THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion Number 2012-UP-475 (S.C. Ct. App. filed Aug. 1, 2012)

Paresh Shah, M.D. and Paresh Shah, M.D., P.A., ... Petitioners,

v.

Palmetto Health, f/k/a Richland Memorial Hospital.....Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Shah's certiorari grounds are properly before this Court.

2. Whether Shah's certiorari grounds have any merit.

3. Whether this Court should affirm the Court of Appeals on additional sustaining grounds.

STATEMENT OF CASE

Introduction: This contempt action arises from litigation that began in 1996. The Petitioner (Shah) sought a finding of contempt against the Respondent (Palmetto) for alleged violations of three court orders related to the 1996 litigation. After a full evidentiary hearing, the trial court held that Shah had not proven the elements of contempt by the requisite clear and convincing evidence. Shah appealed, and the Court of Appeals affirmed. Shah petitioned for rehearing, and the Court of Appeals denied the petition.

Shah was a radiologist with privileges at a hospital operated by Palmetto. A dispute arose between them, and Shah sued Palmetto in 1996 ("the 1996 Action"). This case was assigned to Judge Keesley as complex civil litigation.

The parties ultimately settled the 1996 Action, and the settlement included the entry of a Confidential Consent Order of Settlement ("the 2001 Consent Order") that altered the ordinary Quality Assurance (QA) review of Shah's cases. (App. 1-11). The QA review was the first step in the multi-stage peer review process. (App. 39, n.4). The QA review took place in the physician's department and, if the department concluded that further action was warranted, it forwarded the issue up the peer review ladder for hearings and decisions by the Fair Hearing Committee (FHC) and the Medical Executive Committee (MEC).[1]

[1] Throughout his Certiorari Petition, Shah conflates Palmetto (referred to as "Hospital") with the FHC and MEC. Physicians with privileges at Palmetto Richland are the members of these committees, and Palmetto does not control them. Thus, when Shah complains that Palmetto decided to impose probation or terminate privileges, he is mis-stating the facts. The physicians on these committees made those decisions, not Palmetto.

The parties could not agree on implementation of the 2001 Consent Order, so Palmetto moved to clarify the Consent Order and, after a contested hearing, the court issued a "2003 Supplemental Order." Shah moved for reconsideration, which the court denied in its "2003 Reconsideration Order." Shah did not appeal the Supplemental Order or the Reconsideration Order and, therefore, those orders are the law of this case, as is the 2001 Consent Order.[2]

Shah filed three motions for contempt against Palmetto in the 1996 Action, alleging Palmetto had violated the three prior orders ("the Settlement Orders"). The court never heard the motions and Shah again sued Palmetto in 2006 ("the 2006 Action"). Shah's 2006 complaint repeated the allegations made in the three contempt motions and also made additional allegations. Discovery proceeded in the 2006 Action, and it was scheduled for trial on November 10, 2008. At a November 4, 2008 motions hearing in the 2006 Action, the parties announced they had agreed to dismiss the 2006 Action and proceed on the contempt motions in the 1996 Action. The trial court entered a 2008 Consent Order to this effect and later heard the contempt claims. Shah submitted affidavits but did not testify at the hearing. The trial court denied all motions for contempt. (App. 29-53). Shah moved for reconsideration, and the trial court denied the motion. (App. 262-277; 54).

The Settlement Orders: The issues in this case begin with the settlement of the 1996 Action. In his certiorari petition, Shah makes passing and inaccurate references to the Settlement Orders but never discusses those orders in any detail. Those orders are briefly summarized below and discussed in more detail later. (For a fuller summary and discussion of the Settlement

[2] It is axiomatic that a consent order is the law of the case. *Ramseur v. Moore*, 21 S.E. 81 (S.C. 1895); *accord Raby Constr. LLP v. Orr*, 594 S.E.2d 478, 482 n.3 (S.C. 2004). The 2003 Supplemental Order and 2003 Reconsideration Order were not consent orders. The 2003 Supplemental Order was the result of a contested hearing held upon petition of Palmetto. The 2003 Reconsideration Order was the result of a contested hearing on Shah's motion to reconsider the 2003 Supplemental Order. Shah did not appeal these orders and, therefore, they are the law of this case. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970).

Orders, see Resp. Br. at App. 2628-2632, 2651-2655. **Note:** The Appendix was constructed so that the "R. ___" cites in the briefs align with the pages of the Appendix. Thus, if a brief cites to "R. 35," that same page of the record can be found at "App. 35").

Paragraph 3 of the 2001 Consent Order is relevant here. The overriding purpose of the 2001 Consent Order was to remove the QA review of Shah's cases from the members of the Radiology Department, with whom Shah had a dispute. In lieu of the Department members, the QA review of Shah's cases would be performed by a radiologist mutually selected by Shah and Palmetto ("the Outside Reviewer").[3] The parties could use a "Petition for a Rule to Show Cause" if any dispute arose regarding paragraph three (3) of the order. (App. 2, ¶ 3).

The parties could never agree on an Outside Reviewer, which resulted in there being no QA review of Shah's cases. To break this impasse, Palmetto petitioned Judge Keesley to resolve the dispute between the parties. (App. 13). Judge Keesley resolved this dispute in the 2003 Supplemental Order, wherein Judge Keesley again emphasized that the intent and goal of the 2001 Consent Order was to remove the QA review of Shah's cases from Palmetto's Department of Radiology. (App. 13-14).[4] After setting forth a procedure for selecting the Outside Reviewer, Judge Keesley closed the 2003 Supplemental Order by expressly holding that nothing in the order, or in the 2001 Consent Order, limited the ability of Palmetto to take any administrative

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[3] The precise language in paragraph three was: "Part of the settlement agreement in this case requires that the Quality Assurance review of Dr. Shah's medical cases *will be removed from the responsibility of the Radiologists who are members of or employed by RRC.* Beginning July 31, 2001, the parties have agreed that *a Radiologist mutually selected* by [Palmetto and Shah] *will conduct the Quality Assurance reviews* of Dr. Shah's cases. This outside reviewer will have oversight authority over the case selection process as well as the cases themselves. The outside reviewer will insure that the selection process is performed consistent with [Palmetto's] established Quality Assurance protocols and not in a discriminatory manner. (App. 2, ¶ 3) (emphasis added).

[4] Judge Keesley specifically stated: "The *QA Process* approved, in the [2001] Consent Order, was *intended to* provide an independent and impartial QA review of Dr. Shah's cases that *would not involve* the other radiologists within [*Palmetto's*] Department of Radiology ... who have been litigants in this case. (App. 13) (emphasis added). He later reiterated: "The *stated goal* of the [2001] Consent Order is to *remove* [Palmetto's Radiology Department] and the Chief of the Department ... *from involvement in the QA Process* to ensure fairness, impartiality, and to remove any claim of bias." (App. 14) (emphasis added).

action it deemed necessary for the proper management of the hospital or to assure quality patient care. (App. 20).

Shah moved to alter or amend the 2003 Supplemental Order, which Judge Keesley denied in the 2003 Reconsideration Order. His principal complaint was the use of an out-of-town radiologist to be the Outside Reviewer and the removal of all persons in the Radiology Department (including the Chief) from the QA review process. (App. 57-58 at ¶¶ 2, 4). He made this complaint despite having specifically agreed in the 2001 Consent Order that his QA review would be conducted by a single radiologist unconnected to the Radiology Department. (App. 2, ¶ 3). This marked the beginning of a recurring tactic by Shah – ask for something, get it, and then complain about it. As noted later, Shah used this tactic in challenging the MEC's reliance on the 35 emergency room cases – he asked to be compared to other radiologists and then complained about the comparison when he did not like the results. (See Arg. IV(C), *infra*).

Judge Keesley found that Shah's "overriding argument [was] that Dr. Shah want[ed] to be treated like every other doctor at the hospital," but this was not possible due to the 1996 litigation and the Settlement Orders, including the 2001 Consent Order. The primary goal was to make the QA review of Shah's cases as close as possible to the standard method used at Palmetto, but doing so was difficult due to the complexities in the medical field and the need to fit within the overlay of governmental regulations, medical and hospital standards, and patients' rights. (App. 22). The court could not go any further – it was "not equipped to function as a doctor or a hospital administrator," and it did not know "all the intricacies involved." (App. 22).

On April 8, 2003, the parties agreed upon a Charleston radiologist (Dr. Selby) to serve as the Outside Reviewer under the Settlement Orders. (App. 852-853). This marked the beginning of protracted Peer Review Proceedings and Shah's reactions of filing three motions for contempt.

Shah's Contempt Motions in the 1996 Action: In September 2005, Shah filed the first of three contempt motions alleging violations of the 2001 Consent Order and the 2003 Supplemental Order. (App. 59-86). Shah filed his second contempt motion in December 2005 (App. 87-94), and he filed his third contempt motion in April 2006 (App. 95-113). Each contempt motion is styled as a "Petition for Rule to Show Cause" pursuant to the language in the 2001 Consent Order. (App. 2). In the order appealed here, the court noted that these petitions were more properly viewed as contempt motions (App. 30, n.1), and that term is used herein.

Shah made numerous and wide-reaching claims in his contempt motions but abandoned many of them by not pursuing them in the Court of Appeals and/or not pursuing them in this Court. (For a more complete summary of the motions, see Resp. Br. at App. 2632-2640). As demonstrated later, the only issues before the trial court in this case were the issues raised in these contempt motions. (See Arg. II, *infra*). Thus, as also demonstrated later, Shah's attempt to raise issues not presented in these motions is to no avail and provides no basis for certiorari.

The 2006 Action: The complaint in the 2006 Action included all of the claims made in the contempt motions in the 1996 Action and added new allegations. At a November 4, 2008, motions hearing, only days before a jury trial on the 2006 Action, the parties announced they had agreed to dismiss the 2006 Action with prejudice and in lieu thereof would proceed on the contempt motions in the 1996 Action. Judge Early signed a Consent Order to this effect, and the Chief Administrative Judge signed a Consent Order transferring the 1996 action and contempt motions to Judge Early. Shah argues the trial court erred in limiting the issues to those raised in the contempt motions in 1996 Action and not also reaching the issues raised in the 2006 Action that were not previously raised in the contempt motions. Stated differently, Shah complains that Judge Early misread his own order. As shown later, this argument is manifestly without merit.

The trial of the contempt motions in the 1996 Action began on November 10 and ended November 13, 2008. The parties presented voluminous evidence. Notably, despite having the burden of proof and relevant personal knowledge on important issues, Shah did not testify, thereby avoiding the crucible of cross-examination and depriving the court of the opportunity to observe his demeanor and credibility.

ARGUMENT

For the reasons set forth below, and forth the reasons set forth in Palmetto's Brief of Respondent (App. 2621-2675) and Return to Petition for Rehearing (Tab A), which are incorporated herein by reference, it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari. As also set forth below, numerous arguments by Shah are not properly before this Court for various reasons and, in any event, Shah's arguments have no merit.

I. The Court of Appeals correctly affirmed the trial court's factual finding that Shah failed to prove contempt, and this ruling moots all other issues raised in Shah's Certiorari Petition.

The trial court (Judge Early) set forth the law of contempt in his order. Shah did not challenge this law on appeal, thus making it the law of this case. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). In any event, Judge Early correctly stated the law:

> Contempt is the ultimate judicial power. For that reason, it is not lightly asserted and only sparingly imposed. *State v. Harper*, 376 S.E.2d 272, 273 (S.C. 1989); *Miller v. Miller*, 652 S.E.2d 754, 759 (S.C. App. 2007). Also for that reason, the law imposes strict requirements that limit contempt to narrow situations.
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> First, the party seeking contempt has the burden of proving the necessary elements by clear and convincing evidence, the highest standard of proof known to the civil law. *Durlach v. Durlach*, 596 S.E.2d 908, 912 (S.C. 2004); *Miller*, 652 S.E.2d at 761. Second, the conduct proscribed or prescribed by the order must be set forth in "clear and certain" terms; it must be stated specifically and definitely rather than by implication. *Welchel v. Boyter*, 196 S.E.2d 496, 498 (S.C. 1973). The proscribed or prescribed conduct must be ascertainable from the express terms of the order itself and not by reference to other materials, including any materials referenced in or incorporated into the order. *Phillips v. Phillips*, 341 S.E.2d 132, 133 (S.C. 1986); *American Fed. Bank, FSB v. Kateman (In re:*

> *First Union Nat'l Bank)*, 516 S.E.2d 1, 2-3 (S.C. App. 1999). . . . Third, the contemptuous conduct must be a "*willful* disobedience" of the order, *i.e.*, contempt does not lie for a violation resulting from mistake, misunderstanding, confusion, or negligence. *Henderson v. Henderson*, 379 S.E.2d 125, 129 (S.C. 1989) (emphasis added). To be "willful," the disobedience must be done "voluntarily and intentionally with the specific intent to do something" forbidden by the order (the proscribed conduct) or "with the specific intent to fail to do something" required by the order (the prescribed conduct). *State v. Sowell*, 635 S.E.2d 81, 83 (S.C. 2006), *quoting Spartanburg County DSS v. Padgett*, 370 S.E.2d 872, 874 (S.C. 1988). . . .

(App. 32-33).[5] Judge Early then held: "Were it assumed [Shah] has shown any violations of any proscribed or prescribed conduct in the Settlement Orders, there is no clear and convincing evidence they were willful as required by law. Thus, the motions are denied." (App. 33).

It is axiomatic that the issue of contempt resides in the sound discretion of the trial court, and the trial court's factual findings will not be reversed on appeal unless there is no evidence to support them. *E.g., Ex parte Bland*, 667 S.E.2d 540, 546 (S.C. 2008).[6] Here, Judge Early found that, as to all claims of contempt, including the claims not made in the contempt motions, Shah failed to present clear and convincing evidence that Palmetto acted willfully, and he also found that Palmetto made a good faith effort to comply with the Settlement Orders. (App. 33, 53).

Ample evidence supports Judge Early's finding that any assumed deviation from the Settlement Orders by Palmetto was not a willful violation as required by South Carolina law on

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[5] Against this backdrop, Judge Early applied the following analytical framework: "The only issue before me is whether [Hospital] has violated the express terms of the Settlement Orders so as to give rise to a finding of contempt. Analysis of this issue requires a four-part inquiry. First, what are the parameters and requirements for contempt under South Carolina law? Second, what conduct is proscribed or prescribed by the Settlement Orders, such that deviation therefrom would support a claim for contempt? Third, do the grounds asserted in the three contempt motions allege a violation of any proscribed or prescribed conduct? Fourth, if so, has Plaintiff proven those violations as required by South Carolina law?" (App. 32). Shah does not challenge this framework, so it is the law of this case. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970).

[6] Though not entirely clear, the Court of Appeals appeared to apply the wrong standard of review and wrong standard of proof but nevertheless reached the correct result. As explained in Palmetto's Return to Petition for Rehearing and incorporated herein, and to the extent the Court of Appeals did so, the Court of Appeals erred in ruling that the standard of proof was a "preponderance of the evidence" rather than "clear and convincing evidence," and the Court of Appeals also erred in ruling that it could take its own view of the evidence on appeal rather than affirming the trial court's factual findings unless no evidence supported those findings. (See Tab A at 2-7). In any event, and assuming no error by the Court of Appeals, ample evidence supports the trial court's ruling under either standard of proof and either standard of review.

contempt. Fred Crawford and Howard West were in charge of developing the procedures for compliance with the Settlement Orders. (App. 1624). Crawford testified that Palmetto used its best efforts to comply with the orders. (Id.). Karen Hart was the person responsible for getting case files to the Outside Reviewer. She testified that she used the same process for Shah's QA selection that she used for all other physicians, as required by the Settlement Orders. (App. 2442-2460). Dr. Greta Harper was the Chief of Staff. She testified that Palmetto followed the Settlement Orders. (App. 2294-2384, 1860). The record is replete with other examples of supporting evidence and testimony but the foregoing evidence, standing alone, demonstrates that some evidence supports Judge Early's finding of no willfulness. Shah's contrary arguments are based on evidence that, at most, created a question of fact for the trial court, but this showing completely fails to satisfy his appellate burden of showing that no evidence supports Judge Early's ruling. Thus, the Court of Appeals did not err in affirming the trial court's ruling, and this Court should deny certiorari for this reason alone, which moots all other issues raised by Shah.

II. The Court of Appeals correctly affirmed the trial court's ruling that the only issues before the trial court were the contempt issues raised in the three contempt motions in the 1996 Action.

As set forth below, the trial court correctly interpreted its own order and the order of the Chief Administrative Judge to hold that the only issues before him were the contempt issues raised in the three contempt motions made in the 1996 Action. As also set forth below, Shah's arguments to the contrary are not properly before this Court and are without merit.

Shah contends that issues outside the contempt motions were tried by implied consent, because Palmetto did not object to evidence pertaining to such issues. As demonstrated below, this issue is not properly before this Court and is without merit.

A. The trial court correctly limited the issues to the grounds for contempt raised in the three contempt motions in the 1996 Action, and Shah's contrary arguments are not properly before this Court.

This issue turns on the meaning of two consent orders, one by Chief Administrate Judge Casey Manning and one by Judge Early. As demonstrated below, the plain language of these consent orders conclusively demonstrates that the only issues before Judge Early were the issues raised in the three contempt motions in the 1996 Action. Moreover, as also demonstrated below, Shah's contrary arguments are not properly before this Court and have no merit.

At a November 4, 2008 motions hearing in the 2006 Action, Shah announced the parties had agreed to dismiss the 2006 Action and proceed on the contempt motions in the 1996 Action. (App. 302-305, 307). The only action then pending before Judge Early was the 2006 Action.

Pursuant to a joint motion by the parties, Chief Administrative Judge Casey Manning entered an order assigning the 1996 Action to Judge Early. (App. 26-27). The parties moved "to assign *this case* [1996 Action], *and the petitions* for rule to show cause, filed against [Palmetto] and *currently pending* in this case, to [Judge Early]." (*Id.*) (emphasis added). The parties also moved for all defendants except Palmetto to be dismissed from the 1996 Action, "and for this matter [1996 Action] to proceed for a non-jury hearing *on those pending petitions* against [Palmetto] as the sole defendant." (*Id.*) (emphasis added).[7] Judge Manning granted the joint motion and ordered: "The *currently pending petitions* for rule to show cause shall be heard by Judge Early[.]" (App. 27) (emphasis added).

After Judge Manning's order, Judge Early entered another consent order that dismissed the 2006 Action with prejudice and further provided:

> 3. A non-jury hearing on the *pending motions* in the 1996 action shall commence on November 10, 2008[.]

[7] This order also recognized that the 1996 Action had been commenced against Palmetto's predecessor in interest and ordered that the caption be changed so that Palmetto Health was the only named defendant. (App. 26, n.1).

. . .

5. [Shah] will proceed in the 1996 action *on the pending petitions* for rule to show cause and *memoranda* in support. The parties may argue and rely on such information, documents and discovery from the 2006 action, and affidavits of Drs. Shah, Close and Waldren, *as may* be relevant and admissible *therein*.

(App. 23-24, ¶¶ 2, 3, and 5) (emphasis added). The orders by Judges Manning and Early plainly dismissed the 2006 Action, leaving only the pending contempt motions in the 1996 Action.

After the filing of the consent orders, and in the middle of the trial on the contempt motions, Shah filed a memorandum wherein he alleged grounds not set forth in any of the pending contempt motions.[8] Judge Early held that these new grounds for contempt were not properly before him and were therefore denied. (App. 41-44). Shah argues that Judge Early misread his own order, and that the new grounds raised in his memorandum were properly before Judge Early under the terms of Judge Early's order. Shah never mentions Judge Manning's order, which was the instrument whereby Judge Early had jurisdiction in this matter and which limited that jurisdiction to the pending contempt motions in the 1996 Action. Thus, Judge Manning's order is the law of this case and, therefore, the only issues before Judge Early were the issues raised in the contempt motions in the 1996 Action.

Shah's arguments on the scope of issues before Judge Early are precluded by the plain language of Judge Early's order. Assuming any ambiguity in that order (and there is none), the controlling inquiry is the intent of the authoring judge.[9] The appealed order conclusively demonstrates Judge Early's intent and thereby precludes all of Shah's contrary arguments.[10]

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[8] The consent orders were entered on November 10, 2008. The merits hearing commenced that same day. Shah filed his memorandum with new grounds on November 12, 2008.

[9] Assuming the order was unclear or ambiguous (and it was not), it was incumbent upon Shah to make a "59(e)" motion to clarify the order. *E.g., ESA Servs., LLC v. South Carolina Dep't of Rev.*, 707 S.E.2d 431, 438-439 (S.C. App. 2011). He did not, so his argument on the meaning of the order is not preserved for appeal and, therefore, is not a proper ground for certiorari.

[10] A trial court's order is to be construed like any other written instrument. *Petition of White*, 385 S.E.2d 211, 215 (S.C. App. 1989); *Weil v. Weil*, 382 S.E.2d 471, 474 (S.C. App. 1989). The controlling inquiry is the intent of the authoring judge. *O'Banner v. Westinghouse Elec. Corp.*, 459 S.E.2d 324, 327 (S.C. App. 1995). That intent must

In short, Judge Early correctly read his own 2008 Consent Order as limiting the issues to those raised in the pending contempt motions. Any assumed error by Judge Early is harmless, because Judge Manning limited Judge Early's jurisdiction in the 1996 Action to the "currently pending petitions for rule to show cause." Shah has never challenged Judge Manning's consent order, thereby making it the law of this case. (For a more complete refutation of Shah's challenge on the scope of issues before Judge Early, see Resp. Br. at App. 2642-2651).

To avoid the plain meaning of Judge Early's order, Shah "artfully" redacts the order and the discussion at the hearing to change the meaning of the order. Shah argues: "The circuit court incorporated the allegations of contempt in the 2006 Action into the previously filed Rules to Show Cause that were never heard by the circuit court." (Cert. Pet. at 15). Shah cites nothing for this argument, because nothing in the record supports it. Shah then misquotes Judge Early's order to bolster his argument:

> In dismissing the 2006 Action and proceeding with a contempt hearing, the Order of Dismissal stated "**The parties may argue and rely on such information, documents, and discovery from the 2006 action, and affidavits of Drs. Shah, Close, and Waldren.**"

(Cert. Pet. at 15) (boldface added by Shah). The order, however, actually stated:

> [Shah] will proceed in the 1996 action *on the pending petitions* for rule to show cause and *memoranda* in support. **The parties may argue and rely on such information, documents and discovery from the 2006 action, and affidavits of Drs. Shah, Close and Waldren**, *as may be relevant and admissible therein.*

(App. 24, ¶ 5) (all emphasis added). The boldfaced material is the partial quote relied upon by Shah in his certiorari petition. He cleverly omits the remainder of the sentence without any indication in his petition that he has redacted the sentence. The omitted phrase – "as may be

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first be gleaned from the order itself, read as a whole and giving effect to every word in the order, not just isolated parts. *Eddins v. Eddins*, 403 S.E.2d 164, 166 (S.C. App. 1991); *Management Recruiters, Inc. v. R.J.R. Mechanical, Inc.*, 404 S.E.2d 908, 909 (S.C. App. 1991). If the order is not ambiguous, there is no room for construction and the order must be enforced as written. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474. If the order is ambiguous, then the court may go beyond the four corners of the order to determine the authoring judge's intent. *Id.*

relevant and admissible therein" – manifestly refers back to the prior sentence in the order (which Shah also omitted) to state that the parties could rely on the discovery in the 2006 action to the extent such was relevant and admissible to "the pending petitions for rule to show cause and memoranda in support." In short, Shah cleverly redacts Judge Early's order, without indicating his redaction, in a vain attempt to change the plain meaning of the consent order. It is axiomatic, however, that an order must be interpreted based on the plain meaning of all the language used in the order. (See n.10, *supra*).[11]

B. Issues outside the three contempt motions in the 1996 Action were not tried by implied consent, and Shah's contrary arguments are not properly before this Court and have no merit.

On appeal, Shah argued that new issues from the 2006 Action were tried by implied consent, because Palmetto did not object to the introduction of the evidence. (App. Br. at App. 2591-2592). He thus argued the trial court erred when it limited the issues to the contempt grounds raised in the three contempt motions. Palmetto responded that Shah never argued "implied consent" to the trial court and, therefore, that issue was not preserved for appeal. (Resp. Br. at App. 2649). Shah replied that he raised "implied consent" in paragraphs 1 and 2 of his motion to reconsider. (Reply Br. at App. 2682). These paragraphs plainly did not raise any issue about "implied consent." (See App. 262-263, ¶¶ 1-2). The Court of Appeals thus correctly held that Shah's "implied consent" argument was not preserved for appeal.

Shah petitioned for rehearing but did not argue or otherwise renew his prior argument that paragraphs 1 or 2 of his motion to reconsider raised the "implied consent" issue, nor did he

[11] Shah also artfully redacts the transcript to change the meaning of the discussion. (Cert. Pet. at 15-16). Reading the entire discussion makes it clear that the parties were to dismiss the 2006 Action and proceed on the existing contempt motions in the 1996 Action. (App. 302-305, 307). For a detailed discussion of Shah's "artful redaction" approach to this case, see Resp. Br. at App. 2646-2647, 2671-2672 and Tab A at 15-16, 21-22, 24). If Shah wanted to amend the contempt motions to add any allegations from the 2006 Action, it was incumbent upon him to say so plainly (which he never did). It was also incumbent upon him to ensure the consent order also said so plainly (which it did not) and, upon receiving the order, to move to amend the order (which he did not). (See n.9, *supra*).

challenge the Court of Appeals' rejection of that argument. (App. 2720-2743, *passim*). He thus abandoned those arguments. Shah, however, argued for the first time that paragraphs 4, 5, 10, 13, 15, and 16 of his motion to reconsider raised the issue of "implied consent." (Rhg. Pet. at App. 2724). He also argued for the first time that he had raised the "implied consent" issue in oral argument at hearing on his motion to reconsider. (*Id.*). Palmetto responded that Shah's rehearing arguments were not properly before the Court of Appeals, because they had not been raised on appeal, and issues could not be raised for the first time in a rehearing petition. (Tab A at 17-19). Palmetto further responded that the "new" paragraphs of Shah's motion to reconsider did not raise the issue of "implied consent," and Shah did not raise this issue at the hearing on the motion to reconsider. (*Id.*). The Court of Appeals denied rehearing.

In seeking certiorari, Shah continues to argue "implied consent" and continues to argue that he preserved this issue in paragraphs 4, 5, 10, 13, 15, and 16 of his motion to reconsider and that he raised the issue in oral argument of the motion. (Cert. Pet. at 19). His arguments are not properly before this Court as grounds for certiorari, and his arguments have no merit.

An issue cannot be raised for the first time on appeal. *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006). The permissible grounds for certiorari are limited to grounds raised in the Court of Appeals and then also raised in the petition for rehearing. Rule 242(d)(2), SCACR. An issue cannot be raised for the first time in a petition for rehearing. *Herron v. Century BMW*, 719 S.E.2d 640, 643 (S.C. 2011). An issue raised for the first time in a rehearing petition before the Court of Appeals is not preserved for certiorari review by this Court. *Nelson v. QHG of S.C., Inc.*, 608 S.E.2d 855, 858-859 (S.C. 2005), *applying* former Rule 226(d)(2), SCACR.[12]

[12] This Court summarized former Rule 226(d)(2): "issue must have been raised in initial arguments to Court of Appeals." 608 S.E.2d at 858-859. Rule 242(d)(2), SCACR now imposes the same requirement: "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (Emphasis added).

Here, Shah never raised the "implied consent" issue to the trial court and, therefore, he could not raise it in the Court of Appeals. Thus, it is not a permissible ground for certiorari. Moreover, before the Court of Appeals, Shah argued only that paragraphs 1 and 2 of his reconsideration motion raised the "implied consent" issue. On rehearing, however, he abandoned these grounds by not arguing them and argued for the first time that paragraphs 4, 5, 10, 13, 15, and 16 of his reconsideration motion,[13] and his oral argument at the motion hearing,[14] raised the "implied consent" issue. Thus, these grounds were not properly before the Court of Appeals and are not permissible grounds for certiorari.

To avoid his failure to raise the "implied consent" issue, Shah cites *Herron, supra,* for the proposition that appellate courts "need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." (Cert. Pet. at 19, quoting *Herron*). The actual ruling in *Herron*, however, demonstrates that Shah's rehearing arguments are not properly before this Court "as a matter of state law."

In *Herron*, the question was whether the issue of federal preemption was properly before this Court on a petition for rehearing. This Court held it was not, because it had been raised for the first time in the rehearing petition. Noting that error preservation rules should not be applied in a hyper-technical manner (the proposition relied upon by Shah here) this Court continued:

> [I]ssue preservation rules "prevent[] a party from keeping an ace card up his sleeve – *intentionally or by chance* – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his

[13] Any attempt to raise paragraphs 1 and 2 in a certiorari reply would be improper and futile, as would any attempt to cure any other error preservation problems noted in this Return. "It is axiomatic that an issue cannot be raised for the first time in a reply brief." *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011), *citing Chet Adams Co. v. James F. Pedersen Co.*, 413 S.E.2d 827 (S.C. 1992). "It is axiomatic that an issue cannot be raised for the first time on rehearing." *McClurg*, 716 S.E.2d at 888 n.2, *citing Nelson v. QHG of S.C., Inc.*, 608 S.E.2d 855 (S.C. 2005). Thus, it is equally axiomatic that an issue cannot be raised for the first time in a certiorari reply.

[14] Assuming Shah's argument at the motions hearing raised the implied consent issue, it came too late. An argument for rehearing must first be raised in the motion to reconsider – it manifestly cannot be raised for the first time at the hearing on the motion. See *Herron*, 719 S.E.2d at 642 n.6 (issue not raised in petition for rehearing could not be raised for the first time at oral argument on the petition).

> case." Here, intentionally or by chance, Appellant kept the ace card of preemption up its sleeve *until after this Court filed its opinion.* Under even the most liberal approach to issue preservation principles, we could not treat Appellant's preemption argument as preserved in our courts *as a matter of state law.*

Herron, 719 S.E.2d at 645 (emphasis added) (citations omitted) (brackets in original). Here, Shah raises paragraphs 4, 5, 10, 13, 15, and 16 of his motion to alter or amend, and an isolated statement at the motions hearing, for the first time in his rehearing petition, *i.e*, "after [the Court of Appeals] filed its opinion." This is precisely the same scenario rejected by this Court in *Herron* and, therefore, these arguments are not preserved for review and not a proper basis for rehearing or certiorari "as a matter of state law." In any event, Shah's arguments have no merit.

Shah also cites *Herron* for the proposition that a party need not use the exact name of a legal doctrine. Nevertheless, a party must "bring into focus the *precise nature of the alleged error* so that it can be *reasonably understood by the judge*." *Herron*, 719 S.E.2d at 642 (emphasis added). Shah summarily argues that he satisfied this test in paragraphs 4, 5, 10, 13, 15, and 16 of his motion to alter or amend (Cert. Pet. at 19), but he never quotes these paragraphs and never discusses any language in them. These paragraphs did not "bring into focus the *precise nature of the alleged error* so that it can be *reasonably understood by the judge*." (App. 264-266, ¶¶ 4-5; App. 268-272, ¶¶ 10; 13, 15-16). Nothing in these paragraphs even hints at an argument of trial by implied consent. Paragraph 13 (App. 270-271) is the only one that even mentions a failure to object to evidence, which is the basis for trial by implied consent, but it never "brings into focus" any argument that the failure to object somehow rose to the level of trial by implied consent. In any event, this paragraph addressed the "breast biopsies" issue, and the trial court rejected this claim of contempt on several grounds (See Resp. Br. 39-40). Moreover, Shah's real complaint, and the focus of paragraph 13, was the manner in which these cases were selected, an issue also rejected by the trial court on the merits.

C. Shah's "futile act" arguments are not properly before this Court and have no merit.

On appeal, Palmetto argued that objections would have been futile and, therefore, there was no trial by implied consent. (Resp. Br. at App. 2649-2651). Shah did not make any counter argument. (Reply Br. at App. 2676-2702, *passim*). Since Shah did not raise the "futile act" issue to the Court of Appeals, it is not a proper ground for certiorari. Rule 242(d)(2), SCACR.

The Court of Appeals ruled that any objection would have been a "futile act" and, therefore, there was no trial by "implied consent" even if that issue was preserved for appellate review. On rehearing, Shah argued for the first time that an objection would not have been futile. (App. 2725-2726). An argument cannot be raised for the first time in a petition for rehearing. *Herron, supra.* Thus, Shah's argument against the Court of Appeals' "futile act" ruling was not a proper ground for rehearing and, therefore, it is not properly before this Court on certiorari. In any event, Shah's argument is without merit.

Any objection would have been futile, because Judge Early had ruled that he would admit all evidence and later determine its relevancy, admissibility, and persuasiveness. *Staubes v. City of Folly Beach*, 529 S.E.2d 543, 547 (S.C. 2000) (law does not require futile acts of objecting when court has already made it clear how the court would rule). This is standard practice for bench trials. See *Brown v. Allstate Ins. Co.*, 542 S.E.2d 723, 726 (S.C. 2001) ("A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting."), *rev'g* 523 S.E.2d 807 (S.C. App. 1999). Judge Early followed this practice throughout the trial. (E.g., App. 323, 378-380, 392, 540). This demonstrates that objections would have been futile.

Shah misperceives the meaning of "futile act." He argues an objection would not have been a futile act, because the trial judge allowed the parties to make objections. (Cert. Pet. at 17). Shah fails to note, however, that the trial court overruled every objection, and this is precisely

why any objection would have been a futile act. Moreover, the trial court made it clear before the hearing, during the hearing, and at the end of the hearing that it would admit all evidence offered and thereafter consider its relevance, admissibility, and weight. Finally, at the end of the trial, Shah specifically agreed with this approach:

> Your Honor has been very inclusive in what you've allowed us to present. . . . We believe the matters that have been presented by both sides are before you and *to the extent that any of it is something that you feel should not be considered, we trust you to make that choice and that decision.* So, we have no concerns about the matters that have been presented by the defendants because we're confident that the court would make a decision about what is appropriate.

(App. 673-674) (emphasis added). [15] The trial judge agreed and again stated his intent to allow all proffered evidence into the record, after which he would decide what was relevant, admissible, and probative: "I'm going to allow everything that has been offered even over objections into the record and I will consider what I think is relevant to the issues at hand and make my decision based on that." (App. 674). This further demonstrates that any objection would have been futile, and it demonstrates that Shah consented to this approach.[16]

III. The Court of Appeals correctly affirmed the trial court's ruling that the Settlement Orders were a limited judicial intrusion upon only the QA stage of the peer review process and did not reach any other aspect of the peer review process.

Judge Keesley issued all three "Settlement Orders." The 2001 Consent Order was the first and principal order. It specifically provided:

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[15] Shah made this same statement to Judge Early during the post-trial hearing and even cited and quoted *Brown, supra*, to argue: "A trial judge's role in a bench trial is to admit all evidence and then to evaluate it in a non-jury setting." (App. 692).

[16] Also throughout his certiorari petition, Shah complains that Judge Early ruled upon grounds not argued by Palmetto during the hearing. At the end of the trial, Judge Early recognized that this case presented numerous, complicated issues. To short cut the need for any further closing arguments, Judge Early requested both parties to present their positions in writing, noting that "you can do it in the form of a proposed order" and that both sides would be given the opportunity to respond in writing to the submission by the other party. (App. 678-679). The parties followed this procedure and, therefore, Shah's arguments regarding matters not specifically argued during the trial are manifestly without merit.

> [Shah] is required to participate in the Quality Assurance program. Normally and traditionally that Quality Assurance Process is conducted within the Radiology Department by other Radiologists[.] Part of the settlement agreement in this case requires that the Quality Assurance review of Dr. Shah's medical cases will be removed from the responsibility of the Radiologists who are members of or employed by RRC. Beginning July 31, 2001, the parties have agreed that a Radiologist mutually selected by [Palmetto and Shah] will conduct the Quality Assurance reviews of Dr. Shah's cases.

(App. 2-3, ¶ 3) (emphasis added). The plain language of this order (above-emphasized) conclusively demonstrates that the only part of the Peer Review Process affected by the 2001 Consent Order was the QA review of Shah's cases. There is no mention of the other stages of Peer Review before the MEC, FHC, or Appeal Board.

Judge Keesley later issued the 2003 Supplemental Order to resolve conflicts over the QA provisions of the 2001 Consent Order. This order also made it clear that altering the QA review of Shah's cases was the only change being made to the Peer Review Process:

> The QA Process approved, in the [2001] Consent Order, was intended to provide an independent and impartial QA review of Dr. Shah's cases that would not involve the other radiologists .... [The 2001] Consent Order only applies to allegations or complaints about Dr. Shah that allege a deviation from the standard of patient care or traditional QA matters (the "QA Process"), not Administrative Requirements. The stated goal of the [2001] Consent Order is to remove [other radiologists] from involvement in the QA Process to ensure fairness, impartiality, and to remove any claim of bias.

(App. 13) (emphasis added). Importantly, Judge Keesley closed the order as follows:

> Nothing in this Order or in the [2001] Consent Order precludes the initiation of any administrative action provided under the Bylaws or Policies, or limits the ability of the Board of Directors of the [Hospital] or Hospital management to take such administrative action as they deem necessary for the proper administration and management of the [Hospital] and to assure quality patient care is provided.

(App. 20) (emphasis added). This closing paragraph highlights Judge Keesley's intent to leave hospital operations to Palmetto and its management, and it fully supports the conclusion by Judge Early that the judicial intrusion into the Peer Review Process was very limited.

In short, the Supplemental Order confirmed that the 2001 Consent Order related to the QA Process only. The Supplemental Order was likewise focused on the QA Process with the minor exception of the Chief deciding which issues were QA (if unclear), and then handling the administrative matters in the ordinary course unless he declined to so. Importantly, nothing in the Supplemental Order altered any step in the Peer Review Process except for continuing the existing alteration of the first step, i.e., the QA Process outlined in the 2001 Supplemental Order.

Shah moved to reconsider the Supplemental Order, and Judge Keesley denied the motion in the 2003 Reconsideration Order. Judge Keesley made it clear that the existing orders and their limited intrusion into the QA review of Shah's cases was as far as he would go:

> As has been repeatedly stated, the court is not equipped to function as a doctor or a hospital administrator. The [Supplemental Order] may not be the best possible solution and the court fully recognizes its lack of knowledge about all the intricacies involved. However, at this point, the court believes the current Order is as good as it can do.

(App. 22) (emphasis added). Judge Keesley's recognition that the judiciary cannot manage a hospital or the Peer Review Process again highlights Judge Keesley's intent to intrude upon that process in a very limited and focused manner. This again supports Judge Early's decision that the Settlement Orders did not judicially regulate the other steps in the Peer Review Process.

IV. The Court of Appeals correctly affirmed the trial court's rulings that Palmetto's actions regarding the case of Patient X, regarding the imposition of the psychological evaluation requirement as a condition of probation, and consideration of the "35 emergency room cases" were not contemptuous violations of the Settlement Orders.

Shah's privileges were terminated for two independent and stand-alone reasons: (1) his gross misdiagnosis of Patient X; and (2) his refusal to comply with the probation condition of a psychological evaluation. Shah concedes this. (App. 2739; Cert. Pet. at 7). Shah is not entitled to any relief in this action unless both of these termination grounds resulted from a willful and

contemptuous violation of the "Settlement Orders." As demonstrated below, the trial court correctly held that neither of these termination grounds was reached in contempt of the Settlement Orders. Thus, Shah is not entitled to any relief. Moreover, if either of these termination grounds was not the result of contempt, then Shah is not entitled to any relief, even if any other action by Palmetto argued by Shah is assumed to be the result of contempt.

A. Patient X (also referred to as Patient 36)

The Outside Reviewer recommended that Shah undergo further training on reading CT scans due to numerous misreads in the reviewed records. (App. 855). This CT training was imposed as a condition of probation in May 2004, to be completed during the six month probation period. (App. 926, ¶ 4). As of February 2005, Shah had not completed any conditions of his six month probation, including the CT training, so Palmetto extended the probation period for another six months, and required completion of the CT training by July 1, 2005. (App. 976, ¶ 3; App. 979, ¶¶ 1 and 6). Shah completed the training in April 2005 and his CT privileges were reinstated. Only four months later, Shah completely misread Patient X's CT scan:

1. Patient X was being treated for diverticulitis. Her physician began to suspect something more serious and scheduled a CT scan of her abdomen, which revealed "a very large ovarian mass." Patient X was sent to Palmetto for a biopsy.

2. Patient X delivered the CT scans and the radiological report. The CT scans comprised seven large sheets containing 16 images each, and Patient X's name was on each of these images, *i.e.*, her name appeared 16 times on each of 7 CT sheets, a total of 102 times.

3. Patient X was placed on a gurney and given an IV with sedation. Shah arrived and said: "Why are you here? ... I can't biopsy something that doesn't exist. I don't know why people expect me to biopsy something that doesn't exist. All you have is an enlarged uterus. ... I have confirmed with my other two colleagues and all three agree that you have an enlarged uterus. Get dressed and go home."[17]

[17] Shah also argues: "No treatment was given and no biopsy was performed" (Cert. Pet. at 5), but the purpose of this true statement is unclear. If Patient X's treating physicians had accepted Shah's expert opinion, Patient X would probably be dead and this Court would likely be reviewing an entirely different type of case.

4. Patient X asked Shah to confer with the radiologist who issued the first report. He left the room, and returned to say he could not reach the radiologist. At Patient X's request, Shah called her primary physician, and told him the same thing he had told Patient X: "There is nothing here to biopsy. I can't biopsy something that doesn't exist. It is an enlarged uterus. I am going to send the patient home."

5. Patient X, elated with the good news, had a celebration dinner with her family that night. Her treating physician called, advising he had called the first radiologist, who was not available, but the first radiologist's partner had read the CT scan and confirmed the existence of the large ovarian mass. The treating physician advised it was essential that she be seen by an oncologist as soon as possible.

6. A neighbor of Patient X was a partner with the oncology group recommended by her treating physician. She immediately walked to his house with her CT scans. He was sitting at his desk, held the CT sheets up to his desk lamp, and confirmed the existence of the very large mass. Patient X underwent surgery to remove the cancerous mass and subsequent treatments to further combat the cancer.

(App. 542-552). After her surgery, Patient X wrote a letter to Palmetto advising of Shah's gross misdiagnosis; she included the radiological and surgical reports with this letter, and she later gave Palmetto a copy of the CT scans. (App. 547-549, 550-551).

Palmetto received Patient X's letter only three days before an October 31 MEC meeting to consider Shah's satisfaction of the conditions of his probation. The Chief of Staff received the letter and delivered it to the MEC at this meeting. The MEC, in compliance with Judge Keesley's Supplemental Order, immediately referred the matter to the Outside Reviewer for review, and delivered the CT films to him on November 2. (See App. 1011). Based on Shah's failure to satisfy all conditions of probation, the MEC recommended suspension and revocation of Shah's privileges. (*Id.*).

The Outside Reviewer issued a preliminary report on December 2. He noted the only excuse for the mis-read would be that Shah had seen the wrong films, but that too would be a deviation from the acceptable standard of medical care:

> This case does represent a mis-interpretation with potential impact on patient care (although none occurred for other reasons [*i.e.*, the intervention of Patient X's

> treating physicians]). As mentioned on the [attached] form, the findings on the scan are evident so I have to wonder if the correct films were reviewed or if there is some other piece of information of which I am unaware. If other films were reviewed, this would still represent a problem, albeit of a different nature (not identifying the patient correctly). These films should be reviewed with Dr. Shah to see what explanation he might have. . . . I did speak with Dr. Shah by telephone, but I feel full review in person with Dr. Shah is indicated. This will serve as a preliminary review pending that discussion.
>
> . . .
>
> Comments: The CT scan shows an obvious pelvic mass with probable second mass as well as multiple deposits at other sites through [sic] abdomen. The pattern is most consistent with ovarian carcinoma with metastases. The initial reading was confirmed at surgery. It is difficult to understand how a review of the films at the time of [sic] scheduled biopsy could have lead to an interpretation of no mass as this is not a subtle case. It is possible that a different set of films were reviewed. This would be the most obvious alternative explanation. In this case, there would be an obvious error of misidentifying the patient. **In either case this would be a deviation from [sic] standard of care that could have an impact on outcome [though not here due to intervention by the primary physician]**.
>
> . . .
>
> I did speak with [Shah] by telephone and he indicated he thought there was an enlarged uterus that did not need biopsy. He said he did show the images to other radiologists who agreed with his opinion. . . . I told him the next step would be to review the films together to see if this was in fact the set of films he saw. It would probably be difficult to draw any further conclusions about what happened at the time of [sic] scheduled biopsy without reviewing this in person with [Shah].

(App. 1015-1017) (all emphasis added). The possibility of having read the wrong films was raised by Shah to the Outside Reviewer during their telephone conversation prior to the report:

> [Shah] asked that we go over the films together because maybe I [Outside Reviewer] had a different set than he had. I told him I would be willing to do this and would not issue a final report until that time. For that reason, I have attached a preliminary review.

(App. 1018) (emphasis added). Nevertheless, Shah falsely states that the Outside Reviewer raised the possibility of Shah being given the wrong CT scans. (Cert. Pet. at 5, 5-6).

Shah apparently would have this Court believe that the stars aligned to conspire against him and deliver the wrong CT scan to his hands, but it just happened to be a CT scan that was almost identical to Patient X's CT scan:

1. Some unidentified person delivered the wrong CT scan to him.

2. It just so happened that it was a CT scan, rather than an x-ray, MRI, etc.

3. It just so happened that it was an abdominal CT scan.

4. It just so happened that it was an abdominal CT scan of a woman.

5. It just so happened that the CT scan revealed an enlarged uterus, allowing Shah to conclude that the "less qualified" physicians and radiologists that were treating Patient X would misread it as a mass justifying a biopsy.

6. But miraculously, the correct CT scan was returned to Patient X as she left the hospital on Shah's orders.

Shah, however, did not submit any evidence to support his starry alignment theory that he was given the wrong CT scan. As noted later (See Arg. VI(D), *infra*), Shah had also claimed that two other radiologists read the same CT scans and reached the same conclusion of an enlarged uterus. These mysterious radiologists apparently disappeared – Shah never identified them and never presented any evidence from them by affidavit or otherwise despite the opportunity to do so. (See n.20, *infra*). And were all of this true, Shah never explains how he failed to recognize that he was reading the wrong CT scan "film" – each film has 16 images, and each image bears the patient's name. (See App. 2294-2384).[18] And as the Outside Reviewer found, misidentifying the patient is also a breach of acceptable medical care standards.[19] The only reasonable conclusion from the evidence is that Shah was not given the wrong CT scans and no other radiologist concurred in his misdiagnosis of Patient X.[20]

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[18] These are the CT scans of Patient X. Her name appeared in the upper right hand corner of each image, but it has been redacted and replaced with "Patient 36." Her name appeared approximately 100 times on the 7 CT films.

[19] Misidentifying the patient is even more troublesome than a misdiagnosis of a particular CT scan. It is likely a more pervasive problem and could lead to unnecessary biopsies and unnecessary surgeries.

[20] In recommending the termination of Shah's privileges, the FHC noted that: despite presenting 18 witnesses at the December 13-15 hearing, Shah did not testify and did not present any evidence regarding his mis-read of Patient X's CT scan. (App. 1020). The FHC also noted that one of Shah's witnesses, a radiologist, agreed that missing a 12 cm pelvic mass on a CT scan (like that revealed in Patient X's CT scan), would "raise serious concerns about a physician's competence." (*Id.*).

Shah never scheduled the meeting with the Outside Reviewer after procuring a delay of the final report, and he never met with the Outside Reviewer despite requests from Palmetto that he do so (App. 1075). Regarding Patient X, Palmetto provided Shah with the Outside Reviewer's cell phone number on December 6, 2005 so that he could arrange a meeting prior to the final hearing on his termination on December 13, 2005. (App. 1075). Shah never contacted the Outside Reviewer despite this correspondence, despite the clear requirement of Judge Keesley's Supplemental Order that he (Shah) was responsible for arranging any meetings with the Outside Reviewer (App. 18), and despite knowing that Patient X would be a subject in the December 13 final hearing on his privileges at Palmetto. His reason for not doing so is simple – he believed he had successfully blocked any corrective action by procuring a delay of the final report and then avoiding the meeting that would lead to a final report.

On certiorari, Shah argues that Palmetto "deliberately circumvented and disregarded the role of the outside reviewer" when it "selected this case [Patient X] and did not await a final decision from [the Outside Reviewer]." (Cert. Pet. at 13). Shah also argues that the Outside Reviewer "requested time to review the case in person with [Shah]" and opined that "no medical conclusions could be drawn until further review," but Shah's privileges were terminated "mere hours after obtaining [the Outside Reviewer's] request ...." (*Id.*). All of this is simply false.

Palmetto did not "circumvent or disregard the role of the Outside Reviewer" – Palmetto forwarded the matter to the Outside Reviewer on November 2 after receiving the complaint from Patient X on October 31. This complied exactly with the requirements of the 2003 Supplemental Order that if a corrective action is instituted for a matter not previously evaluated by the Outside Reviewer, the matter should be sent to the Outside Reviewer. (App. 9).

Palmetto did not "select" the case of Patient X for QA review – patient complaints are an automatic trigger for QA review under Palmetto's established QA protocols as established by the testimony of the Outside Reviewer (Dr. Selby) and Palmetto's Director of Quality Assurance (Karen Hart). (See App. 2440 and 2451). This was in exact compliance with the requirement of the 2001 Consent Order that the selection of Shah's cases for QA review be "consistent with [Palmetto's] established Quality Assurance protocols and not in a discriminatory manner." (App. 2). There is no evidence that any other doctor would have been treated differently than Shah under the facts of Patient X's case.

The Outside Reviewer did not "request" additional time for a final report. Rather, he had merely noted Shah's request for a meeting and his agreement to meet with Shah. (App. 1018). This never happened, because Shah never arranged the meeting.

Shah was not terminated "mere hours" after this non-existent request. To support this fiction, Shah relies on a December 13 email between the Outside Reviewer and Palmetto's counsel. (Cert. Pet. at 13). In this email, the Outside Reviewer merely noted the prior phone call with Shah, wherein Shah had suggested that the Outsider Reviewer had a different set of CT scans, and asked that they meet to review the films together. The Outside Reviewer had agreed to meet with Shah, but Shah never arranged this meeting. (App. 1018).

The Outside Reviewer did not find that "no medical conclusions could be drawn until further review." Rather, he found that, unless Shah had in fact read the wrong CT scan – something that Shah suggested but never pursued and never proved – the mis-read of the CT scan was an inexcusable misdiagnosis of a condition that was not subtle. (App. 1015-1017). He also found that reading the wrong CT scan was a different but equally serious deviation from the standard of medical care. (App. 1015, 1016).

Finally, Palmetto was not required to wait on a "final decision" from the Outside Reviewer when Shah prevented "finality" by requesting but not arranging a meeting with the Outside Reviewer. Shah knew how to contact the Outside Reviewer and he knew that the Patient X issue was to be a subject at his upcoming termination hearing. Shah's failure to schedule the meeting that he requested simply did not and could not prevent Hospital from considering Shah's gross misdiagnosis of Patient X, particularly given that the Outside Reviewer had found that, regardless of whether Shah's suggestion about the "wrong" CT scan had any truth, Shah had deviated from the standard of medical care.

In short, Palmetto properly reviewed and relied upon the Outside Reviewer's "preliminary" report since Shah failed to arrange a meeting with the Outside Reviewer. Moreover, since there is no evidence that Shah was given the wrong CT scans, any meeting would not have changed the Outside Reviewer's report. Shah's gross misdiagnosis of Patient X was a "stand alone" ground for the termination of his privileges and, therefore, Shah was not entitled to any relief against Hospital, even if it is assumed that he proved some other willful violation of the Settlement Orders (which he did not).

B. The Psychological Evaluation Requirement

It is undisputed that Shah refused to comply with this condition of his probation and that this refusal was a "stand alone" basis for the termination of his privileges. (App. 1020, ¶ 1). Shah concedes this in his rehearing and certiorari petitions. (App. 2732; Cert. Pet. at 7). This probation condition was imposed after receiving the Outside Reviewer's reports to assist Shah in improving his communication and interaction skills with patients and staff, and to improve his general attitude towards compliance with hospital regulations. (App. 976 at opening paragraph; App. 978-979, ¶ 13). As the Outside Reviewer noted in his first report:

> Dr. Shah did not show a willingness to proactively address concerns regarding compliance with the Rules and Regulations of the hospital. Instead he will often carry on extended debates about the appropriateness or necessity of a given policy. Although some of his arguments may be reasonable and the sentiment even shared by other physicians, they are irrelevant when there is a clear direction from medical staff bylaws, JCAHO requirements, or hospital rules and regulations. This pattern of behavior is disruptive at best and can cause greater problems at worst. I see two issues here: (a.) failure or delay in complying and b.) the general attitude that he can decide what rules are worthy of compliance. This attitude was more widespread among physicians in the past and has represented a difficult adjustment for many, however, it can no longer be tolerated in the modern framework of healthcare delivery. Note that this is not necessarily a finding of substandard care, but there must be a change or it could lead to that.

(App. 855) (emphasis added). As the Outside Reviewer found in his third report regarding Shah's treatment of a patient he required to urinate into a towel:

> For physicians to be functioning members of any medical staff, their ability to show respect and compassion for their patients is at least as important as their medical knowledge. This case represents a serious breach. . . . [Alternatives were available and either] of these would have been simple to accomplish and the fact that they were not indicates a serious lack of "listening" to the patient. . . . The fact that none of these options was pursued, in the face of clear communication from both the patient and nursing staff, is unacceptable.
>
> It is up to the Medical Staff to decide the appropriate response to this case. I will reiterate that I consider this to be equal if not more important than most medical issues as patient communication is always paramount in medical care. It does represent a deviation from the standard of care that I would expect at any hospital. . . . It is up to the Medical Staff to make a final determination of any action(s) that is to be taken.

(App. 886-887) (emphasis added).[21] Also, the patient records were replete with other examples of Shah's inappropriate responses to patient and staff complaints and inquiries. (E.g., App. 631-638). Shah nevertheless continued to disregard hospital policies as found by the FHC in its December 2005 recommendation to terminate Shah's privileges. (App. 1020). Most notably, Shah refused to follow the policy that required entry of his "preliminary reports" into the PACS system for use by *emergency room* physicians, which delayed treatment for *emergency room*

[21] This is a heavily redacted excerpt of the Report, which is reproduced in its entirety at App. 886-887.

patients. (*Id.*). The FHC found that Shah's refusal to follow this policy "has a direct impact on patient care and illustrates an apparent lack of regard for Hospital policy." (*Id.*).

On certiorari, Shah argues principally that Palmetto violated the procedures set forth in the bylaws, thereby depriving him of contractual due process. He also argues that these same violations deprived him of constitutional due process, which he asserts is a substantial constitutional issue that this Court should address. (Cert. Pet. at 14-15, *citing Huellmantel v. Greenville Hosp. Sys.*, 402 S.E.2d 489 (S.C. App. 1991). As to the relevant issue of contempt for violation of the Settlement Orders, Shah summarily argues on that the "Settlement Orders required [Palmetto] to follow its Bylaws and written policy for administrative issues." (Cert. Pet. at 13). Shah's arguments have no merit.

As to his principal arguments of contractual and constitutional due process, Shah ignores basic hornbook law. First, there is no constitutional due process issue here, because there is no state action, which is the linchpin requirement for any constitutional due process claim. In *Huellmantel, supra*, the only authority cited by Shah, the hospital was a public hospital and, therefore, the requisite state action for due process was present. Here, Palmetto is a private hospital, so there is no state action and, therefore, no constitutional due process claim. The trial court rejected Shah's due process claim on these grounds and several others. (App. 43 n.7). Shah never challenges these rulings and, therefore, they are the law of the case and require affirmance. Second, there is no contractual due process claim, because contempt does not lie for a breach of contract. Shah might have pursued a breach of contract claim in the 2006 Action, but he dismissed that action, and with that dismissal went any potential breach of contract claim.

Shah's contempt argument is equally without merit. First, Shah did not raise this issue in his contempt motions and, therefore, the judge court correctly ruled that the issue was not

properly before him. (App. 42-43; see Arg. II, *supra*). Affirmance on this ground moots all other issues raised by Shah. Second, this probation condition was imposed at the FHC and MEC levels of the peer review process, and the trial court correctly held the Settlement Orders did not regulate anything at these peer review levels. (*Id.*; App. 49). Affirmance on this ground moots all other issues raised by Shah. Third, the trial court correctly held that the references to the bylaws in the Settlement Orders did not make any bylaw violation enforceable by contempt. (App. 42-43, 49; see Arg. VI(B), *infra*). Affirmance on this ground moots all other issues.

Finally, as noted earlier, the Outside Reviewer's reports demonstrate that Shah's conduct towards patients, staff, and his obligation to follow hospital policies had risen to the level of patient care (QA) issues, and Judge Keesley expressly held in the unappealed (law of the case) 2003 Supplemental Order that such "administrative" issues could become QA issues. (App. 15, n.1). Judge Keesley also expressly held in this unappealed order that nothing in the Settlement Orders precluded Palmetto from taking necessary steps to ensure and protect proper management of the hospital and proper patient care. (App. 20). The evaluation requirement met these exceptions in the unappealed (law of the case) Supplemental Order as a corrective action imposed for QA problems identified by the Outside Reviewer.

In short, the imposition of a psychological evaluation as a condition of probation was not a matter subject to the contempt power and, in any event, it was in full compliance with the Settlement Orders. It is undisputed that Shah did not satisfy this condition of probation, and his failure to do so was a "stand alone" basis for the termination of his privileges. Accordingly, Shah was not entitled to any relief against Palmetto, even if it is assumed that he proved some other willful violation of the Settlement Orders (which he did not).

C. The 35 Emergency Room Cases

Shah summarily argues that the evidence regarding the "35 emergency room cases" requires a finding of contempt. (Cert. Pet. at 12). As demonstrated below, the "35 Emergency Room Cases" provide no basis for finding contempt.

Judge Early rejected this contempt claim on several independent grounds. First, he correctly ruled that "[t]his 'violation' is not asserted in any of the 'pending motions.'" (App. 41). Thus, it was not a proper ground for contempt. (See Arg. II, *supra*). Affirmance on this ground moots all other issues raised by Shah.

Second, Judge Early correctly ruled that "[t]his was done in response to [Shah's] repeated demands at the Medical Executive Committee (MEC) and Fair Hearing Committee (FHC) stages that he should be compared to other radiologists. He cannot now complain that [Palmetto] heeded his requests." (App. 41-42). Shah did not challenge this ruling in the Court of Appeals (App. Br. at App. 2565-2617, *passim*), and he does not challenge it on certiorari. (Cert. Pet., *passim*). Thus, this ruling is the law of this case and, right or wrong, requires affirmance. *Buckner, supra.* Affirmance on this ground moots all other issues raised by Shah.

Third, Judge Early correctly ruled that "[t]his was done at the MEC and FHC stage of the PPR process, not the QA stage, to which the Settlement Orders clearly limited the imposition of any prescribed or proscribed conduct." (App. 43). Affirmance on this ground moots Shah's other issues.

Fourth, Judge Early correctly ruled that "[t]his was done not as QA but as part of the MEC's investigation into whether Plaintiff had satisfied the conditions of his earlier imposed probation. The Settlement Orders did not attempt to limit the power or right of the MEC or the FHC to make any such investigation." (App. 43). Shah did not challenge this ruling in the Court of

Appeals (App. Br. at App. 2565-2617, *passim*), and he does not challenge it on certiorari. (Cert. Pet., *passim*). Thus, this ruling is the law of this case and, right or wrong, requires affirmance. *Buckner, supra.* Affirmance on this ground moots all other issues raised by Shah.

Finally, were it true that considering the 35 emergency room cases was a violation of the Settlement Orders, Shah is nevertheless not entitled to any relief. As shown earlier, Shah's privileges were properly terminated on two "stand alone" grounds: (1) his refusal to satisfy the probation condition of a psychological evaluation; and (2) his gross misdiagnosis of Patient X. Any presumed error in considering the 35 emergency room cases in the termination of Shah's privileges does not impact these separate grounds and, therefore, Shah is not entitled to a writ of certiorari.[22]

V. The Court of Appeals correctly did not reach the HCQIA and doctrine of non-review questions but, in any event, the trial court correctly ruled on these issues and these rulings, standing alone, are an additional sustaining ground for denying Shah's Certiorari Petition.

It is axiomatic that an appellate court need not reach an issue if it has disposed of the appeal on a different ground and reaching the issue would not change the ruling of the appellate court. *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591, 598 (S.C. 1999). As demonstrated in this Return, as well as in the Brief of Respondent and Respondent's Return to Petition for Rehearing (which are incorporated herein), the Court of Appeals correctly affirmed the judgment of the trial court. Thus, the Court of Appeals did not err in not reaching the HCQIA and doctrine of non-review issues. Assuming this Court does not otherwise deny

[22] As he did on appeal, Shah claims that he did not learn of the 35 emergency room cases until discovery in the 2006 Action. (Cert Pet. at 18). This is simply false. Shah filed his third contempt petition on April 14, 2006, long after the December 2005 hearing and termination decision. (App. 95). His memorandum in support of that petition, also filed on April 14, 2006, is replete with references to the December 2005 hearing transcript and decision. (App. 97-113). Thus, Shah knew about the 35 emergency room cases long before any discovery in the 2006 Action. As noted later, the dissent erroneously relied on this false claim in reaching the issue of the 35 emergency room cases. (See Arg. VI(E), *infra*).

certiorari, it should deny certiorari upon the additional sustaining grounds that the trial court correctly ruled on the HCQIA and doctrine of non-review issues.

Judge Early ruled that Shah's request for relief was limited to the requests made in the pending contempt motions and supporting memoranda, and that these requests were barred by state and federal law:

> In addition, all motions are denied because the relief sought by Plaintiff is not available as a matter of law. Plaintiff's September 2005 motion and memoranda request an award of costs and attorney's fees as the only relief in addition to a finding of contempt. The December 2005 motion and memorandum request only a finding of contempt. Plaintiff's April 2006 motion and memorandum requests a finding of contempt, restoration of his privileges at Defendant's hospital, and damages (which under South Carolina's contempt law, may include attorney's fees). It is axiomatic that a court cannot grant relief not requested and, therefore, the foregoing requests are the only ones properly before me. An award of damages is not available to Plaintiff due to the immunity from damages provided by the Health Care Quality Improvement Act ("HCQIA"), which is a federal law that pre-empts any state law claim that would allow such damages. [Footnote 2]. Restoration of privileges is not available to Plaintiff under South Carolina's doctrine of non-review, which essentially deprives the courts of jurisdiction to grant this relief. [Footnote 3]. In any event, assuming any relief were available, the motions are denied for the other reasons set forth in this order.
>
> [Footnote 2]: Congress passed HCQIA to address serious, national problems with the quality of healthcare. HCQIA provides immunity from liability for damages for participants in a professional peer review proceeding that meets the standards set forth in the Act. 42 U.S.C. § 11111. Those standards are presumed met unless rebutted by the practitioner, which has not occurred here. The record also contains abundant evidence that the professional review proceedings concerning Plaintiff satisfied the standards in the Act, 42 U.S.C. § 11112.
>
> [Footnote 3]: In *Wood v. Hilton Head Hospital, Inc.*, 356 S.E. 841 (S.C. 1987), our Supreme Court affirmed the trial court's holding that it lacked jurisdiction to reinstate a physician to the medical staff of a private hospital (like Defendant here) and declined to adopt the minority view that such decisions are subject to judicial review.

(App. 31). Shah does not challenge Judge Early's ruling on what remedies were claimed by and available to him. Thus, it is the law of this case. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d

544, 544 (S.C. 1970). Moreover, a review of the contempt motions and supporting memoranda demonstrates the accuracy of Judge Early's ruling. (See App. 59-113).

Shah mentions but never challenges Judge Early's ruling that HCQIA pre-empted any State law claim for damages. Thus, it is the law of this case. *Buckner, supra.*

As to the doctrine of non-review precluding the relief of reinstatement, Shah argues that Palmetto waived this subject matter jurisdiction defense by agreement in the 2001 Consent Order. (Cert. Pet. 23-24). It is axiomatic, however, that "subject matter jurisdiction cannot be waived or conferred by agreement of the parties to an action." *In re November 4, 2008 Bluffton Town Council Election*, 686 S.E.2d 683, 688 (S.C. 2009). As to HCQIA, Shah argues he proved contempt and, therefore, the requirements of HCQIA have not been met. (Cert. Pet. at 23). As found by Judge Early, Shah did not prove contempt and, therefore, Shah's argument fails of its own weight.

As to HCQIA and the doctrine of non-review, Shah argues Judge Early should not have reached these issues, because the issues of liability and remedies had been bifurcated. (Cert. Pet. at 23). Shah overstates the bifurcation. Judge Early stated that if he found contempt, then Shah could present his "evidence on damages." (App. 554-555). Nothing in this statement precluded Judge Early from considering defenses to damages, particularly when those defenses precluded any relief regardless of the "evidence on damages."

VI. Miscellaneous "Arguments"

Throughout his petition, Shah makes passing references to issues that he had raised on appeal to the Court of Appeals. These "arguments" are not properly before this Court, because they are not set forth in a "question presented" and not argued under separate headings. In an abundance of caution, however, these "arguments" are addressed below.

A. Case Selection and "Stockpiling"

This "argument" pertains to the first cases reviewed by the Outside Reviewer under the Settlement Orders. Shah complains that these cases were "stockpiled" by Palmetto and that Palmetto selected the cases in violation of the Settlement Orders because the Outside Reviewer was not involved in the selection of these cases. His arguments are manifestly without merit.

These cases were "stockpiled," because the dispute between Palmetto and Shah, as well as the delay in appointing an outside reviewer after settlement of that dispute, precluded any QA review of Shah's cases. As Judge Early correctly found, the 2001 Consent Order set forth the case selection process, and it did not require the Outside Reviewer to select the cases. Rather, it gave the Outside Reviewer "oversight authority" to ensure that "the selection process is performed consistent with [Palmetto's] established Quality Assurance protocols and not in a discriminatory fashion." (App. 2). Karen Hart was the Director of Quality Assurance. She testified that Shah's QA cases were selected in accordance with Palmetto's established protocols, including the so-called "stockpiling" of cases. (App. 2442-2460). Shah presented no evidence to dispute Ms. Hart's testimony. More importantly, the Outside Reviewer agreed that the process used by Palmetto was the most common process for selecting QA cases, and he had no problem with it. (App. 2440-2441). Thus, Shah's arguments have no merit. The undisputed testimony establishes that Palmetto used standard protocols to select the QA cases, which was the only thing required by the Settlement Orders.

Shah also argues that Palmetto interfered with the Outside Reviewer in the case selection process. No evidence supports this argument. There is no evidence that Palmetto did anything not wanted by the Outside Reviewer or refused something requested by the Outside Reviewer.[23]

[23] Shah also complains that he was placed on probation despite the absence of any recommendation for corrective action from the Outside Reviewer. (Cert. Pet. at 3). This argument is manifestly without merit. First, the

B. Bylaws

Throughout these proceedings, Shah had argued that any violation of the bylaws was a violation of the Settlement Orders and punishable by contempt. In other words, Shah argued that he could invoke the court's contempt power any time he disagreed with anything. Judge Early and the Court of Appeals properly rejected this argument.

The 2001 Consent Order, which was the original Settlement Order, never mentions the bylaws except to note that Shah was to remain on the duty schedule so long as he met the bylaw requirements for being a member of the medical staff at Palmetto. (App. 1-4). There has never been a "duty schedule" issue in this case.

The 2003 Supplemental Order and the 2003 Reconsideration Order mention the bylaws but only in the context clarifying the changes to the peer review of Shah, the principal change being that members of the Radiology Department were removed from the QA review of Shah's cases and replaced with an Outside Reviewer. (App. 12-22, *passim*). Any other matter was to be handled under the bylaws in the normal course of business. (*Id.*). Nothing in either order declared that a violation of a bylaw was enforceable by contempt. (*Id.*). Doing so would be in direct contradiction of the rulings in the Settlement Orders that the court was intruding upon hospital operations in a very narrow and limited manner, and that any other matters were left to the normal operating procedures at Palmetto. (*Id.*).

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unappealed (law of the case) 2003 Supplemental Order specifically provided that the MEC would decide whether any corrective action was warranted based on the reports from the Outside Reviewer. (App. 19). Second, nothing in any of the Settlement Orders required a recommendation from the Outside Reviewer before Shah could be subjected to corrective action. (App. 1-22, *passim*). The Outside Reviewer was free to make recommendations "where appropriate," but nothing required a recommendation from him. (App. 19). Third, the Outside Reviewer typically concluded that corrective action, if any, was a matter to be decided by the MEC. (*E.g.*, App. 886-887).

In the appealed order, Judge Early correctly rejected Shah's "bylaw" claims under firmly established principles of South Carolina law that the references to the bylaws in the Settlement Orders did not make the bylaws enforceable by contempt:

> [T]he conduct proscribed or prescribed by the order must be set forth in "clear and certain" terms; it must be stated specifically and definitely rather than by implication. *Welchel v. Boyter*, 196 S.E.2d 496, 498 (S.C. 1973). The proscribed or prescribed conduct must be ascertainable from the express terms of the order itself and not by reference to other materials, including any materials referenced in or incorporated into the order. *Phillips v. Phillips*, 341 S.E.2d 132, 133 (S.C. 1986); *American Fed. Bank, FSB v. Kateman (In re: First Union Nat'l Bank)*, 516 S.E.2d 1, 2-3 (S.C. App. 1999). To the extent [Shah] relies upon alleged violations of any Bylaws or other matters referenced in the Settlement Orders as a ground for contempt, the motions are denied.

(App. 32-33). Shah never challenged these rules of law on appeal and, therefore, they became the law of the case. He also never challenges these rules of law in his certiorari petition. The Court of Appeals correctly affirmed Judge Early, first noting that the Settlement Orders were a limited judicial intrusion upon hospital operations (App. 2714-2715) and then holding:

> Although the Supplemental Order addresses matters outside the QA review process, such as Administrative Requirements, *the court did not direct [Palmetto] to handle these matters in any particular manner*. Rather, the court permitted [Palmetto] to *address these matters in accordance with its own rules and regulations*. Because the Settlement Orders *only set forth requirements governing how [Palmetto] conducts QA reviews of Dr. Shah's cases*, our review in this case is limited to determining whether [Palmetto] complied with those requirements. Therefore, we decline to address the asserted grounds for contempt that are unrelated to the QA review process.

(App. 2715) (emphasis added). In short, the trial court and the Court of Appeals correctly applied South Carolina law and correctly interpreted the Settlement Orders to conclude that Shah's alleged bylaw violations, were they assumed to be true, are not enforceable by contempt.

C. Standard of Care

Regarding Patient 27, whom Shah required to void in a towel while lying on a table, Shah argues that "Selby [the outside reviewer] disagreed with Shah and the Radiology Department

because he was unaware of the local standard of care for this procedure." (Cert. Pet. at 2-3). There is no evidence that the Outside Reviewer was not aware of the local standard of care. Shah had raised the "standard of care" earlier in the proceedings, but he never challenges the rejection of that argument by Judge Keesley in the Settlement Orders and by Judge Early in the appealed order. (See Resp. Br. at App. 2637-2639). Moreover, any "local standard of care" resulted from the vetting of any QA review within the Radiology Department. Shah specifically and voluntarily removed himself from that "vetting" process under the Settlement Orders and, therefore, he cannot complain about any failure to apply the so-called local standard of care.

D. The two other radiologists

In his "Statement of the Case," Shah states that Patient X in her letter to Palmetto "complained Shah *and two other radiologists* had misread [her CT scan] and misdiagnosed" her condition. (Cert. Pet. at 4-5) (emphasis added).[24] This is simply false. The letter from Patient X stated that Shah told her that two other radiologist had reviewed her CT scans and agreed with his misdiagnosis. (See App. 1009).

Throughout these proceedings, Shah had claimed that two other radiologists reviewed Patient X's CT scans with him and agreed with his diagnosis of an enlarged uterus. Shah has never identified these radiologists, and he never presented any testimony from them by affidavit or otherwise to support his misdiagnosis of Patient X or his suggestion that he was given the wrong CT scans. (See n.20, *supra*). The only reasonable conclusion to be drawn from the record is that these two other radiologists simply do not exist.

[24] The bracketed material replaces "an x-ray" from Shah's petition. It is undisputed that Patient X brought CT scans, not x-rays, with her to the hospital.

Finally, Shah never argued or relied on these other radiologists and their purported opinion in his rehearing petition. (App. 2720-2743, *passim*). Thus, no such argument can be made in support of certiorari. Rule 242(d)(2), SCACR.

E. The "Fairer Measurement" Reports

In April 2005, the MEC ordered a random audit of Shah's cases for evaluation by the Outside Reviewer (App. 800), resulting in the so-called "fairer measurement" reports. Shah complains that Palmetto "deliberately withheld and disregarded these favorable reports." (Cert. Pet. at 4). This is simply false, and it is not a proper ground for certiorari.

It is axiomatic that an issue not ruled upon by the trial court is not preserved for appeal unless the appellant raised the issue in a "59(e)" motion. Here, Judge Early's appealed order did not rule upon or mention the alleged withholding of the "fairer measurement" reports. (App. 29-53, *passim*). Shah did not raise this issue in his motion to reconsider (App. 262-277), so this issue was not properly before the Court of Appeals and, therefore cannot be a certiorari ground.[25]

The Outside Reviewer issued his first four reports in July 2003, November 2003, December 2003, and February 2004. (App. 854-874, 876-888, 904-912). These reports were part of the evidence that resulted in Shah's probation, including the requirement of additional training on reading CT scans. The so-called "fairer measurement" reports covered "the period of March through October 2005" (App. 1007) and were issued in April 2005, June 2005, and October 2005. (App. 991, 994-999, 1007). Notably, the June 2005 report revealed continuing problems with Shah's reading of abdominal CT scans (like that of Patient X) even after completing CT

[25] Shah made a passing reference to these "fairer measurement" cases in his motion to reconsider in an argument about the case selection process: "When he [the outside reviewer] later selected 633 of Dr. Shah's cases, he found practically nothing with which he took exception. The Order ignores this." (App. 271, ¶ 14). But Shah never complained about Palmetto's alleged withholding of these reports, which is the basis for his certiorari argument.

training in April 2005. For example, Shah concluded that Patient 95's CT scan revealed "no evidence of appendicitis," but surgery revealed a "perforated appendix." (App. 996).

The "fairer measurement" reports were received and reviewed by the MEC in October 2005. (App. 1011: "The following reports were distributed, reviewed and discussed by the Committee: 1) [the Outside Reviewer's reports] for the period March through October 2005 ...."). In short, the MEC ordered, received, and reviewed the "fairer measurement" reports. Thus, Shah's argument that Palmetto withheld the reports is simply false.

F. The Dissent in the Court of Appeals' Decision

Shah relies heavily on the dissenting opinion by Judge Short, which relied solely on the issue of the 35 emergency room cases. Respectfully, Judge Short's dissent is incorrect for several different reasons as explained below.

First, Judge Short never addressed Shah's misdiagnosis of Patient X and Shah's refusal to comply with the probation condition of a psychological evaluation. As noted earlier, each of these matters was a "stand alone" ground for termination that mooted all other complaints by Shah. Second, although Judge Short apparently (albeit silently) disagreed with the trial court and the majority opinion on the scope of issues before the trial court, including the meaning of the 2008 Consent Order and the issues of "implied consent" and "futile act," he never addressed the other reasons that Shah's appellate arguments about the emergency room cases were not a basis for reversal. (See Arg. IV(C), *supra*).

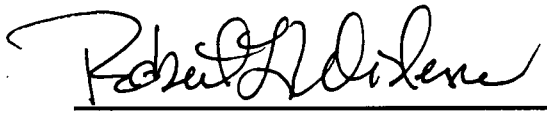
Finally, and most importantly, Judge Short fell victim to Shah's factual misrepresentations in this case. Judge Short found that "[t]his evidence [that Palmetto had considered the 35 emergency room cases] was revealed through discovery in the 2006 action ...." (App. 2718). It thus appears that Judge Short forgave Shah's failure to raise this issue in his

contempt motions, because Judge Short believed Shah's assertion that he did not know about the emergency cases until discovery in the 2006 Action. As noted earlier, Shah's assertion is simply false – the record conclusively demonstrates that Shah knew about the emergency room cases long before he filed his third contempt motion. (See n.22, *supra*).

CONCLUSION

For the reasons stated above, and for the reasons stated in Palmetto's Brief of Respondent and Return to Petition for Rehearing, which are incorporated herein, it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari.

Respectfully Submitted,



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June 20, 2013
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Tab A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 1996-CP-40-0271
Appellate Case No. 2009-122786
Unpublished Opinion Number 2012-UP-475
Heard March 15, 2012 – Filed August 1, 2012

Paresh Shah, M.D. and Paresh Shah, M.D., P.A., ...Appellant,

v.

Palmetto Health, f/k/a Richland Memorial Hospital.....Respondent.

RETURN TO PETITION FOR REHEARING

As ordered by this Court in its letter of October 9, 2012, the Respondent (Hospital) respectfully submits this Return to the Petition for Rehearing filed by the Appellant (Shah). The Petition also requests a rehearing *en banc*, but Rule 219(b), SCACR, provides: "No response shall be filed by other parties unless the Court shall so order." This Court's order acknowledged receipt of Shah's "Petition for Rehearing" and directed Hospital to file a "return to this motion" but did not mention the *en banc* request. It thus appears this Court did not order a response to the *en banc* request and, therefore, this Return does not address that request in detail. In an abundance of caution, however, Hospital notes that Shah does not set forth any grounds for his *en banc* request, and his request should be denied for this reason alone. If this Court desires a more detailed response, Hospital will file one.

STANDARD OF REVIEW

Hospital respectfully submits that this Court applied the wrong standard of review and the wrong standard of proof but nevertheless reached the correct result. The majority opinion described the standard of review as follows:

> A decision on contempt rests within the sound discretion of the trial court, and an appellate court will not disturb such decision unless the trial court has abused its discretion. *DiMarco v. DiMarco*, 393 S.C. 604, 607, 713 S.E.2d 631, 633 (2011). As an equitable matter, we review the exercise of that discretion de novo. *See Chisholm v. Chisholm*, 396 S.C. 507, 510, 722 S.E.2d 222, 223 (2012) (reviewing the family court's discretion in awarding attorney's fees under a de novo standard of review). **Consequently**, we will affirm the decision of the trial court unless appellant satisfies this court that the preponderance of the evidence is *against the findings of the trial court. Id.*

(Tab A at 6-7) (all emphasis added). Hospital respectfully submits the proper standards of review and proof require affirmance unless *no evidence* supports the decision that Shah failed to prove contempt by *clear and convincing evidence*. The application of the wrong standards did not aggrieve Hospital, because this Court affirmed the trial court.[1] Shah's rehearing petition, however, should be reviewed under the correct standards of review and proof.

It may be that this Court applied the correct standard of review and correct standard of proof in deciding this case despite its statement of the standard of review. In opening its

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[1] A party is "aggrieved" if the order causes injury to his person or property by denying some personal or property right or by imposing a burden or obligation upon the party. *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970), *citing Parker v. Brown*, 10 S.E.2d 625 (S.C. 1940) *and Bowles v. Dannin*, 2 A.2d 892 (R.I. 1938); *accord Powell v. Bank of America*, 665 S.E.2d 237 (S.C. App. 2008). If a reversal of the trial court's judgment would not benefit or improve the party's position, then the party is not aggrieved. *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970); *accord Knight v. Autumn*, 245 S.E.2d 602, 604 (S.C. 1978) *and Bivens*, 173 S.E.2d at 152. Here, this Court's opinion did not deny Hospital any right or impose any burden upon it, nor would a reversal of the appealed order improve the Hospital's position. Thus, Hospital was not aggrieved by the application of the wrong standard of review. The foregoing cases relate to whether a party had to the right to appeal but the concept is the same, *i.e.*, a party cannot complain of a court's decision unless it is aggrieved by that decision. See also *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997) ("Only a person aggrieved by a ruling may appeal") (emphasis added), *applying* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.") *and* S.C. Code Ann. § 18-1-30 (1976) ("Any party aggrieved may appeal in the cases prescribed in this Title."); *Bivens*, 173 S.E.2d at 152 (right to appellate review "is restricted to persons or parties aggrieved by the decision below.") (emphasis added); *accord First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998) *and Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997).

discussion of the merits of this appeal, the majority stated: "we find Dr. Shah failed to present *clear and convincing evidence* that the Hospital willfully violated the Settlement Orders." (Tab A at 10) (emphasis added). In closing its discussion of the merits, the majority concluded: "Even if the evidence is conflicting as to willful conduct, the fact finder's decision on contempt may be affirmed absent an *abuse of the broad discretion* granted to the court." (Tab A at 11) (all emphasis added).[2] In an abundance of caution, and with apologies if the ensuing discussion is unnecessary, Hospital addresses the standard of review set forth in the majority opinion.

A. Factual findings in a contempt order are reviewed for an abuse of discretion, and the appellate courts will not reverse unless no evidence supports those findings.

The majority correctly cites the Supreme Court's decision in *DiMarco, supra,* for the proposition that the issue of contempt resides within the sound discretion of the trial court. See *DiMarco*, 713 S.E.2d at 633, *citing Durlach v. Durlach*, 596 S.E.2d 908, 912 (S.C. 2004). In *DiMarco*, the Supreme Court did not discuss the standard of review in detail, because the dispositive issue was whether the contempt found in that case was civil or criminal. The Supreme Court concluded it was criminal in nature and therefore reversed, because the contempt order deprived the appellant of his constitutional right to a jury trial. 713 S.E.2d at 634. Citing *Durlach*, however, the Supreme Court noted generally that a trial court's ruling on contempt would "not be disturbed on appeal unless it is unsupported by the evidence." *Id.* at 633. In *Durlach*, the Supreme Court held that "this Court should reverse a decision regarding contempt 'only if it is without evidentiary support ....'" 596 S.E.2d at 912, *quoting Stone v. Reddix-Smalls*, 396 S.E.2d 840, 840 (S.C. 1988). None of these cases, nor any other opinion on contempt, applied the "de novo" standard of review to contempt actions. Rather, both appellate courts have always affirmed factual findings in contempt actions unless no evidence supports those findings.

[2] Cases applying the "abuse of discretion" standard of review typically state the trial court's findings will be or must be affirmed unless those findings have no evidentiary support.

The majority next states that contempt is a matter in equity and then applies the "de novo" standard of review generally applicable to equity actions. (Op. at 7). It is here that Hospital respectfully submits the majority erred. To understand the error requires consideration of the Supreme Court's decision in *Lewis v. Lewis*, 709 S.E.2d 650 (S.C. 2011), which was the authority cited by the Supreme Court in *Chisholm,* upon which the majority relied in this case.

Lewis was the seminal case in using the term "de novo" to describe the standard of review applicable to general equity cases, *i.e.*, that the appellate court takes its own view of the evidence in reviewing the trial court's factual findings. Prior to *Lewis*, a few equity cases had made a passing reference to the term "de novo" in stating the standard of review for factual findings, but *Lewis* was the first full-blown use of that term.[3]

In *Lewis*, the Supreme Court addressed the history of "the appellate court standard of review of family court factual findings." 709 S.E.2d at 650.[4] The Court first reviewed the "abuse of discretion" standard as it had been applied in family court cases, which created tension with the standard of review generally applicable to factual findings in equity actions, *i.e.*, that an appellate court takes its own view of the evidence. That tension reached its zenith in the *Dawkins* opinion when the Supreme Court stated: "An appellate court should approach an equitable division award with a presumption that the family court acted within its broad discretion. The family court's award should be reversed only when the appellant demonstrates

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[3] It appears the first case to use "de novo" in describing the standard of review for factual findings in general equity cases was this Court's 2005 decision in *Arnal v. Arnal*, 609 S.E.2d 821, 827, 833 (S.C. App. 2005) (family court appeal – reviewing visitation schedule in the child's best interest). In the ensuing six years before *Lewis*, at least a few other equity cases also mentioned "de novo" in passing. See *Historic Charleston Holdings, LLC v. Mallon*, 673 S.E.2d 448, 453, 454 (S.C. 2009) (equitable accounting action – reviewing parties' relative rights to proceeds of property sale); *Hardy v. Aiken*, 631 S.E.2d 539, 541 (S.C. 2006) (scope of easement is equitable issue and reviewed de novo); *Plott v. Justin Enters.*, 649 S.E.2d 92, 95 (S.C. App. 2007) (same), *citing Hardy, supra*; *Sheppard v. Justin Enters.*, 646 S.E.2d 177, 178 (S.C. App. 2007) (same), *citing Hardy, supra*; *Altman v. Griffith*, 642 S.E.2d 619, 621 (S.C. App. 2007) (family court appeal – reviewing child custody determination).

[4] The Supreme Court recently used "de novo" to describe an appellate court's ability to take its own view of the evidence in other general equity cases. *Oskin v. Johnson*, Op. No. 27187 (S.C.Sup.Ct. filed Nov. 7, 2012) (Shearouse Adv. Sh. No. 40 at 67, 72) (equitable action to set aside conveyance under the Statute of Elizabeth).

an abuse of discretion." *Id.* at 709 (emphasis added), *quoting Dawkins v. Dawkins*, 687 S.E.2d 52, 54 (S.C. 2010). Referring to the "abuse of discretion" standard of review was problematic, because that standard limits reversal to errors of law and factual findings having no evidentiary support, but an appellate court's authority to take its own view of the evidence in general equity cases permits it to reverse even if evidence supports the trial court's finding. *Id.* at 654-655.

Contempt actions are not general equity cases – they have long been recognized as one of the several types of actions that, by statute or case law, have a specialized standard of review. For contempt actions, the standard for reviewing factual findings has always been whether no evidence supports that finding. See Jean Hoefer Toal *et al.*, Appellate Practice in South Carolina (2nd ed. 2002) at 171, ¶ 5; see generally *id.* at 169-176. Nothing in the Supreme Court's opinion in *Lewis* indicated an intent to depart from the long-standing "abuse of discretion" standard of review in contempt actions – nor is any such intent expressed in *Chisholm,* which the majority cited in the present case for the standard of review. After *Lewis* and *Chisholm,* both appellate courts continued to apply the "abuse of discretion" standard of review to contempt cases.

The Supreme Court issued its decision in *DiMarco* (discussed *supra*) only three months after its decision in *Lewis, supra*, without changing the standard of review for contempt cases. Only three weeks after its decision in *Chisholm*, the Supreme Court issued its opinion in *Knight v. Austin*, 722 S.E.2d 802 (S.C. 2012) and again applied the long-standing "abuse of discretion" standard to contempt issues (and mandamus issues). Had the Supreme Court intended its decision in *Lewis* or *Chisholm* to change the standard of review in contempt actions, it would have done so in *DiMarco* and/or *Knight*.[5] In like manner, this Court has continued to apply the

[5] Justice Kittredge authored *Lewis* and *Knight* but never mentioned *Lewis* in *Knight*. *Lewis* cited and relied upon *Ex parte Bland*, 667 S.E.2d 540, 546 (S.C. 2008), which stated that contempt actions are reviewed for an abuse of discretion, and this "occurs when the trial court's ruling is based upon factual conclusions that are without evidentiary support or when the trial court's decision is based upon an error of law." *Lewis*, 722 S.E.2d at 804.

long-standing "abuse of discretion" standard of review for contempt actions after *Lewis* and *Chisholm*. See *Ex parte Lipscomb*, 730 S.E.2d 320, 323 (S.C. App. 2012) (appellate court reverses factual basis of a contempt decision "only if it is without evidentiary support").

B. The standard of proof in contempt actions is "clear and convincing evidence" rather than the "preponderance of evidence" standard that typically applies in equity cases generally and in family court cases specifically.

In most family court cases, and in equity cases generally, the standard of proof is whether the party proved its case by a preponderance of the evidence. Thus, in reviewing such cases, the appellate courts typically summarize their appellate review as whether, after taking their own view of the evidence (the standard of review now called "de novo" under *Lewis*), the trial court erred in finding a party proved or failed to prove its case by a preponderance of the evidence. See, *e.g.*, *Chisholm, supra.* In other words, the appellate courts apply the standard of proof to their view of the evidence, when the de novo standard of review applies in an equity action. See *Oskin v. Johnson*, Op. No. 27187 (S.C.Sup.Ct. filed Nov. 7, 2012) (Shearouse Adv. Sh. No. 40 at 67, 71 n.4) (applying de novo standard of review, *i.e.*, court taking its own view of the evidence, in equity case does not change the clear and convincing standard of proof in an equitable action to set aside conveyance under the Statute of Elizabeth).

"Clear and convincing evidence" has always been the standard of proof for contempt. *E.g., Durlach v. Durlach*, 596 S.E.2d 908, 912 (S.C. 2004) ("Civil contempt must be proved by clear and convincing evidence."). Nothing in *Lewis* or *Chisholm* indicated any intent to change this. After *Lewis* and *Chisholm*, the Supreme Court and this Court have continued to apply the "clear and convincing evidence" standard of proof to contempt actions. *DiMarco v. DiMarco*, 713 S.E.2d 631, 633 (S.C. 2011); *Ex parte Lipscomb*, 730 S.E.2d 320, 323 (S.C. App. 2012).[6]

[6] In *Durlach, DiMarco,* and *Lipscomb*, the Supreme Court and this Court cited *Poston v. Poston*, 502 S.E.2d 86, 89 (S.C. 1998) for the long-standing rule that "[c]ivil contempt must be proven by clear and convincing evidence."

C. Summary and Conclusion.

As set forth in Hospital's Brief of Respondent (Resp. Br. 2) and as demonstrated above, the issue of contempt resides in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. To obtain reversal of a contempt decision, the appellant must demonstrate that the trial court's factual findings have no evidentiary support. As also set forth in Hospital's Brief of Respondent (Resp. Br. 30) and as also demonstrated above, contempt must be proven by clear and convincing evidence, which is the highest standard of proof known to the civil law. Accordingly, in reviewing Shah's Petition for Rehearing, it is respectfully submitted that this Court should consider whether any evidence supports the trial court's conclusion that Shah failed to prove contempt by clear and convincing evidence. In any event, as demonstrated in Hospital's Brief of Respondent, and assuming this Court may take its own view of the evidence under the de novo standard of review, ample evidence supports the trial court's factual findings and, therefore, this Court should affirm the appealed order.

RETURN ARGUMENTS

For the convenience of this Court, the arguments in this Return are presented under argument headings similar to those appearing in the Petition for Rehearing and in the same general order. Several matters, however, warrant preliminary treatment.

First, as he did in his appellate briefs before this Court, Shah continues to manipulate the record with "artfully" redacted quotations from the trial court's orders and the transcript of the hearing before the trial court. These redactions change the meaning of the quoted material. Second, many of Shah's arguments repeat his appellate arguments. Rather than burden this Court with a full recitation of the responsive arguments in Hospital's Brief, this Return summarizes those responses when appropriate and references the Brief of Respondent for a fuller argument.

Finally, and most importantly, Hospital terminated Shah's privileges for two independent and stand-alone reasons: (1) his gross misdiagnosis of Patient X; and (2) his refusal to comply with the probation condition of a psychological evaluation. Shah is not entitled to any relief in this action unless each of these termination grounds resulted from a willful and contemptuous violation of the "Settlement Orders." As demonstrated below, the trial court correctly held that neither of these termination grounds was reached in contempt of the Settlement Orders. Thus, Shah is not entitled to any relief. Moreover, if either of these termination grounds was not the result of contempt, then Shah is not entitled to any relief, even if any other action by Hospital is assumed to be the result of contempt.[7]

A. Shah's Gross Misdiagnosis of Patient X

It is undisputed that Shah's gross misdiagnosis of Patient X was a "stand alone" basis for the termination of his privileges. (R. 1020, ¶ 2). Shah concedes this. (Rhg. Pet. at 20).

The Outside Reviewer had earlier recommended that Shah undergo further training on reading CT scans due to numerous misreads in the reviewed records. (R. 855). This CT training was imposed as a condition of probation in May 2004, to be completed during the six month probation period. (R. 926, ¶ 4). As of February 2005, Shah had not completed any conditions of his six month probation, including the CT training, so Hospital extended the probation period for another six months, and required completion of the CT training by July 1, 2005. (R. 976, ¶ 3; R. 979, ¶¶ 1 and 6). Shah completed the required training in April 2005 and his CT privileges were reinstated. Only four months later, Shah completely misread the CT scan of Patient X:

[7] Here, the dissent relied solely on the "35 emergency room cases." (Tab A at 12-14). As the trial court found, and as the majority agreed, this issue was not a proper ground for contempt, because it had not been raised in the contempt petitions even though Shah was aware of it when he filed his third contempt petition. See n.17, *infra*. In any event, since the termination of Shah's privileges was based on other independent and separate grounds that would have resulted in termination even in the absence of the "35 emergency room cases," any assumed contempt in considering the "35 emergency room cases" did not entitle Shah to any relief in the trial court, nor does it entitle Shah to any relief on appeal.

1. Patient X was being treated for diverticulitis. Her physician began to suspect something more serious and scheduled a CT scan of her abdomen, which revealed "a very large ovarian mass." Patient X was sent to Palmetto for a biopsy.

2. Patient X delivered the CT scans and the radiological report. The CT scans comprised seven large sheets containing 16 images each, and Patient X's name was on each of these images, *i.e.*, her name appeared 16 times on each of 7 CT sheets, a total of 102 times.

3. Patient X was placed on a gurney and given an IV with sedation. Shah arrived and said: "Why are you here? ... I can't biopsy something that doesn't exist. I don't know why people expect me to biopsy something that doesn't exist. All you have is an enlarged uterus. ... I have confirmed with my other two colleagues and all three agree that you have an enlarged uterus. Get dressed and go home."

4. Patient X asked Shah to confer with the radiologist who issued the first report. He left the room, and returned to say he could not reach the radiologist. At Patient X's request, Shah called her primary physician, and told him the same thing he had told Patient X: "There is nothing here to biopsy. I can't biopsy something that doesn't exist. It is an enlarged uterus. I am going to send the patient home."

5. Patient X, elated with the good news, had a celebration dinner with her family that night. Her treating physician called, advising he had called the first radiologist, who was not available, but the first radiologist's partner had read the CT scan and confirmed the existence of the large ovarian mass. The treating physician advised it was essential that she be seen by an oncologist as soon as possible.

6. A neighbor of Patient X was a partner with the oncology group recommended by her treating physician. She immediately walked to his house with her CT scans. He was sitting at his desk, held the CT sheets up to his desk lamp, and confirmed the existence of the very large mass. Patient X underwent surgery to remove the cancerous mass and subsequent treatments to further combat the cancer.

(R. 542-552). After her surgery, Patient X wrote a letter to Hosptial advising of Shah's gross misdiagnosis; she included the radiological and surgical reports with this letter, and she later gave Hospital a copy of the CT scans. (R. 547-549, 550-551).

Hospital received Patient X's letter only three days before an October 31 MEC meeting to consider Shah's satisfaction of the conditions of his probation. The Chief of Staff received the letter and delivered it to the MEC at this meeting. The MEC, in compliance with Judge Keesley's Supplemental Order, immediately referred the matter to the Outside Reviewer for

review, and delivered the CT films to him on November 2. Based on Shah's failure to satisfy all conditions of probation, the MEC recommended suspension and revocation of Shah's privileges.

The Outside Reviewer issued a preliminary report on December 2. He noted the only excuse for the mis-read would be that Shah had seen the wrong films:

> This case does represent a mis-interpretation with potential impact on patient care (although none occurred for other reasons [*i.e.*, the intervention of Patient X's treating physicians]). As mentioned on the [attached] form, the findings on the scan are evident so I have to wonder if the correct films were reviewed or if there is some other piece of information of which I am unaware. If other films were reviewed, this would still represent a problem, albeit of a different nature (not identifying the patient correctly). These films should be reviewed with Dr. Shah to see what explanation he might have. . . . I did speak with Dr. Shah by telephone, but I feel full review in person with Dr. Shah is indicated. This will serve as a preliminary review pending that discussion.
>
> . . .
>
> Comments: The CT scan shows an obvious pelvic mass with probable second mass as well as multiple deposits at other sites through [sic] abdomen. The pattern is most consistent with ovarian carcinoma with metastases. The initial reading was confirmed at surgery. It is difficult to understand how a review of the films at the time of [sic] scheduled biopsy could have lead to an interpretation of no mass as this is not a subtle case. It is possible that a different set of films were reviewed. This would be the most obvious alternative explanation. In this case, there would be an obvious error of misidentifying the patient. **In either case this would be a deviation from [sic] standard of care that could have an impact on outcome [though not here due to intervention by the primary physician]**.
>
> . . .
>
> I did speak with [Shah] by telephone and he indicated he thought there was an enlarged uterus that did not need biopsy. He said he did show the images to other radiologists who agreed with his opinion. ... I told him the next step would be to review the films together to see if this was in fact the set of films he saw. It would probably be difficult to draw any further conclusions about what happened at the time of [sic] scheduled biopsy without reviewing this in person with [Shah].

(R. 1015-1017) (all emphasis added). The possibility of having read the wrong films was raised by Shah to the Outside Reviewer during their telephone conversation, prior to the report:

> [Shah] asked that we go over the films together because maybe I [Outside Reviewer] had a different set than he had. I told him I would be willing to do this and would not issue a final report until that time. For that reason, I have attached a preliminary review.

(R. 1018) (emphasis added). Shah never scheduled the meeting after procuring a delay of the final report, and he never met with the Outside Reviewer, despite requests from Palmetto that he do so (Tab B).[8] Regarding Patient X, Hospital provided Shah with the contact information for the Outside Reviewer on December 6, 2005, the same date that Hospital advised Shah that the final hearing on his termination would be held on December 13, 2005. (Tab B; R. 1075). Shah never contacted the Outside Reviewer despite this correspondence, despite the clear requirement of Judge Keesley's Supplemental Order that he (Shah) was responsible for arranging any meetings with the Outside Reviewer (R. 18), and despite knowing that Patient X would be a subject in the December 13 final hearing.

At trial and on appeal, Shah contended that two other radiologists agreed with his reading of Patient X's CT scans. He never identified them and never presented any evidence from them. He abandons this argument on rehearing by not pursuing it. Also at trial and on appeal, Shah contended he had been given the wrong CT scans but never presented any supporting evidence.

In his rehearing petition, Shah argues only that Hospital violated the Supplemental Order by not waiting for a "final" report from the Outside Reviewer. (Rhg. Pet. at 19-20). The Outside Reviewer issued his "preliminary" report on December 2, 2005. (R. 1015-1017). This report referenced a prior telephone conversation with Shah, wherein they had discussed the need to review the CT scans together to determine whether Shah had read the wrong CT scans. (R. 1015, 1016). Thus, some time prior to December 2, Shah knew of the need to meet with the Outside Reviewer regarding the complaint from Patient X. On December 6, Hospital advised Shah that the termination hearing was to be held on December 13, and also advised Shah that the Outside Reviewer was available to meet with him "[a]s to the records regarding patient complaint [by]

[8] The letter appearing at Tab B was added to the Record on Appeal upon motion of Hospital – Shah had inadvertently failed to include it when he compiled the Record on Appeal.

Patient 36 [Patient X]" and gave Shah the Outside Reviewer's cell phone number. (Tab B; R. 1075). Shah never scheduled this meeting despite the clear requirement of the Supplemental Order that he was responsible for arranging any meetings with the Outside Reviewer. (R. 18).

Shah relies on a December 13 email between the Outside Reviewer and Hospital's counsel to imply that, only hours before the termination hearing commenced, the Outside Reviewer "insisted" that there be a meeting with Shah before any report became final. (Rhg. Pet. at 20, citing R. 1018). There was no such "insistence" by the Outside Reviewer. He merely noted the prior phone call with Shah, wherein Shah had suggested that the Outsider Reviewer had a different set of CT scans, and asked that they meet to review the films together. The Outside Reviewer had agreed to meet with Shah, but Shah never arranged this meeting.

Shah's only ground for rehearing is that the Outside Reviewer's report on Patient X was "preliminary." The only reason it was "preliminary" was that Shah had requested but never arranged a meeting with the Outside Reviewer to review the CT scans together. Shah knew how to contact the Outside Reviewer and he knew that the Patient X issue was to be a subject at his upcoming termination hearing. Shah's failure to schedule the meeting that he requested simply did not and could not prevent Hospital from considering Shah's gross misdiagnosis of Patient X. Moreover, there is no evidence that Shah was given the wrong CT scans, so any meeting would not have changed the Outside Reviewer's report.

In short, Hospital properly reviewed and relied upon the Outside Reviewer's "preliminary" report since Shah failed to arrange a meeting with the Outside Reviewer. Moreover, since there is no evidence that Shah was given the wrong CT scans, any meeting would not have changed the Outside Reviewer's report. Shah's gross misdiagnosis of Patient X was a "stand alone" ground for the termination of his privileges and, therefore, Shah was not

entitled to any relief against Hospital, even if it is assumed that he proved some other willful violation of the Settlement Orders (which he did not).

B. Shah's Refusal to Satisfy the Psychological Evaluation Condition of Probation

It is undisputed that Shah refused to comply with this condition of his probation. It also undisputed that his refusal was a "stand alone" basis for the termination of his privileges. (R. 1020, ¶ 1). Shah concedes this in his rehearing petition. (Rhg. Pet. at 13).

The psychological evaluation requirement was imposed to assist Shah in improving his communication and interaction skills with patients and staff, and to improve his general attitude towards compliance with hospital regulations. (R. 976 at opening paragraph; R. 978-979, ¶ 13). As the Outside Reviewer noted in his first report:

> Dr. Shah did not show a willingness to proactively address concerns regarding compliance with the Rules and Regulations of the hospital. Instead he will often carry on extended debates about the appropriateness or necessity of a given policy. Although some of his arguments may be reasonable and the sentiment even shared by other physicians, they are irrelevant when there is a clear direction from medical staff bylaws, JCAHO requirements, or hospital rules and regulations. This pattern of behavior is disruptive at best and can cause greater problems at worst. I see two issues here: (a.) failure or delay in complying and b.) the general attitude that he can decide what rules are worthy of compliance. This attitude was more widespread among physicians in the past and has represented a difficult adjustment for many, however, it can no longer be tolerated in the modern framework of healthcare delivery. Note that this is not necessarily a finding of substandard care, but there must be a change or it could lead to that.

(R. 855) (emphasis added). As the Outside Reviewer found in his third report regarding Shah's treatment of a patient he required to urinate into a towel:

> For physicians to be functioning members of any medical staff, their ability to show respect and compassion for their patients is at least as important as their medical knowledge. This case represents a serious breach. . . . [Alternatives were available and either] of these would have been simple to accomplish and the fact that they were not indicates a serious lack of "listening" to the patient. . . . The fact that none of these options was pursued, in the face of clear communication from both the patient and nursing staff, is unacceptable.

> It is up to the Medical Staff to decide the appropriate response to this case. I will reiterate that I consider this to be equal if not more important than most medical issues as patient communication is always paramount in medical care. It does represent a deviation from the standard of care that I would expect at any hospital. . . . It is up to the Medical Staff to make a final determination of any action(s) that is to be taken.

(R. 886-887) (emphasis added).[9] Also, the patient records were replete with other examples of Shah's inappropriate responses to patient and staff complaints and inquiries. (E.g., R. 631-638).

Shah argues that imposition of the evaluation requirement violated the notice provisions of the Bylaws, and that the underlying issues were administrative issues rather than QA issues. The Outside Reviewer's reports demonstrate that these so-called "administrative issues" had risen to the level of patient care (QA) issues, and Judge Keesley expressly held in the unappealed (law of the case) 2003 Supplemental Order that administrative issues could become QA issues. (R. 15, n.1). Judge Keesley also expressly held in this unappealed order that nothing in the Settlement Orders precluded Hospital from taking necessary steps to ensure and protect proper management of the hospital and proper patient care. (R. 20). The evaluation requirement met these exceptions in the unappealed (law of the case) Supplemental Order. Moreover, Judge Early properly rejected Shah's appellate arguments because: (1) these issues were not raised in contempt motions; (2) these issues related to alleged Bylaw violations, which were not enforceable by the contempt power; and (3) these issues concerned matters that occurred at later (post-QA) stages of the Peer Review Process, and the Settlement Orders did not proscribe or prescribe anything beyond the QA stage. (R. 42-43, 49).

In short, the imposition of a psychological evaluation as a condition of probation was not a matter subject to the contempt power and, in any event, Hospital's actions were in full compliance with the Settlement Orders. It is undisputed that Shah did not satisfy this condition

[9] This is a heavily redacted excerpt of the Report, which is reproduced in its entirety at R. 886-887.

of probation, and his failure to do so was a "stand alone" basis for the termination of his privileges. Accordingly, Shah was not entitled to any relief against Hospital, even if it is assumed that he proved some other willful violation of the Settlement Orders (which he did not).

I. This Court correctly held that the Order of Dismissal limited the contempt action to the grounds asserted in the contempt petitions.

At pages 2-4 of his Petition, Shah challenges this Court's ruling that "the Order of Dismissal unequivocally limited the grounds for contempt to those asserted in the Petitions." (Tab A at 7). This Court's ruling was based on the rule that a court order is to be construed like any other written instrument and that there is "no room for construction or interpretation" if the "language employed is plain and unambiguous." (Id.). The Consent Order dismissed the 2006 Action with prejudice and provided in paragraph 5 under plain and unambiguous language:

> [Shah] will proceed in the 1996 action *on the pending petitions* for rule to show cause and *memoranda in support*. The parties may argue and rely on such information, documents and discovery from the 2006 action, and affidavits of Drs. Shah, Close and Waldren, *as may* be relevant and admissible *therein*."

(R. 24, ¶ 5) (emphasis added).[10] Nothing in the Consent Order permitted Shah to raise contempt issues not raised in the pending petitions and memoranda already filed in support of the petitions.

Shah does not challenge this Court's ruling on the construction of court orders – rather, he ignores it. Shah does not begin his argument with the actual language of the order, which is the starting pointing for interpreting any written instrument. Rather, he begins his "analysis" with partial quotations from pages 302-305 of the Record that are taken out of context and

[10] Upon joint motion of the parties in the 1996 Action, Chief Administrative Judge Manning had previously entered an order assigning the 1996 Action to Judge Early. (R. 26-27). The parties moved "to assign *this case* [1996 Action], *and the petitions* for rule to show cause, filed against [Hospital] and *currently pending* in this case, to [Judge Early]." (*Id.*) (emphasis added). The parties also moved "for this matter [1996 Action] to proceed for a non-jury hearing *on those pending petitions* against [Hospital] as the sole defendant." (*Id.*) (emphasis added). Judge Manning granted the joint motion and ordered: "The *currently pending petitions* for rule to show cause shall be heard by Judge Early[.]" (R. 27) (emphasis added). Thus, Judge Early's jurisdiction was limited to the matters raised in the "currently pending motions" and, therefore, any assumed error in Judge Early's interpretation of his own order (and there is none) is harmless error.

presented out of order. (Rhg. Pet. at 2-3). He then combines this "artful" redaction of the transcript with an even more "artful" redaction of paragraph 5 of the Consent Order to argue:

> Accordingly, the Consent Order of Dismissal *explicitly* stated that the parties could file "**memoranda in support**" and "**argue and rely on such information, documents and discovery from the 2006 action, and affidavits of Drs. Shah, Close and Waldren, as may be relevant and admissible therein**" at the rule to show cause hearing.

(Rhg. Pet. at 3) (italics added) (boldface and underling added in Rhg. Pet.). Having thus rewritten the Consent Order, Shah argues that the permission to file memoranda in reliance on the discovery in the 2006 action allowed him to raise new grounds for contempt.

The Consent Order, however, simply does not say what Shah argues through his "artful" redaction of the Consent Order. The Order never stated, "explicitly" or otherwise, that "the parties could file 'memoranda in support.'" Rather, the "memoranda in support" language, which were the memoranda *already filed* in support of the *already pending Petitions*, plainly identified the issues upon which Shah would proceed at the upcoming hearing, to-wit: "[Shah] will proceed in the 1996 action *on the pending petitions* for rule to show cause and *memoranda in support*." (R. 24, ¶ 5) (emphasis added). In sum, this Court correctly applied the law to the plain language of the Consent Order and correctly concluded: "the Order of Dismissal unequivocally limited the grounds for contempt to those asserted in the Petitions." (Tab A at 7).[11]

II. This Court correctly held that Shah's "trial by implied consent" argument was not preserved and correctly held that any objections by Hospital would have been futile.

At pages 5-7 of his Petition, Shah argues that issues not raised in the contempt petitions were tried by implied consent and this Court erred when it ruled: (1) Shah's implied consent argument was not preserved for appeal; and (2) Shah's implied consent argument failed on its

[11] As to Shah's remaining "arguments," Hospital incorporates the arguments in its Brief, including pages 17-26.

merits, because any objection by Hospital would have been futile. (See Tab A at 8). This Court ruled correctly. Shah's contrary arguments are not properly before this Court and have no merit.

A. Shah's "trial by implied consent" argument was not properly before this Court, because it was never raised to the trial court, and his "rehearing" arguments are not properly before this Court, because they are made for the first time in his petition for rehearing.

Hospital argued that Shah's "trial by implied consent" argument was not properly before this Court, because Shah had not raised it to the trial court. (Resp. Br. 24, citing R. 262-277, *passim*, which is Shah's motion to alter, amend or reconsider). Shah replied and argued that the "first two grounds" of his motion to reconsider raised the "trial by implied consent" issue. (Reply Br. 4, citing R. 262-263). This Court correctly held the "implied consent" issue was not preserved for appeal, because it was not raised in Shah's motion to alter or amend the judgment. (Tab A at 8). Shah now argues that he raised the "implied consent" in paragraphs 4, 5, 10, 13, 15, and 16 of his motion to alter or amend – he never mentions and thereby abandons his only appellate argument that paragraphs 1 and 2 raised the "implied consent" issue. (See Rhg. Pet. at 5).[12] He also argues he raised this issue at the hearing on his motion to alter or amend. (Rhg. Pet. at 5, citing R. 693 ll. 13-17).[13]

Shah's rehearing arguments are not properly before this Court. An argument cannot be raised for the first time in a petition for rehearing. *Herron v. Century BMW*, 719 S.E.2d 640, 643 (S.C. 2011), *quoting and applying Kennedy v. South Carolina Retirement Sys.*, 564 S.E.2d 322,

[12] Any attempt to raise paragraphs 1 and 2 in a rehearing reply would be improper and futile. "It is axiomatic that an issue cannot be raised for the first time in a reply brief." *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011), *citing Chet Adams Co. v. James F. Pedersen Co.*, 413 S.E.2d 827 (S.C. 1992). In *McClurg*, the Supreme Court also held: "It is axiomatic that an issue cannot be raised for the first time on rehearing." 716 S.E.2d at 888 n.2, *citing Nelson v. QHG of S.C., Inc.*, 608 S.E.2d 855 (S.C. 2005). Given these rulings, it is equally axiomatic that an issue cannot be raised for the first time in a rehearing reply.

[13] Assuming Shah's argument at the motions hearing raised the implied consent issue, it came too late. An argument for rehearing must first be raised in the motion – it manifestly cannot be raised for the first time at the hearing on the motion. See *Herron*, 719 S.E.2d at 642 n.6 (issue not raised in petition for rehearing could not be raised for the first time at oral argument on the petition).

322 (S.C. 2001); *Nelson v. QHG of S.C., Inc.*, 608 S.E.2d 855, 858-859 (S.C. 2005) (argument made for the first time in rehearing petition before the Court of Appeals not preserved for review by the Supreme Court), *citing and applying* former Rule 226(d)(2), SCACR.[14] Shah never argued to this Court that paragraphs 4, 5, 10, 13, 15, and 16 of his motion to alter or amend raised the "implied consent issue," nor did he argue that any statement made at the hearing on this motion raised the "implied consent issue." (Reply Br., *passim*). Thus, Shah's argument that he raised the "implied consent" issue to the trial court is not properly before this Court.

Shah's motion to alter or amend never mentioned "trial by implied consent," nor did he ever raise this issue at the hearing on the motion to alter or amend. Recognizing this, Shah cites *Herron, supra* for the proposition that appellate courts "need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." (Rhg. Pet. at 5, quoting *Herron*). The actual ruling in *Herron*, however, demonstrates that Shah's rehearing arguments are not properly before this Court "as a matter of state law."

In *Herron*, the question was whether the issue of federal preemption was properly before the Supreme Court. The Court held it was not, because it had been raised for the first time in a petition for rehearing. Acknowledging that error preservation rules should not be applied in a hyper-technical manner (the proposition relied upon by Shah here) the Supreme Court continued:

> [I]ssue preservation rules "prevent[] a party from keeping an ace card up his sleeve – *intentionally or by chance* – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Here, intentionally or by chance, Appellant kept the ace card of preemption up its sleeve *until after this Court filed its opinion.* Under even the most liberal approach to issue preservation principles, we could not treat Appellant's preemption argument as preserved in our courts *as a matter of state law.*

[14] The Supreme Court summarized former Rule 226(d)(2): "issue must have been raised in initial arguments to Court of Appeals." 608 S.E.2d at 858-859. Rule 242(d)(2), SCACR now imposes the same requirement: "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (Emphasis added).

Herron, 719 S.E.2d at 645 (emphasis added) (citations omitted) (brackets in original). Here, Shah raises paragraphs 4, 5, 10, 13, 15, and 16 of his motion to alter or amend, and an isolated statement at the motions hearing, for the first time in his rehearing petition, *i.e*, "after this Court filed its opinion." This is precisely the same scenario rejected by the Supreme Court in *Herron* and, therefore, these arguments are not preserved for review and not a proper basis for rehearing "as a matter of state law." In any event, Shah's arguments have no merit.

Again acknowledging that he never mentioned "trial by implied consent" to the trial court, Shah again cites *Herron* for the proposition that a party need not use the exact name of a legal doctrine. Nevertheless, a party must "bring into focus the *precise nature of the alleged error* so that it can be *reasonably understood by the judge*." (Rhg. Pet. at 5, citing *Herron*, 719 S.E.2d at 642 (emphasis added)). Shah summarily argues that he satisfied this test in paragraphs 4, 5, 10, 13, 15, and 16 of his motion to alter or amend (Rhg. Pet. at 5), but he never quotes these paragraphs and never discusses any language in them. A cursory reading of those paragraphs reveals they did not "bring into focus the *precise nature of the alleged error* so that it can be *reasonably understood by the judge*." (R. 264-266, ¶¶ 4-5; R. 268-272, ¶¶ 10; 13, 15-16).

Nothing in these paragraphs even hints at an argument of trial by implied consent. Paragraph 13 (R. 270-271) is the only one that even mentions a failure to object to evidence, which is the basis for trial by implied consent, but it never "brings into focus" any argument that the failure to object somehow rose to the level of trial by implied consent. In any event, this paragraph addressed the "breast biopsies" issue, and the trial court rejected this claim of contempt on several grounds (See Resp. Br. 39-40). Moreover, Shah's real complaint, and the focus of paragraph 13, was the manner in which these cases were selected, an issue also rejected by the trial court on the merits. (Resp. Br. at 9-10, ¶ (6)-(7); 12, ¶ (1); 31-33, 36-38).

B. Shah's argument against this Court's "futile act" ruling is not properly before this Court and, in any event, has no merit.

Hospital argued that any objection would have been futile and, therefore, there was no trial by implied consent. (Resp. Br. 24-27). Shah did not make any counter argument. (Reply Br., *passim*). As shown earlier, an argument cannot be raised for the first time in a petition for rehearing. Thus, Shah's argument against this Court's "futile act" ruling is not a proper ground for rehearing and not properly before this Court. In any event, his argument is without merit.

Shah misperceives the meaning of "futile act." He argues an objection would not have been a futile act, because the trial judge repeatedly admitted evidence over objection. This is precisely why any objection would have been a futile act. Moreover, as this Court found, the trial court made it clear before the hearing, during the hearing, and at the end of the hearing that it would admit all evidence offered by any party and thereafter consider its admissibility, relevance, and weight. (Tab A at 8) (See also Resp. Br. at 22-25). Finally, at the end of the trial, Shah specifically agreed with this approach:

> Your Honor has been very inclusive in what you've allowed us to present. . . . We believe the matters that have been presented by both sides are before you and *to the extent that any of it is something that you feel should not be considered, we trust you to make that choice* and that decision. So, we have no concerns about the matters that have been presented by the defendants because we're confident that the court would make a decision about what is appropriate.

(R. 673-674) (emphasis added). The trial judge agreed and again stated his intent to allow all proffered evidence into the record, after which he would decide what was admissible, relevant, and probative: "I'm going to allow everything that has been offered even over objections into the record and I will consider what I think is relevant to the issues at hand and make my decision based on that." (R. 674). This further demonstrates that any objection would have been a futile act not required by law, and it demonstrates that Shah consented to this approach.

III. This Court correctly interpreted the Settlement Orders.
IV. This Court correctly ruled the Settlement Orders related to the QA process only.
V. This Court correctly did not reach the "psychological evaluation" issue.

At pages 8-10, 10-12, and 13-15 of his Petition, Shah challenges this Court's ruling that the Settlement Orders were a limited intrusion into Hospital's operations and controlled only the QA process. (Tab A at 9-10).[15] Shah argues the Settlement Orders also controlled the "corrective action" stages of his peer review and any application of Hospital's by-laws to him. At bottom, Shah seeks the right to invoke the judiciary's contempt power any time he disagrees with Hospital. This is the exact opposite of the clear provisions of the Settlement Orders. As set forth in Hospital's Brief, and as correctly found by this Court, the Settlement Orders reached the QA process only, which is the first step of the peer review process, but otherwise did not intrude upon Hospital's operations. (Resp. Br. 26-30; *id.* at 3-7, 30-31, 38-39, 41-43).

One of Shah's arguments is based upon a misreading of this Court's ruling. Shah first argues it was error to find the Settlement Orders controlled only the QA process. (Rhg. Pet. at 10). As his argument progresses, however, Shah uses a classic "writer's trick" and changes the issue to conclude this Court erred in finding the Settlement Orders were "limited to the case selection process." (Rhg. Pet. at 12, bottom of page; see also *id.* in middle of first full paragraph). This Court never held the Settlement Orders were limited to the "case selection process." Rather, this Court held correctly that these Orders were limited to the QA process, of which "case selection" is a part. As noted later, Shah uses the result of this "writer's trick" to argue this Court should have addressed all issues on appeal. See Arg. VIII, *infra*.

Contrary to Shah's argument, which hinges on his "writer's trick," the Settlement Orders did not extend to any corrective action taken by Hospital after receiving the reports issued by the

[15] Shah also makes numerous arguments about the psychological evaluation requirement. As demonstrated earlier, imposing this condition of probation was not contempt.

Outside Reviewer at the conclusion of the QA process. The Supplemental Order expressly stated that the MEC would determine what action, if any, should be taken based on the reports, including but not limited to whether any corrective action should be taken. (R. 19). Nothing in the Supplemental Order, nor any other Settlement Order, imposed a judicial limitation on any corrective action proceedings.

VI. This Court correctly affirmed the trial court's finding that Shah failed to present clear and convincing evidence of contempt.

At pages 15-17 of his Petition, Shah summarily argues this Court incorrectly found that he failed to prove contempt by clear and convincing evidence. These arguments are a rehash of Shah's arguments on appeal and, therefore, Hospital incorporates herein its responsive arguments in its Brief of Respondent. Notably, the real question is whether any evidence supports the trial court's ruling that Shah failed to prove all elements of contempt by clear and convincing evidence. As demonstrated herein and in Hospital's Brief, there is supporting evidence. Thus, this Court did not err in affirming the trial court.

VII. This Court correctly affirmed the trial court's rulings that Hospital's actions regarding the "35 emergency room cases" and "Patient X" were not grounds for contempt.

At pages 17-20 of his Petition, Shah argues that the evidence regarding the "35 emergency room cases" and "Patient X" demonstrate as a matter of law that Hospital was in contempt of the Settlement Orders. As demonstrated earlier, Hospital's actions regarding Patient X were completely proper. As demonstrated below, the "35 Emergency Room Cases" provide no basis for finding contempt.

Judge Early rejected this contempt claim on several different grounds, noted by bracketed numbers below:

> [Shah] contends [Palmetto] considered 35 emergency room cases without first having them reviewed by the Outside Reviewer. [1] This "violation" is not asserted in any of the "pending motions." Moreover, it is manifestly without merit. [2] This was done in response to Plaintiff's repeated demands at the Medical Executive Committee (MEC) and Fair Hearing Committee (FHC) stages that he should be compared to other radiologists. He cannot now complain that Defendant heeded his requests. [3] This was done at the MEC and FHC stage of the PPR process, not the QA stage, to which the Settlement Orders clearly limited the imposition of any prescribed or proscribed conduct. This was done not as QA but as part of the MEC's investigation into whether Plaintiff had satisfied the conditions of his earlier imposed probation. The Settlement Orders did not attempt to limit the power or right of the MEC or the FHC to make any such investigation.

(R. 41-42). As this Court found, Judge Early properly rejected all claims not made in the pending contempt motions. As this Court also found, Judge Early properly rejected all contempt claims based on allegations occurring beyond the QA stage of the Peer Review process. Judge Early also found that the review of these cases was in response to Shah's requests for comparative studies, and Shah did not dispute this on appeal. (Init. App. Br. at 25). Thus, it is the law of this case and requires affirmance. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970).[16] Moreover, and contrary to Shah's appellate arguments, the evidence shows that these reports were the result of the MEC's directive that a study be conducted for all radiologists (not just Shah) regarding X-ray readings by radiologists that differed from those of an ER physician. (R. 2027-2029, 1784). On appeal, Shah complained about the lack of comparison to other radiologists (App. Br. 37) but simultaneously challenges here the use of such comparisons.

Finally, were it assumed that the Hospital erred in considering the 35 emergency room cases, Shah is nevertheless not entitled to any relief. As shown earlier, Hospital properly terminated Shah's privileges on two "stand alone" grounds: (1) his refusal to satisfy the probation condition of a psychological evaluation; and (2) his gross misdiagnosis of Patient X.

[16] As noted throughout Hospital's Brief, numerous arguments by Shah are not preserved for appeal and/or are barred by the law of the case doctrine. (See, *e.g.*, Resp. Br. 17, 30-32, 34-38, 41).

Any presumed error regarding the 35 emergency room cases in Hospital's December 2005 termination of Shah's privileges does not impact these separate grounds and, therefore, Shah is not entitled to any relief on appeal or rehearing.[17]

VIII. This Court correctly did not reach non-dispositive issues raised by Shah.

At pages 20-21 of his Petition, Shah argues this Court should have addressed all issues on appeal, asserting "the only issue addressed by the Court was that of the case selection process by the outside reviewer." This argument is based on Shah's earlier noted "writer's trick." As shown earlier, and as shown throughout Hospital's Brief, this Court correctly held that the Settlement Orders were a limited intrusion into Hospital's operations and the contempt action was limited to the issues raised in the contempt petitions. Thus, this Court correctly held that it need not address Shah's other arguments. In any event, as shown in Hospital's Brief, the trial court correctly refused to hold Hospital in contempt of the Settlement Orders.

IX. This Court correctly did not reach the "HCQIA" and "doctrine of non-review" issues based upon its other rulings in the case and, in any event, the trial court properly ruled on these issues.

At pages 21-22 of his Petition, Shah argues this Court should have reached the trial court's rulings based on HCQIA and the doctrine of non-review. As noted above, this Court had affirmed other rulings by the trial court and thereby mooted any need for reviewing these issues. In any event, as set forth in Hospital's Brief, the trial court ruled correctly. (Resp. Br. 33-34). As to the doctrine of non-review, Shah argues Hospital had earlier waived any defense based on subject matter jurisdiction and, therefore, the remedy of reinstatement was available to him. It is

[17] As he did on appeal, Shah claims that he did not learn of the 35 emergency room cases until discovery in the 2006 Action. (App. Br. 25; Reply Br. 9; Rhg. Pet. 4). This is simply false. Shah filed his third contempt petition on April 14, 2006, long after the December 2005 hearing and termination decision. (R. 95). His memorandum in support of that petition, also filed on April 14, 2006, is replete with references to the December 2005 hearing transcript and decision. (R. 97-113). Thus, Shah knew about the 35 emergency room cases long before any discovery in the 2006 Action. Respectfully, the dissent erroneously relied on this false claim in reaching the issue of the 35 emergency room cases. (Tab A at 13: "This evidence was revealed through discovery in the 2006 action ....").

axiomatic, however, that "subject matter jurisdiction cannot be waived or conferred by agreement of the parties to an action." *In re November 4, 2008 Bluffton Town Council Election*, 686 S.E.2d 683, 688 (S.C. 2009). As to HCQIA, Shah argues that the HCQIA immunity does not apply because he proved contempt. As this Court and the trial court correctly found, however, Shah failed to prove contempt and, therefore, the HCQIA immunity applies.

X. This Court correctly affirmed the trial court's ruling that the judiciary should not become involved in the intricacies of hospital operations.

At page 23 of his Petition, Shah summarily recasts his challenges to the trial court's rulings on the scope of the Settlement Orders. As demonstrated above and throughout Hospital's Brief, this Court and the trial court correctly refused Shah's argument that the Settlement Orders entitled him to invoke the judiciary's contempt power any time he disagreed with the Hospital. And contrary to Shah's argument, the trial court did not rule "that the directives set forth in the Settlement Orders were too general to support a contempt claim." Rather, the trial court correctly ruled that the Settlement Orders were a limited intrusion into Hospital's operations and, as to those limited intrusions, Shah failed to prove contempt by clear and convincing evidence.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the Brief of Respondent, which are incorporated herein, this Court should deny the Petition for Rehearing.

Respectfully Submitted,

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November 20, 2012
Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2013-000225

Paresh Shah, M.D. and
Paresh Shah, M.D., P.A., ... Petitioners,

v.

Palmetto Health, f/k/a
Richland Memorial Hospital,.....Respondent.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the **Return to Petition for a Writ of Certiorari** by depositing a copy in the United States Mail, postage prepaid, on June 20, 2013; addressed to the attorney for the Appellants, as follows:

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