions not to drive the company vehicle home. When an employer limits the scope of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, not compensable. Wright, *supra* (citing Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)). Here, the substantial evidence establishes petitioner left the scope of his employment by violating the specific order not to drive the company vehicle home. Accordingly, the full commission did not err by finding petitioner's injuries not compensable. *See* Wright, *supra* (grocery bagger's death not compensable where bagger violated employer's prohibition against approaching or apprehending suspected shoplifters);

Black, *supra* (police chief's death not compensable where police chief violated City's express prohibition against riding a fire truck).[2]

ISSUE II

Did the Court of Appeals err by holding Morris Roofing did not provide transportation to its employees?

DISCUSSION

The full commission and the Court of Appeals found Morris Roofing did not provide transportation to petitioner because petitioner was required to pay for that transportation. These rulings are in error.

As a general rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment and, therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment. Medlin v. Upstate Plaster Service, 329 S.C. 92, 495 S.E.2d 447 (1998). However, where, in going to and returning from work, the employer provides the means of transportation, the employee is within the scope of his employment. *Id.* The question is whether the fact petitioner paid Morris Roofing $35 a week for the use of or for transportation in one of the company vehicles means that Morris Roofing was "providing the means of transportation" such that petitioner's injuries could have been compensable

[2]Petitioner argues he returned to the scope of his employment on the date of the accident because he was returning the truck, which contained the employer's tools and materials, back to his employer. However, at the relevant time, petitioner still was violating his employer's instructions not to take the truck home. His effort to return the truck does not place him back inside the scope of his employment. *See* Matter of Death of Haneline, 662 P.2d 691 (Okla. App. 1983) (death not did not arise out of or in course of employment where accident occurred while employee was trying to take company truck back to his employer after employee had used truck without authorization three days earlier).

had he not left the scope of his employment by driving the truck against his employer's specific instructions.

The decision of the Court of Appeals improperly suggests that, even if an employer charges an employee a nominal fee for transportation to and from work, that employee is not covered under workers' compensation. However, if an employer does not charge for transportation, the employee is covered.

According to Larson's Workers' Compensation Law § 15.01[2] (1999), when an employee pays out of his or her own pocket for transportation furnished in the employer's own conveyance, the employer still controls the element of risk and is liable in workers' compensation. The employer remains liable for the journey even though it charges the employee an amount for the trip sufficient to cover its cost. *See* 99 C.J.S. *Workmen's Compensation* § 441 (2000) (fact employer's charge for transportation is deducted from employee's wages definitely indicates connection of transportation with contract of employment); *see also* Thayer v. Iowa, 653 N.W.2d 595 (Iowa 2002) (allowing workers' compensation benefits where employer provided transportation and employees paid fee for that transportation); Securex, Inc. v. Couto, 627 So.2d 595 (Fla. App. 1993) (rejecting argument that transportation must be free to fall within exception to going and coming rule); Schauder v. Pfeifer, 570 N.Y.S.2d 179 (N.Y. App. Div. 1991) (allowing workers' compensation benefits where company furnished transportation and employees paid for transportation); Neyland v. Maryland Casualty Co., 28 So.2d 351 (La. App. 1946) (where employee paid employer for transportation, employee was riding as incident to employment and was entitled to benefits); Peski v. Todd & Brown, Inc., 158 F.2d 59 (7th Cir. 1946) (allowing benefits where employer furnished transportation and employee paid for transportation).

Accordingly, we hold the Court of Appeals erred by finding that an employer does not provide the means of transportation to an employee if that employer receives payment from the employee for the transportation.

AFFIRMED AS MODIFIED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice G. Thomas Cooper, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances Walsh as Personal Representative of the Estate of Jerome Walsh, Deceased, and in her individual capacity, Appellant,

v.

Joyce K. Woods, f/k/a Joyce K. Walsh, Respondent.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 3758
Heard December 11, 2003 – Filed March 15, 2004

AFFIRMED

Russell H. Putnam, Jr., of Hinesville; for Appellant

John S. Nichols, of Columbia; Kelli Lister Sullivan, of Columbia; for Respondent.

CURETON, J.: Frances Dudley Walsh (Frances), individually and in her capacity as personal representative of the estate of her deceased husband, Jerome J. Walsh (Walsh), brought this action against Walsh's former wife, Joyce K. Woods (Joyce). In her complaint, Frances seeks relief pertaining to the disposition of surviving spouse benefits made available through Walsh's retirement plan. Frances appeals from the trial court's order granting Joyce's motion for summary judgment. We affirm.

FACTS

Walsh married his first wife, Joyce, in 1957, and the two separated in 1970. Although they continued to live apart, Walsh and Joyce remained married for twenty years after their separation. In 1989, Walsh retired from E.I. du Pont de Nemours and Company (DuPont) after approximately forty years of employment. During his tenure at DuPont, Walsh participated in a DuPont sponsored pension benefits plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 et. seq. ("ERISA"). Contemporaneously with his retirement, Walsh signed a Post Retirement Company-Paid Survivor Benefits and Spouse Benefit Option designating Joyce, to whom he was still married, as the sole beneficiary of his surviving spouse benefits plan in the event he predeceased her. Walsh's monthly benefit was therefore reduced by the amount necessary to cover the cost of the survivor benefit plan.

Walsh and Joyce were divorced by order of the family court dated August 24, 1990. Incident to the divorce, Walsh and Joyce entered into an agreement which the family court approved, adopted, and incorporated into the divorce decree. The decree provided, in relevant part:

> [T]he parties shall sign whatever documents or other paperwork that is necessary to enforce this Agreement. I find that the parties have further agreed that each shall retain what . . . retirement plans, pension plans . . . etc., that he or she has in his or her possession. If the wife is required to sign any papers concerning the husband's retirement or benefit options from DuPont of Westinghouse, then she shall sign those.

It is undisputed Walsh never presented Joyce with any documents to sign regarding his retirement benefits, and that neither party attempted to obtain a Qualified Domestic Relations Order (QDRO) reassigning the surviving spouse benefits during Walsh's lifetime.

On May 31, 1991, Walsh advised DuPont he was divorced from Joyce and desired to change the beneficiary of his pension plan to his wife Frances and requested the paperwork for this purpose[1]. In 1994, Walsh married Frances, with whom he had been involved since 1980. On November 30, 1994, Walsh wrote to DuPont again advising the company that he was married to Frances and wished to designate her as beneficiary under his retirement plan, and that the company should send him any documentation necessary to effectuate the change in beneficiary. Despite the May 31, 1991 letter and other subsequent communications with DuPont wherein Walsh referred to Frances as his designated beneficiary, the change Walsh requested was never made legally effective.

Walsh died testate on January 27, 1996. Pursuant to the terms of his will, Frances became the sole beneficiary and the Personal Representative of his estate.

In 1997, Frances instituted an action against DuPont, which was removed to federal court; seeking a judicial finding that Walsh's surviving spouse benefits (SSB) should be paid to her and not Joyce. DuPont moved for and was granted summary judgment based on the fact that no QDRO existed terminating Joyce's right to receive the benefits at the time of Walsh's retirement.

Thereafter, Frances contacted John W. Harte, the attorney who represented Walsh in his divorce from Joyce, and requested that he prepare and submit a QDRO to DuPont. Harte prepared the QDRO, then contacted Vickie Johnson, the attorney who represented Joyce in the divorce action, and requested that she obtain Joyce's signature on the document. Joyce did not

[1] Apparently, Walsh thought he had a common law marriage with Frances.

sign the QDRO but authorized Johnson to sign it on her behalf. Joyce noted on the document, however, that she authorized her signature under protest and out of concern she would be held in contempt of court if she refused to sign.

In August of 1998, Harte submitted the QDRO to DuPont. In a letter dated September 16, 1998, DuPont advised Harte that the document was unenforceable as a QDRO inasmuch as "[a] QDRO cannot be entered after the death of the participant. A participant must be a living person. There was no QDRO in effect at the participant's death that awarded any benefits to an alternate payee. Therefore, there are no benefits payable pursuant to a QDRO." In addition, the letter from DuPont advised that even if the document had been prepared at some point prior to Walsh's death, it would nonetheless be ineffective to divest Joyce of her surviving spouse benefits inasmuch as ERISA requires that married participants be offered qualified joint and survivor annuities and their spouses must be offered the option to accept or waive the benefit. Once this election is made, it is irrevocable.

Frances filed the instant action against Joyce on December 18, 2000, seeking recovery under seven theories of relief: 1) unjust enrichment; 2) "law of the case"; 3) res judicata; 4) collateral estoppel; 5) breach of contract; 6) bad faith breach of contract; and 7) conversion. Joyce answered, denying Frances was entitled to the relief sought in her complaint, and asserted as defenses: 1) expiration of the statute of limitations; 2) failure to state a claim upon which relief can be granted; 3) laches; and 4) res judicata.

The parties filed cross motions for summary judgment. Joyce argued, inter alia, that all of Frances's causes of actions failed because the surviving spouse benefits vested in Joyce in 1989, at the time of Walsh's retirement, and she could not now be divested of her right to the benefits. Joyce further asserted the applicable statute of limitations bars the claims. In support of her cross motion, Frances asserted generally that no genuine issues of material fact existed and specifically that Joyce had waived her rights to the benefits in the divorce decree. In addition, Frances asserted that the court could enforce the property settlement agreement by requiring Joyce to disgorge herself of all surviving spouse benefit payments she had received in

the past and will receive in the future by transferring the payments to Frances.

By order dated January 28, 2001, the trial court granted Joyce's motion for summary judgment. Specifically, the court cited Hopkins v. AT&T, 105 F.3d 153, 157 (4th Cir. 1997), for the propositions that 1) surviving spouse benefits vest in a plan participant's current spouse on the date the participant retires, whether or not spouses are married at the time the participant dies, and 2) surviving spouse benefits may not be paid to a spouse who marries a participant after the participant's retirement. The trial court expressly determined the holding in Hopkins was determinative of the entire case and, therefore, declined to address Joyce's other grounds for summary judgment and further declined to reach Frances's cross motion for summary judgment. This appeal followed.

LAW/ANALYSIS

Joyce argues in her Petition for Rehearing that the dispositive issue on appeal is whether Frances's claims based on contract and/or conversion are barred by the applicable statute of limitations. We agree.

The statute of limitations begins to run at the time the cause of action accrues. Harvey v. S.C. Dept. of Corrections, 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000) (citing Matthews v. City of Greenwood, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991)). In analyzing a limitations defense, "[t]he fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it." Id. (quoting Matthews, 305 S.C. at 269, 407 S.E.2d at 669). Thus, a particular cause of action accrues "at the moment when the plaintiff has a legal right to sue on it." Id.

The statute of limitations for both an action upon a contract and a conversion claim is three (3) years. S.C. Code Ann. §15-3-530(1) and (5) (Supp. 2003). Additionally, under §15-3-535 an action predicated on an injury to the person or rights of another not arising on contract must be brought within three years after the person knew "or by the exercise of

reasonable diligence should have known that he had a cause of action." Thus, under the discovery rule the statute of limitations begins to run from the date the injured party either knows or should have known by the exercise of due diligence that a cause of action arises from the wrongful conduct. Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). A cause of action arises when it "should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist." Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

To determine whether the statute of limitations has run, the Court does not consider whether the particular plaintiff in the case before it knew he or she had a claim but rather "whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." Young v. S.C. Department of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

In the instant case, Frances retained counsel to enforce her rights to her husband's SSB when she learned that DuPont was paying the SSB to Joyce regardless of any waiver of her rights to the benefits or approval of that waiver by the family court. On November 20, 1997, United States District Judge Matthew Perry dismissed the claims Frances brought against DuPont. We hold that this dismissal should have put Frances on notice, and would put any person of common knowledge and experience on notice, that she individually and on behalf of Mr. Walsh's estate had a cause of action against Joyce. Because Frances did not file her complaint against Joyce until December 11, 2000, over three years after Judge Perry issued his order, Frances's claims against Joyce are barred by the statute of limitations.[2]

Accordingly, the decision of the circuit court is

[2] Having decided that the cause of action is barred by the applicable statute of limitations, we need not address the remaining issues raised on appeal.

AFFIRMED.

STILWELL and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

QZO, Inc., d/b/a Palmetto Ambulance Service,

Respondent,

v.

Darrin Moyer, Jerry Benenhaley, Alice Childers,

Of Whom Darrin Moyer is

Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3759
Heard February 11, 2004 – Filed March 15, 2004

AFFIRMED

Kevin S. Little, of Atlanta, GA; and William E. Hopkins, Jr., of Columbia, for Appellant.

Blaney A. Coskrey, III, John E. Schmidt, III, Travis Dayhuff, and Daniel J. Westbrook, all of Columbia, for Respondent.

ANDERSON, J.: Darrin Moyer ("Appellant") appeals several rulings from the Circuit Court in favor of QZO, Inc., d/b/a Palmetto Ambulance Service ("Palmetto"), including the denial of Appellant's motion to dismiss based on lack of personal jurisdiction, the granting of a temporary restraining order ("TRO"), the imposition of sanctions for violating the TRO, and the court's decision to strike Appellant's answer and declare him in default. We affirm.

FACTS/PROCEDURAL BACKGROUND

This case arises out of a dispute between former business partners. Appellant, a citizen and resident of Richmond County, Georgia, is a fifty percent owner/shareholder in Palmetto, a corporation organized under the laws of the state of Georgia. Palmetto provides ambulance services and maintains offices in Augusta, Georgia, and Columbia, South Carolina.

Keith Stille, the president of Palmetto and the other fifty percent shareholder, commenced this action by verified complaint dated February 28, 2002. The complaint alleged Stille had reason to believe Appellant intended to open a competing ambulance service in violation of the South Carolina Trade Secrets Act.[1] The complaint stated that Palmetto had reason to believe a computer belonging to the company, but in Appellant's possession, contained evidence of Appellant's wrongful acts.

The complaint requested a TRO enjoining Appellant from using any proprietary information and ordering Appellant to surrender the computer either to Palmetto or a neutral third party.

Having determined that the information in Palmetto's computer was in danger of being altered or destroyed before a hearing on the matter could be accomplished, and that irreparable harm would result if the TRO were not issued, the Circuit Court granted the TRO on the same day the original complaint was filed. The TRO ordered Appellant to immediately surrender Palmetto's computer upon receipt of the order.

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[1] See S.C. Code Ann. §§ 39-8-10 to –130 (Supp. 2003).

Although the TRO was issued on February 28, 2002, and served on the Appellant that same day, Appellant did not turn over the computer until seven days later. Upon receipt, counsel for Palmetto hired a computer expert to inspect and retrieve any pertinent information that might be located on the computer's hard drive. However, the expert's examination revealed that the hard drive was reformatted a day before the computer had been turned over to Palmetto, effectively erasing any information the computer may have contained.

On March 8, 2002, and again on March 22, 2002, Palmetto filed amended complaints adding additional grounds of liability as well as two more defendants. In a motion dated April 24, 2002, Appellant moved to dismiss the case pursuant to Rule 12(b), SCRCP. Specifically, Appellant averred the case should be dismissed based on Rule 12(b)(1) – lack of subject matter jurisdiction; 12(b)(2) – lack of personal jurisdiction; and 12(b)(8) – that another action was pending between the parties concerning the same subject matter as the current suit.

Before Appellant's motion to dismiss was heard, Palmetto moved pursuant to Rule 37, SCRCP, for sanctions to be imposed on Appellant for what Palmetto alleged was a willful violation of the TRO issued by the court on February 28, 2002. On July 9, 2002, a hearing was held concerning both motions. In an order dated July 30, 2002, the trial court denied Appellant's motion to dismiss and granted Palmetto's motion for sanctions.

Specifically, the court found Appellant willfully destroyed evidence relevant to Palmetto's case. Thereafter, while recognizing the severity of the sanction, the trial court struck Appellant's pleadings and entered a judgment of liability in favor of Palmetto.

Appellant filed a motion to reconsider and a hearing was held on September 30, 2002. In an order dated October 8, 2002, the trial court reaffirmed its earlier rulings and denied Appellant's motion to alter or amend the judgment.

ISSUES

I. Did the trial court err in denying Appellant's motion to dismiss based on lack of personal jurisdiction?

II. Did the trial court err in issuing a TRO that provided no opportunity for Appellant to be heard?

III. Did the trial court err in sanctioning Appellant for an alleged violation of the TRO?

IV. Did the trial court err in striking Appellant's answer and entering a default judgment of liability in favor of Palmetto?

LAW/ANALYSIS

I. Denial of Motion to Dismiss

Appellant argues the trial court erred in failing to grant its motion to dismiss based on lack of personal jurisdiction. We disagree.

Although a pre-trial motion to dismiss based on lack of personal jurisdiction is not usually immediately appealable, it can be considered when other appealable issues are presented to an appellate court. See Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 426 S.E.2d 777 (1993); Cox v. Woodmen of the World Ins. Co., 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001).

A two-step process is utilized to determine whether or not a South Carolina court may exercise personal jurisdiction over a non-resident defendant. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992). The trial court must first consider whether South Carolina's long-arm statute applies.[2] Should the court find the statute does apply, it must then determine whether the defendant's contacts with South

[2] S.C. Code Ann. § 36-2-803 (2003).

Carolina are such that an exercise of personal jurisdiction would comport with due process. Id.

As the trial court correctly pointed out in its order denying Appellant's motion to dismiss, Appellant's conduct clearly falls within the purview of the long-arm statute. First, when Appellant was an officer and director working for Palmetto, his office was located in Columbia, South Carolina. After leaving Palmetto, Appellant began operating a competing ambulance service under the name of Regional Ambulance Service, Inc., with its principal place of business in West Columbia, South Carolina. Because Appellant was transacting business in this state, the long-arm statute is satisfied. See S.C. Code Ann. § 36-2-803(1)(a) (2003) (stating a court may exercise jurisdiction over a person transacting business in South Carolina).

Moreover, the long-arm statute is satisfied because Palmetto averred in its complaint that the alleged wrongful conduct occurred within South Carolina. See S.C. Code Ann. § 36-2-803(1)(c) (2003) (jurisdiction exists over a person committing a tortious act in whole or in part in South Carolina).

Significantly, the nature of Appellant's current business in South Carolina would subject him to general jurisdiction as well under S.C. Code Ann. § 36-2-802 (2003). Section 802 reads as follows: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action." Id. (emphasis added).

Furthermore, Appellant's contacts with South Carolina are such that the exercise of jurisdiction would comport with due process. In order for states to exercise jurisdiction over a non-resident defendant, due process requires that the defendant have minimum contacts with the forum state "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

The due process analysis involves a two-step inquiry. First, it must be determined if the party has minimum contacts with the forum state. One way to determine whether a party has minimum contacts with a state is to

determine whether he or she "should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). Clearly, Appellant's contacts were such in South Carolina that he should reasonably anticipate "being haled into court [here]." He currently owns and operates a business in South Carolina, worked for Palmetto in South Carolina, and allegedly committed the complained of acts in South Carolina. Thus, Appellant has the requisite minimum contacts with the state to satisfy due process.

Similarly, the traditional notions of fair play and substantial justice would not be offended by exercise of jurisdiction over Appellant. To determine whether an exercise of jurisdiction would comport with this standard, a number of factors must be considered, including: (1) the duration of Appellant's activity in this state; (2) the nature and circumstances of Appellant's acts; (3) inconvenience to the parties by either the exercise or refusal to exercise jurisdiction; and (4) South Carolina's interest in exercising jurisdiction over the action. Clark v. Key, 304 S.C. 497, 405 S.E.2d 599 (1991). This standard is met as well. Appellant maintained activity in South Carolina the entire time he worked for Palmetto, and currently runs another business in this state. All the acts of which Palmetto complains occurred in South Carolina. The exercise of jurisdiction would not inconvenience the parties because Appellant currently runs a business located in this state. Finally, South Carolina has an interest in exercising personal jurisdiction over this action because the acts complained of occurred here.

Because we find Appellant's conduct falls within the purview of the long-arm statute and comports with due process, we hold that the trial court did not err in its refusal to grant Appellant's motion to dismiss.

Appellant avers that South Carolina's "door closing statute"[3] prevents a non-resident corporation from bringing an action against a non-resident citizen within South Carolina. Indubitably, the "door closing statute" does **NOT** involve subject matter jurisdiction. See Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003). Because Appellant did not raise this argument below, it is not preserved for our review. See Wilder Corp. v.

[3] See S.C. Code Ann. § 15-5-150 (1977).

Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal.").

II. TRO

Appellant makes a number of arguments concerning the TRO the court issued on Palmetto's behalf. However, these issues were not raised in the court below and they are not preserved for our review. See Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).

III. Sanctions and Default Judgment

Because issues three and four are related, we find it prudent to address them simultaneously. Appellant contends the trial court erred by granting sanctions, ordering Appellant's answer to be struck, and entering a default judgment. We disagree.

The decision of whether or not to award sanctions is generally entrusted to the discretion of the trial court. See Fields v. Regional Med. Ctr. Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003) (decision of what kind and whether to impose discovery sanctions is left to sound discretion of Circuit Court); Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) (noting that imposition of sanctions is generally entrusted to sound discretion of Circuit Court); see also Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988) (stating that contempt decision should be reversed only when without evidentiary support or upon an abuse of discretion by the trial court). An appellate court will not disturb this decision unless the trial court abused its discretion. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999); see also Karppi, 327 S.C. at 542, 489 S.E.2d at 681 (stating that trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if abuse of discretion has occurred).

The burden is on the appealing party to show the trial court abused its discretion in imposing sanctions for failing to comply with a discovery order. Halverson v. Yawn, 328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997); Karppi,

327 S.C. at 542, 489 S.E.2d at 681. An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. Kershaw County Bd. of Educ. v. United States Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990); Karppi, 327 S.C. at 542, 489 S.E.2d at 681.

When a party fails to obey an order relating to discovery, the trial court may strike that party's pleadings and enter a default judgment. Griffin, 334 S.C. at 198, 511 S.E.2d at 718 (citing Rule 37(b)(2)(c), SCRCP); see also Karppi, 327 S.C. at 542, 489 S.E.2d at 682 (explaining that Rule 37, SCRCP, expressly grants trial court power to order judgment by default for either the violation of a court order or, upon motion, for party's failure to respond to certain discovery requests). When a court orders a sanction that results in default or dismissal, "the end result is harsh medicine that should not be administered lightly." Griffin, 334 S.C. at 198, 511 S.E.2d at 718; see also Karppi, 327 S.C. at 547, 489 S.E.2d at 684 (Anderson, J., concurring) ("A sanction which results in a default or dismissal is harsh punishment which should be imposed only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party."). The sanction should be aimed at the specific misconduct of the party sanctioned and should not be used improvidently to prevent a decision on the merits. Griffin, 334 S.C. at 198, 511 S.E.2d at 719; Karppi, 327 S.C. at 543, 489 S.E.2d at 682. The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. Karppi, 327 S.C. at 543, 489 S.E.2d at 682. Finally, when a sanction "would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." Griffin, 334 S.C. at 198-99, 511 S.E.2d at 719; see also Karppi, 327 S.C. at 543, 489 S.E.2d at 682 ("Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants.").

Appellant essentially argues there is no evidence to suggest he intentionally violated the TRO. We disagree. The record contains evidence to support the trial court's findings. The trial court heard Appellant's testimony and found it lacked credibility. In fact, the trial judge commented

at the hearing that Appellant's reasons for not complying with the TRO were "a great mysterious sequence of coincidences that strain credulity." When, as here, there is conflicting evidence on an issue, it is up to the court as trier of facts to judge credibility. See Halbersberg v. Berry, 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

Additionally, it is undisputed that Appellant did not turn the computer over to Palmetto until seven days after issuance of the TRO. When the computer was eventually turned over, it became clear that the hard-drive had been formatted the day before, effectively erasing any information contained therein. We conclude there was evidence to support the trial court's finding that Appellant willfully violated the TRO.

Appellant asserts the trial court did not consider the severity of the sanction when he ordered Appellant's pleadings struck. We disagree. The trial court specifically mentioned in its order that "[a]lthough it is a severe sanction, the Court strikes [Appellant's pleadings] . . . in response to [Appellant's] intentional defiance of this Court's order of February 28, 2002 and his willful destruction of evidence."

Appellant cites Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), in support of his argument. However, Karppi is factually distinguishable from the present case. In Karppi, this Court held that the trial court's sanction of striking the answer of a defendant was unduly harsh under the circumstances, especially because of the profound effect it had on the co-defendant to the litigation. Here, the only party punished is the Appellant, the party who clearly and willfully committed the misconduct.

The sanction imposed in the case of Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999), is similar to the sanction in the case sub judice. After Griffin Grading filed suit against Tire Service, the circuit judge struck Tire Service's answer as a discovery sanction. On appeal, the Court of Appeals determined that the striking of Tire Service's answer as a discovery sanction was warranted based on Tire Service's failure to comply meaningfully with four prior orders compelling discovery, even after the imposition of the assessment of attorney

fees and after Tire Service was warned of the consequences of its failure to comply with the court's order.

The trial court in the instant case complied with the standards articulated in Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), and Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999). Concomitantly, the trial court did not abuse its discretion in awarding sanctions or ordering Appellant's answer stricken.

CONCLUSION

Accordingly, based on the foregoing, the trial court's rulings are

AFFIRMED.

HEARN, C.J., and BEATTY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brandon Heath Rogers, Appellant,

v.

State of South Carolina, Respondent.

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

Opinion No. 3760
Submitted January 29, 2004 – Filed March 15, 2004

AFFIRMED

Cheree Gillespie, of Clemson, for Appellant,

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R. J. Shupe, of Columbia; Solicitor Druanne Dykes White, of Anderson, for Respondent.

KITTREDGE, J.: Brandon Heath Rogers appeals his conviction of criminal domestic violence (CDV), arguing the circuit

court erred by (1) upholding the decision of the municipal court, which was the trial court, finding him guilty of CDV; (2) failing to hold that the municipal court erred by not granting a directed verdict to him; and (3) failing to file an order setting forth its findings of fact and conclusions of law pursuant to Rule 52(a), SCRCP. We affirm.

FACTS/PROCEDURAL HISTORY

On the morning of March 24, 2002, Brandon's wife, Rebecca Lynn Rogers, went to the Westminster Police Department to report an incident of CDV allegedly perpetrated by Brandon against her. According to Rebecca's written and signed statement, Brandon and she argued the previous night while riding in their car. Rebecca told police that while they were arguing, Brandon "was smacking me in my face and in my head." Later, when they arrived at a gas station, Rebecca stated Brandon "smashed my face there." The couple then drove to their home, where Rebecca claimed in her written statement to police that Brandon "busted my windshield," "smacked me in the head," and "punched me in the side of the stomach." According to Rebecca's statement, when the couple entered their house, Brandon made Rebecca "get into bed," "dared me out with a knife," "hit me again," and told her he would "hurt me really bad" if she contacted law enforcement. Among other things, Rebecca stated that Brandon "threaten[ed] to kill my parents and my brother."

At trial before the municipal court on May 9, 2002, Rebecca confirmed she had written and signed the statement. Brandon's attorney initially objected to having Rebecca read the statement into evidence. However, she agreed to allow Rebecca read the statement into evidence "sentence by sentence[,] and at the end of each sentence" allow Rebecca to acknowledge whether she made that portion of the statement, and make additional comments about that portion of the statement.

Rebecca proceeded to read the statement into evidence, frequently reacting to portions of the statement with claims that she did not remember the incidents cited in the report. However, when she

read a sentence that stated Brandon had "smacked" her at the gas station, she did not refute its accuracy or question her memory of the incident. Among other things, she also acknowledged that Brandon hit her "in the side" but claimed that his action was accidental. Furthermore, when asked under cross-examination whether Brandon "threatened [her] with a knife," she responded, "Yeah. I mean[,] he didn't have a knife but he told be he could get something but he didn't have one he didn't point one at me or anything."

At the trial's conclusion, the municipal court found Brandon guilty of CDV, noting that he found Rebecca's signed and written statement more credible than her testimony in court. Brandon received a time-served sentence, which amounted to twenty days in jail.

Brandon then appealed to the circuit court, only "upon the grounds of inadequate evidence to support a conviction and utilization of improper evidence." Following a hearing, the circuit court affirmed the municipal court. Brandon then filed a Rule 52, SCRCP, motion seeking a written order from the circuit court that enumerated its findings of fact and conclusions of law. The circuit court denied the motion, rejecting Brandon's efforts to invoke civil procedural rules in a criminal appeal. This appeal follows.

LAW/ANALYSIS

I. Finding of Guilt on CDV Charge

Brandon argues the municipal court erred in finding him guilty of CDV. We are constrained to disagree, for the simple reason that Brandon seeks to pursue specious arguments and to assign error to matters that were not raised in the lower courts.

Brandon was charged with CDV under S.C. Code Ann. § 16-25-20 (Supp. 2001), which provides that "[i]t is unlawful to: (1) cause physical harm or injury to a person's own household member, (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances

reasonably creating fear of imminent peril." Here, Brandon does not allege an error of law, but instead argues that evidence in the record fails to support either the municipal court's conclusion of his guilt or the circuit court's affirmance of his conviction. Brandon clearly misconstrues our standard of review, for in criminal appeals we sit to review errors of law only. See City of Landrum v. Sarratt, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct.App. 2002) ("In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception. In reviewing criminal cases, [the court of appeals] **may review errors of law only**.") (emphasis added).[1]

II. Directed Verdict

Brandon argues that the circuit court erred in failing to hold that the municipal court erred by not granting Rogers a directed verdict. However, Brandon neither made a directed verdict motion in the trial court nor raised the issue in his intermediate appeal to the circuit court. Thus, the issue is not preserved, and we cannot address it. See City of Columbia v. Ervin, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998) (an issue not raised in an intermediate appeal cannot be considered in a subsequent appeal to the court of appeals or supreme court); Graniteville Mfg. Co. v. Renew, 113 S.C. 171, 171, 102 S.E. 18, 19 (1920) (an issue not made before the circuit court on appeal from a magistrate is not properly before the appellate court.).

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[1] The standard of appellate review in circuit court from a civil judgment in magistrate court differs markedly from its criminal counterpart in magistrate or municipal court. See Parks v. Characters Night Club, 345 S.C. 484, 490, 548 S.E.2d 605, 609 (Ct. App. 2001) (construing S.C. Code Ann. § 18-7-170 and noting that in a civil appeal from magistrate's court, the circuit court may make its own findings of fact.).

III. Rule 52(a), SCRCP, Motion

Brandon argues the circuit court erred in denying his motion pursuant to Rule 52(a), SCRCP, seeking an order setting forth the circuit court's findings of fact and conclusions of law. We find this argument unavailing, because the CDV charge against Brandon was a criminal matter to which the South Carolina Rules of Civil Procedure do not apply. See Rule 1, SCRCP (stating "[t]hese rules govern the procedures in all South Carolina courts in all suits of a civil nature ….). Moreover, as noted above, the circuit court, sitting in its appellate capacity, may not engage in fact finding. We find this issue meritless.

CONCLUSION

For the forgoing reasons, the judgment of the circuit court is

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Fleet Capital Leasing –
Technology Finance, formerly
Sanwa Leasing Corporation, Respondent,

v.

Seal Jet of the Carolinas, Inc.
f/k/a American High
Performance Seals, Inc., Appellant.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 3761
Heard October 7, 2003 – Filed March 15, 2004

REVERSED AND REMANDED

Brian Dumas and Joseph M. McCulloch, Jr., both of Columbia, for Appellant.

Anthony D. Hoefer, of Sumter, for Respondent.

HOWARD, J.: Fleet Capital Leasing – Technology Finance ("Fleet") sought to enforce a Michigan default judgment against Seal Jet of the Carolinas, Inc. ("Seal Jet") pursuant to the Uniform Enforcement of Foreign Judgments Act, South Carolina Code Annotated section 15-35-900 – 960 (Supp. 2002). Seal Jet defended, asserting the default judgment was void because the Michigan court did not have personal jurisdiction over it. The circuit court found Seal Jet made a general appearance in the Michigan case, and thus, the Michigan court had personal jurisdiction. Furthermore, the circuit court entered the judgment of $18,345.97, plus interest, against Seal Jet. Seal Jet appeals, arguing the circuit court erred by holding res judicata precluded Seal Jet from raising the issue of personal jurisdiction as a defense to the South Carolina proceeding. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

Fleet brought suit in Michigan against Seal Jet, alleging it was formerly known as American High Performance Seals, Inc. ("American"), and was liable for breach of various leases signed by American. The complaint alleged the leases were subject to Michigan law.

Daniel Hughes, President of Seal Jet, was served with the summons and complaint. Hughes responded to the suit by writing a letter to the Michigan District Court denying Seal Jet was a party to the leases and asking for a jury trial.

The Michigan court viewed this letter as Seal Jet's answer to the lawsuit. Fleet moved to strike the answer, arguing a corporation can only appear through a licensed attorney. Fleet asserted the answer was therefore void and should be stricken.

The Michigan District Court granted Fleet's motion, striking Hughes' letter. Further, because this meant Seal Jet had not answered the complaint, the Michigan court entered a default judgment against Seal Jet.

Fleet then submitted its Notice of Filing of Foreign Judgment to the South Carolina circuit court to enroll the Michigan judgment in South Carolina pursuant to the Uniform Enforcement of Foreign Judgments Act. Seal Jet filed a motion for relief from the judgment. Seal Jet asserted that the Michigan court did not have personal jurisdiction over Seal Jet and that Seal Jet and American were separate entities. Seal Jet also contested the merits of the underlying suit.

The circuit court ruled Seal Jet could not contest the merits of the Michigan action because to do so would be an impermissible collateral attack in violation of the Full Faith and Credit clause of the United States Constitution. U.S. Const. art. IV, § 1. Relying upon this court's opinion in Colonial Pacific Leasing Corp. v. Taylor, 326 S.C. 529, 484 S.E.2d 595 (Ct. App. 1997), the circuit court concluded Seal Jet had made a general appearance in Michigan by means of Hughes' letters[1] and was precluded by principles of res judicata from arguing the Michigan court did not have personal jurisdiction. The court entered judgment against Seal Jet in the amount of $18,345.97 plus interest. Seal Jet appeals.

LAW/ANALYSIS

Seal Jet argues the circuit court erred by holding res judicata precluded Seal Jet from raising the issue of personal jurisdiction as a defense in the South Carolina proceeding. We agree and remand.

The Full Faith and Credit Clause of the United States Constitution requires the courts of one state give "such force and effect to a foreign judgment as the judgment would receive in its own state." Taylor, 326 S.C.

[1] Hughes wrote several letters to the Michigan District Court arguing the merits of his defense and asking for procedural guidance. All of the letters were written by Hughes as the president and presiding officer of Seal Jet. There was no intercession by an attorney on behalf of Seal Jet, and ultimately, none of Hughes' letters was recognized by the Michigan court as a basis for relief.

at 532, 484 S.E.2d at 597; see U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."). However, "[t]he Full Faith and Credit Clause does not prevent the litigation of personal jurisdiction in an action to enforce a foreign judgment" if the party did not make a general appearance in the foreign jurisdiction. Taylor, 326 S.C. at 532-33, 484 S.E.2d at 596-97 ("Only a defendant who 'remains aloof' by not making an appearance and has a default judgment entered against him may contest the issue of personal jurisdiction in a later proceeding."); see Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 92, 390 S.E.2d 370, 371 (Ct. App. 1990) ("[A] court is bound to enforce the judgment of a court in another state only if the court in the other state had jurisdiction to render the judgment."); see also Taylor, 326 S.C. at 533, 484 S.E.2d at 597 ("'A defendant who appears [in the foreign jurisdiction] to litigate the merits without properly preserving an objection to personal jurisdiction waives the right to raise the objection in the initial proceeding and is bound by the resulting judgment.'" (quoting Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 4430 (1981))).

In determining whether a party made a general appearance in the foreign jurisdiction, the laws of the state that rendered the judgment must be applied. Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping and Garden Center, Inc., 315 S.C. 88, 91, 431 S.E.2d 632, 634 (Ct. App. 1993) ("The validity and effect of a foreign judgment must be determined by the laws of the state that rendered the judgment."). Therefore, we look to Michigan law to resolve the issue of whether Hughes' letter served as a general appearance by the corporation, Seal Jet.

In Michigan, "any action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will [normally] constitute a general appearance." Penny v. ABA Pharm. Co., 511 N.W.2d 896, 897 (Mich. Ct. App. 1993); see Ragnone v. Wirsing, 367 N.W.2d 369, 370 (Mich. Ct. App. 1985) ("Two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) 'knowledge of the pending proceedings' and (2) 'an intention to appear.'" (quoting Rhodes v. Rhodes, 142 N.W.2d 508, 511 (Mich. Ct.

App. 1966))); Deeb v. Berri, 325 N.W.2d 493, 496 (Mich. Ct. App. 1982) ("This Court has held that 'appear' as it is used in default proceedings should be taken 'in its generic sense' as any act of a party acknowledging jurisdiction of a court or invoking court action on his behalf." (quoting Rhodes, 142 N.W.2d at 510)). Thus, as an initial matter, we note a letter sent to the Michigan District Court that denies liability and asks for a jury trial is one means of making a general appearance in Michigan.

Our inquiry then becomes whether, under Michigan law, a corporation makes a general appearance when its president sends such a letter to the court.

According to Michigan law, "[a] party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction." Penny, 511 N.W.2d at 897. A corporation named as a party in a Michigan lawsuit can only appear through an attorney. Detroit Bar Ass'n v. Union Guardian Trust Co., 281 N.W. 432, 433 (Mich. 1938) ("While an individual may appear in proper person, a corporation, because of the very fact of its being a corporation, can appear only by attorney, regardless of whether it is interested in its own corporate capacity or in a fiduciary capacity."); Peters Production, Inc. v. Desnick Broadcasting Co., 429 N.W.2d 654, 655 (Mich. Ct. App. 1988) ("An individual may appear in *propria persona*; a corporation, however, can appear only by attorney regardless of whether it is interested in its own corporate capacity or in a fiduciary capacity.").

After being served with a summons and complaint, Hughes responded to the suit by writing a letter to the Michigan District Court denying Seal Jet was a party to the lease and asking for a jury trial.

At the Michigan hearing, Fleet moved to strike Hughes' letter, arguing the letter did not constitute an appearance by the corporation and was void. The Michigan District Court agreed.

It stands to reason that a person who is legally incapable of representing a corporation in a court proceeding and whom the court refuses

to recognize for that purpose cannot bind the corporation by his actions. Although it may be true that Hughes intended to contest the merits of the lawsuit, it is inconsistent to state Hughes' letter must be stricken from the court record because Hughes was not authorized to speak for the corporation, and the letter must be imputed to Seal Jet for purposes of determining if the corporation made a general appearance.

Once the letter was struck as not being an action of the corporation, there was no evidence of a general appearance by the corporation in the Michigan court proceedings. In addition, there is no indication in the record that the issue of personal jurisdiction has been previously litigated by Seal Jet. Thus, the circuit court erred by concluding res judicata precluded Seal Jet from raising the issue of personal jurisdiction as a defense in this proceeding.[2]

CONCLUSION

For the foregoing reasons, the judgment of the court is **REVERSED**, and the case is **REMANDED** for further proceedings.

REVERSED and REMANDED.

STILWELL and BEATTY, JJ., concur.

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[2] Seal Jet also argues the circuit court erred by enrolling the Michigan judgment because the Michigan court did not have sufficient evidence to conclude Seal Jet was the same entity as American. This issue involves the merits of the case. Thus, we decline to rule on this issue. See Hamilton v. Patterson, 236 S.C. 487, 492, 115 S.E.2d 68, 70 (1960) ("'[T]he full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.'" (quoting Milliken v. Meyer, 311 U.S. 457, 462 (1940))).