Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E
September 2, 2003

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the commission in writing of the seat for which the prospective candidate intends to apply. Correspondence and questions must be directed to the Judicial Merit Selection Commission as follows:

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6623

The commission will not accept applications after 12:00 noon on Wednesday, October 1, 2003.

The term of the office currently held by the Honorable Jean Hoefer Toal, Chief Justice of the Supreme Court, will expire on July 31, 2004.

The term of the office currently held by the Honorable Ralph King Anderson, Jr., Judge of the Court of Appeals, Seat 9, will expire on June 30, 2004.

The term of the office currently held by the Honorable James C. Williams, Jr., Judge of the Circuit Court for the First Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Diane Schafer Goodstein, Judge of the Circuit Court for the First Judicial Circuit, Seat 2, will expire on June 30, 2004.

A vacancy will exist in the office currently held by the Honorable Rodney A. Peeples, Judge of the Circuit Court for the Second Judicial Circuit, Seat 1, upon Judge Peeples' retirement on June 30, 2004.

The term of the office currently held by the Honorable Thomas W. Cooper, Jr., Judge of the Circuit Court for the Third Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Paul M. Burch, Judge of the Circuit Court for the Fourth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Paul E. Short, Jr., Judge of the Circuit Court for the Sixth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Wyatt T. Saunders, Jr., Judge of the Circuit Court for the Eighth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Henry F. Floyd, Judge of the Circuit Court for the Thirteenth Judicial Circuit, Seat 1, will expire on June 30, 2004.

A vacancy exists in the office of Judge of the Circuit Court for the Thirteenth Judicial Circuit, Seat 4. The successor will fill the unexpired term of the Honorable John W. Kittredge, which will expire on June 30, 2004.

The term of the office currently held by the Honorable Steven H. John, Judge of the Circuit Court for the Fifteenth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable John C. Hayes, III, Judge of the Circuit Court for the Sixteenth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Lee S. Alford, Judge of the Circuit Court for the Sixteenth Judicial Circuit, Seat 2, will expire on June 30, 2004.

The term of the office currently held by the Honorable William J. Wylie, Jr., Judge of the Family Court for the First Judicial Circuit, Seat 2, will expire on June 30, 2004.

The term of the office currently held by the Honorable Nancy Chapman McLin, Judge of the Family Court for the First Judicial Circuit, Seat 3, will expire on June 30, 2004.

The term of the office currently held by the Honorable Peter R. Nuessle, Judge of the Family Court for the Second Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable George M. McFaddin, Jr., Judge of the Family Court for the Third Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Roger E. Henderson, Judge of the Family Court for the Fourth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable H. Bruce Williams, Judge of the Family Court for the Fifth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Donna S. Strom, Judge of the Family Court for the Fifth Judicial Circuit, Seat 4, will expire on June 30, 2004.

The term of the office currently held by the Honorable Wesley L. Brown, Judge of the Family Court for the Seventh Judicial Circuit, Seat 3, will expire on June 30, 2004.

The term of the office currently held by the Honorable John M. Rucker, Judge of the Family Court for the Eighth Judicial Circuit, Seat 2, will expire on June 30, 2004.

The term of the office currently held by the Honorable F.P. Segars-Andrews, Judge of the Family Court for the Ninth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Judy Cone Bridges, Judge of the Family Court for the Ninth Judicial Circuit, Seat 3, will expire on June 30, 2004.

The term of the office currently held by the Honorable Jack A. Landis, Judge of the Family Court for the Ninth Judicial Circuit, Seat 6, will expire on June 30, 2004.

The term of the office currently held by the Honorable Timothy M. Cain, Judge of the Family Court for the Tenth Judicial Circuit, Seat 2, will expire on June 30, 2004.

The term of the office currently held by the Honorable Kellum W. Allen, Judge of the Family Court for the Eleventh Judicial Circuit, Seat 1, will expire on June 30, 2004.

A vacancy will exist in the office currently held by the Honorable Wylie H. Caldwell, Jr., Judge of the Family Court for the Twelfth Judicial Circuit, Seat 3, upon Judge Caldwell's retirement on June 30, 2004.

The term of the office currently held by the Honorable Aphrodite K. Konduros, Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 3, will expire on June 30, 2004.

The term of the office currently held by the Honorable Alvin D. Johnson, Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 4, will expire on June 30, 2004.

The term of the office currently held by the Honorable Timothy L. Brown, Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 6, will expire on June 30, 2004.

The term of the office currently held by the Honorable Jane Dowling Fender, Judge of the Family Court for the Fourteenth Judicial Circuit, Seat 2, will expire on June 30, 2004.

The term of the office currently held by the Honorable Lisa A. Kinon, Judge of the Family Court for the Fifteenth Judicial Circuit, Seat 2, will expire on June 30, 2004.

The term of the office currently held by the Honorable Robert E. Guess, Judge of the Family Court for the Sixteenth Judicial Circuit, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Marvin F. Kittrell, Chief Judge of the Administrative Law Judge Division, Seat 1, will expire on June 30, 2004.

The term of the office currently held by the Honorable Walter H. Sanders, Jr., Master-in-Equity for Allendale County, will expire on December 31, 2004.

The term of the office currently held by the Honorable Ellis B. Drew, Jr., Master-in-Equity for Anderson County, will expire on June 30, 2004.

The term of the office currently held by the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County, will expire on December 24, 2004;

The term of the office currently held by the Honorable William C. Coffey, Jr., Master-in-Equity for Clarendon County, will expire on June 30, 2004;

The term of the office currently held by the Honorable Patrick R. Watts, Master-in-Equity for Dorchester County, will expire on June 30, 2004.

The term of the office currently held by the Honorable Linwood S. Evans, Jr., Master-in-Equity for Sumter County, will expire on December 31, 2004.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

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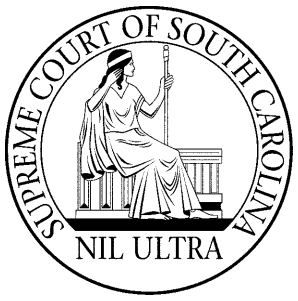

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

September 8, 2003

ADVANCE SHEET NO. 33

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

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sandra Jones, Appellant,

v.

Georgia-Pacific Corporation,
Self-Insured Employer, Respondent.

Appeal From Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25710
Heard April 23, 2003 - Filed August 25, 2003

AFFIRMED

Albert V. Smith, of Albert V. Smith, P.A., of Spartanburg, for Appellant.

Grady L. Beard, and Marcy J. Lamar, of Sowell Gray Stepp & Laffitte, L.L.C., both of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Sandra Jones ("Claimant") appeals the affirmance of the Worker's Compensation Commission's ("Commission")

finding that she was not entitled to benefits because she committed fraud in filling out her employment application.

FACTUAL/PROCEDURAL BACKGROUND

Claimant applied for a job at Georgia Pacific ("Respondent") in 1991. The application requested that Claimant respond to the following question: "Do you have any physical or mental disability which would interfere with or impair your ability to perform the job(s) for which you have applied?" Claimant checked the "No" box on the application. Claimant had to fill out a health history form as a part of her pre-employment physical exam, on which she was asked to check off whether or not she had various prior medical conditions. Claimant failed to disclose that she had had back trouble, leg pain and Bursitis on the health history form.[1] In her testimony before the Hearing Commissioner, Claimant admitted to lying on the application and health history form.

Claimant received a job offer from Respondent and began working as a General Laborer. While working for Respondent over the ensuing six years, Claimant repeatedly returned to her doctor, Dr. Poole, due to nagging back and leg pain. Then, on August 7, 1997, Claimant was picking up large pieces of cardboard and felt something "pop" in her back. She complained of the pain to her superiors, and they sent her to the Respondent's doctor, Dr. Hodge, who determined that nothing major was wrong with Claimant's back.[2] Claimant sought help from Dr. Poole and three other doctors over the next two years, had two back surgeries, and finally had to stop working in 1999.

Claimant filed a claim seeking benefits under the South Carolina Workers' Compensation Act, S.C. Code Ann. §§ 42-1-10 et seq., stemming from her August 7, 1997, back injury. Commissioner Catoe agreed with Claimant that she suffered an accidental injury on August 7, 1997, and that her continued back problems and eventual surgery resulted from the injury.

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[1] Claimant also failed to disclose that she had a back X-Ray taken.

[2] Dr. Hodge diagnosed her as having mild lumbosacral muscle strain.

The Commissioner determined that Respondent should pay all of Claimant's post August 7, 1997, medical bills and ordered that Respondent pay Claimant a weekly temporary total disability payment of $321.12.

Respondent appealed the decision, and the full Commission reversed, finding that the Claimant did not establish that her back problems were directly and causally related to the August 7, 1997, incident and that, regardless, her claim was barred by this Court's holding in *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973) because she committed fraud in filling out her application for employment.

The Circuit Court affirmed the Commission's holding, and Claimant appeals the court decision raising the following issues on appeal:

I. Did the Circuit Court correctly determine that the Commission did not err in finding that Claimant's back problems did not directly and causally relate to her accidental injury on August 7, 1997?

II. Did the Circuit Court err in affirming the Commission's finding that Claimant's claim for Worker's Compensation is barred because she committed fraud in filling out her employment application?

III. Did the Circuit Court err in finding that the Commission's decision in *Oglesby v. Manpower of Seneca*, S.C. Worker's Compensation file number 9643449/9714003 (September 25, 2000), was not controlling?

STANDARD OF REVIEW

This Court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its

action." *Howell v. Pacific Columbia Mills*, 291 S.C. 469, 354 S.E.2d 384 (1987).

LAW/ANALYSIS

I. INJURY

Claimant asserts that the Commission erred in determining that her existing back problems are not directly and causally related to her August 7, 1997, injury. We disagree.

Claimant saw many doctors after her accident on August 7, 1997, and there is conflicting testimony as to whether the doctors believed that the accident caused Claimant's subsequent back problems. Claimant saw Dr. Mitchell shortly after the accident. Dr. Mitchell prescribed physical therapy for Claimant, which seemed to suppress some of the pain. Dr. Mitchell opined that Claimant had significant back problems prior to the accident.

Dr. Poole referred the Claimant to Dr. Robert E. Flandry in March 1999. Dr. Flandry was unaware of Claimant's long history of back problems, yet he also opined that she had back problems prior to the 1997 accident. Claimant's regular doctor, Dr. Poole, testified that Claimant had a history of back problems, but also stated that Claimant had a "major problem" as of August 8, 1997.

Dr. Flandry referred Claimant to Dr. Robert Stephen Harley, who performed surgery on Claimant in June 1999. Harley testified that he believed that the August 7, 1997, incident caused Claimant's resulting back problems:

> I feel that the straw that broke the camel's back was when she lifted those heavy pieces of cardboard when she was on the job in September of 1997 as she describes. I think indeed she may have had some aches and pains in her back before but that indeed it was the last straw that broke the camel's back that caused her to have this aggravation of her problems.

While the doctors' testimony is inconsistent as to whether the August 7, 1997, injury triggered Claimant's subsequent back problems, we find there was substantial evidence presented upon which the Commission could conclude that Claimant's injuries were not directly and causally related to the August 7, 1997, accident. Our standard of review does not permit us to weigh the evidence and make our own determination. We are bound to uphold the Commission's decision unless its factual determination is not supported by substantial evidence. *Howell*, 291 S.C. 469, 354 S.E.2d 384: *see also* S.C. Code Ann. § 1-23-386(A)(6) (Supp. 2002) ("the court shall not substitute its judgment for that of the agency as to the weight of evidence on the questions of fact.")

II. FRAUD IN THE EMPLOYMENT APPLICATION

Claimant argues that the Commission erred in holding that her claim for benefits was barred since she committed fraud in filling out her employment application. We disagree.

Claimant testified that she lied when she filled out the employment application when she failed to disclose that she had prior back problems. According to this Court's decision in *Cooper*, a Claimant's claim for Worker's Compensation benefits will be barred if the following factors are proven: "(1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury." 260 S.C. at 468, 196 S.E.2d at 835 (citation omitted).

The Respondent put forth substantial evidence that satisfied the three prongs of this test. First, Claimant testified that she lied on the application and health history form when she failed to disclose her history of back and leg problems. She testified that she was afraid that she would not get the job with Respondent if she responded truthfully on the forms. Second, Respondent's Human Resource Manager, Philip Stilwell ("Stilwell"), testified that the fact that Claimant had prior physical ailments would not

have barred her from working for Respondent.[3] Rather, Respondent would have attempted to find a job for Claimant that would not subject a pre-existing physical impairment to further deterioration. Stilwell also testified that Respondent relies on the answers given by applicants on the employment application and considers them as a substantial factor in hiring the applicants. Finally, there is a causal connection between Claimant's injuries and the false representation as she had documented back problems prior to employment and claims that she injured her back while working for Respondent.

We hold that the Respondent presented substantial evidence that that the three prongs of the *Cooper* test were satisfied.

III. The *Oglesby* Decision

Claimant argues that the Commission's prior decision in *Ogelsby* is controlling. We disagree.

Ogelsby was decided the day before the Comission made its decision in this matter. In *Ogelsby*, the same panel members involved in this case determined that the *Cooper* decision had been overruled by the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq. (2000). Claimant alleges that the Commission's conclusion in the present case was arbitrary and capricious given the prior holding in *Ogelsby*, and that this Court should reverse the decision based on a provision of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(6)(f) (Supp. 2002).[4]

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[3] Next to the question on the employment application - "Do you have any physical or mental disability which would interfere with or impair your ability to perform the job(s) for which you have applied?" - was the statement: "A 'yes' answer is not an automatic bar to employment."

[4] The provision states:

> (6) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been

In our opinion, the ADA does not trump the *Cooper* determination of when fraud in the application process bars the applicant's attempt to collect Worker's Compensation benefits. The ADA permits employers to "make preemployment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 1211(d)(2)(B). The section mentioned above authorizes the Respondent's question on its employment application regarding the existence of a physical or mental impairment. Further, the ADA does not have a section that provides protection to an applicant who commits fraud in the application process.

We find that the Commission was neither arbitrary nor capricious in concluding that the three *Cooper* factors were met because there was substantial evidence presented to support that determination.

CONCLUSION

For the reasons set forth above, we **AFFIRM** the Circuit Court's determination that the Commission did not err in concluding that Claimant's claim for benefits was barred.

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

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prejudiced because the administrative findings, inferences, conclusions or decisions are:

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Voncorie Jermal Barnette and
Marlos Dupree Barnette, minors
under the age of eighteen years,
by Willie M. Barnette and
Evelyn G. Barnette, their Parents
and General Guardians, Appellants,

v.

Adams Brothers Logging, Inc.
and Dan Frederick Little, Respondents.

Evelyn G. Barnette, Appellant,

v.

Adams Brothers Logging, Inc.
and Dan Frederick Little, Respondents.

Willie M. Barnette, Appellant,

v.

Adams Brothers Logging, Inc.
and Dan Frederick Little, Respondents.

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

John Buford Grier, Circuit Court Judge

Opinion No. 25711
Heard May 14, 2003 - Filed September 2, 2003

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Mitchell K. Byrd, of Byrd and Byrd, of Rock Hill, for Appellants.

Mark S. Barrow, Esq., and William R. Calhoun, Jr., of Sweeny, Wingate, and Barrow, P.A., of Columbia; for Respondents.

JUSTICE WALLER: This is a tort action in which the circuit court dismissed the appellants' (the Barnettes/plaintiffs) complaints for failing to comply with pre-trial discovery. We affirm in part and reverse in part.

FACTS

This case involves an auto accident between the Barnettes' 1991 Plymouth van and a logging truck owned by respondent, Adams Brothers Logging, Inc. Sixteen-year old Voncorie Barnette was driving the Plymouth van; his eight-year old brother Marlos and his mother Evelyn were passengers. The van was stopped at a red light in Rock Hill. A logging truck driven by Adams Brothers employee, Dan Little, was stopped directly behind the Barnette vehicle. The light turned green and Voncorie began to proceed through the intersection; however, he decelerated believing another vehicle was about to enter the intersection. The logging truck driven by Little collided with the Barnette vehicle, having proceeded into the intersection approximately one car length. The Barnettes were transported to the hospital by ambulance where they were treated and released.

Between March and May 1999, lawsuits were filed on behalf of Voncorie, Marlos, and Evelyn Barnette, seeking recovery for personal injuries, and a loss of consortium was filed on behalf of Evelyn's husband, Willie Barnette.

Approximately one and one-half years later, in January 2001, the chief administrative judge orally established a date of April 1, 2001, as the close of discovery. In May 2001, the court found that the plaintiffs had failed to timely name five expert witnesses; accordingly, it ruled they would not be allowed to testify. Simultaneously, the court ruled Evelyn Barnette would be required to produce Social Security records, and ordered the parties to provide pre-trial briefs to Judge Short by June 13, 2001.

On July 13, 2001, the circuit court issued an order dismissing all of the Barnettes' complaints. The order states, "Plaintiff's machinations and invidious manipulations of the discovery process had, by the time the undersigned became administrative judge for the Sixteenth Judicial Circuit, created an extremely hostile environment, consumed an inordinate amount of the Court's time to the detriment of other litigants in York County, and made what should have been a simple wreck case into an administrative nightmare." It held the actions of the Barnettes' attorney "manifest a persistent pattern of failing without justification to present his clients for deposition."[1] The court found counsel's direct defiance of its orders and failure to cooperate in discovery, justified dismissal of plaintiffs' claims.

ISSUES

1. Did the trial court err in excluding the testimony of plaintiffs' experts?

2. Did the trial court err in dismissing all three cases?

[1] The cases were initiated in March and May, 1999. Despite repeated attempts to depose the Barnettes beginning in July 1999, counsel for the plaintiffs persistently refused, contending he wanted further discovery from the defendants before allowing his clients' depositions to go forward. After numerous hearings, the depositions were finally taken in March 2001.

1. EXCLUSION OF EXPERTS

The Barnettes contend the trial court erred in excluding the testimony of their five expert witnesses, whom they named in late March 2001. We agree.

In determining the appropriate sanction for late disclosure of an expert witness, this Court has stated, "it lies within the discretion of the trial judge to decide what sanction, if any, should be imposed. The rule is designed to promote decisions on the merits after a full and fair hearing, and the sanction of exclusion of a witness should never be lightly invoked. Jackson v. H & S Oil Co., Inc., 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975) (quoting Carver v. Salt River Valley Water Users' Ass'n., 446 P.2d 492, 496 (Ariz. 1968)). In Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996), we addressed the trial court's exclusion of the plaintiff's expert witness for failing to abide by a pre-trial scheduling date for taking depositions, stating, "[w]hatever sanction is imposed should serve to protect the rights of discovery provided by the rules. A sanction of dismissal is too severe if there is no evidence of any intentional misconduct." 320 S.C. at 511-512, 466 S.E.2d at 355.

In Jumper v. Hawkins, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001), the Court of Appeals addressed the authority of a trial court to exclude the testimony of an expert. The Jumper court held a trial judge is required to consider and evaluate the following factors before imposing the sanction of exclusion of a witness: (1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party. 348 S.C. at 152, 558 S.E.2d at 916.

In the present case, the trial court made no specific finding of prejudice to the respondents, other than finding the late disclosure would necessitate further discovery. Moreover, the trial court advised the parties that there had been no disobedience of any order of the court, and that it had not imposed

any sanctions. Under the facts presented, we find the exclusion of plaintiffs' experts was not warranted. Accordingly, the trial court's exclusion of plaintiffs' experts is reversed.

2. DISMISSAL OF PLAINTIFFS' COMPLAINTS

The Barnettes also assert the trial court erred in dismissing their complaints. As to the actions of Voncorie, Marlos, and Willie Barnette, we agree; as to Evelyn Barnette's claim, we disagree.

Pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just," including an order dismissing the action or proceeding, or any part thereof. Accord In Re Anonymous Member of South Carolina Bar, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001)(noting that "judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law."). The imposition of sanctions is generally entrusted to the sound discretion of the trial judge. Halverson v. Yawn, 328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997). A trial judge's exercise of his discretionary powers with respect to sanctions imposed in discovery matters will not be disturbed on appeal absent a clear abuse of discretion. Id. The burden is on the party appealing from the order to demonstrate the trial court abused its discretion. Id.

At a May 18, 2001 hearing, counsel for Adams Brothers moved to compel Evelyn Barnette to produce her social security records, indicating he needed a medical authorization before the Social Security Administration (SSA) would release her records.[2] The court granted the motion from the bench, insofar as the records related to Evelyn Barnette's position before the SSA. Although the trial court's written order, dated May 21, 2001, did not specifically order Evelyn Barnette to sign a medical authorization, it did order that the defendant's motion for production of the SS records was

[2] The defense learned in her March 8th deposition that Evelyn had sought and been denied SS disability four times, claiming that she had been disabled as a result of the accident.

granted. The Barnettes filed a timely motion to alter or vacate, which was denied. On May 30, 2001, counsel for Adams Brothers sought clarification of the written order, requesting Mrs. Barnette be ordered to sign a medical authorization for her medical records. On June 4, 2001, the court held another hearing, at which it indicated that its oral ruling on May 18th was intended as an order for Mrs. Barnette to sign a medical release authorization for the SS records. At the conclusion of the hearing, the court orally ordered that the defendants be allowed to take the deposition of the social security representative on two days notice.[3] The Barnettes' attorney filed another motion to alter the court's June 4th oral rulings, which was denied.

Yet another hearing was held by the court on June 11, 2001, when it came to the court's attention that the SSA was not willing to allow their agent to be deposed without a written consent form from Evelyn Barnette. The court ordered Evelyn sign a release form, and deliver it to defense counsel by 1:00 pm on Wednesday, June 13th. At the hearing, defense counsel indicated that the plaintiffs had not yet complied with the court's oral June 4th order to exchange witness and exhibit lists. Counsel for the plaintiffs responded that he didn't feel he was bound by the court's oral orders from the bench, and that he was "going to have to give it some serious thought" whether to comply with the court's orders, and whether to require Evelyn Barnette to sign a consent to release her SS records. At the conclusion of the June 11th hearing, the court stated the plaintiffs' refusal to comply with its orders could result in the following:

> . . . the imposition of sanctions which may result in dismissing the action. . . My view of this matter is that if the plaintiff continues to disregard the instructions of this court with regard to discovery and getting the matter ready for trial, that it is exercising bad faith, willful disobedience to the orders of this court. . . and failure to comply by 5:00 pm today (June 11th) may well result in dismissal of all three of these cases.

[3] The court also ruled at the June 4th hearing that the parties would be required to exchange witness lists and exhibit lists by Friday, June 8th.

Further, the court reiterated that Evelyn Barnette's authorization to release her SS records must be delivered by 1:00 pm Wednesday, June 13th, and that written pre-trial briefs must be filed that day as well. Plaintiffs' motion to vacate or reconsider these rulings was denied. Mrs. Barnette failed to comply with the court's order that she sign a medical authorization form.

The court issued form orders dismissing all three cases on June 14, 2001; a detailed written order was entered on July 13, 2001. The Barnette's motions to alter or amend were denied.

Given Evelyn Barnette's persistent refusal to comply with the trial court's orders, particularly her failure to authorize release of her social security records, we find the court acted within its discretion in dismissing her action. In Re Anonymous Member of South Carolina Bar, supra. However, we find the trial court's dismissal of the remaining complaints was largely premised upon Evelyn Barnette's refusal to sign the medical authorization form; accordingly, we find that only her case should have been dismissed. Cf. Balloon Plantation v. Head Balloons, 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990) (sanction imposed should be aimed at the specific misconduct of the party sanctioned). We find the discovery violations pertaining to Marlos and Voncorie's claims, and to Willie Barnette's loss of consortium claim,[4] do not warrant dismissal. Accordingly, we reverse the circuit court's dismissal of these claims and remand for further proceedings.

CONCLUSION

On the record before us, we find exclusion of plaintiffs' expert witnesses was not warranted; accordingly, the circuit court's ruling in this regard is reversed. We affirm the circuit court's dismissal of Evelyn Barnette's complaint; however, we reverse the circuit court's dismissal of the remaining complaints and remand for trial.

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[4] This Court has recognized that a loss of consortium claim is not derivative, but is a distinct, independent cause of action. Preer v. Mims, 323 S.C. 516, 476 S.E.2d 472 (1996). Judgment in favor of the defendant in one action is not a bar to the other action. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). Accordingly, the fact that Evelyn Barnette's claim is dismissed does not bar Willie Barnette's claim.

Affirmed in part, reversed in part, and remanded.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alphonso Duckson, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Lexington County
Rodney A. Peeples, Post Conviction Relief Judge

Opinion No. 25712
Submitted March 19, 2003 - Filed September 8, 2003

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of S.C. Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief Deputy Capital & Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General Elizabeth R. McMahon, all of Columbia, for Respondent.

JUSTICE PLEICONES: Petitioner's parole was revoked following a hearing at which he was represented by a retained attorney. Petitioner then filed an application for post-conviction relief (PCR) alleging, among other things, that his parole revocation attorney rendered ineffective assistance of counsel. Following an evidentiary hearing, the PCR judge held:

(1) Petitioner had stated no cognizable claim under the Uniform Post Conviction Relief Act[1]; and

(2) Petitioner failed to prove that his parole revocation counsel was ineffective.

We granted certiorari, and now affirm.

ISSUE

Has petitioner stated a cognizable PCR claim?

ANALYSIS

In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), we held that, generally, PCR is available *"only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence…"* Id. at 367, 527 S.E.2d at 749 (emphasis in original). The only exceptions are that a PCR action may be brought to assert a claim that the applicant's sentence has expired, or that his probation, parole, or conditional release has been unlawfully revoked. Id., citing S.C. Code Ann. § 17-27-20(a)(5).

At first glance, it would appear that petitioner's claim of ineffective assistance of counsel brings this action within the ambit of § 17-27-20(a)(5). An ineffective assistance claim is premised, however, on the violation of an individual's Sixth Amendment right to counsel. See, e.g., McKnight v. State, 320 S.C. 356, 465 S.E.2d 352 (1995). No such Sixth Amendment right to

[1] S.C. Code Ann. §§ 17-27-10 through –160 (2003).

counsel exists, however, in the context of a parole revocation hearing which is an administrative rather than a criminal proceeding.[2] See In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (Sixth Amendment right to the effective assistance of counsel limited to criminal actions).[3]

A constitutional right to counsel may arise in a parole revocation proceeding by virtue of the Due Process clause. See Gagnon v. Scarpelli, 411 U.S. 778 (1973). Further, a state statute permits counsel to appear at such a hearing. S.C. Code Ann. § 24-21-50 (Supp. 2002). At his parole revocation hearing, petitioner was represented by his retained attorney. Since petitioner's attorney was permitted to appear, and since petitioner does not

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[2] The concurrence would recognize no distinction between probation and parole in this context. Probation is judicially-imposed at the time of sentencing: whether a violation of probationary terms has occurred, and if so, the consequences of such a violation, are matters for the courts. See e.g., State v. Crouch, Op. No. 25698 (S.C. Sup. Ct. filed August 11, 2003). On the other hand, the Board of Probation, Parole, and Pardon Services determines both parole eligibility and revocations. Id.; Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991).

[3] The concurring opinion would extend the holding of Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), that all individuals have a right to counsel in a probation revocation, to parole revocations as well. See footnote 3, *infra*. The Barlet decision is grounded in our Rules, and not in the Constitution. See Rule 602 (a), SCACR; see also e.g. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (right to counsel on PCR certiorari by virtue of Court rule, not constitution). While it may be preferable to give all inmates facing parole revocation the right to counsel, such a requirement is not found in the Constitution or Court rule. See Ex parte Foster, 350 S.C. 238, 565 S.E.2d 290 (2002) ("The unnecessary appointment of lawyers to serve as counsel or GALs places an undue burden on the lawyers of this State. . . . [A] lawyer should not be appointed as counsel for an indigent unless the indigent has a right to appointed counsel under the state or federal constitution, a statute, a court rule or the case law of this State").

contend that his Due Process rights[4] were violated, he has failed to allege that his parole revocation hearing was "unlawful." Petitioner has therefore failed to state a claim cognizable in a PCR action. S.C. Code Ann. § 17-27-20(a)(5).

Accordingly, the decision of the PCR court is

AFFIRMED.

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

[4] The concurring opinion would engraft the Sixth Amendment standard of effective assistance of counsel onto an attorney appointed pursuant to the Due Process clause. In support of this proposition, that opinion cites a California Court of Appeals decision, In re Isaac J., 6 Cal. Rptr. 2d 65 (Cal. App. 4th Dist. 1992), and an opinion from the Superior Court of Pennsylvania, In re Smith, 573 A.2d 1077 (Pa. Super. 1990). In fact, the California Courts of Appeal are divided whether parents facing termination of their parental rights are entitled to the effective assistance of counsel issue, and the issue has not been resolved by the California Supreme Court. Compare Isaac J., *supra* with In re Ammanda G., 231 Cal.Rptr. 372 (Cal. App. 3rd Dist. 1986). Like Pennsylvania, we have long recognized that juveniles are entitled to the effective assistance of counsel in their quasi-criminal proceedings, and have judged claims that the standard was not met by the same criteria used in adult PCR cases. See, e.g., Sanders v. State, 281 S.C. 53, 314 S.E.2d 319 (1984). Neither of the cases cited convinces us that we should transform petitioner's Sixth Amendment claim into a Due Process claim, and thereafter judge that Due Process claim by a Sixth Amendment standard.

JUSTICE WALLER: Because I believe petitioner had a right to the effective assistance of counsel at his parole revocation hearing, and therefore can bring a post-conviction relief (PCR) action, I disagree with the majority's reasoning. However, since petitioner failed to establish counsel's ineffectiveness, I concur in result only.

FACTS

Petitioner was convicted of murder in 1969 and sentenced to life imprisonment. He was paroled in 1979, went back to prison in 1984 because of a parole violation, and was paroled again in 1988.

The instant action stems from his 1999 parole revocation. According to the warrant issued in October 1998 by the Department of Probation, Parole and Pardon Services, petitioner violated his parole by failing to report, changing his residence at 4063 Charleston Highway, West Columbia, without permission, and failing to pay a supervision fee.[5] On April 7, 1999, the Parole Board held a hearing at which petitioner was represented by John Watson.[6] Petitioner contested the violations, but the Parole Board revoked his parole, thereby reinstating his life sentence.

At the PCR hearing, petitioner testified that he had a seventh-grade education and worked for steel companies. He stated he had not moved from his Charleston Highway residence and explained that his parole agent might have visited his residence while he was in the hospital since he was going every day for treatments. As to his attorney's performance at the parole revocation hearing, petitioner asserted Watson should have presented witness testimony. He showed that the arrest warrant, which was served on petitioner in January 1999, listed the 4063 Charleston Highway address. In addition, petitioner called his sister, Willie Deen Anderson, who testified that petitioner had been sick, and before he went back to jail, she drove him to the hospital every day for six months.

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[5] He was $100 in arrears.

[6] Petitioner retained Watson who had represented petitioner on different matters over the years.

Watson testified for the State at the PCR hearing. Watson explained he attempted to convince the Parole Board that: (1) petitioner had not moved from his Charleston Highway residence, (2) any failure to report was because petitioner was in the hospital frequently for dialysis treatments, and (3) the $100 arrearage had been paid by Watson. Watson showed the Parole Board letters to petitioner at the Charleston Highway address and the receipt for the $100 payment. Watson testified he unsuccessfully attempted to contact petitioner's landlady and that other witnesses, such as petitioner's former wife and his daughter, refused to testify on petitioner's behalf.

The PCR court found petitioner had no right to counsel at the parole revocation hearing and therefore could not state a PCR claim. Alternatively, the PCR court found that even if petitioner was entitled to counsel, he had not shown counsel was ineffective.

DISCUSSION

As recognized by the majority, a parolee may have a right to counsel at a parole revocation hearing. See Gagnon v. Scarpelli, 411 U.S. 778 (1973). In Gagnon, the United States Supreme Court was faced with the question of whether "an indigent probationer or parolee has a due process right to be represented by appointed counsel at these hearings." Id. at 783. The Supreme Court started its analysis by looking at Morrissey v. Brewer, 408 U.S. 471 (1972), which established the minimum requirements of due process for parole revocation. The Supreme Court rejected the argument that because of the rights outlined by Morrissey, counsel was unnecessary. Instead, the Supreme Court noted that "the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess." 411 U.S. at 786. The Gagnon Court concluded that the entitlement of counsel should be determined on a case-by-case basis. Giving guidance on how courts should make this determination, the Supreme Court stated the following:

> [C]ounsel should be provided in cases where, after being informed of his right to request counsel, the probationer or

> parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

411 U.S. at 790-91.

This Court has not had the occasion to address whether a parolee is entitled to counsel at a parole revocation hearing. However, the Court has held that at a **probation** revocation hearing, there is a right to counsel. See Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986) (discussing Gagnon, as well as holding that Supreme Court Rule 51 [now Rule 602, SCACR] requires that all persons charged with probation violations be advised of their right to counsel, and indigent persons be advised of their right to court appointed counsel); see also Salley v. State, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991) ("The right to counsel attaches in probation revocation hearings."); Huckaby v. State, 305 S.C. 331, 335, 408 S.E.2d 242, 244 (1991) ("all persons charged with probation violations must be advised of their right to counsel") (citing Barlet, supra).

In my opinion, the right to counsel likewise attaches at a parole revocation hearing, or at the very least, at those parole revocation hearings that meet the guidelines for appointment of counsel laid out by the Supreme Court in Gagnon. See Gagnon, 411 U.S. at 790-91.[7]

[7] I note the Supreme Court in Gagnon held there was no difference between the revocation of parole and the revocation of probation which would be relevant to the guarantee of due process. See Gagnon, 411 U.S. at 782 & n.3. Therefore, given this Court's decisions which have held that the right of

As to the instant case, petitioner clearly contested the some of the alleged parole violations and offered reasons in mitigation for others. In addition, he testified he only has a seventh grade education, which presumably would impact his ability to effectively present his case. Finally, it appears from Watson's PCR testimony that a certain amount of investigation and evidence gathering was required for the hearing, which clearly would have been near impossible for petitioner to accomplish since he was incarcerated. Accordingly, given the facts of this case, it is my opinion petitioner clearly was entitled to counsel at his parole revocation hearing. See id.

Petitioner makes the very reasonable argument that he was entitled to the **effective** assistance of counsel. The majority seems to contend that a right to counsel grounded in the constitutional principles of due process does not guarantee effectiveness of counsel, unlike the same right grounded in Sixth Amendment principles. I disagree. Certainly, a due process right to counsel would be a hollow one if there were no concomitant guarantee to an effective attorney. See, e.g., In re Issac J., 6 Cal.Rptr.2d 65, 69 (Cal. Ct. App. 1992) (finding that in appropriate cases, there is a due process right to counsel in a termination of parental rights proceeding, and "[w]here there is a due process right to counsel, there is a concomitant right to the effective assistance of counsel"); In re Smith, 573 A.2d 1077 (Pa. Super. 1990) (finding that where juvenile had right to counsel in delinquency proceeding, the right obviously was to effective assistance of counsel).

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counsel attaches at probation revocation hearings, it logically should follow that the same right attaches in the parole setting. Arguably, however, since Barlet relied on Supreme Court Rule 51, the predecessor to Rule 602, SCACR, and Rule 602 mentions the right to counsel for a probation violation, but is silent as to a parole violation, I hesitate to extend the Court's Barlet holding to the parole context. Since there appears to be no South Carolina authority supporting the proposition that there is a right to counsel at **all** parole revocation hearings, I confine my analysis to the right to counsel pursuant to the law set out in Gagnon.

Therefore, petitioner's claim of ineffective assistance of parole revocation counsel is cognizable under the PCR statute. Although petitioner's claim is not a challenge to his conviction or sentence, it is encompassed by the claim that his parole was unlawfully revoked -- a claim which is specifically authorized by the PCR statute. See S.C. Code Ann. § 17-27-20(a)(5) (2003); see also Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (where the Court held that PCR is proper only when the applicant collaterally attacks the validity of his conviction or sentence; however, a non-collateral challenge may be brought pursuant to § 17-27-20(a)(5) which, *inter alia*, specifically allows a PCR claim that parole has been "unlawfully revoked"); Kerr v. State, 345 S.C. 183, 547 S.E.2d 494 (2001) (same).[8]

In sum, I believe petitioner had a right to counsel at his parole revocation hearing pursuant to Gagnon and therefore he has a right to assert a PCR claim that counsel was ineffective. Accordingly, I would reverse the PCR court's findings on this issue. Nonetheless, I agree with the PCR court's alternative finding that counsel in this case was not ineffective.

To prove ineffective assistance of counsel, a PCR applicant must show that: (1) counsel's performance was deficient; and (2) prejudice resulted from the deficient conduct. Strickland v. Washington, 466 U.S. 668 (1984); Nichols, supra. This Court will uphold the PCR court's findings if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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[8] In addition, this Court has held, in the probation revocation context, that "a probationer retains his full Sixth Amendment right to counsel." Huckaby v. State, 305 S.C. 331, 335, 408 S.E.2d 242, 244 (1991). Moreover, in Nichols v. State, 308 S.C. 334, 417 S.E.2d 860 (1992), the Court evaluated Nichols' claim of ineffective assistance of counsel at a probation hearing and found counsel had been deficient in his performance and that Nichols had been thereby prejudiced. Again, given the closely related nature of parole and probation revocation proceedings, see footnote 3, supra, there is South Carolina authority that petitioner may bring this type of PCR claim.

Watson's testimony at the PCR hearing clearly supports the PCR court's ruling that petitioner was not denied his right to effective assistance of counsel. At the parole revocation hearing, Watson presented documentary evidence that petitioner resided at the Charleston Highway address and that the $100 arrearage had been paid. Although no witnesses were presented, Watson stated he attempted to contact witnesses and have them appear, but was unsuccessful in his efforts. Moreover, Watson presented oral argument to the Parole Board as to his personal belief that petitioner lived at the Charleston Highway residence. Unfortunately for petitioner, however, the Parole Board apparently was not persuaded by counsel's presentation of petitioner's case.[9]

Because the PCR court's finding that Watson rendered effective assistance at the parole revocation hearing is amply supported by the evidence, the PCR court's denial of relief should be affirmed. Accordingly, I concur in the result reached by the majority's opinion.

[9] There is evidence in the record supporting the allegations regarding petitioner's failure to report; therefore, the Parole Board had the discretion to revoke petitioner's parole. See State v. McCray, 222 S.C. 391, 396, 73 S.E.2d 1, 3 (1952) ("Revocation of probation or parole, in whole or in part, is the means of enforcement of the conditions of it; and in the absence of capricious or arbitrary exercise, the discretion of the revoking court will not be disturbed"); cf. State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct. App. 2001) (the determination to revoke probation is reversible only when based on an error of law or a lack of supporting evidence renders it arbitrary or capricious).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Toler's Cove Homeowners Association, Inc., Plaintiff,

v.

Trident Construction Company, Inc., Defendant.

and

Trident Construction Company, Inc., Respondent,

v.

Ball Corporation, Proper Seal, Inc., L.A. Metz, Inc., and Tynes Associates, Inc., Third Party Defendants,

of whom Ball Corporation, is Appellant.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 25713
Heard May 28, 2003 - Filed September 8, 2003

AFFIRMED

Morgan S. Templeton, of Elmore & Wall, P.A., of Charleston, for appellant.

Perrin Q. Dargan, III, and Paul E. Sperry, of Robertson & Hollingworth, of Charleston, for respondents.

JUSTICE MOORE: We certified this appeal from the Court of Appeals pursuant to Rule 204(b), SCACR. Ball Corporation (appellant) appeals the lower court's order granting Trident Construction Company, Inc.'s (respondent's) motion to compel arbitration. We affirm.

FACTS

On January 30, 2001, Toler's Cove Homeowners Association (Toler's Cove) filed a complaint against respondent alleging construction defects resulting from work performed to a condominium complex in Mount Pleasant, South Carolina. Respondent filed an answer asserting its right to compel arbitration.

Following two inspections of the building to determine the precise nature of Toler's Cove's complaints and to identify the subcontractors responsible for the work, respondent learned Toler's Cove's allegations focused in part on work performed by appellant[1] pursuant to its subcontract with respondent to perform stucco repair and installation at the project.

Appellant's subcontract with respondent states on the first page: **THIS AGREEMENT SUBJECT TO ARBITRATION UNDER 15-48-10 S.C. CODE OF LAWS.** The subcontract also contains the following arbitration provision:

> SECTION 19. All claims, disputes and other matters in question between the Contractor and Subcontractor arising out of or relating to the Contract Documents or the breach thereof; shall be decided by arbitration

[1]Appellant is a defunct corporation that ceased doing business in 1994.

> in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

On October 21, 2001, respondent submitted to the court a consent order to file a third-party complaint. On January 3, 2002, respondent filed the third-party complaint against appellant once learning the order had been filed. Respondent's third-party complaint stated: "[Appellant's] contract contains an arbitration provision that is enforceable under South Carolina law." On February 11, 2002, appellant filed its answer to the complaint. After procuring all other parties' consents to arbitration except appellant's, respondent moved to compel arbitration on February 21, 2002. Appellant responded to respondent's written discovery requests that were served four days after that motion. The lower court subsequently granted respondent's motion to compel arbitration.

ISSUES

I. Whether the court's order compelling arbitration is immediately appealable?

II. Did the court err by granting the motion to compel arbitration?

III. Whether the arbitration clause is unconscionable?

I

DISCUSSION

The parties' agreement, on its face, does not resolve the issue of whether the Federal Arbitration Act (FAA) or the South Carolina Uniform Arbitration Act applies to the arbitration agreement because it does not include a choice of law provision. The lower court, however, took judicial notice of the fact the agreement involves interstate commerce. This finding is the law of the case because neither party has taken issue with that finding. *See* ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489

S.E.2d 470 (1997) (unappealed ruling is law of the case). Therefore, the substantive law of the FAA applies to the parties' arbitration agreement. *See* Osteen v. T.E. Cuttino Constr. Co., 315 S.C. 422, 434 S.E.2d 281 (1993) (where contract involves interstate commerce, state law regarding arbitration is supplanted by federal substantive law). However, we must still determine whether the FAA preempts our state procedural rule that an order compelling arbitration is not immediately appealable under Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995).

The court's order compelling arbitration is not immediately appealable under South Carolina law because Heffner held all orders relating to arbitration not mentioned in S.C. Code Ann. § 15-48-200(a) (Supp. 2002)[2] are not immediately appealable.[3]

The federal policy favoring arbitration, as expressed in the FAA, is binding in state courts and supersedes inconsistent state law and statutes that invalidate arbitration agreements. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 590, 553 S.E.2d 110, 115; Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363, n.2. However, the FAA contains no

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[2]Section 15-48-200(a) states that an appeal may be taken from: (1) an order denying an application to compel arbitration; (2) an order granting an application to stay arbitration; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a judgment or decree entered pursuant to provisions of the Uniform Arbitration Act.

[3]The Heffner court also found that an order staying an action and compelling arbitration is not immediately appealable under 9 U.S.C.A. § 16(a)(3) (1999) of the FAA. The United States Supreme Court's subsequent decision in Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S.Ct. 513 (2000), overruled the Heffner decision to the extent it can be read to mean that a federal court's order compelling arbitration under the FAA is not immediately appealable. However, Green Tree does not affect our state's procedural rule that a South Carolina court's order compelling arbitration is not immediately appealable.

express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. Volt Information Servs., Inc. v. Board of Trustees of Leland Stanford Univ., 489 U.S. 468, 477, 109 S.Ct. 1248, 1255 (1989). The question is whether the state law would undermine the goals and policies of the FAA. *Id.* at 477-478, 109 S.Ct. at 1255. There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate. *Id.* *See also* Zabinski, *supra* (state procedural rules that do not undermine enforceability of otherwise valid contract to arbitrate may be deemed to have been incorporated into contract through choice of law provisions); Wells v. Chevy Chase Bank, F.S.B., 768 A.2d 620 (Md. 2001) (finding general state appeals statute that recognizes order compelling arbitration to be appealable not preempted by § 16(b)(2) of the FAA).

While the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate, *see* Zabinski, *supra*, in the instant case South Carolina law is not invalidating the arbitration agreement or undermining the goals and policies of the FAA. Instead, the arbitration agreement is being enforced by the court's order compelling arbitration which coincides with the FAA's policy in favor of arbitration of disputes. *See* Zabinski, *supra*; Heffner, *supra*.

Accordingly, because South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA rule, is applicable, the court's order compelling arbitration is not immediately appealable. Regardless, because appellant's issues are capable of repetition and need to be addressed we proceed to a review of those issues.

II

DISCUSSION

Appellant argues respondent waived its right to arbitrate by engaging in the litigation process.

It is generally held that the right to enforce an arbitration clause may be waived. General Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001). *See also* Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003). In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. General Equip., *supra*. Mere inconvenience to an opposing party is not sufficient to establish prejudice. *Id.* There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case. *Id.* Furthermore, it is the policy of this state to favor arbitration of disputes. *Id.*

In this case, the litigation process had lasted approximately thirteen months between the time the initial complaint was filed by Toler's Cove and the time respondent moved to compel arbitration. As between respondent and appellant, a third-party-defendant, the litigation process had lasted only approximately six weeks between the time respondent filed a complaint against appellant and the time respondent filed a motion to compel arbitration. This fact alone does not prejudice appellant due to a delay in demanding arbitration. *See* General Equip., *supra* (no waiver where party seeking arbitration had been involved in litigation for less than eight months). *Cf.* Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (waiver occurred where party seeking arbitration had been involved in litigation for two and one-half years).

Further, as in General Equip., the discovery that occurred was very limited in nature and the parties had not availed themselves of the court's assistance other than respondent's request to file a third-party complaint. Respondent had not held any depositions or engaged in extensive discovery requests. Accordingly, respondent did not waive its right to enforce the arbitration clause.

III

DISCUSSION

Appellant argues the arbitration clause in the subcontract should be invalidated because the arbitration costs are unconscionable given appellant is a defunct corporation. Appellant asserts the arbitration filing fee of $8,500 and the case service fee of $2,500 are unconscionable. Appellant also believes the requirement under American Arbitration Association rules that a deposit be made in advance of arbitration to cover the arbitration expenses is unconscionable.

Appellant does not have to pay the $8,500 filing fee, instead, respondent, as the claimant, is responsible for that fee. Appellant would only have to pay the fee if appellant filed a counterclaim. Further, the $2,500 case service fee is split between the parties, which in this case is five parties. Appellant would be responsible only for $500 of the case service fee. Also, any advance deposit required to cover arbitration expenses would be shared among the parties. Therefore, the costs related to the arbitration do not make the arbitration clause unconscionable because they are not so oppressive that no reasonable person would make them and no fair and honest person would accept them. *See* Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) (unconscionability is absence of meaningful choice on part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them).

Further, as the party seeking to invalidate the arbitration agreement on the ground that arbitration would be prohibitively expensive, appellant has not met its burden of showing the likelihood of incurring such costs. Green Tree, 531 U.S. at 92, 121 S.Ct. at 522.

Accordingly, the lower court did not err by rejecting appellant's argument that the arbitration clause should be invalidated on the basis of unconscionability.

CONCLUSION

We find the court's order compelling arbitration is not immediately appealable. However, addressing appellant's issues on appeal, we find respondent did not waive its right to enforce the arbitration clause in the subcontract and that the clause is not unconscionable.
AFFIRMED.

TOAL, C.J., WALLER and BURNETT, JJ., concur.
PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

RE: South Carolina Bar License Fees

ORDER

The House of Delegates of the South Carolina Bar has adopted an amendment to increase the license fee for all members of the South Carolina Bar, other than Retired or Senior Members, by $20.00. The South Carolina Bar petitions this Court to amend Rule 410(b)(2), SCACR, to allow this increase to occur.[1] The petition is granted.

Over the last several years, the Budget of the Judicial Department has been reduced significantly. In Fiscal Year 2000-2001, the appropriation for the Judicial Department was $42,988,000. Through numerous budget reductions, the appropriation has been reduced to $32,134,000 for the current fiscal year, a 25% reduction. This level of funding has severely impacted the

[1] A 2002 Survey by the American Bar Association indicates that the average top membership dues for states with unified state bar associations like South Carolina is $245. The current top license fee in South Carolina (excluding the optional indigent defense fee) is $170, well below the national average.

ability of the Department to discharge its Constitutional responsibilities, and has forced the Legislature and this Court to consider various alternative funding sources for the Judicial Department.

In most states, the cost of operating the lawyer disciplinary system is borne in whole or substantial part by the members of the bar. Based on information collected by the Office of Disciplinary Counsel, the amounts charged through assessments or dues for the support of the disciplinary process varies from $25 to $260 per year.

In light of the current budget situation, we find it appropriate to place a portion of the cost of operating the disciplinary system on the members of the South Carolina Bar. Therefore, we have decided that an additional fee of $50.00 shall be charged to Active Members (three years or more) and Judicial Members, with $20.00 being charged for all other classes of members other than Retired, Senior or Associate Members. It is anticipated that this will generate approximately 53% of the cost of operating the attorney and judicial disciplinary systems in South Carolina.

Accordingly, in light of the Bar's petition and our decision that the members should bear a portion of the costs of the disciplinary process, we make the following amendments to Rule 410, SCACR:

(1) Rule 410(c)(2) is amended to read as follows:

> (2) The annual license fee for active members who have been admitted to practice law in this State or any other jurisdiction for three years or more shall be $190.00 plus the amount specified in (3) below. The license fee for all other members shall be in lesser amounts as may be provided for in the Bylaws of the South Carolina Bar plus the amount specified in (3) below. The license fee shall be payable on or before January 1st of each year. All income and assets, other than license fees, may be handled separately by the South Carolina Bar, as prescribed in its Constitution and Bylaws.

(2) Rule 410(c) is amended by adding the following:

> (3) For each of the listed classes of membership, the following additional license fee shall be paid:
>
> (a) Active Members (less than three years) - $20.00
>
> (b) Active Members (three years or more) - $50.00
>
> (c) Judicial Members - $50.00
>
> (d) Inactive Members - $20.00
>
> (e) Military Members - $20.00
>
> (f) Limited Certificates - $20.00

> The funds generated from this additional fee shall be placed in a separate account by the South Carolina Bar and shall be disbursed as directed by the Supreme Court to help defray the costs of operating the Commission on Judicial Conduct, the Commission on Lawyer Conduct and the Office of Disciplinary Counsel.

These amendments to Rule 410, SCACR, shall become effective September 1, 2003.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 25, 2003