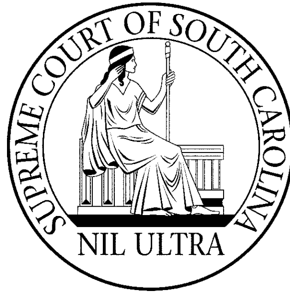

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14
March 30, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Samuel Brownlee and Richard Jolly, Respondents,

v.

South Carolina Department of Health and Environmental Control, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Mikell R. Scarborough, Circuit Court Judge

Opinion No. 26620
Heard January 22, 2009 – Filed March 30, 2009

REVERSED

General Counsel Carlisle Roberts, Jr. and Staff Attorney Sara P. Bazemore, of Columbia, for Petitioner.

Christopher M. Holmes, of Mt. Pleasant, for Respondents.

JUSTICE BEATTY: We granted the petition of the South Carolina Department of Health and Environmental Control (DHEC) for certiorari to review the decision in Brownlee v. South Carolina Department of Health and Environmental Control, 372 S.C. 119, 641 S.E.2d 45 (Ct. App. 2007). In Brownlee, the South Carolina Court of Appeals reversed a circuit court order affirming the denial of dock permits to Samuel Brownlee and Richard Jolly (Landowners) by DHEC's Office of Ocean and Coastal Resource Management (OCRM). We reverse, finding DHEC properly denied the permit requests.

I. FACTS

Landowners have property on Johns Island that is adjacent to an unnamed tributary of the Bohicket River in Charleston County, South Carolina. Landowners brought this action against DHEC after it denied their requests for construction permits to extend their docks across the tributary to the Bohicket River. Landowners asserted the location of a dock owned by a neighbor, Lawrence Atkinson, was situated near the mouth of the tributary in a manner that made the water no longer navigable.

DHEC denied the permits on the basis it would be contrary to existing regulations to allow the docks to cross the tributary. Specifically, after DHEC staff conducted a boat trip in the area, DHEC determined the tributary was navigable and that construction of the docks would violate the regulatory prohibition on crossing navigable creeks. DHEC advised the Landowners of its decision in letters sent in April 2002:

> OCRM staff [DHEC] has determined that authorizing the dock extension would be counter to Regulations. OCRM Regulations specifically state, "docks shall not impede navigation and they can only extend to the first navigable creek as evidenced by a significant change in grade." OCRM staff performed a boat trip and found that the creek exhibits significant width (50′) and change in grade at your dock that exudes the very nature of a

waterbody that is navigable. Furthermore, the creek has an established history of public use as evidenced by the 4 docks that currently access this creek.

DHEC relied upon several provisions, including former 23A S.C. Code Ann. Regs. 30-12(A)(2)(n) (Supp. 2001),[1] in support of the denial of Landowners' applications. This regulation has since been amended, but the former version relied upon by DHEC at the time the permit applications were considered is controlling for purposes of this appeal.[2]

---

[1] Former regulation 30-12(A)(2)(n) provided as follows:

> Docks must extend to the first navigable creek with a defined channel as evidenced by a significant change in grade with the surrounding marsh. Such creeks cannot be bridged in order to obtain access to deeper water. However, pierheads must rest over open water and floating docks which rest upon the bottom at normal low tide will not normally be permitted.

[2] The current version of this provision, now renumbered and denominated as Regulation 30-12(A)(1)(n), states as follows:

> Docks must extend to the first navigable creek, within extensions of upland property lines or corridor lines, that has a defined channel as evidenced by a significant change in grade with the surrounding marsh; or having an established history of navigational access or use. Such creeks may only be bridged/crossed when there are rare geographic circumstances, such as very close proximity of a significantly larger creek within extensions of property or corridor lines, [which] may warrant dock extension to a creek other than the first navigable creek. A creek with an established history of navigational use may also be considered as navigable. In exceptional cases, the Department may allow an open water channel to be bridged if current access is prohibited by other man made or natural restrictions or if site-specific conditions warrant such a crossing.

23A S.C. Code Ann. Regs. 30-12(A)(1)(n) (Supp. 2008) (emphasis added). DHEC notes that under either version of the regulation – the one in effect when the permits were first considered or the current regulation - DHEC would deny the permit applications. Under the current regulation, access must be prohibited by a man-made or natural restriction to warrant an exception, and the parties acknowledge that access is not prohibited at this time. Landowners argue there was an intervening version of the regulation that allowed a navigable creek to be bridged if the creek merely had impeded access, so the permits

Upon review, an administrative law judge[3] (ALJ) ordered DHEC to issue the permits. The ALJ noted that "[a] creek is not navigable unless the waterway has the capacity for 'valuable floatage,'" and the test is not whether it is accessible at all times, but whether it is accessible at the ordinary stage of the water." He stated that "the area of the tributary in front of [Landowners'] property is currently a defined channel, as evidenced by a significant change in grade with the surrounding marsh." However, he "conclude[d] that in order for a waterway to be legally navigable under Regulation 30-12A(2)(n), the navigation of the waterway must not be so impeded as to create a frequent hazard."

The ALJ stated the waterway was not navigable and explained "the determination that the tributary is not navigable is due to a man-made impediment. If the Atkinson dock is removed from its location in the mouth of the tributary, the impediment would no longer exist and the tributary would be a navigable stream." The ALJ reversed DHEC's decision and remanded the case for DHEC to either have the Atkinson dock removed from its current location and built as permitted[4] or to approve Landowners' applications.

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should be granted. However, we find this argument is unavailing as it is clear that this prior version, which existed for a limited time, is not applicable in this case and it does not mandate granting of the permits, in any event.

[3] The name has since changed to the Administrative Law Court.

[4] In 1991, as Atkinson was building his dock, the South Carolina Coastal Council, the predecessor to DHEC's OCRM, discovered through a neighbor's report and an on-site inspection that he was not in compliance with the dock permit he had been issued. Atkinson requested authorization for construction of the dock "as-built." By letter dated September 4, 1991, DHEC denied the request, finding the location of the dock is substantially different from that originally permitted and that it "presents a hazard to navigation both in its proximity to the mouth of the tributary and in its channelward extension." Atkinson was advised in the letter that enforcement proceedings would be instituted to bring the dock into compliance. On November 22, 1991, the Coastal Council issued an Administrative Order finding the Atkinson dock was not in compliance with the permit and instructing Atkinson to relocate the dock within thirty days. However, there is no indication in the record that any enforcement action was ever taken. At oral argument, we asked DHEC for further information about the status of the

Upon motion, the ALJ amended his order "to clarify [his] conclusions" as follows:

> Though the waters of the tributary in front of the [Landowners'] property <u>are navigable</u>, the waterway itself is not navigable <u>because the mouth of the tributary</u> cannot safely be entered at the ordinary stages of the tide. This case presents exceptional facts because the safety of the navigation varies depending upon the winds, tide, currents, etc. [Emphasis added.]

In this amended order, the ALJ ordered DHEC to grant outright Landowners' permit applications to extend their docks to the Bohicket River.

The Coastal Zone Management Appellate Panel (the Appellate Panel) reversed the ALJ and reinstated the denial of the permits, finding the ALJ had erred in several conclusions of law. Specifically, the Appellate Panel found the ALJ "erred in his interpretation of 23A S.C. Code Ann. Regs. 30-12(A)(2)(n), where he concludes in Conclusion of Law Number 6, that 'in order for a waterway to be legally navigable . . . , the navigation of the waterway must not be so impeded as to create a frequent hazard.'" In addition, the panel found the ALJ committed "reversible error in Conclusion of Law Number 4, specifically: 'the facts establish that the mouth of the tributary cannot be consistently navigated safely at the ordinary stages of the tides because of the Atkinson dock. Therefore, I find that it currently is not a navigable waterway.'"

The circuit court affirmed the Appellate Panel. The circuit court stated the "central issue" in this case "concerns an interpretation of state law that limits the circumstances under which docks may be constructed across navigable waterways, specifically the interpretation of . . . Reg. 30-12 . . . ."

Atkinson dock. DHEC subsequently provided a letter dated October 27, 1992 from the Coastal Council to Atkinson advising Atkinson that his "permit has been amended to authorize the 'as-built' dock" and that the amendment closed the "enforcement file" in this case. Atkinson was advised, however, that "[t]his letter does not relieve you of your responsibility of acquiring any other applicable federal or local permits that may be required."

The circuit court concluded that the Appellate Panel acted "within the scope of [its] authority by setting forth [its] own interpretation of the regulations" and "agree[d] with [its] interpretation that Reg. 30-12 prohibits the crossing of navigable waterways unless there is an obstruction, which prohibits navigation at most stages of the tide cycle."

Upon further review, the South Carolina Court of Appeals reversed in a split decision. The majority found the ALJ had not committed an error of law and his factual findings were supported by substantial evidence and should be upheld under the applicable standard of review. Brownlee, 372 S.C. at 126, 641 S.E.2d at 48. In particular, the majority held the Appellate Panel's determination that the ALJ had misinterpreted what constitutes a navigable waterway under Regulation 30-12(A)(2)(n) was in error. Id.

The dissent, in contrast, agreed with the Appellate Panel's determination that the ALJ erred in his interpretation of what legally constitutes a navigable waterway. The dissent noted that the ALJ had expressly found the tributary was navigable, but the ALJ had, nevertheless, concluded that because navigation at the mouth of the tributary was impeded by the Atkinson dock, the tributary was rendered nonnavigable. Id. at 133, 641 S.E.2d at 52 (Goolsby, J., dissenting). The dissent contended that "[t]he mere fact that an artificial structure, such as Atkinson's dock, impedes navigation, does not make the waterway nonnavigable" and that there was "no compelling reason to reverse the agency's interpretation of its own regulation." Id. at 134, 641 S.E.2d at 52. This Court granted DHEC's request for a writ of certiorari.

II. ISSUES

On certiorari, DHEC contends the Court of Appeals erred in evaluating the legal standard for navigability in this case as a question of fact rather than a question of law. DHEC also contends the Appellate Panel's interpretation of its regulation should be awarded deference and upheld.

III. LAW/ANALYSIS

A. Standard of Review

This case involved multiple levels of review. Under the Administrative Procedures Act, the ALJ presided as the fact finder in this matter. Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002). The proceeding before the ALJ was in the nature of a de novo hearing, including the presentation of evidence and testimony. Id. Under the review procedure in effect at the time, the Appellate Panel was authorized to reverse the ALJ based on an error of law or if his findings were not supported by substantial evidence.[5] See Dorman v. South Carolina Dep't of Health & Envtl. Control, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002).

"Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005); see also Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 591 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.").

B. Navigability

DHEC argues the Court of Appeals erred in evaluating navigability as a question of fact because DHEC does not challenge the facts in this case, but rather, the legal standard applied by the ALJ. DHEC asserts: "[T]he ALJ developed a test which provides that a waterbody is not navigable when challenges to easy and safe navigation exist. In contrast, the [Appellate] Panel determined that pursuant to the legal test of navigability, a waterbody is

[5] The review procedure under the Administrative Procedures Act was changed by 2006 South Carolina Laws Act No. 387, which eliminated the review of the ALJ's determination by the Appellate Panel. Chem-Nuclear Sys. v. South Carolina Bd. of Health & Envtl. Control, 374 S.C. 201, 648 S.E.2d 601 (2007). However, this appeal continues under the prior procedure.

navigable despite certain challenges to navigability. That fundamentally is a dispute as to the appropriate legal standard, and not a dispute of facts." DHEC contends "[t]he [Appellate] Panel interpreted regulation 30-12(A)(2)(n) to mean that some impairment does not render a waterbody nonnavigable. . . . In practical terms, every dock creates some impairment to navigation, yet that does not render the waterbody nonnavigable."

DHEC further contends that "under the ALJ's test of navigability which considers wind, currents and safety, the frequent small craft advisories issued . . . on windy days would potentially result in [waterways] being deemed [nonnavigable] at times and ultimately destroy the navigable status of [waterways] containing 'unsafe' conditions." DHEC argues the Court of Appeals erred in viewing the appeal as a dispute of fact rather than a challenge to the correct legal standard.

In this case, the Court of Appeals stated the question of navigability was a question of fact and that the ALJ found those facts adverse to DHEC and these findings should be upheld under the applicable standard of review. Although navigability may turn on the facts of the case, the determination regarding navigability here was influenced by the ALJ's interpretation of the law. The majority extensively quoted the ALJ's findings, stating these were factual findings that were supported by the evidence. However, the findings and conclusions were based on the definition of navigability that was applied and the interpretation of a regulation. The ALJ found the tributary in front of Landowners' property was inherently navigable, but concluded the entire tributary had been rendered nonnavigable because a neighbor's dock at "the mouth of the channel" created an impediment at that point. Although we agree the ALJ is the fact-finder in this proceeding, we find that his determination of navigability was based on his application of those facts to the law.

Former Regulation 30-12(A)(2)(n), which was in effect at the time of DHEC's consideration of the permit applications, provided that docks could not be built over "navigable creeks" in order to access deeper water:

> Docks must extend to the first navigable creek with a defined channel as evidenced by a significant change in grade with the surrounding marsh. Such creeks cannot be bridged in order to obtain access to deeper water. However, pierheads must rest over open water and floating docks which rest upon the bottom at normal low tide will not normally be permitted.

23A S.C. Code Ann. Regs. 30-12(A)(2)(n) (Supp. 2001) (emphasis added).

"Navigable water is a public highway which the public is entitled to use for the purposes of travel either for business or pleasure." State ex rel. Lyon v. Columbia Water Power Co., 82 S.C. 181, 189, 63 S.E. 884, 888 (1909).

Navigable water is protected under state law to ensure public access. S.C. Const. art. XIV, § 4 (declaring navigable waters to be public highways for which citizens are entitled to free access); S.C. Code Ann. § 49-1-10 (Supp. 2008) ("All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free . . . .").

In determining navigability, "[t]he true test to be applied is whether a stream inherently and by its nature has the *capacity* for valuable floatage, irrespective of the fact of actual use or the extent of such use." State ex rel. Medlock v. South Carolina Coastal Council, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986). "Valuable floatage is not necessarily commercial floatage." Id. Commercial use of the waterway is not required for it to be navigable; and pleasure traffic is entitled to protection in using the waterway. Hughes v. Nelson, 303 S.C. 102, 399 S.E.2d 24 (Ct. App. 1990).

"Valuable floatage" is a term that has been used as the standard in this state for many years. See Heyward v. Farmers' Mining Co., 42 S.C. 138, 19 S.E. 963 (1894) (applying this term). "Valuable floatage" is not determined by what specific size or class of vessel or object can achieve buoyancy in the waterway; rather, the term is defined broadly to include any legitimate and

beneficial use, whether commercial or recreational. White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 125, 609 S.E.2d 811, 815 (Ct. App. 2005).

As we have previously stated:

> Section 49-1-10 of the South Carolina Code does not change the definition of navigable waters, but merely emphasizes the law already declared and set out in *Heyward v. Farmers Mining Company,* 42 S.C. 138, 19 S.E. 963 (1894). The Court in *Heyward* rendered a thorough pronouncement of the law of navigability. As noted in *Heyward,* the common law doctrine that the navigability of a stream is to be determined by the ebb and flow of the tide was repudiated in South Carolina in the case of *State v. Pacific Guano Co.,* 22 S.C. 50 (1884).
>
> The Court clarified in *Heyward v. Farmers Mining Company,* 19 S.E. at 971, that neither the character of the craft nor the relative ease or difficulty of navigation are tests of navigability. The surroundings (e.g. marshland) need not be such that it may be useful for the purpose of commerce nor that the stream is actually being so used. The Court points out a distinction between navigable waters of the United States and navigable waters of the State. In order to be navigable under the United States, the water must connect with other water highways so as to subject them to the laws of interstate commerce. This is not a requirement for navigability of waters under the control of the State.

State ex rel. Medlock, 289 S.C. at 449, 346 S.E.2d at 719 (emphasis added).

Access at all times is not required for the waters to be navigable. In Hughes v. Nelson, the Court of Appeals held a canal was navigable despite the fact that, "[a]t certain times of the year, the canal has very little water in it, making access difficult." Hughes, 303 S.C. at 104, 399 S.E.2d at 25. The canal was approximately fifteen feet wide and twelve feet deep and had been used by the public for fishing and recreation, but not commercial traffic.

Nelson blocked the opening to the canal and argued it was not navigable because "the canal cannot sustain boat traffic or be fished for certain periods during the year because of insufficient depth." Id. at 106, 399 S.E.2d at 26.

In rejecting the argument the canal was not navigable, the Court of Appeals stated: "The test of navigability is not whether a waterway is accessible at all times. Rather, the test is whether it is accessible 'at the ordinary stage of the water.'" Id. (quoting State v. Columbia Water Power Co., 82 S.C. 181, 186, 63 S.E. 884, 888 (1909)).

Moreover, "[i]n order that the stream or body of water be classed as navigable, it need not be navigable in its entirety." 65 C.J.S. Navigable Waters § 7 (2000). "In other words, a stream or body of water which is susceptible of being used in its ordinary condition as a highway of commerce may be navigable regardless of whether it admits the passage of boats at all portions thereof, and the general character of a stream as being navigable is not changed by the fact that at a particular place it is not in fact navigable by boats." Id.

In this case, the ALJ specifically stated that "the waters of the tributary in front of [Landowners'] property are nagivable," but nevertheless concluded that "the waterway itself is not navigable because the mouth of the tributary cannot safely be entered at the ordinary stages of the tide. This case presents exceptional facts because the safety of the navigation varies depending upon the winds, tide, currents, etc." [Emphasis added.] The ALJ referred to the test for navigability, but added the additional qualification that navigation of the waterway must not be so impeded as to create a frequent hazard.

The fact that the mouth of the tributary has a man-made impediment does not render the entire tributary nonnavigable. "The navigability of water does not depend on its actual use for navigation, but on its capacity for such use . . . . [T]he definition of navigable water embraces, not only that which is actually used, but that which is susceptible of use for navigation in its ordinary state." State ex rel. Lyon, 82 S.C. at 187, 63 S.E. at 888. In State ex rel. Lyon, we held that the fact that a waterway ceased to be passable because

a lock at the Broad River terminus had been so neglected that it could not be used did not render the waterway nonnavigable as the waterway was capable of navigation up to the lock. Id.

As the dissent noted in the current appeal, the test for navigability does not hinge on the existence of man-made impediments or other obstructions, and these impediments do not cause the waterway to lose its characterization as navigable.[6] See 65 C.J.S. Navigable Waters § 8 (2000) ("As a general rule a stream or other body of water is not rendered nonnavigable because of occasional difficulties attending navigation. The existence of occasional natural obstructions do not destroy the navigability of a river. So, a stream may be navigable despite the obstruction of falls, rapids, sand bars, carries, or shifting currents. Artificial obstructions which are capable of being abated by the due exercise of pubic authority do not prevent a stream from being regarded as navigable . . . ." (footnotes omitted)); see also State v. Head, 330 S.C. 79, 89, 498 S.E.2d 389, 394 (Ct. App. 1997) ("[T]he existence of occasional natural obstructions to navigation, such as rapids or falls, or the construction of authorized or unauthorized artificial obstructions to navigation, such as dams, generally does not change the character of an otherwise navigable stream.").

The ALJ's factual findings are not in dispute in this case, but his conclusions as to navigability were based on not only the facts, but also his interpretation of the legal test for navigability. See 65 C.J.S. Navigable Waters § 3 (2000) ("Each determination as to navigability must rest on the facts and circumstances of the particular case. To these facts and

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[6] In his original order the ALJ found the tributary was navigable at mid-tide and higher and it was possible to easily navigate around the Atkinson dock, though the dock presented a hazard: "While the tributary itself can be navigated at mid-tide and higher, the 'thead' of the stream goes underneath the Atkinson dock and is an impediment to boaters attempting to enter or exit the tributary. Though it is possible to easily navigate around the dock, as reflected by the experience of the OCRM staff, that ease of navigation is dependent upon unpredictable winds and currents. Therefore, I find that the Atkinson dock as it is currently situated presents a frequent hazard to safe navigation in and out of the tributary at the ordinary tides due to the location of the channel of the tributary under the Atkinson dock, the existence of the sand bar/mud flat on the side of the mouth opposite the Atkinson dock, and the prevailing winds and currents."

circumstances, however, certain judicial standards are to be applied for determining whether the complex of conditions with respect to the capacity of the water . . . renders it a navigable stream.").

The ALJ essentially found the tributary was navigable but for the Atkinson dock; however, our precedent establishes that the entire tributary did not lose its navigability merely because there was an impediment that made access at the mouth of the tributary where it joined the Bohicket River more difficult. See State v. Head, 330 S.C. at 91, 498 S.E.2d at 395 (holding the judge applied an erroneous test of navigability by agreeing that the creek in question was navigable except for a "stopping point" such as a dam that prevented navigability); see also 78 Am. Jur. 2d Waters § 125 (2002) ("Once a waterway has been deemed navigable, it remains so; it retains its navigable status, even though it is . . . presently incapable of use because of changed conditions or the presence of obstructions."). Thus, we hold the ALJ committed an error of law in assessing navigability in this case and that the Court of Appeals decision should be reversed.

C. Atkinson Dock

Finally, we note that the Court of Appeals correctly observed in its majority opinion that the cause of this entire litigation is the location of the Atkinson dock, which has made traversing the mouth of the tributary where it meets the Bohicket River more difficult. Brownlee, 372 S.C. at 128, 641 S.E.2d at 49. As that court remarked, "The dock remains to this day in the same place, still impeding navigation." Id.

We believe this is a prime example of an "[a]rtificial obstruction[] which [is] capable of being abated by the due exercise of public authority," 65 C.J.S. Navigable Waters § 8, and we are bewildered as to why DHEC has allowed the Atkinson dock to remain in this location since 1991. After Atkinson built his nonconforming dock, he requested an as-built permit, but the request was promptly denied and Atkinson was advised that enforcement proceedings would be commenced to require the dock to be brought into compliance. Although an administrative order was issued on November 22,

1991 directing Atkinson to relocate the dock within thirty days, the record on appeal revealed no further action taken in this regard.

DHEC opined during oral argument that its failure to require compliance could have arisen from a general lack of resources, particularly its inability to perform on-site inspections for every permit application. However, an on-site inspection was already conducted by DHEC in 1991 that revealed the dock was not in compliance. Thus, DHEC needed only to follow up on its own directives. After oral argument in this matter, DHEC investigated further and subsequently submitted a letter from the Coastal Council to Atkinson dated October 27, 1992 advising him that it had amended Atkinson's permit and had approved the "as-built" dock. No explanation is provided as to why Atkinson's dock was approved in this manner. We note the unnecessary litigation that has been spawned with this case and several others by the location of the Atkinson dock constitutes a waste of valuable judicial resources. Public funds would have been better spent in enforcing compliance rather than engaging in protracted litigation to resolve what is essentially a dispute among neighbors.

Section 49-1-10 of the South Carolina Code declares that obstruction of a stream is a "nuisance and such obstruction may be abated as other public nuisances are by law." S.C. Code Ann. § 49-1-10 (Supp. 2008). We strongly believe that equal enforcement of the rules and regulations and compliance with the law by all parties is absolutely essential to avoiding precisely the problems generated here.

IV. CONCLUSION

Based on the forgoing, we find the ALJ committed legal error in reversing the Appellate Panel and that DHEC's denial of the permit requests should be reinstated. However, we urge DHEC to take the proper steps to prevent additional unnecessary litigation in this regard. The decision of the Court of Appeals is, hereby,

REVERSED.

TOAL, C.J., and KITTREDGE, J., concur. PLEICONES, J., concurring in part, dissenting in part in a separate opinion in which WALLER, J., concurs.

JUSTICE PLEICONES: I join the majority except as to Part 3 C captioned "**Atkinson Dock**" and the second sentence of the Conclusion urging DHEC "to take proper steps to prevent additional unnecessary litigation." As I read this record, we are not asked, nor do we have any basis, to comment upon Coastal Council's decision to amend the permit and approve the "as-built" dock, to scold DHEC, to imply that the dock constitutes a "public nuisance," or to suggest that there has been an unequal enforcement of rules and regulations. In my opinion, an appellate court must confine its discussion as narrowly as possible solely to the issues properly presented for its consideration. As Chief Judge Sanders famously wrote, "[A]ppellate courts in this state . . . . do not answer questions they are not asked." Langley v. Boyter, 284 S.C. 162, 325 S.E.2d 250 (Ct. App. 1984) *subsequent history omitted*.

WALLER, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alex Kiriakides, III, Mary Ann Kiriakides, and Michael Kiriakides, as Personal Representatives of the Estate of Alex Kiriakides, Jr., Appellants/Respondents,

v.

The School District of Greenville County, South Carolina, a Political Subdivision, Respondent/Appellant.

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 26621
Heard December 3, 2008 – Filed March 30, 2009

AFFIRMED

David Lloyd Thomas, of Moore, Taylor & Thomas, of Greenville, and S. Jahue Moore, of Moore, Taylor & Thomas, of West Columbia, for Appellants-Respondents.

Thomas W. Traxler and Travis V. Olmert, both of Carter, Smith, Merriam, Rogers & Traxler, of Greenville, for Respondent-Appellant.

JUSTICE BEATTY: Alex Kiriakides, Jr. (Kiriakides) sued the School District of Greenville County (the School District) to prevent it from condemning his property. He also sought damages for inverse condemnation for the School District's alleged delay in this matter, as well as attorneys' fees. The master-in-equity found in favor of the School District on the condemnation claims, but awarded attorneys' fees to Kiriakides. Kiriakides and the School District filed cross appeals.[1] We affirm.

I. FACTS

Kiriakides owned property in Greenville County that was formerly the site of the Bijou Theater, an eight-theater multiplex. During the first half of 2001, the property was under a monthly lease to United Artists. United Artists was in bankruptcy proceedings during this time.

In February 2001, a real estate agent working for the School District, Henry Garrison, advised Kiriakides that the School District was interested in purchasing the property. The Kiriakides property adjoined Wade Hampton High School, and the School District wanted to renovate and expand the school. Kiriakides initially informed Garrison that he did not want to sell the property, but that he would lease it.

In June 2001, United Artists stopped paying rent and moved out of the theater. Kiriakides and the School District continued their negotiations for a voluntary sale until approximately April 2002, but when the negotiations proved unsuccessful, the School District began the process to acquire the property by eminent domain.

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[1] Alex Kiriakides, Jr. passed away before oral argument was held in this matter. This appeal continues via his personal representatives.

The School District retained an appraiser as part of the preliminary preparation for a condemnation proceeding, but Kiriakides refused to allow entry on his property. On April 30, 2002, the School District filed a complaint seeking an order of entry. On May 1, 2002, the circuit court issued an "Order for Entry Pursuant to S.C. Code Ann. § 28-2-70 (1991)" allowing the School District to enter upon the property to make a survey, to determine the location of proposed improvements, and to prepare an appraisal.

Due to the workload of the appraiser, the appraisal was first given to the School District in late July 2002. On or about August 12, 2002, the School District served Kiriakides with a "Condemnation Notice and Tender of Payment" pursuant to the South Carolina Eminent Domain Procedure Act.[2]

The School District never filed the condemnation action with the court, however, because on August 23, 2002, Kiriakides instituted the current action challenging the right of the School District to condemn his property. In his pleadings, Kiriakides additionally sought damages for inverse condemnation and attorneys' fees, alleging "[t]he stigmatization of [his] property as well as the unreasonable delay in commencing condemnation [proceedings] has amounted to an inverse condemnation of [his] property."

In May 2003, because of the urgency of the school construction project and the existence of this litigation challenging the right to proceed with condemnation, the School District notified Kiriakides that it had abandoned its efforts to condemn the property. The School District ultimately purchased a different piece of property located nearby.

Thereafter, in December 2005, the master held a bench trial regarding Kiriakides's complaint. By order filed May 4, 2006, the master ruled in favor of the School District, finding as follows: (1) Kiriakides's challenge to the School District's right to condemn his property was moot because the School District had abandoned its condemnation efforts; (2) any challenge to the delay in the condemnation proceedings was likewise moot and there was no evidence of delay, in any event; and (3) Kiriakides had not established his inverse condemnation claim and was not entitled to damages.

[2] The Act is codified at S.C. Code Ann. §§ 28-2-10 to -510 (2007).

After a post-trial motion and hearing, the master awarded Kiriakides $6,500 in attorneys' fees pursuant to a provision in the South Carolina Eminent Domain Procedure Act based on his finding that the School District had "abandoned its condemnation efforts." This cross appeal followed.

II. LAW/ANALYSIS

On appeal, Kiriakides challenges the master's ruling in favor of the School District on his claim for inverse condemnation, and the School District challenges the master's award of attorneys' fees to Kiriakides.

A. KIRIAKIDES'S APPEAL

Kiriakides contends the master erred in denying his claim for inverse condemnation. We disagree.

"The concept of inverse condemnation was originally conceived as a remedy for the physical taking of private property without following eminent domain procedures." 11A Eugene McQuillin, The Law of Municipal Corporations § 32.132.20 (3d ed. 2000) (citing, inter alia, Woods v. State, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993)). "Inverse condemnation is, therefore, a cause of action against a governmental defendant to recover the value of property which has been taken in fact by a governmental entity although not through eminent domain procedures." Id.

"One basic difference between condemnation and inverse condemnation is that in condemnation proceedings, the governmental entity is the moving party, whereas, in inverse condemnation, the property owner is the moving party." South Carolina State Highway Dep't v. Moody, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976).

A landowner has the burden of proving damages for the taking of the landowner's property, whether through condemnation proceedings or by inverse condemnation. Brenco v. South Carolina Dep't of Transp., 377 S.C.

124, 128, 659 S.E.2d 167, 169 (2008) (citing Owens v. South Carolina State Highway Dep't, 239 S.C. 44, 54, 121 S.E.2d 240, 245 (1961)).

Not all damages that are suffered by a private property owner at the hands of the governmental agency are compensable. Woods v. State, 314 S.C. 501, 504, 431 S.E.2d 260, 262 (Ct. App. 1993). The property itself must suffer some diminution in substance, or it must be rendered intrinsically less valuable. Id.

"[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request." Cobb v. South Carolina Dep't of Transp., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005).

Inverse condemnation claims can result from two instances: "An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property." Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005).

In the second instance, where there is a regulatory inverse condemnation, there are two elements that must be shown: (1) affirmative conduct, and (2) a taking. Id. at 657, 620 S.E.2d at 80. The analysis of whether a taking has occurred is governed by the case of Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) when the claim stems from an allegation of a temporary denial of less than all economically viable use of the property. Id. at 658, 620 S.E.2d at 80. "In the context of a regulatory delay, the *Penn Central* inquiry is whether the delay ever became unreasonable." Id. at 81, 620 S.E.2d at 660. "Until regulatory delay becomes unreasonable, there is no taking." Id.

As enumerated in Byrd, two circumstances are particularly important: (1) the economic impact on the claimant, especially the extent to which the governmental entity has interfered with the claimant's investment-backed expectations, and (2) the character of the governmental action. Id. at 659, 620 S.E.2d at 80 (citing Penn Central, 438 U.S. 104, 124 (1978)).

In the case now before us, the parties conceded, and the master specifically found, that there was never any physical occupation or appropriation of Kiriakides's property, the first type of taking under Byrd. Rather, Kiriakides asserted the stigmatization of his property by the threat of condemnation amounted to a regulatory inverse condemnation under the second prong of Byrd.

In rejecting this assertion of a regulatory inverse condemnation, the master found there was no act and no taking by the School District that would come within the parameters of an inverse condemnation claim. The master noted: "The parties agree that the School District never imposed any regulations or restrictions on the property of Mr. Kiriakides. The School District's pre-condemnation activities and the service of the Condemnation Notice and Tender of Payment to Mr. Kiriakides certainly did not give rise to a taking, regulatory or otherwise."

The master stated that "[a] *regulatory taking* by its very nature necessitates the existence of some regulation, statute, ordinance, zoning law, or similar rule of law that impacts a landowner's use of his property. In other words, regulatory takings exist only in conjunction with affirmative governmental restrictions on the use of land." The master further stated: "Such was the essence of the *Byrd* case, where Mr. Byrd's property was restricted by zoning regulations, and in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)[,] where land use restrictions constituted a regulatory taking. That does not exist in this case."

The master additionally observed his conclusion was supported by public policy, namely, the construction of public projects would be severely impeded if the government incurred liability for inverse condemnation as a result of merely announcing plans to condemn, citing National By-Products, Inc. v. City of Little Rock, 916 S.W.2d 745, 749 (Ark. 1996) ("Construction of public-works projects would be severely impeded if the government could incur inverse condemnation liability merely by announcing plans to condemn property in the future."); Santini v. Connecticut Hazardous Waste Management Service, 739 A.2d 680, 691 (Conn. 1999) ("[I]f the government were to be considered as having accomplished a compensable taking as a result of mere planning that, because of its publicity, harmed the value of

property, public planning would be discouraged . . . ."); City of Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 903-04 (N.Y. 1971) (stating the threat of condemnation generally does not constitute a taking and any changes in value are incidents of ownership). The master stated that Kiriakides's arguments, "if accepted, would have a devastating impact on government and its citizens."

We agree with the master's determination that Kiriakides did not establish a claim for inverse condemnation. We find no merit to his arguments that the mere threat of a condemnation suit stigmatized his property and that the School District's alleged delay in bringing this action entitled him to damages for an inverse condemnation.

The Supreme Court of the United States has held that the "impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking." Kirby Forest Indus. v. United States, 467 U.S. 1, 15 (1984). In Kirby Forest, the Supreme Court concluded the landowner "failed to demonstrate that its interests were impaired in any constitutionally significant way before the Government tendered payment and acquired title in the usual course." Id. at 16.

The mere institution of condemnation proceedings does not constitute a taking, as it is a legitimate exercise of the government's authority. See generally 29A C.J.S. Eminent Domain § 90 (2007) (stating the mere planning in anticipation of a public improvement is not an actionable taking of property); J. R. Kemper, Annotation, Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected, 37 A.L.R.3d 127 (1971 & Supp. 2008) (discussing acts performed in preparation for and as part of condemnation proceedings and the imposition of liability therefor).

The evidence shows that the School District and Kiriakides engaged in extensive negotiations concerning a voluntary sale of the property until at least April 2002. During this time, no public action was taken by the School District that would "stigmatize" the property as Kiriakides alleges, as the communications were solely with Kiriakides and there was no public filing of a condemnation action. The first public communication occurred when

Kiriakides refused to allow an appraiser to enter his property and the School District filed a motion in April 2002 seeking an order allowing entry.

Thereafter, when negotiations failed, the School District followed the statutory procedures for an eminent domain action and served a notice of condemnation in August 2002. Kiriakides challenged the School District's right to condemn within thirty days of being served with notice by the School District by filing the current, separate action, as was his right under state law, which stayed the condemnation proceedings. See S.C. Code Ann. § 28-2-470 (2007) (providing an "action [challenging a condemnor's right to condemn] must be commenced within thirty days after service of the Condemnation Notice upon the landowner" and that "[a]ll proceedings under the Condemnation Notice are automatically stayed until the disposition of the action, if any, unless the landowner and the condemnor consent otherwise").

We discern no unreasonable delay or bad faith conduct on the part of the School District in this matter. The School District never tried to obtain possession of Kiriakides land, and until Kiriakides refused to allow an appraiser on his property, it had made no public filing in this case. If anything, Kiriakides's failure to cooperate with the School District's efforts to obtain an appraisal and his challenge to the School District's right to condemn extended these proceedings. Further, Kiriakides presented no evidence of damages. He offered no proof that the value of his property was diminished or that he lost any potential sales of his property due to the proceedings. In fact, Kiriakides admitted that he had not tried to sell his property during this time.

The School District's actions were part of the statutorily-mandated process for condemnation, and did not constitute an unreasonable delay in these circumstances that would establish a compensable claim. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 335 (2002) ("A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making."); Woods, 314 S.C. at 504, 431 S.E.2d at 262 (holding not all damages suffered by private property owners at the hands of the government are compensable). The nine-month period between the time the School District served notice of the condemnation in August

2002 until it notified Kiriakides in writing in May 2003 that it was abandoning the condemnation proceeding due to Kiriakides's opposition and the need to proceed with the project did not establish a taking. Cf. Byrd, 365 S.C. at 661-63, 620 S.E.2d at 82 (finding an eleven-month delay in evaluating the rezoning of certain property did not result in a regulatory taking and inverse condemnation).

The master observed that cases from other jurisdictions overwhelmingly hold that normal activities incident to condemnation do not rise to the level of a taking. See Joseph M. Jackovich Revocable Trust v. Alaska Dep't of Transp., 54 P.3d 294, 302 (Alaska 2002) (stating "there is no indication the state did anything more than make announcements, prepare and publish plans, and provide publicity concerning the project" and no evidence the state interfered with the property rights of the landowners); City of Chicago v. Loitz, 295 N.E.2d 478, 480 (Ill. App. Ct. 1973) (observing "the weight of authority in other states and in the Federal courts, is that mere planning by a governmental body in anticipation of the taking of land for public use and preliminary steps taken to accomplish this, without the filing of proceedings and without physically taking or actual invasion of the real estate, is not actionable by the owner of the land").

To the extent Kiriakides's alleges the master improperly considered public policy in determining no inverse condemnation occurred in this matter, we find no error. The master merely cited this as additional support for his conclusion that Kiriakides's position was untenable because if it was accepted, the government would be faced with inverse condemnation claims every time it attempted to survey property and obtain an appraisal, which would preclude the government from engaging in normal activities incident to a condemnation. Accordingly, based on the foregoing, we affirm the master's determination that Kiriakides did not establish a claim for inverse condemnation.

B. THE SCHOOL DISTRICT'S APPEAL

In its cross appeal, the School District contends the master erred in awarding statutory attorneys' fees to Kiriakides. We disagree.

In the order ruling on Kiriakides's complaint, the master found that, "because the School District abandoned its condemnation efforts, that part of the present litigation challenging its right to condemn has been rendered moot." Kiriakides filed a post-trial motion seeking a determination whether he was entitled to attorneys' fees, stating he had requested attorneys' fees in his complaint, but the issue was not addressed in the master's order.[3]

After a hearing, the master issued an order on December 5, 2006, finding Kiriakides was entitled to attorneys' fees pursuant to section 28-2-510(C) of the South Carolina Code, which allows a landowner costs and fees in the event a condemnor abandons a "condemnation action" as follows:

> If the condemnor abandons or withdraws the condemnation action in the manner authorized by this chapter, the condemnee is entitled to reasonable attorney fees, litigation expenses, and costs as determined by the court.

S.C. Code Ann. § 28-2-510(C) (2007) (emphasis added).

The master concluded a reasonable fee would be $6,500, which "fairly represents the portion of the fees in this case that were necessarily related to the issues of abandonment or withdrawal of the condemnation action by the Defendant."[4] On appeal, the School District contends this was error.

The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Id. "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." Id.

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[3] We find the issue is preserved for our review under these circumstances.

[4] Kiriakides submitted an affidavit and statement seeking attorneys' fees of $13,775, representing 55.1 hours at $250 per hour.

(1) Applicability of Section 28-2-510(C).

The School District argues the master erred in awarding attorneys' fees to Kiriakides under section 28-2-510(C) of the South Carolina Eminent Domain Procedure Act because the statute is inapplicable. The School District asserts that, although it served Kiriakides with a Condemnation Notice and Tender of Payment, it never filed the notice with the circuit court; therefore, the action was never commenced. Consequently, it is not liable for attorneys' fees for the abandonment of a "condemnation action."

The master rejected this argument, finding "under the unique facts of this case," a party is entitled to attorneys' fees if the condemnor abandons the action after service of the Condemnation Notice. The master reasoned that "[t]o hold otherwise would . . . encourage a governmental entity to serve its Condemnation Notice, chill the value of the property, negotiate until it determines that the value sought by the landowner is still too high or that another parcel is more suitable, and then unilaterally withdraw its Notice with complete impunity since a condemnation lawsuit was never filed. All to the detriment of the landowner. This certainly cannot be the result intended by our Legislature."

Under Rule 3 of the South Carolina Rules of Civil Procedure, a civil action is generally deemed commenced by filing and serving a summons and complaint. Rule 3(a), SCRCP. Under this rule, both filing and service are required to institute an action. See 24 S.C. Juris. Rules of Civil Procedure § 3.2 (1994) ("Subpart 3(a) requires both the filing and service of a summons and complaint prior to the commencement of a civil action. The South Carolina courts have demanded literal compliance with Rule 3(a).").

The provisions of the South Carolina Eminent Domain Procedure Act, however, constitute the exclusive procedure for condemnation in this state. S.C. Code Ann. § 28-2-210 (2007). Moreover, these provisions control over the South Carolina Rules of Civil Procedure. Id. § 28-2-120 ("In the event of conflict between this act and the South Carolina Rules of Civil Procedure, this act shall prevail.").

In this case, section 28-2-30(5) specifically states a "'[c]ondemnation action' includes all acts incident to the process of condemning property after the service of a Condemnation Notice." Id. § 28-2-30(5) (emphasis added).

The Act also makes reference to service in other provisions. For example, section 28-2-470 provides that a separate action to challenge the condemnor's right to condemn automatically stays a proceeding for condemnation, and the Act requires this separate action to be filed within thirty days after service of the Condemnation Notice. Id. § 28-2-470.

In addition, the Act defines litigation expenses as those incurred from the time of service of the Condemnation Notice, again referencing service:

> (14) "Litigation expenses" means the reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the Condemnation Notice, including, but not limited to, reasonable attorney's fees . . . .

Id. § 28-2-30(14) (emphasis added).

The provisions of the Act are unique and thus the commencement of the condemnation action cannot be measured in terms of regular civil proceedings:

> The Act does not require the issuance of a summons and complaint and the filing of responsive pleadings. Rather, the procedure begins with service of a condemnation notice. The condemnation notice may be served in any manner allowed for serving a summons and complaint in a civil action.

18 S.C. Juris. Eminent Domain § 38 (1993) (emphasis added) (footnotes omitted).

Although there are references to filing in the Act,[5] we hold service marks the time for commencement of the action as defined in the Act. Thus, we find section 28-2-510(C) is applicable in this instance.

(2) Contingency Fee Agreement.

The School District further argues the master erred in awarding attorneys' fees to Kiriakides because he legally owed no fees to his attorneys. One of Kiriakides's attorneys testified that he and his co-counsel had no written fee agreement with Kiriakides, but they did have a contingency fee arrangement with him – their understanding was they were to be paid if Kiriakides recovered on his claims. The attorney acknowledged that they had not billed Kiriakides for any fees and that Kiriakides had paid no fees. [R. 44-46] The School District argues that, because Kiriakides did not prevail on his inverse condemnation claim and he did not obtain a recovery, no attorneys' fees were legally due, relying upon the case of South Carolina Public Service Authority v. Weeks, 201 S.C. 199, 22 S.E.2d 249 (1942).

In Weeks, we considered a statutory provision allowing attorneys' fees for the abandonment of eminent domain proceedings that provided as follows:

> At any time prior to the final conclusion of the condemnation proceeding provided for in this Act and prior to entry into possession by such State Authority, it may abandon, withdraw or dismiss such condemnation proceedings upon payment by it to the owner of all costs and expenses incurred by the owner, and the amount of such costs and expenses shall constitute a lien, for the payment thereof, upon any award theretofore deposited in said proceeding by said Authority.

Id. at 200-01, 22 S.E.2d at 249.

[5] For example: "In all condemnation actions, the date of valuation is the date of the filing of the Condemnation Notice." S.C. Code Ann. § 28-2-440 (2007) (referencing filing).

The parties in Weeks had a contingency fee agreement to compensate the attorneys one-half of the amount recovered over and above what the condemnor offered, but there was no recovery obtained as the condemnation proceeding was abandoned. Id. at 202, 22 S.E.2d at 250. Consequently, no fees were owed under the terms of the agreement. The trial judge allowed attorneys' fees, however, on the theory of quantum meruit. Id. Upon review, we noted that, we found this was error, stating:

> [T]he agreement was for a contingent fee, contingent upon recovery and, incidentally, recovery of more than the amount offered for the land by the condemnor. This contingency never occurred, the event of recovery did not transpire, because the condemnation was abandoned, and the right to that course by the condemnor is not challenged.
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> * * * *
>
> Undoubtedly, generally where an attorney is discharged without cause by his client after they have entered into a contingent fee agreement, he is entitled to compensation. . . .
>
> The latter, however, is not the case now presented. No action on the part of the landowners prevented the happening of the contingency; it failed because of the abandonment of the condemnation by the appellant. The inevitable result is that the attorneys by force of the terms of their contract, voluntarily entered into, are entitled to no compensation.

Id. at 202-03, 22 S.E.2d at 250.

The master noted the holding of the Weeks case, but concluded: "Notwithstanding, I find that Plaintiff and his attorneys had a reasonable expectation of payment and that [section 28-2-510(C)] entitles Plaintiff, as the owner of property which was subject to an abandoned condemnation action, to reasonable attorneys['] fees. Further, even though an express contract for legal services was not entered into, the law in this State is clear that under the facts of a case such as this, the law will imply one."

Kiriakides maintains Weeks is distinguishable because the statute there referred to "all costs and expenses incurred by the owner," which requires the fees to be actually incurred, whereas section 28-2-510(C) generally provides for the recovery of "reasonable" attorneys' fees, which means the fees need not be actually incurred. The South Carolina Eminent Domain Procedure Act, however, defines "litigation expenses" as those "reasonable . . . expenses necessarily incurred from and after service of the Condemnation Notice, including, but not limited to, reasonable attorney's fees . . . ." S.C. Code Ann. § 28-2-30(14) (emphasis added).

In the current appeal, Kiriakides's attorneys had an unwritten agreement to be paid on a contingency basis – essentially they would recover a percentage of any award Kiriakides obtained. They included a request for attorneys' fees in their pleadings, but the School District subsequently abandoned its condemnation action. As one treatise has stated:

> Some courts have denied recovery for attorneys' fees which were wholly contingent upon the payment of an award or judgment in the condemnation proceeding, when the proceeding was abandoned by the condemnor. [Citing, inter alia, South Carolina Public Service Authority v. Weeks, 201 S.C. 199, 22 S.E.2d 249 (1942).] However, other courts have held or recognized that the recovery of attorneys' fees in such a situation is not barred by the existence of a contingency fee agreement between the property owner and the owner's attorney, rejecting the contention that the contingent nature of the agreement meant that fees were not "incurred" by the landowner and thus not recoverable.

2 Robert L. Rossi, Attorneys' Fees § 11:38 (3d ed. 2001) (footnotes omitted).

We agree with the master's determination that Kiriakides was entitled to attorneys' fees under these circumstances. We hereby overrule Weeks to the extent that it conflicts with section 28-2-510(C), as the obvious intent of this statute is to allow a landowner to recover his expenses in the event of abandonment of a condemnation proceeding. Further, we see no reason to

differentiate situations where a party terminates the attorney and those where the condemnor terminates the proceeding. Having found the School District abandoned its efforts to condemn Kiriakides's property, we hold attorneys' fees were properly awarded. We note that on appeal the School District has challenged Kiriakides's entitlement to attorneys' fees, but it has not challenged the reasonableness of the master's award. Accordingly, we affirm the award of attorneys' fees to Kiriakides in the amount of $6,500.

III. CONCLUSION

Based on the foregoing, we affirm the master's determination that Kiriakides has not established his claim for inverse condemnation and that Kiriakides is entitled to attorneys' fees pursuant to section 29-2-510(C) of the South Carolina Code for the School District's abandonment of its condemnation proceeding.

AFFIRMED.

TOAL, C.J., WALLER and PLEICONES, JJ., concur. KITTREDGE, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Curtis Jerome Mitchell, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26622
Heard December 2, 2008 – Filed March 30, 2009

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Kevin Scott Brackett, of York, for Respondent.

CHIEF JUSTICE TOAL: In this case, Petitioner was convicted of armed robbery and sentenced to twenty years imprisonment. The court of appeals affirmed the conviction and sentence. *State v. Mitchell*, Op. No. 2006-UP-403 (S.C. Ct. App. filed December 11, 2006). We granted Petitioner a writ of certiorari to review the court of appeals' decision. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On December 30, 2003, Petitioner Curtis Jerome Mitchell entered a Bi-Lo grocery store in Rock Hill. A store employee observed Petitioner pick up two twelve-pack cases of chewing tobacco and proceed past the point of sale towards the exit without paying. The employee approached Petitioner as he reached the exit door and asked him to return the chewing tobacco. Petitioner presented a pocket knife and told the employee, "Go ahead, mother f****r, try something. I'll kill you." Petitioner then walked out the exit door with the chewing tobacco.

Petitioner was subsequently apprehended and indicted by the York County grand jury for armed robbery. On April 21, 2004, Petitioner was tried before a jury. After the state rested its case, Petitioner's trial counsel moved for directed verdict on the grounds that Petitioner completed the crime of larceny before using force or intimidation, and therefore did not commit an armed robbery. The trial court ruled that a person may be convicted of armed robbery if he arms himself at any time during commission of the larceny, and instructed the jury accordingly. The trial court based its ruling on this Court's opinion in *State v. Keith*, 283 S.C. 597, 325 S.E.2d 325 (1985). The jury returned a guilty verdict.

On appeal to the court of appeals, Petitioner argued that: (1) the trial court erred by refusing to grant Petitioner's motion for directed verdict on the charge of armed robbery, where the evidence showed that Petitioner had completed the larceny prior to the threat of force; and (2) the trial court erred

in instructing the jury that a robber need not be armed at all times during the commission of the larceny in order to be guilty of armed robbery. The court of appeals affirmed the trial court, holding that armed robbery may be proved by showing that the defendant became armed before asportation of the property, and that the trial court properly instructed the jury that a robber need not be armed at all time during the commission of a theft in order to be found guilty of armed robbery.

STANDARD OF REVIEW

In criminal cases, this Court will review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This Court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). On review, this Court is limited to determining whether the trial court abused its discretion. *State v. Rochester,* 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

LAW/ANALYSIS

Petitioner argues that the court of appeals erroneously affirmed the trial court's finding that he was properly charged with armed robbery. Petitioner submits that he should have instead been charged with separate offenses for petit larceny and assault with intent to kill or assault of a high and aggravated nature. We disagree.

Armed robbery occurs when a person commits robbery while either armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon. S.C. Code Ann. § 16-11-330 (2003). Included in armed robbery is the lesser included offense of robbery, which is defined as "the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." *State v. Al-Amin*, 353 S.C. 405, 424, 578 S.E.2d

32, 42 (Ct. App. 2003). Larceny, which is a lesser included offense in the crime of robbery, is defined as the felonious taking and carrying away of the goods of another against the owner's will or without his consent.[1] *Id.* "Thus, it is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny." *State v. Moore*, 374 S.C. 468, 477, 649 S.E.2d 84, 89 (Ct. App. 2007).

The central issue in the present case involves the determination of at what point asportation becomes final so that a larceny may not become a robbery. We considered that issue, pursuant to a different set of factual circumstances, in *State v. Keith*, 283 S.C. 597, 325 S.E.2d 325 (1985). In that case, the defendant Keith was one of three unarmed men, who accosted the victim as he walked along a public street. The men rifled through the victim's pockets and removed cash from his wallet. The men also found the victim's pocketknife, which they used to stab the victim repeatedly. Keith was convicted of armed robbery and on appeal argued that the conviction was improper because he did not become armed until after he had taken the victim's money. We disagreed and held that "when a defendant commits robbery without a deadly weapon, but becomes armed with a deadly weapon before asportation of the victim's property, a conviction for armed robbery will stand." *Keith,* 283 S.C. at 598-99, 325 S.E.2d at 326. We also noted that "the crime of robbery is not completed the moment the stolen property is in the possession of the robbers, but may be deemed to continue during their attempt to escape." *Id*.

Petitioner argues that *Keith* is inapposite to the present case. We disagree. *Keith*'s enduring legacy, which is directly relevant to the present case, is the "continuous offense theory." This theory is articulated thoroughly in the court of appeals' opinion in *State v. Moore*, which involves a set of facts nearly identical to the present case. 374 S.C. at 478, 649 S.E.2d at 89.

[1] The "taking and carrying away" of goods is often referred to as the element of "asportation."

In *Moore*, defendant Moore entered a Wal-Mart, picked up a package of over-the-counter medication from a display shelf, and walked toward the exit. A security guard followed Moore out of the door and stopped him just outside the door on the sidewalk. Moore then brandished a handgun, and the security guard, fearing his safety, ended the encounter and returned inside the store. Moore was later apprehended and charged with armed robbery.

At trial, Moore moved for directed verdict on the same grounds raised by Petitioner. Moore argued that he could not be convicted of armed robbery because the asportation of the property occurred before the confrontation and no force or threat of force was used to take the merchandise. The trial court denied Moore's motion on the grounds that asportation, a necessary element of armed robbery, continues during the escape.

The court of appeals affirmed the trial court's ruling, and began its analysis with the *Keith* opinion, which it interpreted to support "the continuous offense theory." This theory "provides that [a robbery] has occurred 'not only if the perpetrator uses force or intimidation to take possession of the property, but also if force or intimidation is used to retain possession immediately after the taking, or to carry away the property, or to facilitate escape."[2] *Id.* (quoting *State v. Meyers*, 620 So.2d 1160, 1163 (La.

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[2] The rationale for adopting the continuous offense theory is to effectuate the purpose of the distinction between larceny and robbery:

> [T]he purpose of the force or intimidation element of the crime of robbery is to distinguish, by imposition of a more severe penalty, those takings which pose a greater risk to the victim. The danger to the victim, however, is identical whether the force or intimidation is employed against the victim immediately before or after the actual taking.

Id.

1993)). As articulated by the court of appeals, the theory supports the proposition that "a 'taking' is not complete – that is to say, has not come to an end – until the perpetrator has neutralized any immediate interference with his or her possession." *Id.* at 480, 649 S.E.2d at 90.

We believe the court of appeals' opinion in *Moore* articulates the correct view of the law in the present case. This view is in keeping with the majority of states and legal authorities. *See id.* at 480-482, 649 S.E.2d at 90 (listing the twenty-seven states to have adopted the continuous offense theory by statute and the eight states to have adopted the theory by common law). *See also* Model Penal Code § 222.1(1) (2001) (adopting the position that a robbery occurs when force or intimidation is part of the entire act, and includes the use of force or intimidation to retain possession of the thing taken or to escape or prevent pursuit); 77 C.J.S. Robbery § 4 (2008) ("Asportation is not confined to a fixed point in time. The taking away is a transaction which continues as the perpetrators depart from the place where the property was seized, and may, under appropriate circumstances, be deemed to continue even after such departure from the place of seizure."); 67 Am.Jur.2d Robbery § 4 ("Although the required force or threat of force for the offense of armed robbery must either precede or be contemporaneous with the taking of a victim's property, the use of a dangerous weapon at any point in the robbery will constitute armed robbery as long as it reasonably can be said to be part of a single occurrence.").

Applied to the facts of the present case, the continuous offense theory requires that we affirm the court of appeals. It is clear that Petitioner did not complete the asportation of the chewing tobacco until after he employed the threat of force to secure his escape and retain possession of the goods. Thus, the trial court was correct to deny Petitioner's motion for directed verdict on the charge for armed robbery.

CONCLUSION

For the foregoing reasons, we hereby affirm the decision of the court of appeals.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Anthony Woods, Appellant.

Appeal From Clarendon County
John C. Few, Circuit Court Judge

Opinion No. 26623
Heard February 3, 2009 – Filed March 30, 2009

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, and Frederick A. Hoefer, II, of Ballenger Barth & Hoefer, of Florence, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

JUSTICE WALLER: Appellant, Anthony Woods, was convicted of murder, first degree burglary and criminal sexual conduct (CSC). He was sentenced to death for murder, thirty years for CSC, and life imprisonment

without parole (LWOP) for burglary, the sentences to run consecutively. We affirm the convictions and sentences.

FACTS

Joanne Dubose, a fifty-three year old Manning school teacher, was last seen alive on Monday, June 2, 2003. When Dubose did not answer telephone calls for several days, a friend went to check on her Wednesday evening, June 4, 2003, and found Dubose lying on her bed, face up, with blood running off the side of her face. The friend called 911, and police arrived to find Dubose dead, with a sheet tied around her neck, and her right arm tied down; her legs were spread under the sheet, her tongue was protruding from her mouth, and her face was beginning to decompose.

In the early morning hours of June 5, 2003, Woods was arrested in connection with a burglary the previous evening of the residence of Linda Taylor, another Clarendon County woman.[1] A shoeprint impression taken from the shoes Woods was wearing at the time of his arrest was ultimately determined to be consistent with a shoeprint lifted from the floor of Dubose's bedroom. DNA testing on the mattress pad and sheet from Dubose's bed revealed semen which matched Woods' DNA profile. A pathologist determined Dubose died from asphyxiation due to strangulation, and that she had been dead for approximately two days, indicating she died on June 3, 2003. The pathologist found no evidence of sexual trauma, but testified decomposition could have affected the ability to detect such trauma.

Woods was indicted and charged with murder, first degree burglary, and first degree CSC. The state sought the death penalty based upon the aggravating circumstances of burglary and criminal sexual conduct. Woods'

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[1] The Court of Appeals subsequently affirmed Woods' convictions for first degree burglary and two counts of assault and battery of a high and aggravated nature in conjunction with the Linda Taylor offense. State v. Woods, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2007), *cert. denied* Oct. 23, 2008. Woods was also tried and convicted of burglary, armed robbery and assault and battery with intent to kill in connection with a May 27, 2003 attack upon an eighty-four year old Clarendon County woman named Laura Jackson. These convictions were recently affirmed by the Court of Appeals. State v. Woods, Op. No. 2008-UP-536 (S.C. Ct. App. filed Sept. 16, 2008).

first trial, utilizing a jury pool from Marion County, ended in a hung jury and a mistrial in September 2006. Upon retrial in December 2006, a jury was selected from Clarendon County, and Woods was convicted on all counts; the jury recommended a sentence of death.

ISSUES

1. Did the trial court err in utilizing a jury pool from Clarendon County, rather than Marion County?
2. Did the trial court err in excusing a black female potential juror for cause?

1. JURY POOL

Prior to Woods' first trial in 2006, he requested a change of venue due to extensive pre-trial publicity and the fact that the Victim was a well-known teacher who had taught in Clarendon County public schools. With the state's consent, the trial judge granted the motion and ruled a jury would be selected from Marion County and transported to Clarendon County for trial. Trial took place in September 2006 and ended in a hung jury and a mistrial.

When the case was called for re-trial in October 2006, the state withdrew its consent to the change of venue. The state took the position that the mistrial resulted in going back to "ground zero." Defense counsel contended the state's consent to the change of venue in the first trial was binding, such that venue remained proper in Marion. The trial judge ruled he would endeavor to empanel a jury in Clarendon County before moving jury selection elsewhere.[2] After a lengthy *voir dire* process, a jury was selected in Clarendon County, and Woods was tried in December 2006; he was convicted on all counts and sentenced to death. Woods now argues it was

[2] The judge specifically noted the primary reason he had granted the motion to change venue in the first trial was due to the state's consent, and the fact that the state wanted to be able to complete the trial in September 2006, before one of the solicitors was leaving to become a judge. The court ruled that if it had not been for this consideration, the motion to move the trial to Marion County would have been denied.

reversible error for the trial court to transfer jury selection from Marion County back to Clarendon County. We disagree.

When a trial judge grants or denies a motion for a change of venue after adequate *voir dire* of prospective jurors, the decision will not be overturned absent extraordinary circumstances. State v. Evins, 373 S.C. 404, 645 S.E.2d 904, *cert. denied* 128 S.Ct. 622 (2007). The moving party has the burden of demonstrating actual juror prejudice. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court. State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). It leaves the parties "as though no trial had taken place." Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (rulings of trial judge in proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). A court ruling as to admissibility and competency of testimony during a trial which is later declared a mistrial results "in no binding adjudication of the rights of the parties." Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948).

In State v. Manning, 329 S.C.1, 495 S.E.2d 191 (1997), upon a retrial in a capital case, the trial court granted the state's motion to change venue from Dillon County to Kershaw County. On appeal, this Court held the trial court "abused his discretion in granting the State's motion to change venue based on pretrial publicity because no evidentiary facts supported a finding of actual juror prejudice toward the State." Id. at 9, 409 S.E.2d at 195. However, we noted that "we think the **better practice is to attempt to seat a jury prior to ruling on a motion to change venue** based on pretrial publicity." Id. (Emphasis supplied).

Here, the case having resulted in a mistrial, it was a nullity and therefore began anew when called again for trial. State v. Mills, 281 S.C. 60, 314 S.C. 324, *cert. denied* 469 U.S. 930 (1984) (when mistrial occurs because of inability of jury to agree on verdict, it is the same as if no trial took place). Accordingly, the trial court properly exercised its discretion in

attempting to seat a jury from Clarendon County prior to ruling on the motion to change venue.

Inasmuch as the trial court was able to select an unbiased jury pursuant to our mandate in Manning, we find no error. Accord State v. Evins, 373 S.C. 404, 645 S.E.2d 904, (2007) (grant or denial of change of venue after adequate *voir dire* of prospective jurors will not be overturned absent extraordinary circumstances).

2. EXCUSAL OF JUROR FOR CAUSE

Woods next asserts the trial court erred in excusing Juror Carolyn Hilton for cause. We disagree.

A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007); State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005), *cert. denied* 547 U.S. 1133 (2006). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire *voir dire*. Id. The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. Id. A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have concluded the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert. denied* 498 U.S. 881 (1990). Deference must be paid to the trial court who saw and heard the juror. Id. There will be situations where a trial court is left with the definite impression a prospective juror would be unable to faithfully and impartially apply the law, and this is why deference must be paid to the trial court. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

During *voir dire*, Juror Hilton was questioned extensively concerning her views on capital punishment. When initially questioned about which type

of juror she would be,[3] she indicated she would always vote for life imprisonment. When the three types of jurors were explained to her again, she indicated she would be the third type of juror, indicating she would wait and see before deciding on punishment. When the trial court questioned her as to whether, if they got to a sentencing phase, she could consider a life sentence, she responded, "yes." However, when the court went further and questioned if, depending on the facts and circumstances, she could vote to return a verdict imposing the death penalty, she replied, "no." The lawyers then questioned Juror Hilton and she reiterated to the solicitor that she could not vote for the death penalty. She continued to maintain she would vote for life and could not vote for death. After some vacillation, she indicated she would not feel comfortable signing a death verdict.

Defense counsel then examined Juror Hilton, advising her that all twelve jurors would have to sign beyond a reasonable doubt to vote for a sentence of death. Hilton replied she "guessed" she could vote for such a sentence. When questioned whether she could, after the vote occurred, confirm her vote on the verdict form, she again replied, "I guess." After further *voir dire* and much vacillation, Juror Hilton ultimately maintained she was a type three juror, and felt she could vote for a death sentence and sign the death verdict.

The trial court then meticulously reflected on whether Juror Hilton was qualified; the judge was clearly concerned that Juror Hilton's initial responses seemed adamant in stating she could not vote to impose a death sentence. The trial court felt her initial responses that she would not vote for a death sentence did not reflect any real confusion. The trial judge ultimately ruled that he would re-read the transcript of Juror Hilton's testimony before making a ruling the next day.

When she was discharged for the evening, Juror Hilton was advised to go home and to call a recorded message after 6:00 p.m. the following night to find out when she was to return to the courthouse. She was also told that

[3] The trial court gave the jury a sheet listing the three types of jurors: 1) would always vote for death, 2) would always vote for life, or 3) would wait and hear facts and circumstances before deciding on punishment.

when she returned, she was to bring with her enough clothing and personal items to stay for the seven to ten day duration of trial. The next day, the Clerk advised the trial judge that Juror Hilton had not come to court, and they had to go out and find her. She also failed to bring any clothing or personal items.

After further *voir dire*, the trial court ruled Juror Hilton was not qualified to serve, both because of her vacillation over the death penalty, and because of her inability to follow the court's instructions.

Woods now asserts Juror Hilton was improperly disqualified inasmuch as her views reflect an ability to recommend the death penalty in an appropriate case. We disagree.

Initially, Woods does not challenge the trial court's alternate basis for removing Juror Hilton, i.e., that she would not follow simple instructions. Accordingly, the ruling is the law of the case and there is no basis for reversal. Sloan v. S.C. Dep't of Transp., 365 S.C. 299, 618 S.E.2d 876 (2005); South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994) (failure to appeal an alternative ground of judgment below will result in affirmance).

In any event, the trial court acted within its discretion in disqualifying the juror. Accord State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005), *citing* Commonwealth v. Duffey, 855 A.2d 764 (Pa. 2004) (where *voir dire* indicated juror was somewhat unclear as to her convictions regarding imposition of the death penalty, and these concerns could have substantially impaired her ability to function as an impartial juror, the trial court was in the best position to make that determination and did not abuse its discretion in dismissing the prospective juror for cause); State v. Green, supra (the determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence). The trial court's ruling on this issue is affirmed.[4]

[4] The remaining issues are affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: Woods' Issue 3- Nix v. Williams, 467 U.S. 431, 446-47, 104 S.Ct. 2501, 81 L.Ed.2d

PROPORTIONALITY REVIEW

We have conducted a proportionality review pursuant to S.C.Code Ann. § 16-3-25(C) (2003). We find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of prior cases shows the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. See State v. Stanko, 376 S.C. 571, 658 S.E.2d 94, *cert. denied* 129 S.Ct. 182 (2008); State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), *cert. denied* 529 U.S. 1025, 120 S.Ct. 1434, 146 L.Ed.2d 323 (2000); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), *cert. denied*, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404, (1992); State v. South, 285 S.C. 529, 331 S.E.2d 775, *cert. denied* 474 U.S. 888, 106 S.Ct. 209, 88 L.Ed.2d 178 (1985).

Woods' convictions and sentences are affirmed.

AFFIRMED.

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

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377 (1984); State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002) (exclusion of physical evidence not required in cases of inevitable discovery); State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) (admission of evidence is harmless where it is cumulative); Woods' Issue 4- State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) (failure to object to charge as given, or request additional charge waives right to complain on appeal); State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) (no error to refuse a charge on mere suspicion where trial court's charge adequately instructs jury regarding reasonable doubt); Woods' Issue 5- State v. Skipper, 285 S.C. 42, 328 S.E.2d 58 (1985) *rev'd on other grounds* 476 U.S. 1 (1986) (Stewart limiting instruction required only where defendant not convicted in guilt phase of crime relied on by State as statutory aggravating circumstance); State v. Avery, 333 S.C, 284, 509 S.E.2d 476 (1998) (failure to object to jury charge precludes consideration on appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kent Blackburn and Allison R. Minnich, Appellants,

v.

TKT and Associates, Inc., Martha C. Carver, and Raymond T. Windham, Respondents.

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

Opinion No. 4496
Submitted December 1, 2009 – Filed January 28, 2009
Withdrawn, Substituted and Refiled March 26, 2009

AFFIRMED

Louis D. Nettles, of Florence, for Appellants.

C. Pierce Campbell and J. Rene Josey, of Florence, for Respondents.

HEARN, C.J.: Minority shareholders, Kent Blackburn and Allison Minnich, appeal an order denying their objections to a court-ordered

appraisal of common stock of Respondent, TKT and Associates, Inc., (TKT) for the purpose of a shareholder buyout. We affirm.

FACTS

In late 2002, TKT was formed by Blackburn, Tina Carver, and Tony Windham to sell durable medical equipment (DME).[1] The corporation was funded by a loan for $50,000, which each incorporator co-signed. Upon receiving the necessary authorization to provide DME through Medicaid, the business began operations under the name Carolina Mobility. Shortly thereafter, Carolina Mobility hired Minnich, a sales representative with experience in the DME field. Under the terms of Minnich's employment, she received ten percent of the shares of TKT.[2]

Both Blackburn and Minnich worked for Carolina Mobility full-time from its inception; Blackburn working closely with Minnich in order to learn the DME business. While Minnich received a salary, Blackburn was only paid when distributions were made to the other majority shareholders. Consequently, in August of 2003, Blackburn left Carolina Mobility to work with Darlington EMS so he could receive a regular paycheck.

After Blackburn left, Minnich assumed nearly all the responsibilities of running the company. In early 2004, both Carver and Windham announced their intention to work for the company on a full-time basis and receive a salary from Carolina Mobility in the amount of $60,000 a year, respectively. Additionally, Minnich's salary was raised to $60,000. Despite Carver and Windham's promise to work for Carolina Mobility on a full-time basis, both split time working for Carolina Mobility and another corporation they owned.

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[1] DME includes walkers, wheelchairs, medical beds, canes, shower seats, bed pans, sponges, sock aides, and other adaptive equipment.

[2] Blackburn, Carver, and Windham collectively retained ninety percent ownership interest in the corporation, with each party holding a thirty percent ownership interest.

In July 2004, Carolina Mobility began experiencing cash flow issues, which resulted in Minnich receiving only seven of the twelve pay checks due to her for the months of July to December. Thus, in spite of Carver and Windham's promise to pay Minnich a $60,000 salary, Minnich received only $39,000 of actual compensation in 2004, while Carver and Windham each received approximately $34,000.

In January of 2005, Minnich's salary was lowered to $40,000, while Carver and Windham each lowered their salary to $30,000. Minnich, who believed Carver and Windham's salaries were still too high, called Blackburn and set up a shareholders meeting to discuss the matter with Carver and Windham. Shortly after the meeting, Minnich left Carolina Mobility, and, in July of 2005, both Blackburn and Minnich sought judicial dissolution of the corporation.

Following a one-day bench trial, the trial court issued an order stating Carver and Windham engaged in self-dealing, which deprived Blackburn and Minnich of "the economic benefit of the value of the [c]orporation's stock by excluding the minority shareholder from the profits of the corporation." Furthermore, the trial court found: (1) Carver and Windham paid themselves in excess of their respective contributions to the corporation; (2) Carver and Windham improperly drained the corporations assets through claims of services as employees of the corporation; and (3) the corporation was devalued by paying Minnich her salary and then splitting the remaining earnings as individual salaries rather than profit.

Despite finding for Blackburn and Minnich, the trial court declined to dissolve the corporation. Instead, it ordered Carver and Windham to purchase Blackburn and Minnich's shares at their fair market value pursuant to section 33-14-310(d)(4) of the South Carolina Code (2006).[3] In its order,

[3] Section 33-14-310(d) provides: "In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order: . . . (4)

the trial court sought to determine fair market value of the corporation's stock by having an appraiser, agreed upon by both parties, determine the value of Blackburn's and Minnich's respective shares. Once chosen, the appraiser was given access to the documents introduced at trial by Blackburn and Minnich regarding the value of the services performed by Carver and Windham, in order to make any adjustments to their respective salaries and to the value of the corporation. The appraiser also asked the parties to agree upon an adjustment figure regarding Carver and Windham's salaries, but no agreement was made.

Upon receiving the appraisal, Blackburn and Minnich filed an objection to the report arguing the appraiser failed to comply with the trial court's order by not adjusting Carver and Windham's salaries. Blackburn and Minnich's motion was denied and judgment was entered. This appeal follows.

LAW/ANALYSIS

On appeal, Blackburn and Minnich argue the trial court erred in admitting the appraiser's report because the appraiser failed to adjust the salaries of Carver and Windham as required by the trial court's order. We disagree.

Simply put, the trial court's order commands Carver and Windham to buy Blackburn's and Minnich's individual shares at fair market value. Specifically, the trial court ordered, "the parties are to agree upon an impartial corporate appraiser . . .who will compute the [c]orporation's value, and assign a dollar value per share of the corporate stock." While Blackburn and Minnich argue the trial court's order implies an adjustment must be made in determining fair market value of the corporation, the order does not expressly require such an adjustment. Assuming arguendo that this was the implication of the trial court's order, there was neither a finding regarding the amount of any adjustment, nor did Blackburn and Minnich make a post-trial motion requesting the trial court issue such a finding.

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providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders."

Furthermore, as stated in the trial court's second order denying Blackburn and Minnich's objections to the appraisal, no evidence or information was proffered showing the report was prepared improperly. This was also the case at trial, where Blackburn and Minnich offered minimal evidence to the trial court regarding the actual value of the services Carver and Windham provided to the corporation. With respect to this issue, the only evidence of note came from Minnich's testimony and deposition. Minnich testified to the hourly rate she paid her own employees in her current job in the DME field. Moreover in her deposition, Minnich speculated about the going rate for technicians and secretaries, positions with duties similar to those services provided by Carver and Windham. Yet despite Minnich's estimates concerning the comparable hourly rate of the services provided by Carver and Windham, Minnich agreed she could not determine, or create a formula for determining, the amount Carver and Windham were overpaid.

Therefore, Blackburn and Minnich failed to present evidence indicating the appraisal was conducted in an improper manner, or contrary to the trial court's order. Consequently, the trial court did not err in denying Blackburn and Minnich's objections to the admission of the appraisal. The decision of the trial court is

AFFIRMED.

SHORT, J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stanley D. Floyd, Deceased Employee, Appellant/Respondent,

v.

C.B. Askins & Co. Contractors, Employer, and AIU Insurance Company, Carrier, Respondents/Appellants.

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No.4500
Heard December 12, 2008 – Filed February 10, 2009
Withdrawn, Substituted and Refiled March 24, 2009

AFFIRMED IN PART AND REVERSED IN PART

Steve Wukela, Jr., of Florence, for Appellant/Respondent.

Peter H. Dworjanyn, Christian Stegmaier, and Amy L. Neuschafer, all of Columbia, for Respondents/Appellants.

KONDUROS, J.: The widow of Stanley D. Floyd (Claimant), Harriett A. Floyd, appeals the circuit court's ruling limiting her husband's workers' compensation award upon his death from an unrelated cause. C.B. Askins & Co. Contractors and its insurer, AIU Insurance Company, (collectively Carrier) cross-appeal the circuit court's failure to deduct attorney's fees from Claimant's award pursuant to an agreement between the parties. We affirm in part and reverse in part.

FACTS

Claimant received a serious, physical brain injury when he was involved in a bulldozer accident while employed with C.B. Askins & Co. Contractors. The parties stipulated Claimant was permanently and totally disabled pursuant to section 42-9-10 of the South Carolina Code (Supp. 2008), and he was awarded benefits for the remainder of his life. Claimant's remaining life expectancy was determined to be 18.99 years meaning he was awarded benefits for 987.48 weeks. The parties also agreed by consent order Carrier would pay the sum of $57,500 in attorney's fees to be deducted from the end of Claimant's award pursuant to Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535 (1995). Claimant received 254 weeks of benefits but then died from an unrelated aneurism in his abdomen.

Upon Claimant's death, Mrs. Floyd claimed she was entitled to the balance of 987.48 weeks compensation pursuant to section 42-9-280 of the South Carolina Code (1985). Section 42-9-280 provides the next of kin of a claimant who dies from an unrelated injury may receive the balance of unpaid compensation if the award was made pursuant to the second paragraph of section 42-9-10 or section 42-9-30 of the South Carolina Code (Supp. 2008). Also relying upon section 42-9-280, Carrier stopped payment of Claimant's benefits at the time of his death. However, prior to the hearing before the single commissioner, Carrier acceded Mrs. Floyd should receive the balance of five-hundred weeks' compensation.

The single commissioner found Mrs. Floyd was entitled to the commuted value of the balance of Claimant's lifetime award minus a credit for attorney's fees paid by Carrier. The Appellate Panel affirmed the payment of benefits, but limited the amount to the balance of five-hundred weeks. Claimant appealed. The circuit court affirmed the Appellate Panel and found Carrier was not allowed a credit for attorney's fees.

On appeal to this court, Mrs. Floyd contends she is entitled to the full balance of 987.48 weeks of compensation. Carrier cross-appeals claiming the circuit court erred in failing to award it credit for attorney's fees as provided for in the consent order between Claimant and Carrier.

STANDARD OF REVIEW

An appellate court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. Libery Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 299 (Ct. App. 2005). Statutory interpretation is a question of law. Stewart v. Richland Mem'l Hosp., 350 S.C. 589, 593, 567 S.E.2d 510, 512 (Ct. App. 2002).

LAW/ANALYSIS

I. Compensation to Mrs. Floyd

Mrs. Floyd argues she is entitled to the balance of compensation remaining on Claimant's lifetime award. We disagree.

Section 42-9-10 of the South Carolina Code (Supp. 2008) is composed of four paragraphs, (A)-(D). Paragraph (A) limits a claimant's award to a maximum of five-hundred weeks even for total, permanent disability. Paragraph (B) provides "[t]he loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this

section." Consequently, an injury listed in Paragraph (B) would entitle the claimant to the maximum allowable award of five-hundred weeks.

Paragraph (C) provides the only exception to this limitation.

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.

Id.

Section 42-9-280 of the South Carolina Code (1985) addresses situations like the one in this case in which an injured claimant later dies from a cause unrelated to the workplace injury.

> When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or 42-9-30[[1]] and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

§ 42-9-280.

In Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006), our supreme court addressed the interpretation of this statute and elucidated

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[1] This section addresses injuries to scheduled members.

the basis for the operation of these statutes together. In Stone, the claimant was found to be permanently and totally disabled pursuant specifically to section 42-9-10(A). 367 S.C. at 583 n.1, 627 S.E.2d at 698 n.1. Upon Stone's death from an unrelated cause, Stone's widow contended she was entitled to the balance of her husband's benefits. Id. at 578, 627 S.E.2d at 696. The court stated:

> The language of § 42-9-280 is plain. The legislature, as is its prerogative, determined that dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member (§ 42-9-30), or "lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof" (second paragraph of § 42-9-10), i.e., those who suffered a physical loss, while the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of § 42-9-10, should not. The legislative distinction between "physical loss" and "wage loss" appears in other workers' compensation statutes as well.
>
> Professor Larson notes that since a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments. In construing a workers' compensation statute, "the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Section 42-9-280 specifically provides for the inheritability of two types of awards only.

Stone, 367 S.C. at 585-86, 627 S.E.2d at 700 (internal citations omitted).

In the present case, Claimant's injury was serious and catastrophic. However, his award was made pursuant to paragraph (C) of section 42-9-10. Section 42-9-280 does not include awards made under paragraph (C) among those that survive a claimant's death from an unrelated cause.

Section 42-9-10(A), at issue in Stone, focuses on situations in which a claimant's "incapacity for work resulting from an injury is total." Likewise, paragraph (C) seems to focus on a claimant's inability to earn a wage as opposed to a physical loss. The statute conditions the lifetime award of benefits upon a finding of total and permanent disability. See § 42-9-10(C) ("[A]ny person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage . . . shall receive benefits for life.").

Claimants suffering catastrophic injuries like Claimant's may require specialized healthcare without the means to earn a wage. The award of compensation for a claimant's life expectancy seems to recognize this reality. If so, it is also logical benefits would terminate upon such a claimant's death from an unrelated cause.

Carrier does not appeal the circuit court's award of the balance of five-hundred weeks' compensation. Therefore, that ruling is the law of the case and is affirmed. See First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.").

II. Attorney's Fees

Carrier argues the circuit court erred in failing to credit attorney's fees to them when a consent order to that effect was entered into by the parties. We agree.

Deducting fees paid by a carrier to a claimant's attorney from the end of a lifetime award is proper under Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535 (1995). This was the arrangement agreed to by the parties via consent order. Mrs. Floyd argues the consent order only

applied if Claimant was receiving lifetime compensation. Therefore, she contends, when Carrier agreed only to payment of the balance of five-hundred weeks' compensation, the consent order became inapplicable. This position is unpersuasive.

We recognize Claimant's untimely passing and other circumstances in this case changed his compensation from a lifetime award to one of a fixed duration; however, we do not believe that negates the agreement by the parties regarding the credit of attorney's fees.[2] According to the record and statements at oral argument, slightly more than 126 weeks of compensation is owed to Mrs. Floyd. Therefore, Carrier owes sufficient money to permit the credit without requiring any reimbursement from Mrs. Floyd.[3] Consequently, we find Carrier is entitled to a credit for attorney's fees paid on behalf of Claimant.

CONCLUSION

Based upon the precedent set forth in Stone and a plain reading of the relevant statutes, we find Mrs. Floyd is not entitled to the balance of her husband's lifetime benefits. Because the award of the balance of five-hundred weeks' compensation is not appealed, we affirm that finding as it is the law of the case.

With respect to attorney's fees, we reverse the circuit court because the allowance of a credit for attorney's fees, pursuant to the agreement of the parties and the circumstances of this case, is appropriate. Therefore, the order of the circuit court is

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[2] A claimant and a carrier may agree that the claimant's attorney's fees, paid by the carrier, will be deducted from an award of a fixed duration greater than one hundred weeks. See id. at 469, 458 S.E.2d at 538 (finding section 42-9-10 and 25A S.C. Code Ann. Regs. 67-1207 (1982), when read together, permit the lump sum award of attorney's fees).

[3] We are not called upon to consider whether repayment of attorney's fees may be required when the credit for attorney's fees is greater than the amount due the claimant; thus, we decline to do so.

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward C. "Buddy" Cribb, III, Appellant,

v.

Dean Spatholt and Clark Callahan, in their individual capacities, and Boundary House, Inc., Respondents.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4519
Heard January 6, 2009 – Filed March 24, 2009

AFFIRMED

Henrietta U. Golding and Amanda A. Bailey, both of Myrtle Beach, for Appellant.

Arthur E. Justice, Jr., and Reginald W. Belcher, both of Florence, for Respondents.

LOCKEMY, J.: Edward C. "Buddy" Cribb, III appeals the circuit court's grant of Dean Spatholt, Clark Callahan, and Boundary House's Rule 12(b)(2), SCRCP, motion to dismiss for lack of personal jurisdiction. We affirm.

FACTS/PROCEDURAL BACKGROUND

Spatholt and Callahan own and operate Boundary House (Boundary), a seafood restaurant. Boundary is a North Carolina company organized under North Carolina law with its principal place of business located at 1045 River Road, Calabash, North Carolina. Spatholt serves as Boundary's president and treasurer, while Callahan serves as vice-president and secretary. Both serve on Boundary's board of directors.

Prior to Boundary's opening, Spatholt and Callahan approached Buddy Cribb to assist with the business. According to Buddy's affidavit and complaint, Spatholt and Callahan first approached him in December of 2003, while he was working at the Carolina Roadhouse in Myrtle Beach, South Carolina. It appears Buddy merely spoke with Spatholt and Callahan about Boundary and did not enter into any type of contract with them in 2003. Later, Spatholt and Callahan approached Buddy's father, Edward, to assist with the planning and operation of Boundary. According to Edward, he met with Callahan at the Carolina Roadhouse in Myrtle Beach twice in January of 2004 to negotiate and discuss restaurant plans. Thereafter, Edward entered into a contract with Spatholt and Callahan to work as a consultant for Boundary, and he agreed to help recruit his son, Buddy, as Boundary's general manager.

In early 2004, Edward contacted Buddy from Myrtle Beach about the general manager position at Boundary. Around May 2005, Buddy met with Spatholt and Callahan and discussed the potential employment. Shortly thereafter, Spatholt and Callahan offered, and Buddy accepted, the general manager position. Buddy alleged Callahan promised to employ him for at least ten years. Additionally, Callahan promised Buddy the following compensation and benefits: an annual salary of $150,000, use of an automobile at Boundary's expense, health insurance benefits, a cell phone and monthly plan for Buddy and his wife, two days off per week, and two weeks paid vacation. In reliance on this offer, Buddy resigned from his position as an operating

partner of California Dreaming in Augusta, Georgia, and he and his family moved to Myrtle Beach. Buddy commuted to and from work while living in Horry County.

On September 12, 2006, the Cribbs sued Callahan and Spatholt in their individual capacities and Boundary. In his complaint, Buddy maintained Spatholt unilaterally terminated him on September 1, 2006, and also sued for breach of contract, promissory estoppel, violation of the South Carolina Payment of Wages Act, and negligent misrepresentation. Collectively, Boundary, Callahan, and Spatholt moved to dismiss both cases for lack of personal jurisdiction, pursuant to Rule 12(b)(2), SCRCP. In a preliminary order, the circuit court granted the motion to dismiss. In a final order, the circuit court dismissed the case with prejudice after finding South Carolina lacked specific and general jurisdiction over Boundary, as a business, and over Callahan and Spatholt, in their individual capacities.

As to general jurisdiction the circuit held Boundary, Callahan, and Spatholt "maintained no continuous and systematic general business contacts with South Carolina that were so substantial and of such a nature to justify allowing [Buddy Cribb] to proceed with these lawsuits in this [c]ourt." In regards to specific jurisdiction, the circuit court found Boundary, Callahan, and Spatholt "did not engage in any of the requisite conduct that the long arm statute references." Further, the circuit court found subjecting Boundary, Callahan, and Spatholt to litigation in South Carolina violated due process because 1) the litigation would be unfair and unreasonable to them; 2) South Carolina had no viable interest in adjudicating a dispute involving conduct of a restaurant operating solely in Brunswick County, North Carolina; and 3) Buddy Cribb knew or reasonably should have known that Boundary operated exclusively in North Carolina; thus, requiring Buddy Cribb to adjudicate the lawsuit there would not be unfair. Accordingly, the circuit court dismissed Buddy Cribb's lawsuit with prejudice. This appeal follows.

ISSUE

Did the circuit court err in dismissing Buddy Cribb's suit after finding it lacked personal jurisdiction over Boundary as a business entity and Callahan and Spatholt individually?

STANDARD OF REVIEW

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." Id. "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008).

PERSONAL JURISDICTION LAW

"The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based." Boan v. Jacobs, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1988). In the present case, we are concerned with personal, rather than subject matter jurisdiction. Personal jurisdiction is exercised as "general jurisdiction" or "specific jurisdiction." Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007).

I. General Jurisdiction

Section 36-2-802 of the South Carolina Code (2003) governs general jurisdiction and states: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action." "A court may assert general jurisdiction if the defendant has an 'enduring relationship' with the forum state." Cockrell, 363 S.C. at 495, 611

S.E.2d at 510. If an individual has an "enduring relationship" with the State, he may be sued here even if the cause of action did not arise in South Carolina. See id. ("General jurisdiction attaches even when the nonresident defendant's contacts with the forum state are not directly related to the cause of action . . . ."). To satisfy the "enduring relationship" requirement of general jurisdiction, the defendant's contacts must be "continuous and systematic" as well as "so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely different from those activities." See id. (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)); Coggeshall, 376 S.C. at 17, 655 S.E.2d at 479 (2007) ("An enduring relationship is indicated by contacts that are substantial, continuous, and systematic."). Furthermore, the defendant's contacts with the forum must satisfy the due process clause. Cockrell, 363 S.C. at 495, 611 S.E.2d at 510.

II. Specific Jurisdiction

Courts may also have specific jurisdiction over a cause of action arising from a defendant's contacts with the state pursuant to the long-arm statute. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 222 (2008). Under the long arm statute, a court may exercise personal jurisdiction over an individual acting directly or through an agent for causes of action arising from the individual's:

> (1) transacting any business in this State;
> (2) contracting to supply services or things in the State;
> (3) commission of a tortious act in whole or in part in this State;
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
> (5) having an interest in, using, or possessing real property in this State;
> (6) contracting to insure any person, property, or risk located within this State at the time of contracting;

> (7) entry into a contract to be performed in whole or in part by either party in this State; or
> (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803 (Supp. 2008). Traditionally, our courts have conducted a two-step analysis to determine whether specific jurisdiction is proper by 1) determining if the long arm statute applies and 2) determining whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008). However, a more recent trend compresses the analysis into a due process assessment only. Id. at 431, 665 S.E.2d at 664-65; see also Cockrell, 363 S.C. at 491, 611 S.E.2d at 508 ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process.").

Due process requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Coggeshall, 376 S.C. at 16, 655 S.E.2d at 478. "Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there." Power Prods., 379 S.C. at 431-32, 665 S.E.2d at 665.

Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Id. at 432, 665 S.E.2d at 665. "The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the "power" to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." Id. To support a finding of due process, both prongs must be satisfied. Id.

To satisfy the power prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Moosally v. W.W. Norton & Co., 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004). The Moosally court stated:

> It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case.

Id. at 332, 594 S.E.2d at 884-85. Finally, under the fairness prong, the court must consider the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. NV Sumatra Tobacco Trading, 379 S.C. at 91, 666 S.E.2d at 223.

ARGUMENTS AND ANALYSIS

I. Personal Jurisdiction of Buddy Cribb's Claims Against Boundary and Callahan and Spatholt Individually

Buddy Cribb argues the circuit court erred in dismissing his suit for lack of personal jurisdiction over Boundary as a business entity, and Callahan and Spatholt individually. He maintains the long arm statute applies to Boundary, Callahan, and Spatholt based on the following activities: (1) transacting any business in this State; (2) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; and (3) entry into a contract to be performed in whole or in part by either party in

this State.[1] Moreover, Buddy argues Boundary possessed the requisite minimum contacts to satisfy due process. We believe the circuit court did not err in dismissing Buddy's case based on Buddy's contract with Boundary and Boundary's presence in South Carolina.

A.) Due Process Based on Contract

In support of Buddy's assertion that Boundary possesses minimum contacts with South Carolina, Buddy argues Boundary directed its activities towards the State by recruiting him in South Carolina. Buddy argues Boundary purposefully availed itself to the benefits of doing business in South Carolina based on this recruitment. Buddy also asserts Boundary purchased numerous food products, supplies, linens, and other goods from South Carolina in furtherance of its business activities. We find South Carolina lacks personal jurisdiction over Boundary if we only examine Buddy's contract.

Our courts have held entering into a contract or mere negotiations inside South Carolina without more is not enough to establish minimum contacts. Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping & Garden Ctr, Inc., 315 S.C. 88, 92, 431 S.E.2d 632, 635 (Ct. App. 1993) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79 (1985)). In Loyd, this court stated: "An individual's contract with an out-of-state party cannot alone establish sufficient minimum contact's in the other party's home forum." Id. Furthermore the court found: "The parties' prior negotiations, the consequences of their actions as contemplated by the parties, the terms of the contract, and the parties' actual course of dealings must be considered in evaluating whether a defendant purposefully established minimum contacts within the forum." Id.

This court has held South Carolina has jurisdiction over a party who entered into a contract that was to be partly performed within the State. Atl. Wholesale Co., Inc. v. Solondz, 283 S.C. 36, 320 S.E.2d 720 (Ct. App. 1984). In Solondz, a New York resident agreed to purchase silver from Atlantic Wholesale. Id. at 37, 320 S.E.2d at 721. However, when Solondz later refused

[1] These activities correspond to sections 1, 4, and 7 of the long arm statute, respectively. S.C. Code Ann. § 36-2-803 (Supp. 2008).

to pay for the silver, Atlantic Wholesale brought suit in South Carolina. Id. Our court held South Carolina had jurisdiction over the suit because "the evidence presented at the hearing on the motion to dismiss clearly show[ed] Solondz entered into a contract that was to be partly performed in South Carolina." Id. at 38, 320 S.E.2d at 722. Moreover this court found adjudicating the case within the State would not offend due process even though "Solondz ha[d] engaged in little activity in South Carolina . . . [because] the length and duration of the activity of the nonresident in this State is not deemed important and need only be minimal when the plaintiff lives in the forum state and the cause of action arose out of the defendant's activities in this State." Id. at 39, 320 S.E.2d at 722 (internal citation omitted) (emphasis added).

Buddy Cribb knew Boundary was located in Calabash, North Carolina when negotiations occurred. In fact, Buddy knew his duties as general manager would include:

> (a) creating, training manuals and other employee guidebooks for Boundary;
> (b) designing the layout of the menu and procuring equipment and inventory for the kitchen, bar, and dining area of Boundary;
> (c) meeting with consultants and accounting professionals to determine the Restaurant's expenses [and] revenues; [and]
> (d) supervising the day-to-day operations of [Boundary], including but not limited to, hiring and firing personnel, training new employees, and managing the operations of the kitchen, bar, and dining area.

Buddy also indicated he knew he would have to purchase supplies from several South Carolina vendors. Based on Buddy's own admissions, under the terms of his negotiated contract, he knew his work as general manager would occur in North Carolina. Therefore, where he would perform his job was within the contemplation of Boundary and Buddy. Finally, the parties' actual course of dealings occurred at Boundary's principal place of business, in Calabash, North

Carolina. Accordingly, South Carolina lacks personal jurisdiction over Boundary based solely on Buddy's contract.

B.) Due Process Based on Presence within the State

Based on our courts' recent trend of compressing a personal jurisdiction analysis into a due process assessment only, our sole question is whether the exercise of personal jurisdiction would violate due process. Cockrell v. Hillerich & Bradsby Co. 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process."); Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 665 S.E.2d 660 (Ct. App. 2008) (where our court assessed only a due process analysis to determine whether specific jurisdiction was proper). Accordingly, we must determine whether Boundary possesses minimum contacts with South Carolina so as not to offend due process. Under the two-pronged analysis, we must determine whether Boundary (1) had the requisite minimum contacts with South Carolina, without which, the court does not have the "power" to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair.

Boundary had more than random contacts within South Carolina under the power prong. S. Plastics Co. v. S. Commerce Bank, 310 S.C. 256, 262, 423 S.E.2d 128, 132 (1992) ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts."). Boundary was present in the state via its agents Callahan, Spatholt, and Edward. Boundary directed its activities toward South Carolina by soliciting and contracting with Edward and Buddy here regarding their respective roles with designing and operating Boundary. In fact, Boundary admits it "hired some service providers from Horry County to assist with planning the construction of the Restaurant in Calabash, North Carolina."

Edward Cribb, as an agent of Boundary, maintains he: met with Spatholt and Callahan to discuss plans for Boundary while in Myrtle Beach; recruited Buddy as Boundary's general manager at Callahan's request from Myrtle Beach; met with Callahan and Spatholt several times at architect William R.

Halasz's offices in Myrtle Beach to discuss and review prospective drawings, design, and layout of Boundary; contacted a Myrtle Beach restaurant planner who drafted proposed plans for the layout of Boundary's kitchen; met with representatives from Jacobi-Lewis Company to discuss the layout of Boundary's kitchen and revised and made changes to the layout at the meeting; closed Aspen Grill and thereafter Boundary hired former employees from Aspen Grill.

Enough business was conducted within the state to satisfy the power prong because: 1) negotiations took place in South Carolina; 2) Edward, as Boundary's agent, transacted business here; and 3) Callahan and Spatholt, as Boundary's agents, met with Edward's contacts in South Carolina to discuss plans for opening Boundary with South Carolina businesses. Based on these contacts, we believe Boundary has sufficient minimum contacts with South Carolina such that it would expect to be haled into court here. Accordingly, Buddy met the requirements of the power prong.

However, the fairness prong of the minimum contacts test fails. As explained above, courts look at the following four factors in determining whether exercise of jurisdiction is reasonable or fair: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008).

Under the first prong, Boundary's activity within the State of negotiating an employment contract with Buddy was brief. Second, the character and circumstances of the negotiations with Buddy were preliminary discussions regarding Buddy's role as general manager. The parties knew Buddy would actually perform his duties under the contract at Boundary's principal place of business and any other contacts formed within the state are not part of Buddy's conflict. Third, as Buddy admits in his appeal, Calabash, North Carolina is only two miles outside the South Carolina border. Further, Buddy commuted to North Carolina daily for work, and he currently lives close to the North Carolina border. Therefore, it would not significantly inconvenience either party to adjudicate the suit in North Carolina.

Finally, the State's interest in exercising jurisdiction is small. Our supreme court, in addressing this prong, held South Carolina's interest in providing redress for its citizens was diminished when "nothing which [was] the subject of this litigation ha[d] taken place in South Carolina." Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 509, 402 S.E.2d 177, 181 (1991. Specifically, the Aviation Court stated: "[W]hile South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business was transacted in this State and any contract formed was not to be performed in this State." Id. Further, the State's interest in exercising jurisdiction further diminishes when public policy issues are taken into account. Here, any business relationship Boundary maintained within the State is unrelated to the current conflict, and a ruling reversing the circuit court could discourage business relationships within South Carolina that have nothing to do with the litigation. Because the fairness prong of the minimum contact analysis fails, adjudication of the suit in South Carolina would offend due process. Accordingly, we affirm the circuit court's order dismissing Buddy Cribb's suit for lack of personal jurisdiction.

C.) Personal Jurisdiction over Callahan and Spatholt individually

For reasons similar to the ones stated above, we believe Callahan and Spatholt individually possess enough minimum contacts with South Carolina so as not to offend due process under the power prong. However, the fairness prong of the due process analysis fails for reasons similar to those stated above. The crux of our reasoning here is based on Aviation which held South Carolina's interest in providing redress for its citizens was diminished when "nothing which [was] the subject of this litigation ha[d] taken place in South Carolina." 303 S.C. at 509, 402 S.E.2d at 181. The circuit court's dismissal of Buddy Cribb's suit for lack of personal jurisdiction in regards to Boundary as a business entity and Callahan and Spatholt individually is therefore

AFFIRMED.

HUFF and THOMAS, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward C. Cribb, Appellant,

v.

Dean Spatholt and Clark Callahan, in their individual capacities, and Boundary House, Inc., Respondents.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4520
Heard January 6, 2009 – Filed March 24, 2009

REVERSED

Henrietta U. Golding and Amanda A. Bailey, both of Myrtle Beach, for Appellant.

Arthur E. Justice, Jr. and Reginald W. Belcher, of Florence, for Respondents.

LOCKEMY, J.: Edward C. Cribb appeals the circuit court's grant of Dean Spatholt, Clark Callahan, and Boundary House's Rule 12(b)(2), SCRCP, motion to dismiss for lack of personal jurisdiction. We reverse.

FACTS/PROCEDURAL BACKGROUND

Spatholt and Callahan own and operate Boundary House (Boundary), a seafood restaurant. Boundary is a North Carolina company organized under North Carolina law with its principal place of business located at 1045 River Road, Calabash, North Carolina. Spatholt serves as Boundary's president and treasurer, while Callahan serves as vice-president and secretary. Both serve on Boundary's board of directors.

Prior to Boundary's opening, Spatholt and Callahan approached Edward and his son, Buddy Cribb, to assist with the business. According to Buddy's affidavit and complaint, Spatholt and Callahan first approached him in December of 2003, while he was working at the Carolina Roadhouse in Myrtle Beach, South Carolina. It appears Buddy merely spoke with Spatholt and Callahan about Boundary and did not enter into any type of contract with them in 2003. Later, Spatholt and Callahan approached Edward to assist with the planning and operation of Boundary. According to Edward, he met with Callahan at the Carolina Roadhouse in Myrtle Beach twice in January of 2004 to negotiate and discuss restaurant plans. Thereafter, Edward entered into a contract with Spatholt and Callahan to work as a consultant for Boundary. Under the terms of the contract, Spatholt and Callahan agreed to pay Edward $35,000 until Boundary opened and thereafter 5% of Boundary's gross pre-tax revenues. Additionally, Edward agreed to help recruit his son, Buddy, as Boundary's general manager.

In early 2004, Edward contacted Buddy from Myrtle Beach about the general manager position at Boundary. Around May 2005, Buddy met with Spatholt and Callahan and discussed the potential employment. Shortly thereafter, Spatholt and Callahan offered, and Buddy accepted, the general manager position.

On September 12, 2006, Edward Cribb sued Callahan and Spatholt in their individual capacities and Boundary. In his complaint, Edward maintained

Spatholt unilaterally terminated him on August 14, 2006, and alleged the following causes of action: breach of contract, promissory estoppel, violation of the South Carolina Payment of Wages Act, and negligent misrepresentation. Buddy Cribb also filed suit. Collectively, Boundary, Callahan, and Spatholt moved to dismiss both cases for lack of personal jurisdiction, pursuant to Rule 12(b)(2), SCRCP. In a preliminary order, the circuit court granted the motion to dismiss. In a final order, the circuit court dismissed the case with prejudice after finding South Carolina lacked specific and general jurisdiction over Boundary, as a business, and over Callahan and Spatholt, in their individual capacities.

As to general jurisdiction the circuit court held Boundary, Callahan, and Spatholt "maintained no continuous and systematic general business contacts with South Carolina that were so substantial and of such a nature to justify allowing [Edward] to proceed with these lawsuits in this [c]ourt." In regards to specific jurisdiction, the circuit court found Boundary, Callahan, and Spatholt "did not engage in any of the requisite conduct that the long arm statute references." Further, the circuit court found subjecting Boundary, Callahan, and Spatholt to litigation in South Carolina violated due process because 1) the litigation would be unfair and unreasonable to them; 2) South Carolina had no viable interest in adjudicating a dispute involving conduct of a restaurant operating solely in Brunswick County, North Carolina; and 3) Edward Cribb knew or reasonably should have known that Boundary operated exclusively in North Carolina; thus, requiring Edward to adjudicate the lawsuit there would not be unfair. Accordingly, the circuit court dismissed Edward Cribb's lawsuit with prejudice. This appeal follows.

ISSUE

Did the circuit court err in dismissing Edward Cribb's case after finding it lacked personal jurisdiction over Boundary as a business entity and Callahan and Spatholt individually?

STANDARD OF REVIEW

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. State v. NV

Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." Id. "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008).

PERSONAL JURISDICTION LAW

"The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based." Boan v. Jacobs, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1988). In the present case, we are concerned with personal, rather than subject matter jurisdiction. Personal jurisdiction is exercised as "general jurisdiction" or "specific jurisdiction." Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007).

I. General Jurisdiction

Section 36-2-802 of the South Carolina Code (2003) governs general jurisdiction and states: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action." A court may assert general jurisdiction if the defendant has an "enduring relationship" with the forum state. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005). If an individual has an "enduring relationship" with the State, he may be sued here even if the cause of action did not arise in South Carolina. See id. ("General jurisdiction attaches even when the nonresident defendant's contacts with the forum state are not directly related to the cause of action . . . ."). To satisfy the "enduring

relationship" requirement of general jurisdiction, the defendant's contacts must be "continuous and systematic" as well as "so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely different from those activities." See id. (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)); Coggeshall, 376 S.C. at 17, 655 S.E.2d at 479 ("An enduring relationship is indicated by contacts that are substantial, continuous, and systematic."). Furthermore, the defendant's contacts with the forum must satisfy the due process clause. Cockrell, 363 S.C. at 495, 611 S.E.2d at 510.

II. Specific Jurisdiction

Courts may also have specific jurisdiction over a cause of action arising from a defendant's contacts with the state pursuant to the long-arm statute. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 222 (2008). Under the long arm statute, a court may exercise personal jurisdiction over an individual acting directly or through an agent for causes of action arising from the individual's:

> (1) transacting any business in this State;
> (2) contracting to supply services or things in the State;
> (3) commission of a tortious act in whole or in part in this State;
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
> (5) having an interest in, using, or possessing real property in this State;
> (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
> (7) entry into a contract to be performed in whole or in part by either party in this State; or
> (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to

be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803 (Supp. 2008). Traditionally, our courts have conducted a two-step analysis to determine whether specific jurisdiction is proper by 1) determining if the long arm statute applies and 2) determining whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008). However, a more recent trend compresses the analysis into a due process assessment only. Id. at 431, 665 S.E.2d at 664-65; see also Cockrell, 363 S.C. at 491, 611 S.E.2d at 508 ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process.").

Due process requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Coggeshall, 376 S.C. at 16, 655 S.E.2d at 478. "Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there." Power Prods., 379 S.C. at 431-32, 665 S.E.2d at 665.

Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Id. at 432, 665 S.E.2d at 665. "The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the 'power' to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." Id. To support a finding of due process, both prongs must be satisfied. Id.

To satisfy the power prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Moosally v. W.W. Norton & Co., Inc., 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004). The Moosally court stated:

> It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case.

358 S.C. at 332, 594 S.E.2d at 884-85 (internal citations omitted). Finally, under the fairness prong, the court must consider the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction. NV Sumatra Tobacco Trading, Co., 379 S.C. at 91, 666 S.E.2d at 223.

ARGUMENTS AND ANALYSIS

I. Personal Jurisdiction of Edward Cribb's Claims Against Boundary, and Callahan and Spatholt individually

Edward Cribb argues the circuit court erred in dismissing his suit for lack of personal jurisdiction over Boundary as a business entity, and Callahan and Spatholt individually. He maintains the long arm statute applies to Boundary, Callahan, and Spatholt based on the following activities: (1) transacting any business in this State; (2) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; and (3) entry into a contract to be performed in whole or in part by either party in this State.[1] Moreover, Edward argues Boundary House possessed the requisite

[1] These activities correspond to sections 1, 4, and 7 of the long arm statute, respectively. S.C. Code Ann. § 36-2-803 (Supp. 2008).

minimum contacts to satisfy due process. Upon examination of Edward Cribb's contract with Boundary and Boundary's presence in the state, we believe Edward met his burden at this stage in the proceeding to defeat a 12(b)(2) motion to dismiss for lack of personal jurisdiction over Boundary, Callahan, and Spatholt.

A. Boundary as a Business Entity

Based on our courts' recent trend of compressing a personal jurisdiction analysis into a due process assessment only, our sole question is whether the exercise of personal jurisdiction would violate due process. Cockrell v. Hillerich & Bradsby Co. 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process."); Power Prods., 379 S.C. 423, 665 S.E.2d 660 (where our court assessed only a due process analysis to determine whether specific jurisdiction was proper). Accordingly, we must determine whether Boundary possesses minimum contacts with South Carolina so as not to offend due process. Under the two-pronged analysis, we must determine whether Boundary (1) had the requisite minimum contacts with South Carolina, without which, the court does not have the "power" to adjudicate the action, and (2) find the exercise of jurisdiction is reasonable or fair.

In support of Edward's assertion that Boundary possesses minimum contacts with South Carolina, he argues in execution of his contract with Boundary he was to provide planning and operation services. Edward maintains Boundary directed its activities toward South Carolina by soliciting and contracting with him to assist with designing and operating Boundary. In his affidavit Edward specifically maintains he: met with Spatholt and Callahan to discuss plans for Boundary while in Myrtle Beach; recruited Buddy as Boundary's general manager at Callahan's request from Myrtle Beach; met with Callahan and Spatholt several times at architect William R. Halasz's offices in Myrtle Beach to discuss and review prospective drawings, design, and layout of Boundary; contacted a Myrtle Beach restaurant planner who drafted proposed plans for the layout of Boundary's kitchen; met with representatives from Jacobi-Lewis Company to discuss the layout of Boundary's kitchen and revised and made changes to the layout at the meeting;

closed Aspen Grill and thereafter Boundary hired former employees from Aspen Grill. As such, Edward contends Boundary purposefully availed itself of the benefits of doing business in South Carolina so that it could reasonably anticipate being haled into court here.

Our courts have held entering into a contract or mere negotiations inside South Carolina without more is not enough to establish minimum contacts. Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping & Garden Ctr, Inc., 315 S.C. 88, 92, 431 S.E.2d 632, 635 (Ct. App. 1993) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79 (1985)). In Loyd, this court stated: "An individual's contract with an out-of-state party cannot alone establish sufficient minimum contact's in the other party's home forum." Id. Furthermore the court found: "The parties' prior negotiations, the consequences of their actions as contemplated by the parties, the terms of the contract, and the parties' actual course of dealings must be considered in evaluating whether a defendant purposefully established minimum contacts within the forum." Id.

Though Edward knew Callahan and Spatholt were planning on opening Boundary in Calabash, North Carolina, in performing his duties under his contract, Edward met with contacts in Myrtle Beach, South Carolina. In fact, Boundary admits it "hired some service providers from Horry County to assist with planning the construction of the Restaurant in Calabash, North Carolina. Therefore, it appears Boundary, when forming its contract with Edward, contemplated Edward would use his Myrtle Beach contacts, including recruiting his son Buddy, to perform his duties of planning and designing Boundary. Therefore, because part of Edward's contract was to be performed in South Carolina, more than "mere negotiations" took place here.

This court has held South Carolina has jurisdiction over a party who entered into a contract that was to be partly performed within the State. Atl. Wholesale Co. v. Solondz, 283 S.C. 36, 37, 320 S.E.2d 720, 721 (Ct. App. 1984). In Solondz, a New York resident, agreed to purchase silver from Atlantic Wholesale. Id. However, when Solondz later refused to pay for the silver, Atlantic Wholesale brought suit in South Carolina. Id. Our court held South Carolina had jurisdiction over the suit because "the evidence presented at the hearing on the motion to dismiss clearly show[ed] Solondz entered into a

contract that was to be partly performed in South Carolina." Id. at 38, 320 S.E.2d at 722. Moreover this court found adjudicating the case within the State would not offend due process even though "Solondz ha[d] engaged in little activity in South Carolina . . . [because] the length and duration of the activity of the nonresident in this State is not deemed important and need only be minimal when the plaintiff lives in the forum state and the cause of action arose out of the defendant's activities in this State." Id. at 39, 320 S.E.2d at 722 (internal citation omitted) (emphasis added).

We believe personal jurisdiction over Boundary is proper at this stage in the proceeding. Boundary negotiated Edward's contract in South Carolina, and it was within its contemplation that Edward would perform his part of the contract here. In fact, Boundary admitted hiring service providers from Horry County to assist with planning the construction of the restaurant in Calabash, North Carolina. Because the restaurant was not yet in existence at the time the contract was entered into, one would logically expect planning to occur at the most convenient location for the parties. Therefore, because part of Edward's contract was to be performed within South Carolina and because Edward's cause of action arose from a breach of that contract, we believe Boundary has sufficient minimum contacts with South Carolina such that it would expect to be haled into court here. Accordingly, we find Edward met his pretrial prima facie burden of demonstrating personal jurisdiction over Boundary in his complaint and affidavits. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Therefore, Edward met the requirements of the power prong.

Lastly, we believe the fairness prong of the minimum contacts test is met as well. To reiterate, courts look at the following four factors in determining whether exercise of jurisdiction is reasonable or fair: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008).

Under the first prong, Boundary's activity within the State was continuous. Edward maintains Callahan and Spatholt, as agents of Boundary, came to Myrtle Beach on several occasions to meet and discuss plans for

opening Boundary with South Carolina businesses. Further, Edward, on behalf of Boundary, met with several Myrtle Beach contacts in performing his part of the contract. Therefore, the duration of Edward's activity in South Carolina was also continuous. Second, the character and circumstances of the negotiations and meetings appear essential to Edward fulfilling his part of the contract. It appears several businesses within South Carolina were contacted and potentially hired to perform several tasks in starting up Boundary. Third, it would not significantly inconvenience either party to adjudicate the suit in South Carolina given Boundary's proximity.

Finally, South Carolina has an interest in providing redress for its citizens. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."); Springmasters, Inc. v. D & M Mfg., 303 S.C. 528, 533, 402 S.E.2d 192, 195 (Ct. App. 1991) ("South Carolina has a legitimate interest in providing its citizens a forum to resolve claims for breach of contract."). Further, enough business was conducted within the state to warrant adjudication of the suit here. Contra Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 509, 402 S.E.2d 177, 181 (1991) ("[W]hile South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business was transacted in this State and any contract formed was not to be performed in this State."). Because both prongs of the minimum contact analysis are met, adjudication of Edward's suit against Boundary in South Carolina would not offend due process.

B. Callahan and Spatholt Individually

For reasons similar to the ones stated above, we believe Callahan and Spatholt individually possess enough minimum contacts with South Carolina so as not to offend due process. These contacts include the following: Callahan's 2003 meeting with Buddy Cribb at the Carolina Roadhouse in Myrtle Beach regarding Buddy's interest in helping start a restaurant; Callahan and Spatholt's two 2004 meetings with Edward Cribb at the Carolina Roadhouse in Myrtle Beach to discuss his interest in starting a new restaurant; and Callahan's meeting at Architect William R. Halasz's office in Myrtle Beach. Furthermore, Boundary filed its Articles of Incorporation on June 23,

2004, and according to Edward's complaint, Boundary opened for business on November 15, 2005. Therefore, given Boundary was not yet in existence when Edward first began acting as a consultant, he was acting on Callahan and Spatholt's behalf rather than on Boundary's behalf in performing part of his contract. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 242, 489 S.E.2d 470, 472 (1997) ("[A]uthorized acts of an agent are the acts of the principal."). Based on Callahan and Spatholt's contacts, the power prong of the minimum contacts analysis is met.

Moreover, the fairness prong is also satisfied. Callahan and Spatholt admit to hiring South Carolina businesses and meeting with them in Myrtle Beach. Second, the character and circumstances of their negotiations and meetings here appear essential to Boundary's successful opening. Third, it would not significantly inconvenience either party to adjudicate the suit in South Carolina given Boundary's proximity. Moreover, given our decision regarding personal jurisdiction over Boundary, Callahan and Spatholt will likely be in South Carolina on Boundary's behalf to defend Edward's suit. Finally, South Carolina has an interest in providing redress for its citizens and enough business was conducted within the state to warrant adjudication of the suit here. The circuit court's dismissal of Edward's suit for lack of personal jurisdiction in regards to Boundary as a business entity and Callahan and Spatholt individually is therefore

REVERSED.

HUFF and THOMAS, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Doe, a high school student in Richland County School District Two, and her parent, Mary Doe, Respondents,

v.

Richland County School District Two, Appellant.

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge

Opinion No. 4521
Heard January 8, 2009 – Filed March 25, 2009

AFFIRMED

Kenneth L. Childs, Vernie L. Williams, and Jasmine S. Rogers, all of Columbia, for Appellant.

Kimaka Nichols-Graham and Thomas L. Bruce, both of Greenville, for Respondents.

HEARN, C.J.: The Richland County School District Two Board of Trustees (Board) expelled Jane Doe from high school for committing a sexual

offense. The circuit court reversed, finding the Board's decision was not supported by substantial evidence and violated her due process rights. Richland County School District Two (District) appeals. We affirm.

FACTS

Jane Doe, a fourteen-year-old high-school student, began the school year enrolled in the District's alternative school at Blythewood Academy (Academy). In August, the Academy suspended Doe for two days after she engaged in a verbal altercation with another student. Less than a month later, a video camera captured Doe following a male student into the boys' restroom. According to Doe, she entered the boys' restroom to retrieve a comb the student had taken from her. Doe remained in the boys' restroom for about a minute until another male student entered the restroom; then, Doe exited the restroom.

Following this incident, the Academy suspended Doe for ten days and recommended expulsion for the remainder of the year. According to the Academy, Doe committed a sexual offense when she entered the boys' restroom with another male student.[1] In a letter to Doe, the District notified her of the Academy's recommendation, the date of the upcoming evidentiary hearing, and her procedural rights. Prior to the hearing, the District recorded over the videotape before Doe was allowed to view it. The school administrator and the hearing officer watched the tape prior to its destruction and reported only observing Doe enter the boys' restroom following a male student. The District did not present any additional evidence suggesting Doe committed a sexual offense. Nonetheless, the hearing officer found Doe committed a sexual offense and expelled her for the remainder of the year.

Doe timely appealed the hearing officer's decision to the Board. The Board, however, upheld the hearing officer's decision. Doe appealed the Board's decision to the circuit court pursuant to section 59-63-240 of the South Carolina Code (Supp. 2008). The circuit court reversed, finding

[1] "Sexual offense" is not defined by the District's Discipline Code. However, Level III Item 5 of the District's Discipline Code, JICDA-R, makes sexual offenses punishable by expulsion.

substantial evidence did not support the Board's decision to expel Doe for committing a sexual offense. In addition, the court found Doe's due process rights were violated. This appeal followed.

STANDARD OF REVIEW

A school board's decision to expel a student from school "may be appealed to the proper court." S.C. Code Ann. § 59-63-240 (Supp. 2008); see Davis v. Sch. Dist. of Greenville County, 374 S.C. 39, 44, 647 S.E.2d 219, 222 (2007) (stating the expulsion provision in the statute, unlike the suspension provision, expressly grants the student a right to appeal to the proper court). Judicial review of the school board's decision is limited to ascertaining whether the board's decision is supported by substantial evidence. Laws v. Richland County Sch. Dist. No. 1, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978). However, this court cannot substitute its judgment for that of the educational authorities. Id.

LAW/ANALYSIS

According to the District, Doe's voluntary act of entering the boys' restroom with a male student amounted to a sexual offense. Thus, the District asserts, given this incident and Doe's prior disciplinary history, substantial evidence supports the Board's decision to expel her from school. The District complains the circuit court improperly substituted its judgment for that of school authorities in reversing the Board's decision. We disagree.

"Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the Board reached or must have reached in order to justify its action." Kizer v. Dorchester County Vocational Educ. Bd. of Trs., 287 S.C. 545, 548, 340 S.E.2d 144, 146 (1986).

Doe's prior acts of disruptive activity while a student at the District have no bearing on the analysis of the question before us. The District chose not to expel Doe for any of her prior transgressions and only expelled her for committing a sexual offense in violation of Level III Item 5 of the District's Discipline Code. Thus, the narrow question before us is whether the Board's

decision to uphold the expulsion of Doe for committing a sexual offense is supported by substantial evidence.

The only evidence Doe committed a sexual offense was her voluntary entry into the boys' restroom for approximately one minute in pursuit of a male student. The school administrator and the hearing officer, the only individuals who viewed the videotape, reported observing no more than this. The record does not contain any evidence that Doe and the male student engaged in any sort of sexual activity or planned to do so. Furthermore, there was no statement from the male student or any other student that indicated anything sexual occurred. On these facts, we believe substantial evidence does not support the Board's decision to expel Doe.

Accordingly, the decision of the circuit court is therefore

AFFIRMED.

SHORT, J., and KONDUROS, J., concur.