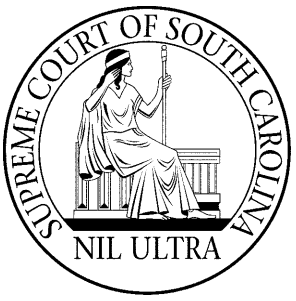


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 4**
**January 20, 2009**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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William D. Curtis, Respondent,

v.

Brandon T. Blake, Petitioner.

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Orangeburg County
J. Derham Cole, Circuit Court Judge

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Opinion No. 26583
Heard November 6, 2008 – Filed January 20, 2009

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**REVERSED AND REMANDED**

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Thomas J. Keaveny, II, and Bob J. Conley, both of Simons & Keaveny, of Charleston, for Petitioner.

C. Bradley Hutto, of Williams & Williams, of Orangeburg, and Mark Brandon Tinsley, of Gooding & Gooding, of Allendale, for Respondent.

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**JUSTICE WALLER:** We granted a writ of certiorari to review an order of the Court of Appeals which dismissed the appeal of Petitioner Brandon Blake as untimely. We find Petitioner's appeal was timely filed and, accordingly, we reverse and remand.

## FACTS

A jury awarded Respondent, William Curtis, a $450,000 verdict for injuries sustained in an auto accident with Petitioner, Blake. Immediately following the verdict, on October 31, 2005, Blake requested to make post-trial motions at a later date. The trial court ruled post-trial motions could be made in written form, stating, "We'll have ten days to file any post-trial motions. And y'all can just send those to me in Spartanburg, and I will rule on those without the necessity of actual oral argument."

On November 10, 2005, the tenth day after the verdict, Blake served opposing counsel with a Rule 59(b) motion for new trial by placing it in the mail. The motion was filed by the Orangeburg Clerk of Court five days later, on November 15, 2005. Curtis responded, claiming the motion was untimely as it was not filed within the ten days allotted by the trial judge; the circuit court ruled the motion was timely but denied the motion for a new trial on the merits.

Blake's appeal to the Court of Appeals was dismissed by Judge Cureton on the ground that the appeal was untimely. Judge Cureton ruled the motion had to be delivered to and received by the Clerk of Court no later than November 10, 2005 in order to comply with the trial court's instructions. As it did not, Judge Cureton found the late-filed motion did not stay the time for service of the notice of appeal, such that the appeal was untimely.[1] On motion for reconsideration, a three-judge panel of the Court of Appeals affirmed.

## ISSUE

Did the Court of Appeals err in dismissing the appeal as untimely where the motion for a new trial was served on opposing counsel on the tenth day after trial?

---

[1] Pursuant to Rule 59(f), the time for appeal is stayed by a **timel**y Rule 59 motion.

## DISCUSSION

A "motion for a new trial shall be **made** promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." Rule 59(b), SCRCP. (Emphasis supplied). A timely Rule 59 motion stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion. Elam v. SCDOT, 361 S.C. 9, 602 S.E.2d 772 (2004). The question here is whether the post-trial motion was "made" at the time it was filed with the court, or when it was served on opposing counsel. We find the motion was "made" when it was placed in the mail for service on opposing counsel.

The trial judge here exercised his discretion in allowing the parties ten days in which to make a post-trial motion. The court then ruled the motion, which was served on the tenth day, was timely made. We agree.

Although Rule 59(b) does not define the term "made," other portions of Rule 59 utilize service as the effective date. For example, Rule 59(c) sets for the Time for Serving Affidavits, stating, "[w]hen a motion for new trial is based upon affidavits they shall be served with the motion." Similarly, Rule 59(d) permits a court on its own initiative to "grant a motion for a new trial, timely served. . ." Under Rule 59(e), "a motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."[2]

Furthermore, this Court has previously held Rule 59(b) requires **service** of post trial motions within ten days after judgment. See Diamond Jewelers v. Naegele Outdoor Advertising, 290 S.C. 260, 349 S.E.2d 888 (1985)

[2] In contrast, the current federal version of Rule 59(b) specifically requires a new trial be **filed** no later than 10 days after the entry of judgment, and Rule 59(c) and (e) also specifically require **filing** rather than **service.** Prior to the Federal Rule 59's amendment in 1995, it was the date of **service** of the motion rather than the date of filing which was significant. If service was timely, it was sufficient if the motion was filed within a reasonable time after service. See Wright and Miller, Federal Practice and Procedure, § 2812 (1995).

(recognizing post-trial motions to amend, alter and for a new trial must be served not later than ten days after entry of judgment).

Accordingly, we hold a motion for a new trial is timely so long as it is served within the time period allotted by the trial judge.[3] We find the trial court properly held Blake's motion for a new trial was timely. We reinstate the appeal and remand the matter to the Court of Appeals for consideration on the merits.

**REVERSED AND REMANDED.**

**TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur.**

[3] It is, however, within the trial court's discretion whether to allow up to ten days for post-trial motions to be made.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Francis Ike Johnson, Respondent,

v.

Sonoco Products Company and
GAB Robins, Inc., Appellants.

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Appeal From Darlington County
James E. Lockemy, Circuit Court Judge

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Opinion No. 26584
Heard November 19, 2008 – Filed January 20, 2009

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**AFFIRMED AS MODIFIED; AND REMANDED**

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Michael A. Farry and David A. Wilson, both of Horton, Drawdy, Ward & Jenkins, of Greenville, for Appellants.

Vernon F. Dunbar, of Turner, Padget, Graham & Laney, of Greenville, for Respondent.

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**PER CURIAM:** Appellants Sonoco Products Company and GAB Robins, Inc. (collectively, Sonoco) argue the circuit court erred in granting Respondent Francis Ike Johnson's motion to compel payment of his workers' compensation benefits during the pendency of the underlying appeal. We disagree and affirm. We find that the circuit court's award of workers' compensation benefits in the underlying appeal was not stayed during the appeal. As a result, we conclude the circuit court retained authority to compel the payment of compensation benefits pursuant to Rule 225(a), SCACR. We further affirm Johnson's entitlement to interest and related sanctions. We modify the order of the circuit court only insofar as the effective date of Johnson's entitlement to relief. We remand to the circuit court to calculate Johnson's entitlement to interest as of June 15, 2005, thirty days following entry of the circuit court order awarding Johnson benefits.

## I.

The single commissioner awarded benefits to Johnson. The commission reversed, and Johnson appealed to the circuit court. The circuit court reversed the commission and awarded benefits to Johnson. Sonoco's motion to reconsider was denied, and the circuit court order became final on May 16, 2005.

Sonoco appealed to the Court of Appeals, which affirmed the judgment of the circuit court. *Johnson v. Sonoco Products Co.*, Op. No. 2006-UP-281 (S.C.Ct.App. filed Sept. 20, 2006). Sonoco unsuccessfully sought rehearing in the Court of Appeals. We subsequently denied Sonoco's petition for a writ of certiorari. The remittitur was sent to the lower court on June 13, 2007.

Prior to the conclusion of the underlying appeal, Johnson filed a motion to compel payment of the compensation benefits in the circuit court, together with a subsequent motion in the circuit court for sanctions (interest and a ten percent penalty) against Sonoco. Sonoco objected to the jurisdiction of the circuit court on two grounds: (1) the award of workers' compensation benefits was stayed during the appeal, and (2) absent a remand from the appellate court, the circuit court lacked jurisdiction to consider Johnson's motions. The circuit court rejected Sonoco's arguments and awarded relief,

calculating Johnson's entitlement to interest as of the date of the single commissioner's order, May 29, 2002, and assessing a ten percent penalty. The circuit court's initial order granting relief was filed December 20, 2006, and an amended order was filed on March 6, 2007, following Sonoco's motion for reconsideration. Sonoco appealed. Thereafter, as noted above, the underlying appeal became final and the remittitur was sent to the lower court.

Following the circuit court order of March 6, 2007, Sonoco paid Johnson his compensation benefits, but continued with the current appeal challenging the award of interest and ten percent penalty. The appeal is before us pursuant to Rule 204(b), SCACR, certification.

## II.

The first issue we must resolve is whether the appeal in the underlying case stayed Sonoco's responsibility to make weekly compensation payments to Johnson. Rule 225(a), SCACR, provides the general rule that service of a notice of appeal in a civil matter automatically stays matters affected by the appeal. Some of the exceptions to this rule are found in Rule 225(b), which sets forth a non-exhaustive list. Rule 225 expressly provides that exceptions to the general rule extend beyond the list in subsection (b) and are found in statutes, court rules, and case law.

This Court provided such case law when it previously addressed this issue of whether an award of workers' compensation benefits by the circuit court would be stayed by the service of the notice of appeal in *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 534, 115 S.E.2d 57, 67-68 (1960). In *Hermitage* this Court stated:

> [I]f the Commission should deny him compensation and upon his appeal the circuit court should reverse the Commission and hold his claim compensable, the weekly payments to be made by the employer pending determination of an appeal from that judgment to the Supreme Court should commence from the date of the

> circuit court's judgment and should not be calculated retroactively from the date of the Commission's decision.

*Id.* In making this determination, this Court interpreted section 72-356 of the South Carolina Code (1952). *Hermitage*, 236 S.C. at 534, 115 S.E.2d at 67. This section is substantially similar to section 42-17-60 of the South Carolina Code (Supp. 2007). We hold that the rule in *Hermitage* is on point. Therefore, when the commission's denial of benefits is reversed and the award is made by the circuit court, the weekly payments are not stayed by the appeal.[1]

We further note that we have already made such a ruling in *this* case. In an order issued by this Court on November 14, 2006, this Court granted Sonoco's motion for an extension of time to file its petition for certiorari, and we specifically stated that the award of benefits to Johnson "is not stayed by the pendency of this matter." This Court went on to cite section 42-17-60; Rule 225, SCACR; *Hermitage*, 236 S.C. 515, 115 S.E.2d 57; and *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984).

We next turn to the authority of the circuit court to compel, in the absence of a remand order, the weekly payments during the pendency of the appeal. The answer is unambiguously provided in Rule 225(a), SCACR, which states, "[t]he lower court . . . retains jurisdiction over matters not affected by the appeal *including the authority to enforce matters not stayed by the appeal*." (emphasis added). The circuit court retained authority to compel the payment of weekly benefits, and Sonoco's arguments to the contrary are without merit. No remand from the appellate court was necessary. Moreover, because the awards of interest and penalty are inextricably linked to Sonoco's nonpayment of benefits, we follow the rationale of *Hermitage* and hold that the matters of interest and penalty were not stayed by the appeal.

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[1] We recognize the procedure followed in this case has been statutorily modified. For injuries occurring on or after July 1, 2007, appeals from the Workers' Compensation Commission go directly from the commission to the Court of Appeals. *See* Act 111, 2007 S.C. Acts 111.

Sonoco further challenges the authority of the circuit court to award interest and assess the ten percent penalty under section 42-9-90 of the South Carolina Code (1976). Sonoco contends such an award rests exclusively in the Workers' Compensation Commission. We find this issue is not preserved. The issue first appears in Sonoco's motion seeking reconsideration of the circuit court's December 20, 2006 order. An issue may not be raised for the first time in a motion to reconsider. *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) ("Further, because the transcript of the proceedings below is omitted from the record, it appears the first time Commercial Credit made this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not properly preserved for our review."). The matters of interest and the ten percent penalty were squarely before the circuit court, and Sonoco's pre-hearing written responses to Johnson's motions did not raise the section 42-9-90 challenge. Moreover, the transcript of the hearing in the circuit court is not included in the record on appeal. *Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 132, 470 S.E.2d 373, 376 (1996) ("The appellant has the burden of providing this court with a sufficient record upon which to make a decision."); *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 306, 395 S.E.2d 742, 744 (Ct. App. 1990) ("It is incumbent upon an appellant to present a record sufficient to permit a review of a trial judge's rulings."). We therefore affirm the awards of interest and ten percent penalty. Johnson is additionally entitled to interest on the ten percent penalty.

We do agree with Sonoco's final assignment of error that Johnson is not entitled to interest from the date of the single commissioner's order. We are guided by the reasoning of *Hermitage*. 236 S.C. at 534, 115 S.E.2d at 67-68 ("[U]pon his appeal [if] the circuit court should reverse the Commission and hold his claim compensable, the weekly payments to be made by the employer pending determination of an appeal from that judgment to the Supreme Court should commence from the date of the circuit court's judgment and should not be calculated retroactively from the date of the Commission's decision."). This Court in *Hermitage* cited to section 72-356

of the South Carolina Code (1952) in referencing a thirty-day supersedeas on appeals from an award of benefits. *Id.*

Section 72-356 is the predecessor to section 42-17-60 of the South Carolina Code (Supp. 2007). The thirty-day time period for appeals remains a part of section 42-17-60, with the provision that "after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered . . . ." Because the commission denied Johnson's claim and the circuit court awarded benefits, we apply this statutory thirty-day supersedeas following the entry of the circuit court order, after which the compensation payments should have been made. There was no legitimate reason to justify or excuse Sonoco's failure to pay compensation benefits to Johnson during the pendency of the underlying appeal. Johnson is therefore entitled to an award of interest calculated from June 15, 2005, which is thirty days from the award of benefits in the circuit court. We remand to the circuit court for the sole purpose of calculating the interest due Johnson.

## III.

The award of workers' compensation benefits by the circuit court was not stayed by the appeal. Pursuant to Rule 225(a), the circuit court had jurisdiction to compel the payment of benefits, as well as interest and penalty, during the pendency of the appeal. We affirm the circuit court in its entirety, save the effective date of the award of interest. The matter is remanded to the circuit court to calculate the award of interest calculated from June 15, 2005.[2]

[2] The principle payment of the ten percent penalty ($20,513) should be made promptly. Moreover, the parties can compute the amount of interest due Johnson, and we urge the parties, through counsel, to do so and bring this unreasonably protracted litigation to an end. The circuit court should not be further burdened with this unnecessary litigation.

**AFFIRMED AS MODIFIED; AND REMANDED.**

**TOAL, C.J., WALLER, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Carlyle McGill, Appellant,

v.

Tracy Moore, Rufus Alton Moore, Pearline Hutto, Estate of Bennie Moore, believed to be the above/below named persons, known or unknown, claiming thereunder, being named herein Jane Doe and Richard Roe, Estate of Vernice Alexander, believed to be William Alexander, Grady Alexander, and any and all persons, known or unknown, claiming under both Alexander estates, collectively known as Jane Doe and Richard Roe, Respondents.

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Tracy Moore, Rufus Alton Moore and Pearline Hutto, and Estate of Iola Moore Smith, Edward J. Smith, Jr., Newana Smith Barnes, Counter-Plaintiffs,

v.

Carlyle McGill, Estate of Lawrence Moore, Estate of Vernice Moore Alexander, the heirs or which are believed to be William Alexander, Estate of Grady Alexander, Jr., Leonard Alexander, and Estate of John Stanley Alexander, Estate of Grady Alexander, Jr., the heirs of which are believed to be Rava A. Colby, Richard L. Alexander, and Regina Alexander, Estate of John Stanley Alexander, the heirs of which are believed to be Tanisha Alexander, and Tora Alexander, Estate of Otis Moore, Tracy Moore, Estate of Alberta Moore Feemster, Estate of Bennie Lewis Moore, John Doe, a fictitious person representing the class of all unknown adult, mentally competent, unimprisoned, non-military persons, who claim any right, title, or interest in, or lien upon, the real estate described in the Counterclaim herein; and Richard Roe, another fictitious person representing the class of all unknown persons who are either: under the age of eighteen (18) years, imprisoned, or in the Armed

Forces, and who claim any right, title or interest in, or lien upon, the real estate described in the Counterclaim herein, which fictitious person includes but are not limited to, all unknown heirs at law, distributees, devisees or assigns of any deceased heirs of the following persons including, but not limited to, Lawrence Moore, Vernice Moore Alexander, Grady Alexander, Jr., John Stanley Alexander, Otis Moore, Alberta Moore Feemster, and Bennie Lewis Moore, and all persons entitled to claim under or through them, or any of them, Counter-Defendants.

Appeal from York County
S. Jackson Kimball III, Circuit Court Judge

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Opinion No. 26585
Heard November 18, 2008 – Filed January 20, 2009

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**AFFIRMED**

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Brian Scott McCoy, of Horack Talley, of Rock Hill, and William M. Brice III, of Brice Law Firm, of York, for Appellant.

John Martin Foster, of Rock Hill, for Respondents.

Paula Knox Brown, of Rock Hill, for Guardian Ad Litem.

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**CHIEF JUSTICE TOAL:** In this case, Appellant Carlyle McGill filed suit against Respondents seeking specific performance on three contracts for the sale of land. The master-in-equity ruled in favor of Respondents, finding that the contracts contained a condition precedent which had not been satisfied. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

Respondents are owners of undivided interests of a tract of land near Hickory Grove, South Carolina by way of intestate succession and devises from wills. Appellant owns a tract of land adjacent to Respondents' property. Although Appellant was aware that many of the owners did not live in the area and that some owners were unknown, he approached Respondent Tracy Moore regarding a possible offer to purchase the land, and in 2000, Appellant's attorney drafted a "Contract for Sale." The contract provided:

> 4. PRICE: The Purchase Price is $1,000.00 per acre, with final purchase price being based on the acreage shown on new survey. All heirs of Rufus Alton Moore hereby agree that his or her share of the purchase price will be in accordance with their individual percentage of ownership as determined by the probate of the Estate . . .
>
> 5. CLOSING: Closing shall be held on or before thirty (30) days from the date the last contract is signed or if not possible by

> that date, then the parties hereto agree to an extension time of thirty (30) days.

Appellant presented nine identical contracts to various owners, of which eight owners signed.[1] Of the eight signed contracts, five were closed and Appellant received deeds representing the interests of those owners. The remaining three were never closed. After Appellant's repeated requests to close the three contracts failed, Appellant filed suit seeking specific performance. Respondents filed a counterclaim seeking partition or sale of the property and moved to allow certain owners not named in the original complaint to intervene. The master granted the motion to intervene and appointed a guardian *ad litem* to represent the interests of any incompetent person or person under the age of eighteen who may have had a claim to any interest in the property.

At trial, Appellant and Appellant's wife testified. Respondents, however, argued that contract interpretation was a question of law and did not present any evidence. The master found that the language in the contract created a condition precedent requiring all owners to sign a contract before the closing could take place. Therefore, because one of the contracts was never signed, the master ruled Appellant was not entitled to specific performance.

[1] Owner Iola Moore Smith was unable to sign the contract because she was incompetent, and before family members could obtain a power of attorney, she passed away.

Appellant appealed the master's order, and this Court certified the case pursuant to Rule 204(b), SCACR.[2] Appellant presents the following issues for review:

I. Did the master err in holding that the language of the contracts created a condition precedent?

II. If the contract set forth a condition precedent, are Respondents permitted to enforce such a condition since the condition would have been for the benefit of Appellant?

III. Did the master err in denying specific performance because Appellant substantially complied with any condition of unity?

IV. Did the master err in excluding testimony regarding the intent of the parties?

## STANDARD OF REVIEW

An action to construe a contract is an action at law. *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n,* 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings. *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008).

[2] Respondents and the guardian *ad litem* argue that we should dismiss this appeal because Appellant failed to serve the notice of appeal on the guardian *ad litem* pursuant to Rule 203, SCACR. We find Appellant was not required to serve the notice of appeal upon the guardian *ad litem* because this appeal does not involve the partition action and thus, the guardian ad litem is not an "adverse party" in this appeal and not a "respondent."

## LAW/ANALYSIS

## I. Condition Precedent

Appellant argues that the master erred in finding that the contract contained a condition precedent. We disagree.

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Id.* It is a question of law for the court whether the language of a contract is ambiguous. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

We hold that the master correctly found that the contracts contained a condition precedent that all owners sign the contract agreeing to sell their interests before any contract could be enforced. Reading all of the provisions as a whole, we find that the contract assumes that all owners would sell their interests in the property and that Appellant would subsequently be the sole owner of the property. For example, the contract provides that "all heirs" agree to a certain purchase price and that closing would be held after "the last contract" was signed. The language used in the contract indicates that the parties contemplated that the closing would not take place until all owners agreed to the terms of the contract, and thus, Appellant could not enforce the contract against any owner until all owners signed a contract.

Appellant argues that the primary purpose of the contract was for the purchase of individual interests in the property and that "from the date the last contract is signed" relates only to the timing of the closing. In our view, Appellant impermissibly focuses on one provision in order to create an ambiguity and ignores the rest of the language in the contract indicating that

the contract required unity of all owners before closing would take place. *See Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134 (recognizing that the meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the contract as a whole and considering the context and subject matter of the contract). However, even if the contract was ambiguous, any ambiguity will be construed in favor of Respondents as the non-drafting party. *See S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (holding that ambiguous language in a contract should be interpreted strongly in favor of the non-drafting party).

Had Appellant intended to purchase the interests of an individual owner without regard to the other owners' interest, he could have easily drafted a contract to reflect this intent. In our view, to construe the contract according to Appellant's interpretation would not be faithful to the entire document and would not reflect the parties' intentions. Accordingly, we hold that the contract contained a condition precedent which was not satisfied.

## II. Respondents' Ability to Enforce the Condition Precedent

Appellant argues that even if the contract contained a condition precedent requiring all owners to sign the contract, this condition would have been for the benefit of Appellant, which he could waive and which could not be enforced by Respondents. We disagree.

In *Ehlke v. Nemec Const. Co., Inc.*, the court of appeals held that where a condition precedent was solely for the benefit of one party, it could not be asserted as a forfeiture by the other party. 298 S.C. 477, 381 S.E.2d 508 (Ct. App. 1989). In this case, however, Appellant cannot show the condition was solely for his benefit. Rather, the condition was in accordance with the parties' intent that the contract would be enforceable once all of the owners had signed the contract. *See id.* at 480, 381 S.E.2d at 511 (finding that the intention of the parties as deduced from the language used, the surrounding circumstances at the time the contract was executed, and the purpose sought to be accomplished by the insertion of the provision" was that parties intended that the condition precedent was for the benefit of the plaintiff).

Again, if the parties intended for this condition to be solely for Appellant's benefit, Appellant could have easily drafted language reflecting this intent.

## III. Substantial Compliance

Appellant argues that even if the contract contained a condition precedent requiring all owners to sign the contract, he substantially complied with this condition because eight of the nine contracts distributed were signed. We disagree.

If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises. *See Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994) (recognizing that a condition precedent is a fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises). In this case, before the closing could occur, the contract required all of the owners to sign the contract. This condition has not been met and has not been excused. Therefore, we hold that Appellant may not circumvent the contract's condition precedent by arguing substantial compliance.[3]

## IV. Testimony

Appellant argues that the master erred in excluding his testimony regarding the intent of the parties in using specific terms in the contract such as "all heirs" and "closing." We disagree.

The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument. *In re Estate of Holden*, 343 S.C. 267, 275-76, 539 S.E.2d 703, 708 (2000). Where a written

[3] This argument appears to be an estoppel claim. However, any estoppel issues are not preserved for review as Appellant did not raise the issue of estoppel before the master and has not explicitly raised it to this Court.

instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. *Id.*

We hold that the master properly excluded this testimony. The terms in the contract are unambiguous and Appellant was therefore barred from introducing evidence to explain these terms. *See Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008), quoting *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945) ("In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from . . . the four corners of the instrument").

## CONCLUSION

For the foregoing reasons, we hold that the master correctly denied Appellant specific performance relief.

**WALLER, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Dorothy Windham, Respondent,

v.

Donald Allen Riddle and
Jennifer D. Riddle, Petitioners.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Orangeburg County
Olin D. Burgdorf, Master-in-Equity

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Opinion No. 26586
Heard October 7, 2008 – Filed January 20, 2009

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**AFFIRMED**

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Pete Kulmala, of Harvey & Kulmala, of Barnwell, for Petitioners.

Clinch H. Belser, Jr. and Michael J. Polk, of Belser & Belser PA, of Columbia, for Respondent.

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**JUSTICE BEATTY:** In this declaratory judgment action brought by Dorothy Windham, the master-in-equity found Donald and

Jennifer Riddle (the Riddles) have an appurtenant easement for access and irrigation purposes across Windham's property. The Court of Appeals reversed the master-in-equity's holding. Windham v. Riddle, 370 S.C. 415, 635 S.E.2d 558 (Ct. App. 2006). This Court granted the Riddles' petition for a writ of certiorari to review the Court of Appeals' decision. We affirm.

## FACTUAL/PROCEDURAL HISTORY

The Riddles and Windham are adjacent property owners in Orangeburg County. Both parties purchased their property from a common grantor, Danny Covington. Covington purchased the combined property in 1991 from Edisto Farm Credit. Marvin Davis, the previous owner, had used the property as a dairy farm. In 1992, Covington had the property surveyed and divided into two tracts, 1-A and 1-B.

On November 15, 1992, Covington and Windham entered into a contract of sale for the approximately 142.38 acre tract 1-B (the Windham tract). Pursuant to the terms of the contract, Windham agreed to purchase the tract in monthly installments over a ten-year period but was allowed to pre-pay the balance without penalty. During the period of these payments, Windham was allowed full possession and occupancy of the property. After Windham satisfied the purchase price, Covington agreed to deliver "good and marketable title" to Windham. In addition to these terms, the contract provided in part:

> Seller to have a 50′ easement of ingress and egress for the purpose of operating and maintaining an irrigation system. [S]aid easement to be centered over existing underground piping. Seller agrees not to pump pond lower than 4′ below full stage. Existing overhead utilities easement to remain as is. When possible seller to run system at times convenient to buyer. Buyer not restricting use more than 36 hours at a given time. Seller to have all rights to use waters in pond. Seller and buyer mutually agree to use pond dam and canal as an easement. [S]eller providing

> buyer 25′ easement for ingress and egress to canal through existing woods road.

After entering into the contract of sale, Windham and her family used the tract as a family retreat, and they visited every other weekend. Covington continued to farm on tract 1-A.

In June of 1993, Covington leased a portion of the 257.49 acre tract 1-A (the Riddle tract) to the Riddles, who began using the land to operate a dairy farm. In the spring of 1994, Covington and the Riddles installed an aboveground irrigation system over the existing underground piping on the Windham tract. The pumping station for the irrigation system is located on the pond that Windham owns and transports water to the Riddle tract. Access to the pump is controlled by a locked gate on the Windham tract.

On November 17, 1997, Covington conveyed tract 1-A in its entirety to the Riddles. The deed provided in pertinent part:

> Said conveyance is subject to a 30-foot easement, a 50-foot irrigation easement, a 25-foot access easement along existing woods road and a canal, all as set forth and shown on the above-referenced plat.

On December 15, 1998, pursuant to the installment contract, Covington deeded the tract to Windham after she paid off the purchase price. The deed stated in relevant part:

> Said conveyance is subject to a (fifty) 50 foot easement of ingress and egress for the purpose of operating and maintaining an irrigation system and an agreement as to the use of said irrigation easement and irrigation system as set forth in that certain Contract of Sale by and between Danny Covington a/k/a J. Danny Covington, as Seller and Dorothy Windham, as Buyer dated November 15, 1992 and recorded in the office the Register of Deeds for Orangeburg County on December 28, 1992 . . . .

Although Windham initially allowed the Riddles to use the pond for irrigation purposes, she brought an action for declaratory judgment and injunctive relief against the Riddles on November 12, 2003, claiming the Riddles exceeded the use of the easement as contemplated by Covington and Windham in the contract of sale. In her Complaint, Windham specifically alleged the Riddles: allowed their livestock to roam on Windham's property; destroyed Windham's fences, gates, and security devices; operated the irrigation system for excessive periods of time which created a nuisance; obtained waters from Windham's property without any legal right; and allowed third parties access to the Windham property for "unauthorized purposes." As the basis for her action, Windham asserted the easement created in the contract of sale and resulting deed was an easement in gross and, thus, the Riddles had no right to this easement. In response, the Riddles asserted Windham was estopped from denying the validity of the easement. The Riddles also claimed the easement was appurtenant to the Riddle tract.

After a trial, the master-in-equity found that the contract of sale between Windham and Covington, in conjunction with the Windham and Riddle deeds, established "various easements for the purpose of irrigating Tract 1-A, the Riddle property." The master further held the easements were appurtenant to the Riddle tract and, therefore, passed to the Riddles when Covington conveyed the land to them. Additionally, the master concluded that Windham could not maintain an action for trespass because the Riddles, the owners of the dominant estate, did not abuse or exceed the limits of the easements. Ultimately, the master dismissed Windham's Complaint with prejudice and ordered that the "irrigation easements are appurtenant to the real estate subject to this action and exist as set forth on the recorded plats."

Subsequently, the master denied Windham's motion to alter or amend the judgment. Windham then appealed the master's decision to the Court of Appeals.

In a divided opinion, the Court of Appeals reversed the decision of the master-in-equity. Windham v. Riddle, 370 S.C. 415, 635 S.E.2d 558 (Ct. App. 2006). The majority found the master erred by

concluding that the easement at issue was appurtenant rather than in gross. Prefacing its analysis with a general discussion of the differences between an appurtenant easement and an easement in gross, the majority focused on the installment land contract that was the subject of the dispute. Citing this Court's opinion in Lewis v. Premium Investment Corporation, the majority noted that typically in this type of contract, "the seller retains legal title until the purchase price has been fully paid, and the purchaser is entitled to immediate possession." Id. at 419, 635 S.E.2d at 560; see Lewis v. Premium Inv. Corp., 351 S.C. 167, 170-73, 568 S.E.2d 361, 363-64 (2002) (stating that in an installment land contract, the seller retains legal title until the purchase price is fully paid and that the vendee in possession of the land is the owner of an equitable interest in the property).

Relying on the long-standing common law rule that an easement cannot exist where both the purported servient and dominant estates are owned by the same person, the majority found that an easement could not have been created by the 1992 contract of sale. Id. at 419, 635 S.E.2d at 560 (citing Haselden v. Schein, 167 S.C. 534, 539, 166 S.E. 634, 635 (1932)). Specifically, the majority stated, "[a]s Covington retained legal title to the Windham tract and also held title to the Riddle tract, no easement could have been created by the Windham contract of sale in 1992." Windham, 370 S.C. at 419, 635 S.E.2d at 560.

The majority further relied on its earlier decision in Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999). In Springob, Dr. Shenoy owned Lot 14, and his wife owned adjoining Lot 13, where the Shenoys' home was located. The Shenoys built a well on Lot 14 and attached it to an irrigation system serving Lot 13. In 1986, Dr. Shenoy sold Lot 14 to L.G.B., Inc. The deed from Dr. Shenoy "reserved to the Grantor" an easement on Lot 13 for use of the well on Lot 14. A house was built on Lot 14 and eventually the Farrars bought the property in 1988. The deed to the Farrars stated "this conveyance is subject to all easements, rights, reservations, restrictions, and covenants of record affecting said property." Id. at 587, 514 S.E.2d at 137. The Farrars' closing attorney informed them of the easement to the well located on their property. In 1989, Mrs. Shenoy sold Lot 13 to Kenneth Perry, and

the South Carolina Federal Savings Bank obtained title to the lot through foreclosure. While Lot 13 was vacant, the Farrars disconnected the well on their property from the Lot 13 irrigation system and connected it to their own system serving Lot 14.

In 1993, Springob purchased Lot 13 unaware of the easement on Lot 14. After discovering the well on Lot 14, Springob demanded use of the well, but the Farrars refused. Springob brought an action for trespass and intentional interference with and obstruction of an easement. He also sought an injunction prohibiting the Farrars from further interfering with the easement. The Farrars answered, asserting the easement was personal to Dr. Shenoy and, therefore, was an easement in gross. The Court of Appeals agreed with the Farrars, finding the easement was in gross rather than appurtenant. In so holding, the Court of Appeals stated:

> In this case, L.G.B. Deed reserved an easement in favor of "the Grantor." The grantor of the L.G.B. Deed was Dr. Shenoy, the sole owner of Lot 14. Because the easement was reserved for Dr. Shenoy only, and Dr. Shenoy did not own Lot 13, the lot benefited by the easement, the requirement that an appurtenant easement have "one terminus on the land of the party claiming it" is not satisfied.

Id. at 589, 514 S.E.2d at 137-38.

Because the Windham deed referred to the language of the contract of sale, which reserved an easement in favor of "Seller" only, and Covington no longer owned the Riddle tract at the time he deeded the Windham tract, the majority further found an appurtenant easement was not created for the benefit of the Riddles as in Springob. Windham, 370 S.C. at 419-20, 635 S.E.2d at 560-61.

In contrast, the dissent found that an appurtenant easement was established in the contract for the sale of the land from Covington to Windham. Id. at 421-22, 635 S.E.2d at 561. In reaching this

conclusion, the dissent focused on when the easement was created and distinguished the instant case from Haselden and Springob. The dissent believed that the contract of sale between Windham and Covington, rather than the deed, was "the instrument that established the legal relationship between the parties" and was "the functional equivalent of a conveyance coupled with a method of financing." Id. at 422, 635 S.E.2d at 561.

Although the dissent believed that "no discussion of the requirement that an appurtenant easement have one terminus on the land of the party claiming" was necessary, the dissent felt compelled to distinguish Springob because the majority heavily relied on that decision. Id. at 423, 635 S.E.2d at 562.

In distinguishing that case, the dissent noted that in Springob, the person who reserved the easement never owned the purported dominant estate, only owning at one time the servient estate. In contrast, Covington "unquestionably owned the dominant estate at the time the contract was entered into." Id. at 423, 635 S.E.2d at 562. Secondly, the dissent did not find dispositive the fact that the Riddle deed did not create an appurtenant easement. The dissent reasoned that "there is no necessity to expressly mention an easement appurtenant when conveying the dominant estate." Id. Because "all the elements necessary for the creation of an easement appurtenant were in existence at the time the contract was entered into between Covington and Windham," the dissent concluded that the later conveyance of "'bare legal title' was a required fulfillment of the contractual terms already set in stone." Id. at 423-24, 635 S.E.2d at 562.

The Riddles petitioned for and were granted a writ of certiorari for this Court to review the decision of the Court of Appeals.

## DISCUSSION

The Riddles assert the Court of Appeals erred in holding that the easement created through the sales of two parcels by Covington, a common grantor, was an easement in gross rather than an appurtenant

easement. Relying primarily on the dissent, the Riddles claim that under the majority's analysis "the nature of this transaction [an installment land contract] erects an insurmountable obstacle to the easement's being recognized as appurtenant." Although the Riddles do not dispute that Covington retained "title ownership" of the servient estate after the 1992 sale to Windham, they contend the sales contract conveyed to Windham the most significant rights in the property. Thus, the Riddles' right of access "was described and reserved in the 1992 sales agreement." As will be discussed, we agree with the majority opinion in the Court of Appeals' decision and specifically reject the reasoning in the dissenting opinion.

"An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed." Douglas v. Med. Investors, Inc., 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971) (citations omitted). "An easement is therefore not an estate in lands in the usual sense." Id. An easement may be created by reservation in a deed. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965).

In construing a deed, "the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." Wayburn v. Smith, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987). "The intention of the grantor must be found within the four corners of the deed." Id.

In Tupper v. Dorchester County, this Court distinguished between the types of easements, stating:

> The character of an express easement is determined by the nature of the right and the intention of the parties creating it. 25 Am. Jur. 2d Easements and Licenses § 13 (1966). An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of

> transfer. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965). In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. Id.; Smith v. Commissioners, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994); Carolina Land Company, Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Sandy Island Corp. v. Ragsdale, supra; 12 S.C. Juris. Easements § 3. It also passes with the dominant estate upon conveyance. Carolina Land Co., Inc. v. Bland, supra. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. 12 S.C. Juris. Easements § 3(c). Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980).

Tupper v. Dorchester County, 326 S.C. 318, 325-26, 487 S.E.2d 187, 191 (1997).

Applying the foregoing to the facts of the instant case, we agree with the Court of Appeals' majority opinion. Under an installment land contract, legal title to the subject property is not transferred to the buyer until the purchase price is satisfied. Lewis, 351 S.C. at 170-73, 568 S.E.2d at 363-64. Therefore, pursuant to the Windham sales contract, Covington retained legal title to the Windham tract until 1998, when Windham paid off the purchase price. The 1998 Windham deed stated that it was subject to the easement in favor of Covington, the seller, as set forth in the 1992 sales contract. Because Covington retained legal title to both the Windham tract and the Riddle tract in 1992, an easement could not have been created by the 1992 installment land contract. Haselden, 167 S.C. at 539, 166 S.E. at 635.

Furthermore, we agree with the Court of Appeals that the 1998 Riddle deed did not create an appurtenant easement. Before Covington

conveyed legal title to Windham in 1998, he sold tract 1-A to the Riddles in 1997. Given that the Windham deed reserved the easement to Covington and he sold the dominant estate to the Riddles in 1997, the "terminus" requirement for an appurtenant easement was not met similar to the conveyance in Springob. See Shia v. Pendergrass, 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952) (noting the absence of a terminus on property is fatal to claim of an appurtenant easement).

In reaching this conclusion, we have carefully considered the dissenting opinion in the Court of Appeals' decision.[1] For several

[1] We have also reviewed the dissent in Springob and several secondary sources which have advocated for this Court to overrule the common law requirements for appurtenant easements. These authors have characterized the current easement law of South Carolina to be "academic" and "archaic." According to these authors, the trend among other jurisdictions is to overrule the common law which would favor effectuating a grantor's intent to create an interest, i.e., an easement, to a third party. See Springob, 334 S.C. at 595-99, 514 S.E.2d at 141-43 (Anderson, J., dissenting) (outlining cases from other jurisdictions where the appellate courts rejected the common law rule that one cannot reserve an easement to a stranger to the title); John E. Lansche, Jr., Ancient, Antiquated, & Archaic: South Carolina Fails to Embrace the Rule that a Grantor May Reserve an Easement in Favor of a Third Party, 52 S.C. L. Rev. 269 (2000) (addressing current easement law in South Carolina and advocating a change in the "ancient-common-law" principles); Michael A. Carbone, The Unity of Title Doctrine and Strangers to the Title: A Slowly Dying Remnant of Ancient Common Law?, 21 QLR 597, 599-600 n.31 (2002) (citing Springob for "unity of title doctrine" (UTD) as representative of the majority rule and stating "[t]he general common law rule, though worded differently [than UTD], is that in a deed, neither a reservation nor an exception in favor of a stranger to the instrument can, by force of ordinary words of exception or reservation, create in the stranger any title, right, or interest in or respecting the land conveyed"); see also W.W. Allen, Annotation, Reservation or Exception in Deed in Favor of Stranger, 88 A.L.R.2d 1199 (1963 & Supp. 2008) (discussing "[t]he

reasons, we believe that an adoption of that approach would create unforeseeable ramifications in this state's current property jurisprudence.

First, the inherent nature of an installment land contract, an unrecorded document, precludes the creation of an appurtenant easement at the point the contract is entered into by the parties. With an installment land contract, the seller retains legal title until the purchase price is fully paid. Thus, an installment land contract is not, as asserted by the Riddles, tantamount to a conveyance. If an appurtenant easement were created at the point the contract was entered into, problems would arise if the buyer defaulted before legal title was conveyed by a deed. The question would then become whether the easement would be extinguished when the buyer defaulted or if it transferred to the next buyer. Accordingly, we find it is essential to retain the two-part procedure of an installment land contract which requires not only a contract of sale but also a deed to convey ownership to the property after the purchase price has been satisfied. Unlike the Riddles, we do not view these requirements as "technical," but rather, find they serve a legitimate purpose for all parties involved in installment land contracts. Therefore, we reject the Riddles' contention that an appurtenant easement may be created simply by entering into an installment land contract.

Secondly, we believe this radical approach to appurtenant easements is based more on efficiency than legal analysis. See John E. Lansche, Jr., Ancient, Antiquated, & Archaic: South Carolina Fails to Embrace the Rule that a Grantor May Reserve and Easement in Favor of a Third Party, 52 S.C. L. Rev. 269, 285 (2000) ("By overruling the common law, states like California and Kentucky made it easier for

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broad rule grounded in the precedents and technicalities of common law, and which still generally prevails, is that in a deed neither a reservation nor an exception in favor of a stranger to the instrument can, by force of ordinary words of exception or reservation, create in the stranger any title, right, or interest in or respecting the land conveyed").

potential buyers conducting a title search to find encumbrances on a specific tract of land. Under the common-law rule, if a grantor wanted to reserve an easement in favor of a third party the grantor had to execute a deed of easement to that third person. Next, the grantor had to execute a deed to the grantee."). Although the common law approach may require additional steps in creating an easement in favor of a third party, it is not a task that is insurmountable. Therefore, we decline to overrule settled property law.

Finally, even though this decision may appear to be inequitable, we note the Riddles are not without other irrigation options given their property borders the Little River.[2] Thus, it is questionable whether an appurtenant easement is essentially necessary to the enjoyment of the property. See Kershaw v. Burns, 91 S.C. 129, 133, 74 S.E. 378, 379 (1912) ("The principle is well settled that a right of way appurtenant cannot be granted, unless it is essentially necessary to the enjoyment of the land to which it appertains."); Ballington v. Paxton, 327 S.C. 372, 380, 488 S.E.2d 882, 887 (Ct. App. 1997) ("An appendant or appurtenant easement must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof.").

## CONCLUSION

Based on the foregoing, we hold the Court of Appeals correctly found the Riddles do not have an appurtenant easement for access and irrigation purposes across Windham's property. Accordingly, the decision of the Court of Appeals is

**AFFIRMED.**

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

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[2] On cross-examination, Covington acknowledged that the Riddles' property fronts the Little River, which is the same river from which they get the water for the irrigation system.

# The Supreme Court of South Carolina

In the Matter of
Kenneth Ray Martin, Respondent.

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ORDER

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The Office of Disciplinary Counsel (ODC) has filed a Petition for Interim Suspension or, in the Alternative, to Transfer Respondent to Incapacity Inactive Status[1] pursuant to Rule 17, RLDE, Rule 413, SCACR. In addition, ODC requests the appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on incapacity inactive status.

IT IS ORDERED that respondent is placed on incapacity inactive status until further order of the Court.

IT IS FURTHER ORDERED that C. Heath Ruffner, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s),

[1] See Rule 28, RLDE, Rule 413, SCACR.

and any other law office account(s) respondent may maintain. Mr. Ruffner shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Ruffner may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that C. Heath Ruffner, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that C. Heath Ruffner, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Ruffner's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

January 16, 2009

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Oakwood Landfill, Inc. and
Hickory Hill Landfill, Inc., Appellants,

v.

South Carolina Department of
Health and Environmental Control
and T & T Disposal, LLC, Respondents.

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Appeal From the State of South Carolina
Board of Health and Environmental Control

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Opinion No. 4485
Heard October 9, 2008 – Filed January 12, 2009

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**AFFIRMED**

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James W. Potter, Leon C. Harmon and Joan W. Hartley, all of Columbia, for Appellants.

Alex G. Shissias, John A. Hodge and Etta R. Williams, all of Columbia, for Respondents.

**SHORT, J.:** Oakwood Landfill, Inc. (Oakwood) and Hickory Hill Landfill (Hickory Hill) appeal two orders of the South Carolina Board of Health and Environmental Control (the Board) affirming a landfill permit issued to T & T Disposal, LLC (T & T) by the South Carolina Department of Health and Environmental Control (DHEC). We affirm.

## FACTS

Sections 44-96-10 to 44-96-470 of the South Carolina Code are known as the South Carolina Solid Waste Policy and Management Act (SWPMA). S.C. Code Ann. §§ 44-96-10 to -470 (2002). Section 44-96-80(A) of the South Carolina Code requires each county in the State to prepare a single county solid waste management plan or participate in a regional solid waste management plan. S.C. Code Ann. § 44-96-80(A) (2002). Jasper County, South Carolina, elected to participate in a regional plan through the Low Country Council of Governments (LCCG), which drafted the Low Country Regional Solid Waste Management Plan (Low Country Plan) in 1994. The Low Country Plan was endorsed by Beaufort, Colleton, Hampton, and Jasper Counties. The Plan states that "[b]ased on the amount of disposal capacity available in and around the Lowcountry there is no apparent need to construct new domestic or inert landfill facilities in the next 20 years." The Plan also provides the "required annual reports due September 1 of each year will represent the extent of progress over a given year and set forth any necessary revisions or amendments."

The SWPMA also provides "[n]o person shall operate a solid waste management facility without a permit from [DHEC]." S.C. Code Ann. § 44-96-290(A) (2002). Pursuant to SWPMA, on June 30, 2003, T & T filed a permit application with DHEC requesting a Construction and Demolition, and Land-Clearing Debris Landfill Permit (landfill permit) to construct a landfill in Jasper County. DHEC conducted a public hearing for the project on October 27, 2003, and staff notified the public the proposed facility would have an estimated disposal capacity of 1,819,000 cubic yards.

DHEC was required to review the application to determine, among other things, if the proposed facility was consistent with the Low Country

Plan.[1] The SWPMA does not specify procedures for DHEC to follow in making need and consistency determinations. Jasper County Council notified DHEC it found the proposed T & T landfill to be consistent with the county's solid waste management plan in letters dated October 29, 1997; May 7, 2000; September 27, 2000; and December 16, 2003.[2] DHEC considered the letters to be amendments to Jasper County's portion of the plan and "penciled in" the changes.[3] DHEC also had minutes from the Jasper County Council meeting at which the county council voted favorably on the matter. After examining the applicable county requirements, in addition to the above-mentioned documents, DHEC determined T & T would be able to meet the land use requirements after receiving the requested landfill permit. Thus, on January 14, 2004, DHEC issued the landfill permit to T & T and stated in the permit the facility would have a final disposal capacity of approximately 1,819,000 cubic yards.

On January 30, 2004, Oakwood and Hickory Hill requested a contested case hearing, challenging DHEC's decision to issue the T & T permit. Oakwood and Hickory Hill alleged DHEC's consistency determination failed to meet the requirements of Section 44-96-290(F) of the South Carolina Solid

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[1] Section 44-96-290(F) of the South Carolina Code states "[n]o permit to construct a new solid waste management facility . . . within a county or municipality may be issued by the department unless the proposed facility . . . is consistent with local zoning, land use, and other applicable local ordinances, if any; [and] the proposed facility . . . is consistent with the local or regional solid waste management plan and the state solid waste management plan." S.C. Code Ann. § 44-96-290(F) (2002).

[2] These letters are referred to as Letters of Consistency by the parties.

[3] DHEC often received such letters from counties and DHEC's practice was to handwrite the changes into the applicable plan. The LCCG has not amended the 1994 Low Country Plan since its adoption; however, at the time of DHEC's review, the LCCG had submitted to DHEC a December 2002 draft plan to replace the 1994 plan. DHEC did not consider the draft plan in its review because at the time it had not been approved by the regional counties.

Waste Policy and Management Act. S.C. Code Ann. § 44-96-290(F) (2002). In the alternative, Oakwood and Hickory Hill argued the permit should be revised to limit the final disposal capacity to 2.2 million cubic feet rather than the 1,819,000 cubic yards approved by DHEC because Jasper County's Letter of Consistency called for a final disposal capacity of only 2.2 million cubic feet.

On March 15, 2005, the Administrative Law Court (ALC) reversed DHEC's decision, finding the landfill was inconsistent with the Low Country Plan because the Plan had not been amended to allow for the T & T landfill. Specifically, the ALC determined section 44-96-80(O) of the South Carolina Code required any amendments to the Low Country Plan to be adopted by a multi-party endorsement.[4] The ALC did not make any findings on the capacity issue because its ruling on the consistency determination was dispositive.

On April 14, 2005, DHEC and T & T appealed the ALC's final order to the Board. The Board upheld DHEC's issuance of the permit on March 30, 2006. The Board determined neither section 44-96-80(O) of the South Carolina Code nor the Low Country Plan placed any limitations on a county's ability to amend the plan as it applied to that particular county. The Board also remanded the matter to the ALC to determine the allowable maximum capacity for the landfill because the ALC had not made any findings on the capacity issue.

On August 28, 2006, the ALC held DHEC had properly set the permit disposal capacity at 1,819,000 cubic yards.[5] Oakwood and Hickory Hill

[4] Section 44-96-80(O) of the South Carolina Code states "[a]ny amendments to a county or regional solid waste management plan must be adopted and implemented in the same manner as provided for in the initial plan." S.C. Code Ann. § 44-96-80(O) (2002). The Low Country Plan does not specifically state how the plan is to be amended.

[5] The ALC found the application of a final disposal capacity of 2.2 million cubic feet for the facility would create an absurd result as it would

appealed and on July 9, 2007, the Board affirmed the ALC's August 28, 2006 Order and affirmed DHEC's decision to set the final disposal capacity at 1,819,000 cubic yards. This appeal follows.

## STANDARD OF REVIEW

The ALC presides over all hearings of contested DHEC permitting cases and, in such cases, serves as the fact-finder and is not restricted by the findings of the administrative agency. Dorman v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 159, 164-65, 565 S.E.2d 119, 122 (Ct. App. 2002); S.C. Code Ann. § 1-23-600(A)-(B) (Supp. 2007). "An aggrieved party may appeal the ALC's decision to the agency's Appellate Panel [(the Board)]; however, the Panel's review is confined to the record and is governed by South Carolina Code section 1-23-610(C)." Terry v. S.C. Dep't of Health & Envtl. Control, 377 S.C. 569, 573, 660 S.E.2d 291, 293 (Ct. App. 2008). "Accordingly, the [Board] can reverse the ALC's decision if it determines the ALC's findings are not supported by substantial evidence contained in the record or are affected by an error of law." Id. at 573-74, 660 S.E.2d at 293-94; see also Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (stating the ALC's findings are supported by substantial evidence if, looking at the record as a whole, there is evidence from which reasonable minds could reach the same conclusion as the ALC).

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allow the facility to operate for only four to five months, well below the design life of the facility and contrary to section 44-96-290(H) of the South Carolina Code. S.C. Code Ann. § 44-96-290(H) (2002). The ALC also concluded section 44-96-320(A) of the South Carolina Code provides DHEC is the sole agency with the authority to promulgate regulations governing the design of landfill facilities; therefore, it is the only entity with the authority to determine a landfill's final disposal capacity. S.C. Code Ann. § 44-96-320(A) (2002). South Carolina Regulation 61-107.11 imposes final disposal capacity restrictions on landfills based on a facility's design, including its size, dimension, layout, setbacks, buffers, and depth to groundwater. 25A S.C. Code Ann. Regs. 61-107.11 (Supp. 2007).

After an aggrieved party has exhausted all administrative remedies, the party is entitled to judicial review by the South Carolina Court of Appeals. See S.C. Code Ann. § 1-23-380(A) (Supp. 2007). Judicial review is confined to the record and is governed by South Carolina Code section 1-23-380(A)(5), which provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2007). "Under our standard of review, we may not substitute our judgment for that of the [ALC] as to the weight of the evidence on questions of fact unless the [ALC's] findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record." Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control, 372 S.C. 351, 358, 641 S.E.2d 763, 766-67 (Ct. App. 2007). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000). "This Court, although not bound by the decision, will ordinarily defer to the

opinion of a state agency as to the interpretation of a statute it is charged with the duty of enforcing." S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, Op. No. 4450 (S.C. Ct. App. filed Oct. 23, 2008) (Shearouse Adv. Sh. No. 40 at 65). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)).

## LAW/ANALYSIS

### I. Timeliness of Appeal

Respondents argue Appellants failed to timely appeal from the March 30, 2006 Order; therefore, the issues in that order are not preserved for our review. We disagree.

"An appeal to [this] court will not lie from an interlocutory order of the [Board] unless such order affects the merits or deprives the appellant of a substantial right." Green v. City of Columbia, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993). "An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." Id. However, the courts of this state have "consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 52, 446 S.E.2d 618, 618 (1994); see also S.C. Baptist Hosp. v. S.C. Dep't of Health & Envtl. Control, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987) (noting an agency decision that does not decide the merits of a contested case, but merely remands to DHEC for further action is not a final agency decision subject to judicial review). "Additionally, piecemeal appeals are not favored by the court and should be avoided." Foggie v. General Electric, 376 S.C. 384, 390 n. 2, 656 S.E.2d 395, 399 n.2 (Ct. App. 2008).

In Brown v. Greenwood Mills, Inc., the Workers' Compensation Commission awarded benefits to Brown for an occupational lung disease. 366 S.C. 379, 382, 622 S.E.2d 546, 548 (Ct. App. 2005), cert. denied, January 31, 2007. The circuit court affirmed the Commission on compensability, but found the Commission should have allocated a portion of Brown's disease to his long history of smoking and remanded for allocation. Id. at 382-83, 622 S.E.2d at 548-49. The remand included "specific direction to make the necessary findings as to the apportionment. . . ." Id. at 386, 622 S.E.2d at 550. This court addressed the appealability of the order under section 1-23-390:

> The question here is whether the circuit court order is a "final judgment" under section 1-23-390. Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits. In Owens v. Canal Wood Corp., 281 S.C. 491, 316 S.E.2d 385 (1984), one of the two cases cited by the Montjoy court, the supreme court found "[t]he order of the circuit court does not involve the merits of the action. It is therefore interlocutory and not reviewable by this Court for lack of finality." Owens, 281 S.C. at 492, 316 S.E.2d at 385 (emphasis added) (citations omitted). Similarly, in Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983), the supreme court held that "[b]ecause the interlocutory order of the circuit court does not involve the merits of the action, it is not reviewable by this Court for lack of finality." Id. (emphasis added) (citations omitted). Accordingly, in determining whether the court's order constitutes a final judgment, we must inquire whether the order finally decides an issue on the merits.
>
> "An order involves the merits if it finally determines some substantial matter forming the whole or part of

> some cause of action or defense in the case." Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) (citing Henderson v. Wyatt, 8 S.C. 112 (1877)). In the case sub judice, the order of the circuit court finally determined an issue on the merits – that Brown's smoking, a non-compensable cause, contributed to his disability. The court noted "the employer does have the burden of proving . . . the interplay of a non-compensable cause" and found "the employer clearly met that burden[.]" Consequently, the circuit court ruled that "the employer was entitled to a determination of the proportion allocable to the non-compensable cause[.]" The case was remanded, not for evaluation whether apportionment was appropriate, but "with specific direction to make the necessary findings as to the apportionment between compensable versus non-compensable causes, and a corresponding reduction in the Claimant's disability award."
>
> The court's order mandates apportionment. This ruling is a decision on the merits because it decides with finality whether Greenwood is required to reduce its compensation . . . . Although the judge left the percentage of apportionment to the commission on remand, the panel would have no choice but to allocate some part of Brown's disability to the non-compensable cause. Accordingly, the circuit court's order constitutes a final decision on the issue of apportionment and is appealable.

Id. at 387-88, 622 S.E.2d at 551 (emphasis in original).

In comparison, in Foggie v. General Electric, also a workers' compensation case, this court noted an order of the circuit court remanding a case for additional proceedings before an administrative agency is not

directly appealable. 376 S.C. 384, 388, 656 S.E.2d 395, 398 (Ct. App. 2008). However, we found "where the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision, the order is immediately appealable." Id. at 389, 656 S.E.2d at 398.

In Foggie, the circuit court affirmed the Commission on two issues; however, the court remanded the case to the Commission to make determinations related to permanent total disability and credit for veteran's disability. Id. at 387, 656 S.E.2d at 397. We distinguished Foggie from Brown v. Greenwood Mills because the order in Brown finally determined the issue on the merits – that the employee's smoking contributed to his disability – and the remand by the circuit court determined with finality whether there would be a reduction in compensation, leaving open only the determination of the percentage of apportionment for the Commission. Id. at 389, 656 S.E.2d at 398. Whereas, the order in the Foggie case was not a final decision on the merits because the circuit court did not make a final determination regarding whether or not the claimant was totally and permanently disabled and did not finally determine the employer's entitlement to the veteran's disability credit. Id. We noted that both of the remanded issues were matters within the purview of the Commission, not this court, and because the issues had not been properly considered by the Commission, the circuit court was correct in remanding the case. Id. at 390, 656 S.E.2d at 398. We also noted the Commission is the ultimate fact finder, and for this court to review the record and make factual findings on the remanded issues would violate the governing APA statues. Id. at 390, 656 S.E.2d at 398-99. Therefore, we held the circuit court order remanding the two issues was not a final decision on the merits and, thus, was not immediately appealable. Id.

Respondents argue Appellants should have appealed from the March 30, 2006 Order of the Board because the decision as to consistency was on the merits, and thus, was immediately appealable. Respondents further argue because Appellants failed to appeal from the March 30, 2006 Order, the

holdings of that order are now the law of the case, and the only matter that remained after the March 30, 2006 Order concerned the final disposal capacity of the landfill.

However, this case also is distinguishable from Brown because the Board remanded the case to the ALC not only for a determination on the capacity of the landfill, but also for a determination as to whether DHEC was bound by the landfill capacity stated in Jasper County's Letters of Consistency, which the Board found to be a valid amendment of the Plan. As a result, this case is more similar to Foggie because only the ALC could determine whether DHEC was bound by the capacity stated in the Letter of Consistency or whether DHEC is the sole agency that can determine capacity. Therefore, until the ALC ruled on that issue, there was no final agency decision on the merits in this case and Appellants had not exhausted all of their administrative remedies.[6] As a result, Appellants timely filed their appeal after the receipt of the July 9, 2007 Order.

**II. S.C. Code Ann. § 44-96-80(O)**

Appellants argue Jasper County lacked authority to unilaterally amend the 1994 Low Country Plan, meaning the County's purported amendments to the plan were invalid and the ALC correctly denied the permit to T & T because the proposed landfill is inconsistent with the 1994 Low Country Plan. We disagree.

"The primary rule of statutory construction is that the Court must ascertain the intention of the legislature." Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002). "In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." Mid-State Auto

[6] South Carolina Code section 1-23-380(A) states that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." S.C. Code Ann. § 1-23-380(A) (Supp. 2007). Thus, because the March 30, 2006 Order was not a final decision, Appellants' administrative remedies were not exhausted until after the July 9, 2007 Order.

Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "Subtle or forced construction of statutory words for the purpose of expanding a statute's operation is prohibited." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown, 348 S.C. at 515, 560 S.E.2d at 414 (quoting Dunton, 291 S.C. at 223, 353 S.E.2d at 133). Our supreme court has determined that DHEC, not the county, is charged with ensuring landfills meet the requirements for permitting. Southeast Res. Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 402, 408, 595 S.E.2d 468, 471 (2004).

Section 44-96-80(O) of the South Carolina Code states "[a]ny amendments to a county or regional solid waste management plan must be adopted and implemented in the same manner as provided for in the initial plan." S.C. Code Ann. § 44-96-80(O) (2002). However, the Low Country Plan does not specifically state how the Plan is to be amended. The SWPMA does not suggest that merely by proceeding under a regional plan, a county loses the power to make independent planning decisions regarding solid waste facilities located within its borders, or that such authority is then automatically ceded to a regional Council of Governments or other organization.

In addition to getting approval for the landfill at county meetings, Jasper County approved and issued four Letters of Consistency to DHEC. At that time, accepting a letter of consistency from a county was a common DHEC practice.[7] In the past, the counties included in the Low Country Plan

[7] Rudy Curtis, of DHEC, testified that since 1994, the low country's process to modify the Low Country Plan was to take action by any county council and notify DHEC of the activity. Once DHEC was notified of the activity, it became an attachment to the 1994 Plan and was a part of that Plan. Also, Arthur Braswell, Manager of DHEC's Division of Solid Waste Management, testified DHEC considers Letters of Consistency as modifications to a plan, not just as letters.

acted independently in modifying the plan as to their individual counties and making solid waste planning decisions. Oakwood had the Low Country Plan modified as it pertains to its landfill in Jasper County by the same procedure as the one in this case – Oakwood had a letter of consistency issued by the County in April 2001, allowing it to significantly expand its facility. Also, Colleton County amended the plan as it relates to that county and Beaufort County filed its own plan. None of these actions were challenged by the LCCG. Furthermore, Chris Bickley, Executive Director of the LCCG, testified Jasper County was free to amend its solid waste plan without obtaining approval from the LCCG and the Low Country Plan does not state the LCCG has to approve any amendments made by county government. Also, no testimony or evidence in the record supports the conclusion that either the LCCG or the member counties acting collectively were required to approve any plan amendment as it applied to any one county member through a "multi-party endorsement."

We find the Board correctly construed the statute to mean that counties participating in a regional plan retain the planning authority granted to the counties under section 44-96-80 of the South Carolina Code, unless the express terms of the plan indicate the counties have chosen to delegate that planning authority to a regional authority. Therefore, Jasper County properly amended the Low Country Plan as to Jasper County. As a result, Jasper County properly approved the T & T landfill and the landfill was consistent with the 1994 Low Country Plan.

**III. S.C. Code Ann. § 44-96-80(F)(1)**

Appellants argue the ALC correctly found the failure of the LCCG to include Jasper County's revisions in its annual report to DHEC was evidence the revisions had not been recognized by the LCCG as valid amendments to the 1994 Low Country Plan. We disagree.

Section 44-96-80(F)(1) of the South Carolina Code states:

> Each county or region submitting a solid waste management plan to the department shall thereafter

> submit an annual progress report to the department by a date to be determined by the department. The annual report shall contain information as may be requested by the department but must contain, at a minimum, the following: (1) any revisions to the solid waste management plan previously submitted by the county or region.

S.C. Code Ann. § 44-96-80(F)(1) (2002).

Section 44-96-80(F)(1) is not a provision that makes inclusion of a revision in the annual progress report mandatory for recognition and acceptance of an amendment to a solid waste management plan. The statute does not provide that revisions will be rendered null and void unless they are contained in the annual progress report. Jasper County did not include its amendments to its local solid waste management plan in the annual progress report to DHEC, but DHEC was made aware of Jasper County's revisions in the County's Letters of Consistency, which was an accepted method of notification to DHEC. Therefore, the annual progress report is not the only means by which DHEC may become aware of revisions to the Low Country Plan.

**IV. Final Disposal Capacity**

Appellants argue if Jasper County's Letters of Consistency are deemed effective to amend the 1994 Low Country Plan, the amendment can only be effective for the maximum capacity authorized in the letters. We disagree.

Section 44-96-320(A) of the South Carolina Code provides that DHEC "shall promulgate, in addition to regulations generally applicable to all solid waste management facilities, regulations governing the siting, design, construction, operation, closure, and postclosure activities of all landfills that dispose of solid waste." S.C. Code Ann. § 44-96-320(A) (2002). Also, Section 44-96-290(H) states that "[p]ermits issued under this section shall be effective for the design and operational life of the facility, to be determined by [DHEC] . . . ." S.C. Code Ann. § 44-96-290(H) (2002).

DHEC is the sole agency with the authority to promulgate regulations governing the design of landfill facilities; therefore, it is the only entity with the authority to determine a landfill's final disposal capacity. Also, the ALC found that setting the final disposal capacity at 2.2 million cubic feet, as stated in the Letters of Consistency, would allow the facility to operate for only four or five months, which is an absurd result. Therefore, the ALC correctly determined DHEC properly set the disposal capacity at 1,819,000 cubic yards.

## CONCLUSION

Accordingly, the Orders of the Board are

**AFFIRMED.**

**THOMAS, J., concurs.**
**PIEPER, J., concurs in a separate opinion.**

**PIEPER, J., concurring:**

I concur in the conclusion reached by the majority, but I respectfully would utilize a different analytical framework as to the timeliness of the appeal.

I agree this case is distinguishable from Brown v. Greenwood Mills, Inc.[8] However, I would not rely on the analysis of Foggie v. General Electric as the beacon to navigate us to our final conclusion based on my dissent therein noting the fact that part of the case was finally determined by a circuit court.[9] Instead, I would distinguish Brown simply on the basis that the remand in Brown occurred by virtue of judicial review by the proper reviewing court; the question in Brown was whether the circuit court's order of remand subsequent to a final agency decision was a final order on the merits and appealable. On the other hand, in the case herein, Respondents

[8] 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005).
[9] 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008).

contend Appellants should have appealed from a decision within the administrative agency itself upon issuance of the Board's order of remand on March 30, 2006; thus, the question here is whether an agency ruling before completion of the administrative process must be immediately appealed. Because Section 1-23-380(A) of the South Carolina Code (Supp. 2007) requires exhaustion of "all" administrative remedies available within the agency unless review of the final agency decision would not provide an adequate remedy, I simply would hold there had not been a final decision requiring judicial review since the exhaustion of all administrative remedies had not been met as of the March 30, 2006, order of remand. I would further hold there had not been a preliminary, procedural, or intermediate action or ruling appropriate for judicial review since review of the final agency decision provides an adequate remedy. This statutory interpretation will avoid piecemeal review of administrative decisions prior to completion or exhaustion of the administrative proceedings.

Moreover, I believe that the judicial review mechanism of Section 1-23-380[10] may be distinguished from the appellate review mechanism of Section 14-3-330 of the South Carolina Code.[11] I believe a distinction based

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[10] Section 1-23-380(A) of the South Carolina Code (Supp. 2007) states the following: "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1, and Article 5. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Except as otherwise provided by law, an appeal is to the court of appeals." S.C. Code Ann. § 1-23-380(A) (Supp. 2007). We also note that this statute has been amended, effective as of June 16, 2008, such that Article 5 is no longer referenced. See Act No. 334, 2008 S.C. Acts 334.

[11] Section 14-3-330(1) of the South Carolina Code (2005), captioned "Appellate jurisdiction in law cases," references appealability; it includes: "any intermediate judgment, order or decree in a law case involving the

upon the posture of the proceeding and the reviewing tribunal is necessary and complements the entire realm of administrative law. The legislature specifically created different mechanisms for review to effectuate the goals of the administrative system it established.

Here, in the context of the timeliness of the appeal, we are asked whether the intermediate or incomplete decision of the agency required earlier judicial review to preserve the claim. Thus, unless an exception to exhaustion applies, we must determine at what point exhaustion of remedies has occurred to warrant or require judicial review. Quite simply, we must squarely address whether the law of this State encourages the administrative process to proceed to its formal conclusion, or whether at some other point in the process judicial review of a partial decision is required to preserve a claim.

The general rule "that administrative remedies must be exhausted absent circumstances supporting an exception to the rule" is well established in South Carolina. Hyde v. S.C. Dept. of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). At its core, the doctrine of exhaustion serves two main purposes: (1) the protection of administrative agency authority; and (2) the promotion of efficiency. Woodford v. Ngo, 548 U.S. 81, 89 (2006). An administrative agency's authority is protected by exhaustion because it gives the agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into . . . court, and discourages disregard of the agency's procedures." Id. (internal quotation omitted). Efficiency is promoted by the exhaustion doctrine because claims generally can be resolved more rapidly and economically by agency hearings and procedures than by litigation in court. Id. Moreover, "even where a

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merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from." S.C. Code Ann. § 14-3-330(1) (2005).

controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." Id.

Thus, when a statute mandates the exhaustion of administrative remedies, the animating principles of (1) protection of agency authority and (2) efficiency are necessarily present. As such, although parties to a case may decide that exhaustion is not efficient in a particular case, "administrative law creates an incentive for these parties to do what they would otherwise prefer not to do, namely, to give the agency a fair and full opportunity to adjudicate their claims"; this is achieved by "requiring proper exhaustion of remedies, which means using all steps that the agency holds out, and doing so properly" Id. In short, absent an exception, so long as there is an opportunity for completion and review of a matter, then the parties must avail themselves of the entire administrative process prior to seeking judicial relief.[12]

In South Carolina, the doctrine of exhaustion is statutorily mandated in the Administrative Procedures Act (APA), which "purports to provide uniform procedures before State Boards and Commissions and for judicial

[12] The statute suggests that as long as an adequate remedy is available upon review of the final agency decision, any preliminary, procedural, or intermediate agency action or ruling would be premature for judicial review. § 1-23-380(A) S.C. Code Ann. (Supp. 2007). Furthermore, the statutory language of Section 1-23-380(A) establishes the distinction between a final decision and a decision that is preliminary, procedural, or intermediate in nature. Id. Even in the context of these preliminary or intermediate decisions, the statute does not require a party to seek immediate judicial review. Id. Similarly, the language of Section 1-23-610 of the South Carolina Code (Supp. 2007) also requires a final decision when judicial review is sought from an administrative law judge. § 1-23-610 S.C. Code Ann. (Supp. 2007) (Amended in Act No. 334, 2008 S.C. Acts 334).

review after the exhaustion of administrative remedies." [13] Bursey v. S.C. Dep't of Health & Envtl. Control, 369 S.C. 176, 182, 631 S.E.2d 899, 903 (2006). While the doctrine of exhaustion is not without exceptions, no exception has been presented herein nor has any reason been presented as to why review of the final agency decision would not provide an adequate remedy. When a matter is remanded within the administrative process itself, that matter is essentially "in house" and does not lend itself well to the judicial review process until a final agency decision is made. To some extent, the premature involvement by the judicial branch could ultimately impact the decision-making process the legislature intended to grant to the executive branch through the administrative process in the first instance. Accordingly, I would hold the Appellants timely filed their appeal.

Having determined the appeal herein timely based upon a different analysis as the majority, I respectfully concur in the remainder of the majority opinion for the reasons cited and would affirm.

[13] While a caption is not controlling, I note the applicable statute here is captioned "Judicial review upon exhaustion of administrative remedies." § 1-23-380(A) S.C. Code Ann. (Supp. 2007).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

South Carolina Department of Transportation, Appellant,

v.

Gloria G. Hood, Respondent.

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Appeal From Fairfield County
Kenneth G. Goode, Circuit Court Judge

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Opinion No. 4486
Submitted November 1, 2008 – Filed January 13, 2009

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**REVERSED AND REMANDED**

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Paul Dezso de Holczer, of Columbia, for Appellant.

Creighton B. Coleman, of Winnsboro; and Robert J. Sheheen, of Camden, for Respondent.

**GOOLSBY, A.J.:** In this condemnation action, the South Carolina Department of Transportation (the Department) argues the circuit court erred

in admitting evidence of an option held by Fairfield County to purchase Gloria Hood's property. We reverse and remand.[1]

## FACTUAL/PROCEDURAL BACKGROUND

On June 30, 2004, the Department filed a notice of condemnation in Fairfield County to acquire a 3.5-acre portion of Gloria Hood's 14.2-acre tract for a highway project. The Department subsequently filed this action to determine the value of the condemned property.

The Department moved in limine to exclude evidence of prior unaccepted offers and unexercised options to purchase the condemned property. At trial, Hood introduced evidence of an expired unexercised option held by Fairfield County in 2001 to purchase the entire 14.2 acre tract for $426,000, amounting to $30,000 per acre. The Department objected, but the circuit held the option admissible.

Hood's son testified the property was worth $30,000 per acre at the time the option was executed, and the property had appreciated in the amount of $10,000 per acre.

Ultimately, the jury awarded Hood a $100,000 verdict, roughly $28,500 per acre. The Department filed motions for JNOV, new trial nisi remittitur, and, alternatively, for a new trial absolute and for reconsideration pursuant to Rule 59(e), SCRCP. The circuit court denied all of the Department's post-trial motions. This appeal followed.

## STANDARD OF REVIEW

The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." Id.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

## LAW/ANALYSIS

I. The Department first argues the circuit court erred in admitting evidence of the option held by Fairfield County because it was never exercised. We agree.

Section 28-2-340 of the South Carolina Eminent Domain Procedure Act (the Act) sets forth the types of evidence admissible in condemnation proceedings to determine the value of the property sought to be condemned. S.C. Code Ann. § 28-2-340 (Supp. 2007). "Evidence of the price and other terms upon any sale . . . relating to the property or to any similar property in the vicinity . . . within a reasonable time of the hearing" is admissible under the Act. Id. (emphasis added).

Sale is defined as "[t]he transfer of property for title or price." Black's Law Dictionary 1337 (7th ed. 1999). Option contracts are "continuing offers to sell, irrevocable during the option period." S.C. Elec. & Gas Co. v. Hartough, 375 S.C. 541, 547, 654 S.E.2d 87, 90 (Ct. App. 2007) (emphasis added). "[T]he transition of an option into a contract of purchase and sale can only be effected by an unqualified and unconditional acceptance of the offer in accordance with the terms and within the time specified in the option contract." Id.

In Baynham v. State Highway Department of South Carolina, 181 S.C. 435, 187 S.E. 528 (1936), our supreme court held an oral offer to purchase a filling station was not admissible as evidence of the value of the filling station. The court relied on Sharp v. United States, 191 U.S. 341 (1903), and quoted the following from Sharp:

> Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our

> judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject.

Id. at 349. The supreme court in Baynham also relied on Hine v. Manhattan Railroad Company, 30 N.E. 985, 986 (N.Y. Sup. 1892), holding testimony regarding unaccepted offers is inadmissible "because it places before the court or jury an absent person's declaration or opinion as to value, while depriving the adverse party the benefit of cross-examination." Id.

The admissibility of an expired and unexercised option contract to prove the value of property at a condemnation proceeding has not been addressed in South Carolina. At least one court, however, has likened expired and unexercised option contracts to unaccepted offers and concluded they are not admissible for valuation purposes. See City of Des Peres v. Persels P'ship, 831 S.W.2d 778, 781 (Mo. Ct. App. 1992) (excluding expired option contracts as proof of value in condemnation cases and stating "[a]n expired contract is effectively an unaccepted offer"). In addition, several courts, without differentiating between expired and unexpired option contracts, have held option contracts are inadmissible to prove value in condemnation cases. See Dep't of Transp. v. Cochran, 287 S.E.2d 599, 600 (Ga. Ct. App. 1981) ("In condemnation cases where comparable sales are offered in evidence to explain the value testimony of expert witnesses, it is frequently held that mere options and unaccepted offers to purchase or sell are inadmissible as having no substantial probative value."); J. William Costello Profit Sharing Trust v. State Roads Comm'n of the State Highway Admin., 556 A.2d 1102, 1104 (Md. 1989) (citations omitted) ("Unlike consummated and binding contracts, offers are inadmissible to prove the value of land because the value of an offer depends on too many considerations to allow it to be used as a test of the worth of property. The same reasoning ordinarily militates against the admissibility of option contracts."); but see Tedesco v. Mun. Auth. of Hazle Township, 799 A.2d 931, 935 (Pa. Commw. Ct. 2002) (allowing evidence of an option contract to prove value in a condemnation case and noting the Pennsylvania Eminent

Domain Code allows evidence of the price and other terms of sale in any "contract to sell" and an option contract is a unilateral contract to sell).

Accordingly, we reverse the circuit court and hold an expired and unexercised option contract is essentially an unaccepted offer; thus, the circuit court erred in admitting evidence of Fairfield County's option.

II. The Department also argues the option was not admissible because it was held by Fairfield County, an entity with the power of eminent domain. We need not address this issue because we are reversing and remanding this case on other grounds. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (holding courts need not address remaining exceptions when the resolution of a prior issue is dispositive of the case).

**REVERSED AND REMANDED.**

**HEARN, C.J., and KONDUROS, J., concur.**