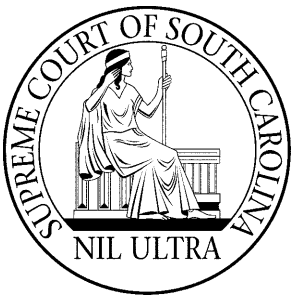

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 12, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27345 - John Doe v. The Bishop of Charleston	Denied 3/6/2014
27348 - Frances Hudson v. Lancaster Convalescent Center	Denied 3/6/2014
27352 - Gloria Pittman v. Jetter Pittman	Denied 3/6/2014
27354 - The State v. Davontay Henson	Denied 3/6/2014
27356 - City of Myrtle Beach v. Tourism Expenditure Review	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2014-UP-100-SCDSS v. Crystal C.

2014-UP-101-SCDSS v. Jennie M.

2014-UP-102-Joseph Williams v. Marie Wilson

2014-UP-103-State v. David Vice

2014-UP-104-State v. Randy Mitchell

2014-UP-105-C. S. Carter v. D.J. Brown aka Dan Brown aka Dan J. Brown, et al.

2014-UP-106-SCDSS v. Christopher B.

2014-UP-107-State v. Dawone Q. Davis

2014-UP-108-State v. Charles Anderson

2014-UP-109-State v. Kenneth Wayne Whitworth

2014-UP-110-State v. Raymond Franklin

2014-UP-111-In the matter of the care and treatment of Dusty A. Cyr

2014-UP-112-State v. Jamie Edward Morris

PETITIONS FOR REHEARING

5185-Hector G. Fragosa v. Kade Construction	Pending
5186-Andreal Holland v. Morbark Inc.	Pending
5190-Morris Antonio Sullivan v. State	Pending

5191-Jacqueline Carter v. Verizon Wireless Southeast	Pending
5192-Larry E. Kinard v. Douglas S. Richardson	Pending
5193-Israel Wilds v. State	Pending
5194-Gerald Smith v. State	Pending
5195-Laura Riley v. Ford Motor Company	Pending (2)
5196-State v. James Anderson	Pending
5197-Gladys Sims v. Amisub	Pending
5198-State v. Robert Palmer and Julia Gorman	Pending (2)
2013-UP-296-Parsons v. John Wieland Homes	Pending
2013-UP-435-State v. Christopher Spriggs	Pending
2014-UP-028-Randy Beverly v. Bucksville Farms	Pending
2014-UP-030-Michele Pelletier v. Mark Pelletier	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-036-State v. Noel Gray	Pending
2014-UP-042-State v. Charles M. Deveaux	Pending
2014-UP-047-State v. Sam Harold Smith	Pending
2014-UP-054-SCDSS v. Selentia O.	Pending
2014-UP-055-Jamesetta Washington v. Edmund Rhett, M.D.	Pending
2014-UP-056-In the matter of the care and treatment of Patrick Guess	Pending
2014-UP-057-State v. Shawn Reaves	Pending
2014-UP-058-James Clark, Jr., v. Pyramid Masonry Contractors	Pending
2014-UP-062-Stoneledge at Lake Keowee v. IMK Development	Pending

2014-UP-064-Antonio Lazaro v. Burris Electrical Pending

2014-UP-073-Pamela Maner v. Marion Maner, IV Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4832-Crystal Pines v. Phillips Pending

4888-Pope v. Heritage Communities Pending

4895-King v. International Knife Pending

4909-North American Rescue v. Richardson Pending

4956-State v. Diamon D. Fripp Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer Pending

4973-Byrd v. Livingston Pending

4975-Greeneagle Inc. v. SCDHEC Pending

4979-Major v. City of Hartsville Pending

4992-Gregory Ford v. Beaufort County Assessor Pending

4995-Keeter v. Alpine Towers International and Sexton Pending

4997-Allegro v. Emmett J. Scully Pending

5008-Willie H. Stephens v. CSX Transportation Pending

5009-State v. Bennie Mitchell Denied 03/06/14

5010-S.C. Dep't of Transportation v. Janell P. Revels et al. Pending

5011-SCDHEC v. Ann Dreher Pending

5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5016-The S.C. Public Interest Foundation v. Greenville Cty. et al.	Pending
5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5041-Carolina First Bank v. BADD	Pending
5052-State v. Michael Donahue	Pending
5053-State v. Thomas E. Gilliland	Pending
5055-Hazel Rivera v. Warren Newton	Pending
5059-Kellie N. Burnette v. City of Greenville et al.	Pending
5060-State v. Larry Bradley Brayboy	Pending
5061-William Walde v. Association Ins. Co.	Pending
5062-Duke Energy v. SCDHEC	Pending
5065-Curiel v. Hampton Co. EMS	Pending
5071-State v. Christopher Broadnax	Pending
5072-Michael Cunningham v. Anderson County	Pending
5074-Kevin Baugh v. Columbia Heart Clinic	Pending

5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5078-Estate of Livingston v. Clyde Livingston	Pending
5081-The Spriggs Group, P.C. v. Gene R. Slivka	Pending
5082-Thomas Brown v. Peoplease Corp.	Pending
5084-State v. Kendrick Taylor	Pending
5087-Willie Simmons v. SC Strong and Hartford	Pending
5090-Independence National v. Buncombe Professional	Pending
5092-Mark Edward Vail v. State	Pending
5093-Diane Bass v. SCDSS	Pending
5095-Town of Arcadia Lakes v. SCDHEC	Pending
5097-State v. Francis Larmand	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending
5101-James Judy v. Ronnie Judy	Pending
5110-State v. Roger Bruce	Pending
5111-State v. Alonza Dennis	Pending
5112-Roger Walker v. Catherine Brooks	Pending
5113-Regions Bank v. Williams Owens	Pending
5116-Charles A. Hawkins v. Angela D. Hawkins	Pending
5117-Loida Colonna v. Marlboro Park (2)	Pending
5118-Gregory Smith v. D.R. Horton	Pending
5119-State v. Brian Spears	Pending

5121-State v. Jo Pradubsri	Pending
5125-State v. Anthony Marquese Martin	Pending
5126-A. Chakrabarti v. City of Orangeburg	Pending
5127-Jenean Gibson v. Christopher C. Wright, M.D.	Pending
5130-Brian Pulliam v. Travelers Indemnity	Pending
5131-Lauren Proctor v. Whitlark & Whitlark	Pending
5135-Microclean Tec. Inc. v. Envirofix, Inc.	Pending
5137-Ritter and Associates v. Buchanan Volkswagen	Pending
5139-H&H Johnson, LLC v. Old Republic National Title	Pending
5140-Bank of America v. Todd Draper	Pending
5144-Emma Hamilton v.Martin Color Fi	Pending
5148-State v. Henry Jermaine Dukes	Pending
5151-Daisy Simpson v. William Simpson	Pending
5152-Effie Turpin v. E. Lowther	Pending
5154-Edward Trimmier v. SCDLLR	Pending
5156-State v. Manuel Marin	Pending
5157-State v. Lexie Dial	Pending
5159-State v. Gregg Henkel	Pending
5160-State v. Ashley Eugene Moore	Pending
5161-State v. Lance Williams	Pending
5164-State v. Darren Scott	Pending

5165-Bonnie L. McKinney v. Frank J. Pedery	Pending
5166-Scott F. Lawing v. Univar USA Inc.	Pending
5171-Carolyn M. Nicholson v. SCDSS and State Accident Fund	Pending
5175-State v. Karl Ryan Lane	Pending
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5177-State v. Leo Lemire	Pending
5178-State v. Michael J. Hilton	Pending
5181-Henry Frampton v. SCDOT	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending

2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-295-Larry Edward Hendricks v. SCDC	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Denied 03/06/14
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-563-State v. Marion Bonds	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-573-State v. Kenneth S. Williams	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending

2012-UP-580-State v. Kendrick Dennis	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-610-Crenshaw's TV & Radio v. Jocassee Partners	Denied 03/06/14
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-623-L. Paul Trask, Jr., v. S.C. Dep't of Public Safety	Pending
2012-UP-647-State v. Danny Ryant	Pending
2012-UP-654-State v. Marion Stewart	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-010-Neshen Mitchell v. Juan Marruffo	Pending
2013-UP-014-Keller v. ING Financial Partners	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-020-State v. Jason Ray Franks	Pending
2013-UP-034-Cark D. Thomas v. Bolus & Bolus	Pending
2013-UP-056-Lippincott v. SCDEW	Pending
2013-UP-058-State v. Bobby J. Barton	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-063-State v. Jimmy Lee Sessions	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending

2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop.	Pending
2013-UP-070-Loretta Springs v. Clemson University	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-082-Roosevelt Simmons v. Hattie Bailum	Pending
2013-UP-084-Denise Bowen v. State Farm	Pending
2013-UP-085-Brenda Peterson v. Hughie Peterson	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending
2013-UP-095-Midlands Math v. Richland County School Dt. 1	Pending
2013-UP-110-State v. Demetrius Goodwin	Pending
2013-UP-120-Jerome Wagner v. Robin Wagner	Pending
2013-UP-125-Caroline LeGrande v. SCE&G	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-133-James Dator v. State	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail, et al.	Pending
2013-UP-183-R. Russell v. DHEC and State Accident Fund	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-189-Thomas J. Torrence v. SCDC	Pending

2013-UP-199-Wheeler Tillman v. Samuel Tillman	Pending
2013-UP-232-Theresa Brown v. Janet Butcher	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-256-Woods v. Breakfield	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-267-State v. William Sosebee	Pending
2013-UP-272-James Bowers v. State	Pending
2013-UP-279-MRR Sandhills v, Marlboro County	Pending
2013-UP-286-State v. David Tyre	Pending
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-294-State v. Jason Thomas Husted	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-304-State v. Johnnie Walker Gaskins	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-317-State v. Antwan McMillan	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-323-In the interest of Brandon M.	Pending
2013-UP-326-State v. Gregory Wright	Pending
2013-UP-327-Roper LLC v. Harris Teeter	Pending
2013-UP-340-Randy Griswold v. Kathryn Griswold	Pending

2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-360-State v. David Jakes	Pending
2013-UP-380-Regina Taylor v. William Taylor	Pending
2013-UP-381-L. G. Elrod v. Berkeley County	Pending
2013-UP-389-Harold Mosley v. SCDC	Pending
2013-UP-393-State v. Robert Mondriques Jones	Pending
2013-UP-403-State v. Kerwin Parker	Pending
2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending
2013-UP-428-State v. Oran Smith	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending
2013-UP-444-Jane RM Doe v. Omar Jaraki	Pending
2013-UP-459-Shelby King v. Amy Bennett	Pending
2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc.	Pending
2013-UP-485-Dr. Robert W. Denton v. Denmark Technical College	Pending
2013-UP-489-F.M. Haynie v. Paul Cash	Pending
2013-UP-495-Lashanda Ravenel v. Equivest Financial, LLC	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ann Coleman, individually, and as Personal Representative of the Estate of Mary Brinson,
Respondent,

v.

Mariner Health Care, Inc., f/k/a Mariner Post Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Management, LLC, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Ask Holdings, LLC, Leonard Grunstein, an Individual, Murray Forman, an Individual, Boyd P. Gentry, an Individual, Abraham Shaulson, a/k/a Abraham Shavlson, a/k/a A. Shawson, a/k/a Abraham Shawson, an Individual, Avi Klein, an Individual, SC Property Holdings, LLC, SC Faith, LLC, and John Does 1-26, Defendants,

Of whom Mariner Health Care, Inc., f/k/a Mariner Post Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida

Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Leonard Grunstein, an Individual, Murray Forman, an Individual, and Boyd P. Gentry, an Individual, are Appellants.

Appellate Case No. 2011-194946

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27362
Heard September 18, 2013 – Filed March 12, 2014

AFFIRMED

Sandra L. W. Miller, of Womble Carlyle Sandridge & Rice, LLP, of Greenville, Perry D. Boulier and W. McElhaney White, both of Holcombe Bomar, P.A., of Spartanburg, D. Jay Davis, Jr., William L. Howard and Russell G. Hines, all of Young Clement Rivers, LLP, of Charleston, Carmelo Barone Sammataro and Robert Gerald Chambers, Jr., both of Turner Padget Graham & Laney, P.A., of Columbia, Malcolm J. Harkins, III, of Proskauer Rose, LLP, of Washington, DC, and Lori D.

Proctor, of Serpe, Jones, Andrews, Callender & Bell, PLLC, of Houston, Texas, for Appellants.
John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, Matthew W. Christian, of Christian and Davis, LLC, of Greenville, Marion S. Fowler, III, of Fowler Law Firm, of Lake City, for Respondent. Kenneth W. Zeller, of Washington, DC, for Amicus Curiae, AARP Foundation Litigation

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JUSTICE PLEICONES: This is an appeal from orders in a wrongful death suit and a survival action denying appellants' motions to compel arbitration.[1] We affirm, finding as did the circuit court that respondent lacked authority to sign the arbitration agreements (AA), and that she is not equitably estopped to deny their enforceability.

FACTS

Respondent Ann Coleman (Sister) signed a number of documents in June 2006 following which her sister Mary Brinson, now deceased (Decedent), was admitted to appellant Faith Health Care Center (Facility). Decedent was readmitted to Facility after Sister again signed documents in December 2006. Decedent died on April 30, 2007, and Sister subsequently brought these wrongful death and survival actions against numerous defendants, some of which are appellants.

ISSUES

I. Does an individual exercising authority to consent to decisions concerning a patient's health care under the Adult Health Care Consent Act have the capacity to execute a voluntary arbitration agreement?

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[1] Although this case involves two arbitration agreements, and two suits, the relevant facts and contract terms are identical and the circuit court orders treat the dispositive issues the same. Accordingly, we dispose of all matters in this opinion.

II. If there is no such authority under the Act, is Sister equitably estopped to deny the validity of the arbitration agreements she executed when Decedent was admitted to the Facility?

I. Capacity

The question of Sister's authority to execute a voluntary AA is one of statutory interpretation requiring us to determine the nature and scope of authority granted a surrogate by the Adult Heath Care Consent Act (Act), S.C. Code Ann. §§ 44-66-10 *et seq*. (2002 and Supp. 2012). We therefore turn to the Act itself. *See e.g. S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 629 S.E.2d 624 (2006) (when construing statutory term, all sections of the same general statutory law should be read together).

At the time of Decedent's two admissions to Facility she was unable to consent within the meaning of § 44-66-20(6) of the Act. The Act applies to adults[2] who are "unable to appreciate the nature and implications of [their] condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner." *Id.* The Act creates a priority list to determine the persons able to consent on behalf of an incapacitated patient:

(1) probate court guardian if decision is within the scope of the guardianship;

(2) attorney-in-fact pursuant to a durable power of attorney executed by the patient pursuant to S.C. Code Ann. § 62-5-501 if within the scope of the attorney-in-fact's power;

(3) an individual given priority pursuant to another statutory provision;

(4) spouse, subject to certain qualifications;

(5) patient's parent or adult child;

[2] It also applies to married or emancipated minors.

(6) patient's adult sibling, grandparent, or adult grandchild;

(7) another blood relative the health care professional reasonably believes to have a close relationship with the patient; or

(8) a person given authority to make health care decisions for the patient by a different statutory provision.

§ 44-66-30(A).

Here, Sister was authorized to make health care decisions for Decedent only because Decedent had no guardian or attorney-in-fact, no other individual had statutory priority, and she had neither a spouse, a parent, nor an adult child.

As the individual with priority under § 44-66-30(A), Sister was authorized to make "decisions concerning [Decedent's] health care . . . ." *Id*. The definitional section of the Act provides:

> "Health care" means a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care.
>
> § 44-66-20(1).[3]

In effect, the Act gives Sister two types of authority. First, she could consent, on behalf of Decedent, to the provision or withholding of medical care including placement in a facility which provides such care. Second, the Act authorized Sister to make certain financial decisions on behalf of Decedent, decisions that obligated Decedent to pay for services rendered.

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[3] 2013 Act No. 39, effective January 1, 2011, altered other definitions in this statute.

The decision to place an incapacitated adult in a nursing facility or a rehabilitative institution is delegated to the surrogate under the Act. Once the decision is made that such placement is appropriate, the surrogate must decide which institution will provide the best care. In making this critical decision, the surrogate must also bear in mind the financial resources of the patient. Thus, the decision to place Decedent in Facility required Sister to use both powers given her by the Act, the medical and the financial, and to make these decisions as the Decedent wished or, if her wishes could not be determined, then in Decedent's best interest. § 44-66-30(H).

In reviewing nursing home options, the surrogate must consider what services the home offers and the cost for such services. For example, some homes might offer laundry services or field trips for a fee, while others include these services as part of the comprehensive charge. The contract terms offered as part of an admission agreement will often require the surrogate to weigh questions that do not directly involve medical treatment or procedures, but are a necessary part of the decision regarding which institution the patient should be placed in.

That the Act contemplates that the surrogate's authority extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions, is illustrated by other provisions of the Act. These sections illustrate that the purpose of the Act is to insure that the patient's wishes concerning her medical treatment are honored whenever possible, and that decision making by the surrogate is a last resort. For example, § 44-66-30(E) states that no one may consent to "health care decisions" if the responsible medical provider determines that the patient's inability to consent is temporary and that waiting for the patient to regain competency will not result in significant detriment to the patient's health. Further, if the health care professional knows the patient's wishes to be contrary to those expressed by the surrogate, the professional must honor the patient's wishes. S.C. Code Ann. § 44-66-60 (2002); *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002). Finally, the Act separates health care from finances in S.C. Code Ann. § 44-66-70 (2002). Subsection (A) provides the surrogate who makes a good faith health care decision "is not subject to civil or criminal liability on account of the substance of the decision." Section 44-66-70(B) provides "A person who consents to health care as provided in Section 44-66-30 does not by virtue of that consent become liable for the costs of the care provided to the patient."

Here, Sister was presented with two documents at each of Decedent's admissions: a "RESIDENTIAL ADMISSION AND FINANCIAL AGREEMENT" and an "AGREEMENT FOR ARBITRATION." The admission and financial agreement provides that it "sets forth the terms under which the Facility will provide long term care health services to [Decedent] and how the [Decedent] will pay for such services." Assent to this contract was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.[4]

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[4] The dissent asserts we read the surrogate's power broadly in finding Sister obligated Decedent to pay for the costs associated with her care at Facility and criticizes us for not also finding authority to sign the AA. Contrary to the dissent's view, we have defined the surrogate's authority strictly by reference to the Act itself, which specifically provides that the surrogate is not financially responsible for the costs associated with the health care decisions she makes on behalf of the incapacitated person. § 44-60-70(B). Second, the dissent is concerned that our reading of the Act is an "inadvisable and undesirable" interpretation because it will deny consumers the choice whether to enter arbitration agreements. We are interpreting a health care surrogacy act, not consumer rights legislation, and the sole question before the Court is the scope of the surrogate's authority. While the power to make decisions other than those involving health care and payment therefore on behalf of the incapacitated person, including authority to enter other types of contracts, may be vested in an attorney-in-fact, a probate court guardian, or another who possesses legal authority, these issues are not before the Court. By focusing on the nature of the disputed contracts here, rather than on the scope of statutory authority, the dissent would rewrite the Act to "empower surrogates to make medical, caretaking, financial *and* dispute resolution decisions." (emphasis

II. Estoppel

Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.

Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.

The admission agreements contain this language in a section titled "Entirety of Agreement":

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in original). This view of the issue leads the dissent to conclude the majority's analysis somehow runs afoul of the rule that arbitration agreements cannot be singled out for special treatment when, in fact, it is the dissent which treats arbitration differently. Forced to acknowledge that Sister's defense here, lack of contractual capacity, may be raised in any contract case, the dissent asserts that our decision "relies on the uniqueness of an agreement to arbitrate." This statement misapprehends the role of facts in an appellate opinion. The sole reason that arbitration agreements are referenced in the majority opinion is because those are the contracts challenged in these appeals as beyond the scope of Sister's statutory authority.

> This Agreement, including all Exhibits hereto, and the Arbitration Agreement between the Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this Agreement acknowledges that no representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in this Agreement or in the Arbitration Agreement. This Agreement may be amended only by a written agreement signed on behalf of the Facility and the Resident.

On its face, this clause recognizes the "separatedness" of the AA and the admission agreement, not a merger of the two contracts. Moreover, the AA could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate. By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *Klutts Resort*, *supra*. Even if the "Entirety" clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) fn. 4. Since there was no merger here, appellants' equitable estoppel argument was properly denied by the circuit court.

CONCLUSION

The Act did not authorize Sister, acting as a health care surrogate, to execute the separate, voluntary AAs presented to her by Facility. Further, the predicate for appellants' argument for application of the doctrine of equitable estoppel, that the AA and the admission agreement were merged, is not present here. For these reasons, the decisions of the circuit court are

AFFIRMED.

BEATTY, KITTREDGE, and HEARN, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. As I see it, there are three problems with the majority's interpretation of the definition of "health care" found in section 44-66-20(1) and applied in section 44-66-30(A).[5]

> Section 44-66-20(1) defines health care as:
>
> a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled or sick persons; and the placement in or removal from a facility that provides these forms of care.

S.C. Code Ann. § 44-66-20(1) (2002). Thus, the statutes explicitly permit the surrogate to make all types of medical care decisions on behalf of an incompetent patient, up to and including end-of-life decisions, as well as allowing the surrogate to choose which care facility in which to place the patient. I agree with the majority that the statutes should be interpreted more broadly than the literal language, and that the surrogate should also have the implied power to make the financial decisions that accompany purely caretaking decisions, such as financially obligating the patient to pay for care services at the chosen facility.

However, my first concern with the majority's interpretation of the statutes is that there is an inherent inconsistency between reading the statutes more broadly than the literal language to allow a surrogate to bind a patient financially to a healthcare contract, but also reading the language narrowly to prohibit the surrogate from binding the patient to arbitration of the same contract. No express statutory language supports either power; rather, the statutes merely reference the surrogate's power to consent regarding "the placement in or removal from a [healthcare] facility . . . ." S.C. Code Ann. § 44-66-20(1). I think it is anomalous to read one of these implied powers into the statute, but not the other. To eliminate such an incongruous result, I would read section 44-66-20(1)'s language regarding "the placement in or removal from a [healthcare] facility" to impliedly encompass not just financial decisions but dispute resolution decisions as well.

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[5] Section 44-66-30(A) grants potential surrogates, listed in order of priority, the power to make "decisions concerning [a patient's] health care" if the patient is unable to consent. S.C. Code Ann. § 44-66-30(A) (2002 & Supp. 2012).

Second, I am concerned that the majority's interpretation of the statutes will create undesirable future consequences. The arbitration agreement at issue here is a separate document from the general nursing home residency contract, and patients may exercise their discretion in deciding whether to sign the arbitration agreement prior to receiving care at the nursing home. Using a separate contract for arbitration agreements is conducive to greater freedom of choice for the consumer. It also better protects the nursing home from a contention that the arbitration contract is unconscionable. *See Hayes v. Oakridge Home*, 908 N.E.2d 408, 413 (Ohio 2009) (holding an arbitration agreement that "was voluntary and not a condition of [] admission" into the nursing home was not unconscionable). However, the majority's reading of the statutes encourages nursing homes to insert adhesive arbitration clauses into their general residency contracts, instead of (perhaps more desirably) allowing patients to enter into such arbitration agreements at their discretion.

While there is nothing inherently "wrong" with including an arbitration agreement in a nursing home residency contract, I believe it is more desirable to make arbitration agreements that are healthcare-related, discretionary, and signed by a surrogate just as enforceable as adhesive arbitration agreements. In my opinion, presenting consumers with a separate arbitration agreement should be encouraged because discretionary agreements enable consumers to make a more voluntary, knowing, and informed choice to arbitrate. Therefore, I believe it is inadvisable and undesirable to interpret the statutes in a manner as to encourage nursing homes to utilize adhesive arbitration agreements more frequently than discretionary arbitration agreements.

Third, and most importantly, I believe that the majority's reading of the statutes runs afoul of the United States Supreme Court's directives regarding arbitration. The Supreme Court has repeatedly emphasized that arbitration agreements must be placed on the same footing as all other contracts. *AT & T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1745–46 (2011) (explaining that placing arbitration agreements on equal footing with other contracts is consistent with the liberal judicial policy favoring arbitration). In particular, the Federal Arbitration Act (FAA) "requires that states place no greater restrictions upon arbitration provisions than they place upon other contractual terms . . . . Therefore, with few limitations, if a state law singles out arbitration agreements and limits their enforceability, it is preempted." *Saturn Distrib. Corp. v. Williams*, 905 F.2d

719, 722 (4th Cir. 1990); *accord Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 [of the FAA]."); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 Wake Forest L. Rev. 1001, 1012 (1996) ("Any law that singles out arbitration agreements by making them less enforceable than other contracts is preempted by the FAA.").

I recognize that the defense asserted here—that the surrogate lacked the ability to consent to the arbitration agreement—is a generally applicable defense to all contracts; however, the way the majority applies this defense "takes its meaning precisely from the fact that a contract to arbitrate is at issue." *Perry*, 482 U.S. at 492 n.9; *see also Concepcion*, 131 S. Ct. at 1747–48 (explaining that the FAA may preempt generally applicable state-law contract defenses if they are applied in a way that would disfavor arbitration, but not other contracts). It makes no difference whether the majority is unjustly limiting the application of section 44-66-30(A), or whether the General Assembly truly intended to disallow surrogates the ability to consent to arbitration involving healthcare-related contracts; in either case, a surrogate is given the power to enter into a wide variety of healthcare-related contracts on behalf of the patient *except for healthcare-related arbitration agreements*. *See Perry*, 482 U.S. at 492 n.9 (holding that a court may not apply state-law in a manner that "rel[ies] on the uniqueness of an agreement to arbitrate . . . , for this would enable the court to effect what we hold today the state legislature cannot"). Accordingly, I believe the majority's interpretation is inconsistent with the clear instructions of the Supreme Court, and I therefore would reverse and compel arbitration between the parties.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Les Springob, Paul Trussell, Barton Dumas, Stanley Harpe and John Yenco, Plaintiffs,

Of whom Paul Trussell, Barton Dumas, and John Yenco are the, Appellants,

v.

The University of South Carolina and The University of South Carolina Gamecock Club, Respondents.

Appellate Case No. 2012-206887

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 27363
Heard November 7, 2013 – Filed March 12, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Joseph M. McCulloch, Jr., and Kathy R. Schillaci, both of Law Offices of Joseph M. McCulloch, Jr., of Columbia, for Appellants.

William H. Davidson, II, and Andrew F. Lindemann, both of Davidson & Lindemann, PA, of Columbia, for Respondents.

JUSTICE KITTREDGE: This is a direct appeal from the trial court's grant of summary judgment in favor of Respondents, the University of South Carolina and the University of South Carolina Gamecock Club. The trial court held that the statute of frauds barred Appellants' claims. While we conclude the statute of frauds applies in the first instance, we find a question of fact exists concerning the question of equitable estoppel, rendering summary judgment inappropriate. We affirm in part, reverse in part, and remand.

I.

In anticipation of the opening of the University of South Carolina's new basketball arena, the University of South Carolina and the University of South Carolina Gamecock Club (collectively "the University") distributed a brochure to high-level Gamecock Club members. The brochure offered these members the opportunity to purchase premium seating for the upcoming basketball seasons, including a number of amenities for Men's Basketball season, Women's Basketball season, and other events held at the arena. These amenities included preferred parking, access to a private area of the arena known as the McGuire Club, and the option to purchase the best tickets to all events held at the arena.[1]

The brochure offered these Gamecock Club members the opportunity to purchase these tickets over a "five year term." Members were to pay $5,000 per seat in the first year and $1,500 per seat each year in years two through five. Appellants have offered affidavits stating that Athletic Department employees promised Appellants that, after year five, they would only have to maintain their Gamecock Club membership and pay the face value of season tickets to retain these premium seats. Appellants accepted the University's offer and made the required payments for years one through five.

After the fifth year, the University contacted Appellants and requested a $1,500 payment per seat for the sixth year of premium seating. Appellants requested that the University review the history of the seat offerings to determine whether these

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[1] The brochure was a lure for Gamecock Club members who wanted to "get close to the action" and "see every pick, pump, bump and dunk!" It also promised that "with these big time seats come plenty of big time amenities[,]" and the rhetorical "[s]ound too good to be true?"

payments were required. The University concluded that the agreement did require members to continue paying the $1,500 fee per seat every year that they wished to retain the premium seating.

Appellants subsequently brought an action against the University alleging breach of contract and seeking specific performance. After discovery, the parties filed cross motions for summary judgment. The trial judge denied Appellants' motion and granted the University's motion, finding that due to the absence of a written contract the statute of frauds barred Appellants' claims. Appellants filed a timely notice of appeal, and we certified the appeal from the court of appeals pursuant to Rule 204(b), SCACR.

II.

In reviewing a trial court's grant of summary judgment, we apply "the same standard required of the circuit court under Rule 56(c), SCRCP." *Bass v. Gopal, Inc.*, 395 S.C. 129, 133, 716 S.E.2d 910, 912 (2011) (citing *Edwards v. Lexington Cnty. Sheriff's Dep't*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010)). Rule 56(c) provides that summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Bass*, 395 S.C. at 133–34, 716 S.E.2d at 912 (citing *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009)). "[T]he non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

III.

Appellants claim the trial court erred by granting Respondents' motion for summary judgment because the agreement does not fall within the statute of frauds, or, alternatively, that the University is equitably estopped from asserting the statute of frauds. While we find that the agreement is subject to the statute of

frauds, we find there is a genuine issue of material fact as to whether the University is equitably estopped from asserting the statute of frauds as a defense.

A.

Appellants allege that their claims are not subject to the statute of frauds because the agreement was capable of being performed within one year. Alternatively, Appellants claim that the brochure distributed by the University constitutes a signed writing sufficient to satisfy the statute of frauds. We disagree.

"[T]he Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the parties." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005) (citing S.C. Code Ann. § 32-3-10 (1991)). If there is a possibility that a contract might be performed within one year, the statute of frauds is not a bar to enforcement of the contract. *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Ct. App. 1997).

We agree with the trial court that the agreement was not capable of being performed within one year. Indeed, the very language of the brochure states that the agreement to purchase premium seating was for a "five year term." It is undisputed that the agreement, at the very least, required the Appellants to pay $5,000 per seat in year one and $1,500 per seat each year during years two through five. In turn, the University was required to provide Appellants with premium seating each year. Even if Appellants were to remit the entire sum of $11,000 per seat during the first year, the University's additional obligations under the agreement could not be performed in less than five years. Thus, we find there is no genuine issue of material fact as to whether the statute of frauds applies. Having found that the statute of frauds applies, we turn now to Appellants' contention that the brochure distributed by the University satisfies the signed writing requirement.

In order to satisfy the statute of frauds, there must be a writing signed by the party against whom enforcement is sought, and "the writings must establish the essential terms of the contract without resort to parol evidence." *Cash v. Maddox*, 265 S.C. 480, 484, 220 S.E.2d 121, 122 (1975) (citing *Barr v. Lyle*, 263 S.C. 426, 430, 211 S.E.2d 232, 234 (1975)). However, "[u]nder the statute of frauds, the form of the writing is not material, and may be shown entirely by written correspondence . . . ." *Barr*, 263 S.C. at 430, 211 S.E.2d at 234 (citing *Speed v. Speed*, 213 S.C. 401, 408, 49 S.E.2d 588, 591 (1948)). Appellants claim that the brochure, cancelled checks,

payment records, and letters from the University confirming Appellants' rights to the premium seats collectively constitute a signed writing sufficient to satisfy the statute of frauds.

Initially, we agree with the University that there is no formal contract signed by the parties. Even if we were to construe the brochure and correspondence from the University to constitute sufficient writings, these writings must bear the University's signature for the statute of frauds to be satisfied. The presence or absence of the University's signature turns on whether the University logo on the brochure suffices for a legal signature. Appellants claim the University logo is a valid signature for these purposes but cite no authority to support this proposition, and the majority rule is contrary to Appellants' position. *See, e.g.*, *Venable v. Hickerson, Phelps, Kirtley & Assocs.*, 903 S.W.2d 659, 662–63 (Mo. Ct. App. 1995) (finding that an employer's logo on a monogrammed notepad was not sufficient to constitute a signature); *Falls v. Va. State Bar*, 397 S.E.2d 671, 673 (Va. 1990) (holding that a logo on the Virginia State Bar's personnel manual was not a signature). We elect to follow the vast majority of jurisdictions and hold that a logo does not constitute a legal signature. Moreover, we find that the brochure and subsequent correspondence do not "establish the essential terms of the contract without resort to parol evidence." *Cash*, 265 S.C. at 484, 220 S.E.2d at 122.

In sum, we find the agreement between Appellants and the University falls within the statute of frauds. Additionally, we find that there is no signed writing sufficient to satisfy the requirements of the statute of frauds, and that the brochure and correspondence from the University do not establish all of the essential terms of the agreement. We turn now to Appellants' reliance on the doctrine of equitable estoppel.

B.

"[T]he doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds." *Collins Music Co. v. Cook*, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct. App. 1984) (citing *Florence Printing Co. v. Parnell*, 178 S.C. 119, 127, 182 S.E. 313, 316 (1935)). The party asserting estoppel "must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position." *Id.* "It is not sufficient to show merely that he has lost an expected benefit under the contract." *Id.* "Before the estoppel doctrine can

be invoked, however, there must be competent proof of the existence of the oral contract." *Atl. Wholesale Co. v. Solondz*, 283 S.C. 36, 40, 320 S.E.2d 720, 723 (Ct. App. 1984) (quotations and citations omitted).

Taking the evidence in the light most favorable to the Appellants, we find there is proof of an oral contract between the parties. Certainly, it is undisputed that there is an agreement for performance over the initial five-year period, and the University so concedes. Appellants' affidavits create a fact question as to the existence of an oral contract beyond year five. Indeed, Appellants' affidavits state they were induced to purchase the special seating under an oral promise that they would not have to pay a fee separate from the Gamecock Club membership and the face value of season tickets beyond year five. This is sufficient to create an issue of material fact as to whether Appellants suffered a definite, substantial, and detrimental change in reliance on these purported oral representations. Thus, we find that the trial court erred in granting summary judgment in favor of the University.[2]

IV.

We affirm insofar as the trial court applied the statute of frauds but reverse the trial court's entry of summary judgment in favor of the University as to Appellants' equitable estoppel claim. We remand the matter for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TOAL, C.J., BEATTY and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion.

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[2] Appellants also claim that the part performance exception to the statute of frauds applies. Because we find that a genuine issue of material fact exists as to estoppel, we need not reach the issue of part performance. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

JUSTICE PLEICONES: I concur but write separately because I do not agree with the majority's holding that a logo can never constitute a signature for purposes of the statute of frauds. Such a holding is unnecessary to resolve the issue in light of the absence of essential terms of a contract in the writings. I would not reach the issue in this factual setting, as I find the question more nuanced than the majority suggests.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ursula R. Pallares, Appellant,

v.

Sharon R. Seinar and Lisa A. Maseng, Respondents.

Appellate Case No. 2011-201026

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 27364
Heard September 18, 2013 – Filed March 12, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John D. Elliott, of Columbia, for Appellant.

Tobias Gavin Ward, Jr., James Derrick Jackson, Evans T. Barnette, of Johnson & Barnette, LLP, and Robert A. McKenzie, of McDonald, McKenzie, Rubin, Miller and Lybrand, LLP, all of Columbia, for Respondents.

JUSTICE BEATTY: Ursula R. Pallares ("Pallares") brought this civil suit alleging five claims against two of her neighbors, Sharon R. Seinar and Lisa A. Maseng ("Respondents"). The circuit court granted partial summary judgment to Respondents on Pallares's claims for malicious prosecution, abuse of process, and

civil conspiracy. Pallares appealed, and this Court certified the case for review pursuant to Rule 204(b), SCACR. We affirm in part, reverse in part, and remand.

I. FACTS

As one party aptly describes the situation, "Appellant and the Respondents are neighbors who obviously do not get along." The three parties live in separate residences in the Shandon/Rosewood area of Columbia. Pallares filed an amended complaint on March 7, 2008 asserting Respondents had "mounted a campaign to harass and humiliate" her and to "drive her from her home." Pallares outlined four areas of conduct by one or both Respondents involving (1) code violations at Pallares's home, (2) nuisance animals, (3) a petition for a mental evaluation, and (4) requests for restraining orders, which Pallares averred gave rise to civil tort liability.

Pallares first contended Respondents had "filed baseless complaints against her with the City of Columbia for various housing and building code violations, only to have those complaints dismissed by the authorities, on or about April 27th, 2006." Pallares also "allege[d] that on August 4th, 2006 defendant Seinar instigated criminal charges against [her] alleging that [her] pet dogs were a nuisance, in violation of the City's criminal ordinances." Pallares contended "that on October 30th, 2006 these charges were dismissed as groundless."

Pallares next asserted "that on May 18, 2007, defendant Seinar filed a petition with the Richland County Probate Court alleging [Pallares] was mentally ill, and in need of a mandatory mental evaluation."[1] Pallares contended "the evaluation was normal, and the petition was dismissed." Pallares lastly alleged Respondents filed actions in the Richland County Magistrate's Court seeking restraining orders against her, but the requests were denied.[2] Pallares contended all

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[1] The petition was signed by both Respondents, as was clarified at the hearing in this matter. An Order for Examination was issued by the Richland County Probate Court on June 7, 2007. Two examiners prepared reports dated June 18, 2007 concluding Pallares was not suffering from mental illness.

[2] Respondents made the requests after Pallares was found not to be mentally ill. In her statement in support of a restraining order, Maseng opined that if Pallares was not mentally ill, then she must be acting out of malice. Respondents described

of the above complaints were made by Respondents with malice and without probable cause for the ulterior purpose of harassing her and subjecting her to ridicule. Pallares stated Respondents acted in concert to harm her, with a conscious indifference to her rights, and that their ultimate intent was to run her out of the neighborhood.

Based on the foregoing, Pallares asserted claims for (1) malicious prosecution, (2) abuse of process, (3) invasion of privacy, (4) intentional infliction of emotional distress, and (5) civil conspiracy. Respondents filed answers denying the allegations. Respondent Maseng also counterclaimed, seeking an order requiring the abatement of a nuisance and damages based on Pallares's alleged failure to properly maintain her property.

Respondents moved for summary judgment as to all claims. The circuit court granted partial summary judgment to Respondents on the claims for malicious prosecution, abuse of process, and civil conspiracy, and denied summary judgment on the remaining claims for invasion of privacy and intentional infliction of emotional distress. Pallares appealed to the Court of Appeals, and this Court certified the case for review pursuant to Rule 204(b), SCACR.

II. STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Id.* at 379, 534 S.E.2d at 692.

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multiple occasions on which Pallares allegedly followed them, photographed them, and stared and/or glared at them.

III. LAW/ANALYSIS

On appeal, Pallares challenges the circuit court's grant of summary judgment to Respondents on her claims for (1) malicious prosecution and (2) abuse of process.[3]

A. Malicious Prosecution

Pallares first contends the circuit court erred in granting summary judgment to Respondents on her claim for malicious prosecution. We disagree.

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings;[4] (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (first alteration in original) (citations omitted). "An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause." *Id.*

"Malice is defined as 'the deliberate[,] intentional doing of an act without just cause or excuse.'" *Id.* at 437, 629 S.E.2d at 649 (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982)). "Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice." *Id.* "In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution." *Id.*

"Probable cause in this context does not turn upon the plaintiff's guilt or innocence, but rather upon whether the facts within the prosecutor's knowledge

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[3] Pallares does not challenge the court's ruling on the civil conspiracy claim.

[4] The "original judicial proceedings" can be civil or criminal. *See generally Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 629 S.E.2d 642 (2006); *Broyhill v. Resolution Mgmt. Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867 (Ct. App. 2012).

would lead a reasonable person to believe the plaintiff was guilty of the crimes charged." *Kinton v. Mobile Home Indus., Inc.*, 274 S.C. 179, 181, 262 S.E.2d 727, 728 (1980).

Where a plaintiff bases the claim on an opponent's institution of civil causes of action, probable cause exists if the facts and circumstances would lead a person of ordinary intelligence to believe that the plaintiff committed one or more of the acts alleged in the opponent's complaint. *Broyhill v. Resolution Mgmt. Consultants, Inc.*, 401 S.C. 466, 475, 736 S.E.2d 867, 871-72 (Ct. App. 2012). The issue is not what the actual facts were, but what the prosecuting party honestly believed them to be. *Eaves*, 277 S.C. at 478, 289 S.E.2d at 416 (citation omitted).

A party must show the opponent lacked probable cause as to each cause of action asserted to prevail on a claim of malicious prosecution; thus, the existence of probable cause as to any one is sufficient to defeat a malicious prosecution claim. *Broyhill*, 401 S.C. at 475, 736 S.E.2d at 871-72. Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion. *Law*, 368 S.C. at 436, 629 S.E.2d at 649 (citing *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 323, 143 S.E.2d 607, 609 (1965)).

In granting summary judgment, the circuit court focused on the element of probable cause, stating Pallares "has failed to allege any material facts that would suggest that Seinar and Maseng did not honestly believe they had probable cause to lodge their complaints." The court stated the record showed that Seinar complained to Animal Control / Columbia Police on three separate occasions that Pallares's dogs were barking excessively, and the incident reports from those complaints set forth information detailing the existence of probable cause on each complaint. The court noted that the Municipal Code of the City of Columbia, SC § 4-70 provides an animal constitutes a nuisance if it is allowed to bark in an excessive, continuous, or untimely manner that results in a serious annoyance or an interference with the reasonable use and enjoyment of neighboring premises.

The court further stated it was undisputed that Respondents had made complaints with the City of Columbia for housing and code violations occurring on Pallares's property. The court found the City first served Pallares with warning notices of these violations, and the violations were thereafter remedied by Pallares. The court determined the service of warnings to Pallares affirmed the fact that Respondents had probable cause to initiate their complaints. Furthermore, the

decision whether to enforce the code violations was made by the City, not by Respondents. The court concluded summary judgment in favor of Respondents was appropriate on the claim for malicious prosecution "because Seinar and Maseng had probable cause" to make their complaints against Pallares.

We find the record supports the circuit court's decision to grant summary judgment to Respondents on Pallares's claim for malicious prosecution because the only evidence in the record demonstrates there was probable cause to support one or more of the complaints lodged by Respondents, which defeats Pallares's claim for malicious prosecution as a matter of law.

The record contains an incident report on or about January 4, 2005 documenting a complaint by Seinar about dogs barking at Pallares's residence: "Complainant reports that a[n] animal (dog) was continuously barking at the rear of the above Incident Location for hours. Upon arrival Reporting Officer observed a dog at Incident Location constantly barking causing [a] disturbance in the neighborhood."

An incident report from April 5, 2005 demonstrates an officer again found the dogs barking at Pallares's residence: "Complainant [Seinar] states that the subject has two dogs that bark constantly and are a nuisance to the neighborhood. Complainant states that this is an ongoing problem." The officer commented in a supplemental report that he observed an extended period of barking during his visit: "While reporting officer was talking to the subject, the dog was heard barking for almost the entire time. (Thirty mins. to an hour[.])"

Lastly, an incident report from on or around August 2, 2006 records Seinar's complaint about the dogs barking during the night: "Complainant states that the dogs at 407 S. Ravenel St. were barking uncontrol[l]ably all night long keeping her awake. Animal Control was called by Complainant several times. Responding Officer was at the listed location for 15 minutes and heard the dogs barking and keeping up the neighborhood. Responding Officer advised Complainant to sign a warrant on the subject."

Seinar did sign warrants at the officer's suggestion.[5] Although Pallares challenges these warrants, we find their manner of execution and the fact that they

[5] On August 4, 2006, Seinar signed two separate warrants for the 2005 incidents, but neglected to include the most recent incident from 2006, so the prosecutor

were not prosecuted does not negate the fact that there was probable cause to support Seinar's animal nuisance complaints, as documented in the officers' reports.

The record also supports the circuit court's conclusion that the only evidence presented showed there was probable cause for one or more of the code complaints. The City Inspections Department issued Pallares a Warning / Notice of Violation on June 17, 2004 for violation of a City ordinance requiring owners to keep their property properly cut and cleared of trash, debris, weeds, etc. Pallares was directed to remove miscellaneous items, materials, and debris from her premises. The City issued Pallares a Uniform Ordinance Summons, No. 7577, ordering her to appear for trial in the City of Columbia Municipal Court for this violation. The City Inspections Department issued another Warning / Notice of Violation to Pallares on January 26, 2005 for failing to keep the premises properly cut and cleared, and she was directed to remove all discarded items from her driveway. On April 5, 2005, the Property Maintenance Code Official issued a Notice of Complaint upon finding, after an investigation, that Pallares had property (a shed) that violated a City code provision governing property maintenance.

Pallares contends "the city administrator [has] pointed out that several of the complaints were groundless and did not amount to code violations," citing to an e-mail dated April 27, 2006 from Marc Mylott. The e-mail does not support Pallares's suggestion that there was no probable cause for the code complaints because some of them were found to be "groundless." To the contrary, Mylott indicates that Pallares had abated a violation regarding bricks in the right of way, and that the City had not prosecuted the 2004 violation for which Pallares was issued Uniform Ordinance Summons No. 7577 because previously code enforcement inspectors had the discretion whether to proceed to a trial if "a property owner abated the violation(s) just prior to court." Thus, the fact that the City did not proceed to trial on a documented violation does not obviate the existence of probable cause for the violation. The existence of probable cause as to any of these allegations is sufficient to defeat Pallares's claim for malicious prosecution.

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declined to prosecute the warrants "at that time" because they were signed more than one year after the allegations described therein.

B. Abuse of Process

Pallares next argues the circuit court erred in granting summary judgment to Respondents on her claim for abuse of process. We agree.

The tort of abuse of process is intended to compensate a party for harm resulting from another party's misuse of the legal system. *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 74 n.5, 567 S.E.2d 251, 255 n.5 (Ct. App. 2002). "Process," as used in this context, has been interpreted broadly to include the entire range of procedures incident to the litigation process. *Id.* at 70, 567 S.E.2d at 253.

The essential elements of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding. *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 697 S.E.2d 551 (2010); *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 492 S.E.2d 103 (1997); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988).

The first element, an "ulterior purpose," exists if the process is used to secure an objective that is "not legitimate in the use of the process." *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012) (citation omitted). An allegation that a party had a "bad motive" or an "ulterior purpose" in bringing an action, standing alone, is insufficient to sustain an abuse of process claim. *Id.* (citing *Food Lion*, 351 S.C. at 74, 567 S.E.2d at 255). Moreover, no action lies where a person has an incidental or concurrent motive of spite or merely seeks to gain a collateral advantage from the process. *Food Lion*, 351 S.C. at 74-75, 567 S.E.2d at 255-56.

However, "[o]ne who uses a legal process, whether criminal or civil, against another *primarily* to accomplish a purpose for which it is not designed, is subject to liability for harm caused by the abuse of process." *Id.* at 75, 567 S.E.2d at 255-56 (quoting Restatement (Second) of Torts § 682 (1977)). The collateral objective must be the "sole or paramount reason for acting." *Id.* at 75, 567 S.E.2d at 256.

The tort centers on events occurring outside the process; the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the

payment of money, by the use of the process as a threat or club. *D.R. Horton*, 398 S.C. at 551, 730 S.E.2d at 352 (citations omitted); *see also Hainer*, 328 S.C. at 136, 492 S.E.2d at 107 (stating the improper purpose usually takes the form of coercion to obtain a collateral advantage); *accord Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008); *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 635 S.E.2d 562 (Ct. App. 2006).

The second element, a "willful act," has been described as "[s]ome definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process[.]" *Hainer*, 328 S.C. at 136, 492 S.E.2d at 107. The "willful act" element consists of three components: (1) "a 'willful' or overt act"; (2) "in the use of the process"; (3) "that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Food Lion, Inc.*, 351 S.C. at 71, 567 S.E.2d at 254 (citations omitted).

In granting summary judgment to Respondents on Pallares's claim for abuse of process, the circuit court stated "the only evidence was that City found probable cause for the complaints in both the animal nuisance and code violations, and that the complaint process initiated by Seinar and Maseng [was] carried to its authorized conclusion." The court further found that, "[e]ven if Seinar and Maseng had an ulterior motive, the Plaintiff has failed to present evidence to suggest that there was a 'willful act' by Seinar and Maseng."

On appeal, Pallares "maintains that [Respondents] were trying to drive her from the neighborhood with various legal actions" and that "[t]his is [] a classic example of the abuse of legal process to obtain a collateral advantage - ejection of the plaintiff from her home and her neighborhood." Pallares asserts "[s]he has a witness to corroborate [Respondents'] motive." The record contains a 2008 affidavit Pallares submitted from a neighbor, Christine Overturf. In the affidavit, Overturf states she observed Maseng take photographs of Pallares and that she heard Seinar make derogatory remarks about Pallares's ethnicity and about the fact that she wanted Pallares out of the neighborhood.

Pallares asserts the elements of abuse of process are less stringent than those for malicious prosecution, citing *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967) and its general definition of abuse of process, and she avers there is no required element of actual malice, citing *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008).

We conclude summary judgment was inappropriate on Pallares's claim for abuse of process because there are genuine issues of material fact regarding the elements of this claim. Even if Respondents had cause to make some complaints against Pallares, the fact that those were properly instituted does not foreclose an action for abuse of process if Respondents have, in fact, committed acts outside the normal process that are improper. *See generally Huggins*, 249 S.C. at 209, 153 S.E.2d at 695 (noting the issuance of the process might be justified in itself, but it is the misuse of the process for an end not lawfully warranted by it that constitutes the tort of abuse of process); *id.* (causing process to issue without justification is an essential element of malicious prosecution, but not for abuse of process).

We find Respondents' act of escalating this "bad neighbor" dispute to the point of seeking the mental commitment of Pallares constitutes evidence of both an ulterior motive and a willful act. The motive was their obvious dislike of Pallares and their alleged desire to drive her from the neighborhood. As for the element of a willful act, Respondents sought the commitment of Pallares when they apparently had no legal authority to do so, as is evidenced on the face of their commitment petition. The form petition signed by Respondents clearly indicates the categories of persons who may seek a mental evaluation for an individual—it is limited by state law to "interested persons," statutorily defined as "a parent, guardian, spouse, adult next of kin, or nearest friend[.]" S.C. Code Ann. § 44-17-510 (2002) (providing procedure for petition to be made by "interested persons"); *id.* § 44-23-10(21) (defining "interested persons"). Respondents listed their relationship to Pallares as "Neighbors" on the form petition, which does not come within any of the permissible categories of persons eligible to petition for commitment under South Carolina law, as Respondents undeniably were not the "nearest friend[s]" of Pallares. Because there is evidence creating a question of material fact and further development of the record is needed, we find summary judgment is premature on the claim for abuse of process.[6] *See Schmidt v.*

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[6] To the extent Respondents assert issues regarding the *Noerr-Pennington* doctrine and judicial immunity as additional sustaining grounds under Rule 220(c), SCACR, we find these grounds unavailing. These issues were originally asserted in Respondents' second set of summary judgment motions pertaining to Pallares's remaining claims. We note the *Noerr-Pennington* doctrine arose from two United States Supreme Court cases involving federal antitrust litigation, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and

Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (holding summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law or when there is a dispute as to the conclusions and inferences to be drawn from the facts; the purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder).

IV. CONCLUSION

Based on the foregoing, we affirm the circuit court's grant of partial summary judgment to Respondents on Pallares's claim for malicious prosecution. However, we reverse the grant of summary judgment on Pallares's claim for abuse of process and remand the matter to the circuit court for further proceedings in accordance with this decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

PLEICONES and HEARN, JJ., concur. KITTREDGE, J., concurring in a separate opinion. TOAL, C.J., concurring in part and dissenting in part in a separate opinion.

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965). The *Noerr-Pennington* doctrine is based on the First Amendment right to petition the government for grievances, which includes the right of access to the courts, and provides immunity from claims that are based on acts related to this right "unless the act is a mere sham." *Select Comfort Corp. v. Sleep Better Store, L.L.C.*, 838 F. Supp. 2d 889, 896 (D. Minn. 2012). Its purpose is to protect the legitimate exercise of the constitutional right and to protect against retributive civil claims. *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996). Although the United States Supreme Court developed the doctrine in the context of antitrust litigation, its potential application in other contexts has been recognized. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993); *Select Comfort Corp.*, 838 F. Supp. 2d at 896; *Kellar v. VonHoltum*, 568 N.W.2d 186 (Minn. Ct. App. 1997); *Hometown Props., Inc.*, 680 A.2d at 60. While some jurisdictions have adopted the *Noerr-Pennington* doctrine and extended it beyond the antitrust context, South Carolina courts have not previously addressed the doctrine, and we decline to adopt it at this time. In any event, even if we were to adopt the *Noerr-Pennington* doctrine, we would not apply it to completely insulate a defendant from a tort claim for abuse of process.

JUSTICE KITTREDGE: I concur in result. I write separately because I would limit Appellant's abuse of process claim to the mental commitment issue.

CHIEF JUSTICE TOAL: I concur in part and dissent in part. While I agree with the majority's decision to affirm the circuit court's grant of summary judgment to Respondents on Pallares's claim for malicious prosecution, I would further affirm the circuit court's grant of summary judgment to Respondents on the abuse of process claim.

In concluding that summary judgment was inappropriate on Pallares's claim for abuse of process, the majority finds that Respondents' attempt to seek the mental commitment of Pallares constitutes evidence of both an ulterior motive and a willful act. To the extent that the majority relies on the mental commitment evidence to support the reversal of the circuit court's grant of summary judgment on the abuse of process claim, I disagree for two reasons.

First, in my opinion, the mental commitment issue is not preserved for our review. The circuit court order granting partial summary judgment makes no mention of the attempted mental commitment and Pallares did not make a Rule 59(e) motion to preserve the issue. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012) (citation omitted) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (stating that if an issue or argument is raised, but not ruled upon by the trial judge, a party may file a Rule 59(e) motion to preserve it for appellate review).

Second, I disagree with the majority's broad assertion that neighbors do not fall within any of the permissible categories of persons eligible to petition for mental commitment. The statute defining "interested person" also defines "nearest friend" as "any responsible person who, in the absence of a parent, guardian, or spouse, undertakes to act for and on behalf of another individual who is incapable of acting for himself for that individual's benefit, whether or not the individual for whose benefit he acts is under legal disability." S.C. Code. Ann. § 44-23-10(14) (2002). Given this definition, I would find that, depending upon the circumstances, a neighbor may well qualify as a "nearest friend," and thus, be eligible to petition for mental commitment. In this case, however, the issue was not raised or litigated.

If the mental commitment issue had been properly preserved, I would consider it the only basis upon which this Court should consider reversing the circuit court's grant of summary judgment with respect to the abuse of process claim. The majority, on the other hand, upholds the entire abuse of process claim.

I would hold that the circuit court was correct in granting Respondents' motion for summary judgment on the abuse of process claim because, as the circuit court stated, the complaint process initiated by Respondents for the animal nuisance and code violations was "carried to its authorized conclusion." *See Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997) ("There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions."). Significantly, Pallares was issued citations for these violations, which indicates that Respondents properly utilized the complaint process. Thus, the circuit court did not err in finding an absence of evidence that Respondents committed a willful act. *See LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 71, 370 S.E.2d 711, 713–14 (1988) (citation omitted) (holding that appellants had not asserted a cause of action for abuse of process because they did not allege that respondents engaged in "a willful act in the use of the process not proper under regular conduct of the proceedings").

Therefore, because the mental commitment issue is not preserved for our review, and because the animal nuisance and code violations do not support the abuse of process claim, I would affirm the circuit court's grant of summary judgment on Pallares's claims for both malicious prosecution and abuse of process.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Beulah Ruth Butler, Petitioner.

Appellate Case No. 2011-194608

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 27365
Heard November 20, 2013 – Filed March 12, 2014

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: Beulah Ruth Butler (Petitioner) appeals the court of appeals' decision affirming her convictions for voluntary manslaughter and possession of a firearm or a knife during the commission of a violent crime, claiming the court of appeals erred in affirming the denial of her motion for a directed verdict on self-defense. We affirm.

FACTS/ PROCEDURAL BACKGROUND

On July 23, 2006, Petitioner and her boyfriend, Tarquinius Lenard Russell (the victim), patronized a bar in the Five Points area of Columbia. After leaving the bar, the victim became very angry when Petitioner answered a telephone call from another man. According to Petitioner,[1] once they arrived at Petitioner's home, the victim punched her, kicked her, and pushed her down onto the bed and choked her until she passed out. After she awoke, the victim picked up a DVD/VCR player, swung it at her, and hit her in the face. Petitioner went into the kitchen, planning to run out the back door, but before she could reach the door, the victim grabbed her by the shirt. Petitioner reached for a knife that was on the kitchen table and "started swinging, telling him to get away from [her]." When Petitioner stopped swinging the knife, she "took off again to go out the front door," but the victim came "running over the couch" toward her. At that point, Petitioner began swinging the knife again and the couple struggled over control of the knife. The victim wrapped his arms around her from behind and tried to cut her with the knife, which was pointing down. Petitioner testified:

> He was saying "I will kill you. I'm going to kill you." He was trying to make the knife stab me, and that's how I got the nicks on my legs. I just remember I was holding on real tight, and I was like, Lord, if he gets this knife, he's going to kill me, and that's when he let go.

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[1] At trial, Petitioner testified in her own defense. Petitioner described the volatile nature of her relationship with the victim, including many incidents in which the victim hit her or the couple fought. According to Petitioner, she never hit the victim first, although she acknowledged that she often fought back. In addition, Dr. Lois Veronen, a clinical psychologist and expert in battered woman syndrome, testified that Petitioner "definitely fits the description of a battered woman."

When the victim let go and she turned around, she saw him "coming [] down onto the knife."[2]

Police responded to Petitioner's home after a neighbor telephoned 911. When police arrived, the home was in disarray and Petitioner was on the floor, crying and attempting to comfort the victim, who had sustained a knife wound to the chest. The victim was transported to the hospital, where he died following surgery.[3] When police officers first asked Petitioner what happened, Petitioner mumbled that the victim "rolled over on the knife." She further stated that "[h]e was coming at me over the couch, and I just did it." Thereafter, she told an investigator that the victim jumped over the couch and "landed on" the knife. On cross-examination, Petitioner testified that she did not remember making these statements to police. Further, Petitioner vehemently denied stabbing the victim and maintained that the victim received the knife wound from falling on the knife. However, Petitioner stated further:

> He didn't fall on it. I guess it's just the way his body, when I turned around, . . . he was falling . . . . It was an accident. . . . I was trying to protect myself. I was trying to protect myself but the initial stab, I believe, [was] an accident. I wasn't swinging at him. I just turned around.

The night of the incident, witnesses observed a scratch on Petitioner's collarbone area, two small cuts on her left knee, two small cuts on her left thigh, and a cut on her bottom lip. After being taken into police custody, Petitioner declined medical attention. In response to standard questions, Petitioner stated that she had not suffered a head injury in the preceding seventy-two hours.

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[2] The State presented evidence that the victim's blood was found on a lamp, the living room carpet, the DVD/VCR player, a vacuum cleaner, the kitchen door frame, the living room and bedroom walls, and on the shirt Petitioner wore to Five Points that night.

[3] An autopsy revealed that, in addition to the stab wound to the victim's chest which was the cause of his death, he sustained five knife wounds to the sides of his body and several defense wounds.

Photographs taken three days after the incident showed that Petitioner's lip was swollen with a small cut and scratches on her lower neck and upper chest, but did not indicate any bruising around Petitioner's neck.

At the conclusion of the State's evidence, Petitioner's counsel moved for a directed verdict on self-defense, arguing that South Carolina law requires the State to bear the burden of disproving self-defense and that the State had failed to disprove every element of self-defense. Petitioner's counsel renewed the motion at the close of the evidentiary phase of trial. The trial court denied the motions, stating, in part, that "the standard I must apply at the directed verdict stage is such that there is either direct or substantial circumstantial evidence to go forward at this stage for a jury's verdict" and that because of Petitioner's conflicting statements, there was an issue of credibility for the jury.

The trial court charged the jury on the law of self-defense,[4] accident, defense of habitation, and the perceptions of battered persons. The jury convicted Petitioner as indicted. The trial court sentenced Petitioner to an aggregate term of nine years' imprisonment, but ruled that Petitioner was entitled to early parole eligibility based on the presentation of credible evidence regarding a history of criminal domestic violence.

The court of appeals affirmed Petitioner's convictions, concluding that the State produced sufficient evidence showing that Petitioner did not act in self-defense and viewing the evidence in the light most favorable to the State, the evidence supported submitting the case to the jury. *State v. Butler,* Op. No. 2011-UP-127(S.C. Ct. App. filed Mar. 28, 2011).

Petitioner sought a writ of certiorari to review the court of appeals' opinion. This Court granted the writ of certiorari pursuant to Rule 242, SCACR.

[4] In instructing the jury on the law of self-defense, the trial court stated that the "State has the burden of disproving self-defense by proof beyond a reasonable doubt."

ISSUES PRESENTED

I. Whether the trial court erred in refusing to apply a standard requiring the State to disprove self-defense beyond a reasonable doubt at the directed verdict stage?

II. Whether the court of appeals erred in affirming the denial of Petitioner's motion for a directed verdict on self-defense?

LAW/ANALYSIS

Petitioner argues the trial court erred by refusing to apply a standard requiring the State to disprove self-defense beyond a reasonable doubt at the directed verdict stage. We disagree.

"'When ruling on a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not its weight.'" *State v. Wiggins*, 330 S.C. 538, 544–45, 500 S.E.2d 489, 492–93 (1998) (quoting *State v. Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997)) (affirming the denial of a directed verdict on self-defense because the State presented sufficient evidence to create a jury issue as to self-defense). In contrast, "when self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." *State v. Burkhart*, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002) (citing *State v. Addison*, 343 S.C. 290, 293, 540 S.E.2d 449, 451 (2000); *Wiggins*, 330 S.C. at 544, 500 S.E.2d at 492–93).

On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *Id.* (citing *State v. Cherry*, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004)).

We disagree with Petitioner's reliance on *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011), to support her contention that the trial court applied an incorrect

standard at the directed verdict stage. In *Dickey*, the Court held that the defendant was entitled to a directed verdict on the issue of self-defense because the *uncontroverted* facts established self-defense *as a matter of law*. *Id.* at 501, 716 S.E.2d at 102. Therefore, even viewing the facts in a light most favorable to the State, the Court found that the evidence established that the defendant acted in self-defense. *Id.* at 503, 716 S.E.2d at 103.

Petitioner's case is distinguishable from *Dickey*. Unlike in *Dickey*, where the facts did not give rise to a jury issue, the evidence in the present case created a jury issue on the issue of self-defense. *See State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury."). For example, as the trial court recognized when ruling on the directed verdict motion, Petitioner's various, inconsistent accounts of how the stabbing occurred created credibility issues and questions of fact to be resolved by the jury. Furthermore, Petitioner's injuries—a swollen lip, scratches and cuts, but no bruising around the neck—were not consistent with her testimony that the victim struck her in the head with the DVD/VCR player, punched and kicked her, and choked her into unconsciousness. Therefore, we find the trial court, applying the correct standard at the directed verdict stage, properly submitted the case to the jury because the State presented sufficient evidence to disprove self-defense.[5]

Based upon our conclusion that there was sufficient evidence to create a jury issue, and viewing the evidence in the light most favorable to the State, we agree with the court of appeals' decision to affirm the denial of Petitioner's motion for a directed verdict on self-defense.

CONCLUSION

For the foregoing reasons, the court of appeals' decision is

AFFIRMED.

KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only. BEATTY, J., concurring in a separate opinion.

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[5] We note that the trial court gave a proper jury instruction on self-defense. *See Burkhart*, 350 S.C. at 262, 565 S.E.2d at 303.

JUSTICE BEATTY: I agree with the majority's decision to uphold Petitioner's convictions. However, I concur in result because I take exception to the majority's attempt to distinguish *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011). As is evident from my dissent in *Dickey*, I believe that case was incorrectly decided and, as a result, has now created confusion regarding the standard to be applied when a defendant makes a motion for a directed verdict on the basis of self-defense.

In *Dickey*, the defendant, who was a security guard at a Columbia apartment building, was charged with the murder of a resident's guest. *Dickey*, 394 S.C. at 495, 716 S.E.2d at 98. The guest, who was indisputably intoxicated and the cause of a disturbance in the apartment building, was ordered to leave by Dickey. *Id.* Because the guest became verbally aggressive, Dickey called police to report the disturbance. *Id.* As the guest and his friend exited the building, Dickey followed them outside to the public sidewalk. *Id.* An eyewitness testified that the men shouted obscenities and threatened to harm Dickey as they walked away. *Id.* According to Dickey, the guest and his friend walked to the corner of Pendleton Street and Sumter Street, which was approximately 68 feet from Dickey, then turned around. *Id.* at 508, 716 S.E.2d at 106. As the guest walked back towards the apartment building, Dickey pulled a gun from his pocket in order to "discourage the two men from attacking him." *Id.* at 497, 716 S.E.2d at 99-100. Dickey claimed the guest appeared to reach for a weapon as he continued to advance in an aggressive manner. *Id.* at 497, 716 S.E.2d at 100. Without warning, Dickey fired three shots, killing the guest. *Id.*

At trial, Dickey moved for a directed verdict of acquittal on the ground of self-defense. *Id.* at 498, 716 S.E.2d at 100. The trial judge denied this motion and ultimately charged the jury on murder and voluntary manslaughter, as well as the affirmative defense of self-defense. *Id.* The jury convicted Dickey of voluntary manslaughter. *Id.* The Court of Appeals affirmed. *Id.* This Court granted Dickey's petition for a writ of certiorari to review the decision of the Court of Appeals. *Id.*

A majority of this Court reversed, finding Dickey was entitled to a directed verdict of acquittal on the ground of self-defense as "the State failed to disprove the elements of self-defense beyond a reasonable doubt."[6] *Id.* at 503, 716 S.E.2d at

[6] Justice Pleicones concurred in the result reached by the majority; however, he would have reversed the decision of the Court of Appeals on the basis there was no

103. In reaching this conclusion, the majority found *as a matter of law* that Dickey: (1) was without fault in bringing about the difficulty; (2) believed he was in imminent danger of losing his life, or sustaining serious bodily injury, and that a reasonable person would have entertained the same belief; and (3) had no probable means of avoiding the danger than to act as he did. *Id.* at 499-503, 716 S.E.2d at 101-03.

In my dissent, I expressed disagreement with the majority's decision because I believed the State presented sufficient evidence to submit the case to the jury. *Id.* at 509, 716 S.E.2d at 106 (Beatty, J., dissenting). Specifically, I noted that the State's evidence created a question of fact as to whether Dickey: (1) was without fault in bringing on the conflict because he followed the guest and his friend out of the building even though he could have remained inside behind the safety of the locked doors to wait for police; (2) had a reasonable belief that he was in imminent danger of losing his life or sustaining serious bodily injury, given he readily exited the locked building and continued the confrontation outside of the apartment building; and (3) had a duty to retreat as he was not within the curtilage of the apartment building at the time of the shooting and there was evidence that he was physically able to return to the safety of the building. *Id.* at 505-09, 716 S.E.2d at 104-06.

Today, I adhere to my dissent and write to highlight the confusion created by the holding in *Dickey*, which is compounded by the majority's current attempt to distinguish the instant case from *Dickey*. In finding that Dickey established self-defense *as a matter of law*, the majority stated that the State "certainly did not rebut [the] elements of self-defense beyond a reasonable doubt, as the law requires." *Dickey*, 394 S.C. at 502, 716 S.E.2d at 102. In my view, this statement and the related analysis constituted an inexplicable departure from the well-established "any evidence" standard for denying a defendant's motion for a directed verdict on self-defense. *See State v. Wiggins*, 330 S.C. 538, 544-48, 500 S.E.2d 489, 492-95 (1998) (concluding that the State presented sufficient evidence to create a jury issue as to whether the defendant was acting in self-defense or was guilty of voluntary manslaughter and stating, "[w]hen ruling on a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not its weight" (citation omitted)); *see also State v. Weston*, 367 S.C. 279, 292, 625

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evidence to support the charge of voluntary manslaughter. *Dickey*, 394 S.C. at 503-04, 716 S.E.2d at 103-04 (Pleicones, J., concurring).

S.E.2d 641, 648 (2006) ("A defendant is entitled to a directed verdict when the [S]tate fails to produce evidence of the offense charged."); *id.* at 292-93, 625 S.E.2d at 648 ("When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the [S]tate. If there is *any direct evidence or any substantial circumstantial evidence* reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." (emphasis added)).

As a result of *Dickey*, members of the Bench and Bar were left with the impression that the long-held "any evidence" standard for evaluating a directed verdict motion is not applicable to directed verdict motions when self-defense is claimed. Although this consequence may not have been intended by the majority in *Dickey*, it is a reality as seen by the issues presented by Petitioner in the instant case.

Here, rather than correct the erroneous standard enunciated in *Dickey*, the majority attempts to distinguish Petitioner's case from *Dickey*. In my opinion, this cannot be done as the State in both cases presented sufficient evidence to create a jury issue on self-defense.

Based on the foregoing, I would affirm Petitioner's convictions and take this opportunity to clarify that the "any evidence" standard is the correct standard to be employed by trial judges and our appellate courts in evaluating a defendant's motion for a directed verdict on self-defense.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Engaging and Guarding Laurens County's Environment ("EAGLE"), Petitioner,

v.

South Carolina Department of Health and Environmental Control and MRR Highway 92, LLC, Defendants,

of whom MRR Highway 92, LLC, is Respondent.

Appellate Case No. 2011-201706

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 27366
Heard October 3, 2013 – Filed March 12, 2014

REVERSED

Amy Elizabeth Armstrong of South Carolina Environmental Law Project, of Pawleys Island, for Petitioner.

W. Thomas Lavender, Jr. and Joan W. Hartley, both of Nexsen Pruet, LLC, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This case is an appeal from the court of appeals' decision reversing the administrative law court's (ALC) final order, which reversed and denied the South Carolina Department of Health and Environmental Control's (DHEC) issuance of a permit (the Landfill Permit) to MRR Highway, 92, LLC (Respondent) for a commercial construction, demolition waste and land-clearing debris (C&D) landfill (the Landfill). We reverse and reinstate the ALC's final order.

FACTUAL/PROCEDURAL BACKGROUND

In February 2006, Respondent submitted a request to DHEC for a demonstration of need (DON) to obtain a solid waste management permit to construct and operate the Landfill in Laurens County, South Carolina.[1] DHEC approved Respondent's DON request for the Landfill on March 3, 2006, stating that DHEC had "evaluated the information and determined that pursuant to the provisions of [the DON Regulation], there is a need for this type of facility in the corresponding planning area."

DHEC issued a draft permit for the Landfill on February 14, 2008, and published public notice of the draft permit.[2] DHEC received comments and letters

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[1] This request was made pursuant to section 44-96-290(E) of the South Carolina Solid Waste Policy and Management Act of 1991 (the Act), S.C. Code Ann. §§ 44-96-10 to -470, and the regulation promulgated to implement section 44-96-290(E), S.C. Code Ann. Regs. § 61-107.17 (Supp. 2008) (DON Regulation). The DON Regulation requires an applicant for any new or expanded commercial C&D landfill to submit a DON request prior to submitting a permit application to DHEC. S.C. Code Ann. Regs. § 61-107.17(D). DON approval may be terminated if DHEC subsequently denies the permit application, or the applicant fails to show evidence of diligent pursuit of the permit or any related necessary approval within 120 days of the DON request. *Id.* at § 61-107.17(C).

[2] Regulation 61-107.19 sets forth the permit application process. S.C. Code Ann. Regs. § 61-107.19(D). That regulation requires DHEC to publish notice in a

questioning the need for the Landfill throughout the permitting process, which DHEC reviewed before issuing the Landfill Permit. In particular, EAGLE (Petitioner) submitted comments contesting the need for the Landfill. In the comments, Petitioner contended that because of the location, capacity, and condition of Curry Lake C&D landfill— located less than five miles from the proposed site of the Landfill—as well as various other landfills in upstate South Carolina, the Landfill was not needed. Upon request, DHEC held a public hearing regarding the Landfill Permit on March 13, 2008.

According to Kent Coleman, DHEC's Director of the Division of Mining and Solid Waste Management, DHEC reviewed Petitioner's concerns about the Landfill, but determined that none warranted its reconsideration of the DON approval. Therefore, on July 18, 2008, DHEC issued the requested Landfill Permit. DHEC informed Respondent of the permit approval via a letter, which stated that DHEC issued the Landfill Permit pursuant to Regulation 61-107.19, S.C. Code Ann. Regs. § 61-107.19(D). In addition, DHEC issued a memorandum to "Concerned Citizens," notifying them of the permit approval, and enclosed a Staff Decision Summary Report, which addressed the comments received at the public hearing and during the public comment period.[3]

Petitioner requested a final review conference by the DHEC Board, but the Board declined to hold a review conference. Thereafter, Petitioner requested a contested case hearing before the ALC, arguing, *inter alia*, that there was no need for the Landfill, and thus, DHEC should not have approved Respondent's DON request. Respondent filed a motion for partial summary judgment on all issues

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newspaper of general circulation when a draft determination for any new or expanded landfill is ready for review. *Id.* § 61-107.19(D)(2)(b). The public then has a 30-day period to review the draft determination and submit comments to DHEC. *Id.* DHEC conducts a public hearing upon receipt of certain requests in writing. *Id.* Finally, after the close of the public comment period on the draft determination and the public hearing, DHEC issues a Department Decision. *Id.* § 61-107.19(D)(3).

[3] The Staff Decision Summary Report states: "In reaching its decision on the [Landfill Permit] application, the Solid Waste Permitting Section reviewed all information submitted in the application, supplemental information submitted, and public comments."

relating to the Landfill Permit. Petitioner also filed a motion for summary judgment and withdrew all grounds for appeal except for issues relating to the DON for the Landfill.

The ALC heard the cross motions for summary judgment and denied both motions, ruling that "a genuine issue of material fact exists as to whether any 'additional factors' beyond those specifically set forth in [the DON Regulation] required denial of the DON request."[4] Thus, on July 22, 2009, the ALC conducted a contested case hearing. The sole issue for determination at the hearing was whether "additional factors" beyond those listed in the DON Regulation required DHEC to deny the DON request pursuant to subsection (D)(3)(d) of the DON Regulation. At the hearing, three witnesses testified about the need for an additional C&D landfill in Laurens County, and Petitioner introduced exhibits providing information about the waste generation and landfill capacity for Laurens, Greenville, and Spartanburg counties.

Coleman testified that, pursuant to the DON Regulation, DHEC plotted the location of the Landfill on a map, counted the number of landfills within a 10-mile radius, and totaled the waste generated by all three counties within the 10-mile radius before approving Respondent's DON request in 2006. Coleman also testified that the planning area surrounding a proposed landfill—established by the DON Regulation—is a "regional concept" because many of the C&D landfills accept waste from other counties, but that there is no actual "regional plan" for dealing with C&D waste in Laurens, Greenville, and Spartanburg counties. Under the DON Regulation, DHEC only considers waste generated within the 10-mile radius in making DON determinations, whereas DHEC looks beyond the 10-mile radius to determine a new landfill's allowable permitted capacity. Further, Coleman testified that in reviewing Respondent's application, DHEC was aware of the permitted disposal rate of the landfills in Laurens, Greenville, and Spartanburg counties, but did not utilize the information pursuant to the DON Regulation's "additional factors" section in making its ultimate decision. *See* S.C. Code Ann. Regs. § 61-107.17(D)(3)(d).

[4] In addition to setting forth specific criteria in subsections (D)(3)(a)–(c), the DON Regulation states that DHEC "reserves the right to review additional factors in determining need on a case-by-case basis" in subsection (D)(3)(d). S.C. Code Ann. Regs. § 61-107.17(D)(3)(d).

The ALC issued a Final Order and Decision, reversing DHEC's decision to issue the Landfill Permit to Respondent. The ALC made substantial findings of fact. In particular, the ALC stated that "[a]n important consideration in addressing the need for a landfill is that the planning area established in the DON Regulation is a regional concept." Because many of the C&D landfills in the Landfill planning area accept waste from other counties, the ALC found that factor "must also be considered in conjunction with the utilization of those landfills." Therefore, the ALC set forth the waste generation and landfill capacity figures for Laurens, Greenville, and Spartanburg Counties for fiscal years 2005–2007. Based upon the findings of fact, the ALC considered the excess regional landfill capacity as an "additional factor" in determining need under the DON Regulation. The ALC found that the region already had more landfill capacity than the county or region needed, and thus, there was no need for the Landfill. Specifically, the ALC looked to the existing landfills "in proximity to the site of the [Landfill]," and found that the "32.9% utilization of existing capacity simply does not reflect a need for another landfill in the area." The ALC also noted that even after the closing of a particular landfill in Spartanburg County, and factoring in the annual tonnage of the Landfill into the existing C&D landfill capacity, "the use of existing capacity would only be 27.38%."

Respondent appealed the ALC's decision to the court of appeals. In an unpublished opinion, the court of appeals reversed the ALC's order and reinstated DHEC's decision "because [DHEC] acted within its discretion by declining to consider additional factors in issuing a [DON] to [Respondent]." *Engaging & Guarding Laurens Cnty.'s Env't v. S.C. Dep't of Health & Envtl. Control*, Op. No. 2011-UP-380 (S.C. Ct. App. filed August 4, 2011).

Petitioner appealed, and this Court granted the petition for writ of certiorari to review the court of appeals' opinion pursuant to Rule 242, SCACR.

ISSUE PRESENTED

I. Whether the court of appeals erred in deferring to DHEC's decision to decline to consider "additional factors" under the DON Regulation?[5]

[5] In the alternative, Petitioner argues that DHEC's decision to approve the DON request was arbitrary and capricious or characterized by an abuse of discretion because DHEC did not, and has not ever, utilized subsection (D)(3)(d) of the DON

STANDARD OF REVIEW

A party who has exhausted all administrative remedies available within an agency and who is aggrieved by an ALC's final decision in a contested case is entitled to judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2012). In an appeal from a decision by the ALC, the Administrative Procedures Act (APA) provides the appropriate standard of review. *See* S.C. Code Ann. § 1-23-610(B) (Supp. 2012). This Court will only reverse the decision of an ALC if that decision is:

> (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;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. Thus, this Court's review is limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010) (citations omitted). The Court may not substitute its judgment for the ALC's judgment as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B). In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Hill*, 389 S.C. at 9–10, 698 S.E.2d at 617.

Regulation in order to consider "additional factors." Based on our conclusion that the ALC properly reversed DHEC's issuance of the Landfill Permit, we need not address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999**)** (holding that the Court need not address remaining issues when resolution of a prior issue is dispositive).

LAW/ANALYSIS

I. Regional Excess Landfill Capacity

Petitioner asserts that the court of appeals erred in reversing the ALC's decision concluding that there is no need for the Landfill and in reinstating DHEC's decision to issue the permit. We agree.

Section 44-96-290(E) of the South Carolina Code provides, in part:

> No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department . . . . The department shall promulgate regulations to implement this section . . . .

S.C. Code Ann. § 44-96-290(E) (2002).

As directed by section 44-96-290(E), DHEC promulgated the DON Regulation. S.C. Code Ann. Regs. § 61-107.17 (Supp. 2008).[6] The regulation sets forth the criteria DHEC should consider to determine the need for a landfill prior to issuing a DON approval. *See id.* The regulation states that a 10-mile "planning area" radius[7] around the proposed facility should be used to determine the need for a C&D landfill. *Id.* The regulation specifies that DHEC will consider the following criteria:

> a. Where there are at least two (2) commercial disposal facilities under separate ownership within the planning area that meet the disposal needs for the area, e.g., that accept special waste and, if applicable, are capable of handling additional tonnage, no new

[6] The DON Regulation was implemented in 2000 and was amended effective June 26, 2009. Both DHEC and the ALC utilized the 2000 version in reviewing the application for the Landfill. As such, we will consider the original version of the DON Regulation in our analysis.

[7] The amended version of the regulation requires a 20-mile "planning area" radius. S.C. Code Ann. Regs. 61-107.17(C)(3) (Supp. 2012). Coleman testified that if the amended version's 20-mile radius had applied to determine the need for the Landfill, DHEC would have denied the Landfill Permit.

disposal facility will be allowed. Disposal facilities that accept only waste generated in the county or region in which the disposal facility is located will not be considered in determining need.

b. Each disposal facility in the planning area will be allowed up to a maximum yearly disposal rate equal to the total amount of solid waste destined for disposal that is generated in the county or counties that fall, either all inclusive or a portion thereof, within the planning area. Disposal rates for existing facilities shall not be reduced pursuant to this provision.

c. In determining the amount of solid waste destined for disposal, [DHEC] will use figures in the current Solid Waste Annual Report for the proposed waste streams, e.g., the generation rate for a [C&D landfill] will be determined by adding the amounts of construction and debris [] destined for disposal in permitted [C&D landfills] in the counties that fall within the planning area.

d. [DHEC] **reserves the right to review additional factors** in determining need on a case-by-case basis.

Id. (emphasis added).

It is undisputed that the Landfill satisfied the requirements of subsections (a), (b), and (c) of the DON Regulation. However, Petitioner asserts that DHEC should have also utilized subsection (d) in analyzing the need for the Landfill and considered additional factors. Petitioner contends that DHEC should have considered the existing permitted disposal capacity in the counties that were a part of the Landfill's planning area as an additional factor, and thus, the ALC was correct in applying an "additional factor" under subsection (d).

Our state's constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review." S.C. Const. art. I, § 22. To that end, the ALC conducts a de novo hearing in contested cases, complete with the presentation of evidence and testimony. *Hill*, 389 S.C. at 9, 698 S.E.2d at 616; *Brown v. S.C. Dept. of Health & Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). In contested permitting cases, the ALC presides as the fact-

finder. *Brown*, 348 S.C. at 512, 560 S.E.2d at 413 (citation omitted). According to the APA, an ALC's "final decision *shall include* findings of fact and conclusions of law, separately stated." S.C. Code Ann. § 1-23-350 (2005) (emphasis added). Consequently, the ALC is authorized to make a final determination—after a final agency decision and subject to judicial review—as to whether an administrative agency should have granted or denied a particular permit. *See Brown*, 348 S.C. at 512–16, 560 S.E.2d at 413–15. As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence. *MRI at Belfair, L.L.C. v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008).

Because an ALC is not bound to an agency's factual findings or permitting decision, the ALC in this case was not bound to DHEC's decision issuing the Landfill Permit, in which DHEC declined to consider the excess regional capacity as an "additional factor" in determining need. *See Hill*, 389 S.C. at 9, 698 S.E.2d at 616; *Brown*, S.C. at 512, 560 S.E.2d at 413. For that reason, the ALC in this case conducted a full contested hearing, de novo, and made its own findings of fact. We hold that those findings of fact are supported by substantial evidence. Upon finding that the facts warranted the application of the "additional factor" because the C&D landfills in the Landfill planning area accept waste from other counties, the ALC—unlike DHEC—applied an "additional factor" based on those factual findings. S.C. Code Ann. Regs. § 61-107.17(D)(3)(d) (permitting the application of "additional factors in determining need on a case-by-case basis").

We find that the ALC, as the fact finder and the final agency decision maker was authorized to apply regional excess capacity as an "additional factor" in denying the Landfill Permit, regardless of the fact that DHEC declined to utilize the "additional factors" section of the DON Regulation. *See* S.C. Code Ann. § 1-23-610(B) ("The Court may not substitute its judgment for the ALC's judgment as to the weight of the evidence on questions of fact."). Accordingly, we disagree with the court of appeals' deference to DHEC's decision to decline to apply the "additional factors" section and hold that the ALC committed no error of law in reversing DHEC's decision.[8] Thus, we find that the ALC properly considered the regional excess landfill capacity by making a conclusion of law *based upon* the

[8] We note that, likewise, in its opinion, the court of appeals pointed to no error of law on the part of the ALC, as required by section 1-23-610(B) to reverse an ALC's decision.

ALC's own findings of fact, and as a result, the ALC was not required to defer to DHEC's decision.

Respondent argues that regional excess landfill capacity is not an appropriate "additional factor" for consideration under the DON Regulation. We disagree, and find that the ALC was permitted to consider regional excess landfill capacity as an additional factor because it was a matter at issue that had been litigated from the time the Landfill Permit was first contested. We emphasize that in this case, the ALC did not conceive a new factor, nor did it consider evidence outside of the existing record. Instead, in determining the Landfill was not needed, the ALC considered and utilized in its decision a factor that was discussed during the public comment period and tried at the ALC hearing. We conclude that the ALC's application of regional excess landfill capacity as an "additional factor" under the DON Regulation was supported by substantial evidence. *See Hill*, 389 S.C. at 9, 698 S.E.2d at 616. Therefore, the ALC did not exceed its authority in reversing DHEC's decision.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals and reinstate the ALC's order denying the Landfill Permit.

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of Frank Barnwell McMaster, Respondent.

Appellate Case No. 2014-000334

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) and (b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent has filed a return and supplemental return in opposition to the petition for interim suspension. The petition for interim suspension is granted.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
March 4, 2014

The Supreme Court of South Carolina

In the Matter of John Kevin Owens, Respondent.

Appellate Case No. 2014-000412

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also requests appointment of the Receiver to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the issuance of an order of interim suspension in this matter.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts 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 account(s) 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 the Receiver, Peyre Thomas Lumpkin, 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 the Receiver, Peyre Thomas Lumpkin, 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. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
March 5, 2014

The Supreme Court of South Carolina

In the Matter of Daniel Nathan Hughey, Respondent.

Appellate Case No. 2014-000411

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
March 5, 2014