The Supreme Court of South Carolina

In the Matter of Stephen C. Martin, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 17, 2003, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated January 29, 2009, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Stephen C. Martin shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

February 20, 2009

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
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N O T I C E

IN THE MATTER OF VANNIE WILLIAMS, JR., PETITIONER

On September 23, 2002, Petitioner was indefinitely suspended from the practice of law. In the Matter of Williams, 351 S.C. 415, 570 S.E.2d 521 (2002). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than April 21, 2009.

Columbia, South Carolina
February 20, 2009

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
February 23, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronnie Judy, Appellant,

v.

Phillip Martin and Dorchester County Sheriff Ray Nash, Defendants,

of whom Phillip Martin is the Respondent.

Appeal from Dorchester County
Patrick R. Watts, Circuit Court Judge

Opinion No. 26604
Submitted October 22, 2008 – Filed February 23, 2009

AFFIRMED

Glenn Walters Sr. and R. Bentz Kirby, both of Orangeburg, for Appellant.

Phillip Martin, of Marion, pro se Respondent.

CHIEF JUSTICE TOAL: In this case, Appellant Ronnie Judy filed a declaratory judgment action seeking to declare an underlying magistrate's

judgment *void ab initio* for lack of subject matter jurisdiction. The master-in-equity found in favor of Respondent Phillip Martin. On appeal, Appellant claims that the magistrate lacked jurisdiction to render the underlying judgment, and that the master erred by assuming facts not in evidence, finding that Appellant was required to request removal to the court of common pleas, and finding that Respondent would suffer prejudice if the magistrate's judgment was vacated.

FACTUAL/PROCEDURAL BACKGROUND

On May 8, 2000, Respondent filed suit in magistrate's court against Appellant, seeking $2,500 in damages. Appellant filed an Answer and Counterclaim in the amount of $6,500. At the time, the jurisdictional limit in magistrate's court was $5,000.[1] The magistrate issued a trial notice for September 28, 2000. Appellant claims he spoke with the magistrate on September 25, 2000, and that the magistrate told him the case was out of his jurisdiction and would be transferred to the circuit court. Appellant failed to appear at trial and the case was tried in his absence. The magistrate rendered a verdict for Respondent in the amount of $2,555. Appellant appealed to the circuit court on November 6, 2000. The magistrate's return acknowledged the conversation with Appellant, but indicates that the magistrate told Appellant only that a claim for over $5,000 would be out of his jurisdiction but said nothing about transferring the case to circuit court. The circuit court affirmed the magistrate's judgment. Appellant did not seek reconsideration from the circuit court or file an appeal.

Shortly after the final judgment, the sheriff issued an execution, which was returned *nulla bona*. In 2004, the probate court issued an order placing certain real property in Appellant's name, and Respondent had a Notice of Levy issued on the property. Appellant thereby filed this action for declaratory judgment with the master, who determined that Appellant was not entitled to relief on the grounds that Appellant: (1) failed to seek removal of the case from magistrate's court; (2) failed to appear in court to press his case

[1] The current jurisdictional limit of $7,500 took effect on January 1, 2001. S.C. Code Ann. § 22-3-10 (2008).

for removal; (3) relied upon a verbal ex parte request by telephone for confirmation that the case would be transferred to circuit court; (4) failed to file a motion for reconsideration of the circuit court's decision to uphold the magistrate's judgment; (5) failed to appeal to the court of appeals; and (6) abandoned his defense of lack of subject matter jurisdiction until nearly four years later. Appellant appealed the master's order, and this Court certified the case pursuant to Rule 204(b), SCACR. Appellant presents the following issues for review:

I. Did the trial court err in failing to address the issue of subject matter jurisdiction and whether the judgment was void ab initio?

II. Did the trial court err by assuming facts not in evidence and upholding the magistrate's order based upon what he assumed the trial judge would have ruled?

III. Did the trial court err by ruling that Appellant had to take an affirmative act to attempt to remove his case to Circuit Court?

IV. Did the trial court commit error by ruling the Respondent would face prejudice relating to having to make complicated legal arguments, and ignoring the proper relief and the relief sought by the Appellant?

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues. *Doe v. South Carolina Medical Malpractice Liability Joint Underwriting*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001). An action for declaratory judgment that a magistrate's judgment is void for lack of subject matter jurisdiction is an action at law. Therefore, the master's findings of fact will not be disturbed on appeal unless found to be without evidence

which reasonably supports them. *Harkins v. Greenville County*, 340 S.C. 606, 621, 533 S.E.2d 886, 893 (2000).

LAW/ANALYSIS

In the first question presented for our review, Appellant alleges that the master-in-equity erred in refusing to declare the magistrate's judgment void ab initio for lack of subject matter jurisdiction. We disagree, and hold that Appellant may not seek relief from the prior unappealed order of the circuit court because the order has become the law of the case.

Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. C.J.S. *Appeal & Error* § 991 (2008); *see also Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry et al*, 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case); *Watkins v. Hodge*, 232 S.C. 245, __, 101 S.E.2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal).

In this declaratory judgment action, Appellant seeks to reopen the question of whether the magistrate had subject matter jurisdiction to hear the merits of the underlying dispute. However, Appellant raised this issue and argued it before the circuit court on appeal from the magistrate's judgment. The circuit court denied Appellant's appeal and affirmed the magistrate's judgment. Appellant did not file a motion for reconsideration, an appeal with the court of appeals, or a motion to set aside the judgment. The circuit court's unchallenged disposition on the magistrate's subject matter

jurisdiction therefore became the law of the case, and this Court declines to reopen that issue in this subsequent action.[2]

CONCLUSION

For the reasons stated herein, we affirm the ruling of the master-in-equity.

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

[2] The remaining three questions presented for our review each involve the master's findings with regard to the magistrate's jurisdiction, and are similarly foreclosed by the law-of-the-case doctrine.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Hardee,	Employee/Claimant,
v.	
Harry D. McDowell, as Personal Representative of the Estate of W. D. McDowell, Uninsured Employer, and S. E. Smith Construction Co., Inc., Alleged Statutory Employer, and Companion Property and Casualty Insurance Company, Carrier/Defendant/Appellants, with the South Carolina Uninsured Employers' Fund,	Appearing/Respondents,
of whom Harry D. McDowell, as Personal Representative of the Estate of W. D. McDowell is	Respondent,
and S. E. Smith Construction Co., Inc. and Companion Property and Casualty Insurance Co., are	Petitioners,
and the South Carolina Uninsured Employers' Fund is	Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26605
Heard January 7, 2009 – Filed February 23, 2009

AFFIRMED AS MODIFIED

Weston Adams, III, Brian G. O'Keefe, Jillian M. Benson, and Ashley B. Stratton, all of McAngus Goudelock & Courie, of Columbia, for Petitioners.

Latonya Dilligard Edwards, of Columbia; Harry D. McDowell, pro se, of Loris; and Terri Morrill Lynch, Matthew J. Story, and Margaret M. Urbanic, all of Clawson & Staubes, of Charleston, for Respondents.

JUSTICE BEATTY: We granted certiorari to review the decision in Hardee v. McDowell, 372 S.C. 413, 642 S.E.2d 632 (Ct. App. 2007). In Hardee, the South Carolina Court of Appeals upheld the finding of the South Carolina Workers' Compensation Commission that a general contractor and its insurer, Smith Construction Co. and Companion Property & Casualty Insurance Co., could not transfer liability for a worker's injury to the South Carolina Uninsured Employers' Fund under section 42-1-415 of the South Carolina Code.[1] The Court of Appeals determined Smith Construction did not obtain proof of insurance from its subcontractor at the time the

[1] S.C. Code Ann. § 42-1-415 (Supp. 2008).

subcontractor was engaged to perform work as required by section 42-1-415. We granted the petition of Smith Construction and its insurer for certiorari and affirm as modified.

I. FACTS

Smith Construction, a general contractor, hired W. D. McDowell as a subcontractor to perform framing and other work for its construction projects on several occasions. Because McDowell could not afford workers' compensation insurance for its employees, Smith Construction routinely paid the premium and then took weekly deductions from McDowell's pay for reimbursement.

On March 11, 2002, McDowell presented Smith Construction with a certificate of insurance indicating McDowell had coverage from January 30, 2002 to January 30, 2003. During the year, McDowell worked on various jobs for Smith Construction. Smith Construction, relying upon the earlier certificate, did not seek proof of insurance for any of these jobs.

In the summer of 2002, McDowell began working on the Socastee library project for Smith Construction. Smith Construction admittedly did not ask for proof of insurance for this job and had no representation from McDowell as to proof of insurance other than the earlier certificate that was in Smith Construction's file.

On September 6, 2002, Anthony Hardee, one of McDowell's employees, was totally and permanently disabled when he fell from scaffolding while working on the Socastee library project. The day before the accident, McDowell's insurance was cancelled. Neither Smith Construction nor McDowell was aware of the cancellation at the time of Hardee's accident.[2]

[2] Although Smith Construction provided funds for the insurance, the insurer performed an audit of McDowell and apparently determined that additional funds were due on the account and terminated coverage. McDowell, however, disputed that additional funds were due.

Hardee filed a workers' compensation claim. Smith Construction sought to transfer its liability as a statutory employer to the Fund under section 42-1-415. The workers' compensation hearing commissioner found Smith Construction, as the general contractor, was liable for paying Hardee's benefits and it was not allowed to shift liability to the Fund under section 42-1-415 because Smith Construction did not request or obtain proof of insurance from McDowell for the job in question – the Socastee library project.

The full Commission upheld the findings of the hearing commissioner and adopted the hearing commissioner's order in full. The circuit court affirmed. Upon further appeal, the Court of Appeals affirmed. Hardee v. McDowell, 372 S.C. 413, 642 S.E.2d 632 (Ct. App. 2007). Smith Construction (and its insurer) petitioned for a writ of certiorari, which this Court granted.[3]

II. ISSUES

Smith Construction contends the Court of Appeals erred in affirming the full Commission's decision that section 42-1-415 requires a contractor to obtain proof of insurance from a subcontractor for each particular job for which the subcontractor is engaged to perform work. It argues the case of South Carolina Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004) mandates that proof of insurance be obtained only at the time the subcontractor is first engaged to work and not for each particular job. In the alternative, Smith Construction contends that, even if it obtained proof of insurance at the outset of the Socastee library job, it still would not have learned of the cancellation of McDowell's policy.

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[3] Smith Construction shall include its insurer as a petitioner where appropriate.

III. LAW/ANALYSIS

Under the statutory employment doctrine, a contractor may be held liable for work-related injuries to employees hired by a subcontractor. See S.C. Code Ann. § 42-1-410 (1985) (stating a "contractor shall be liable to pay to any workman employed in the work [of a subcontractor] any compensation under this Title which he would have been liable to pay if that workman had been immediately employed by him"); Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 580, 510 S.E.2d 431, 433 (Ct. App. 1998) ("The concept of statutory employment is designed to protect the employee by assuring workers' compensation coverage by either the subcontractor, the general contractor, or the owner if the work is part of the owner's business.").

The Fund was "created [by the South Carolina Legislature] to ensure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage for employees . . . ." S.C. Code Ann. § 42-7-200(A)(1) (Supp. 2008).

Section 42-1-415 provides that a contractor may shift liability to the Fund if the contractor obtains adequate proof that the subcontractor had insurance coverage at the time the subcontractor "was engaged to perform work":

> (A) Notwithstanding any other provision of law, upon the submission of documentation to the [C]ommission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section. . . . The higher tier subcontractor, contractor, project owner, or his insurance carrier may petition the [C]ommission to transfer responsibility for continuing compensation to the Uninsured Employers' Fund. . . .

> (B) To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the [C]ommission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the [C]ommission at the time a claim is filed by the injured employee.

S.C. Code Ann. § 42-1-415(A)-(B) (Supp. 2008) (emphasis added).

The issue in this case is at what point in time a contractor must obtain proof of insurance from a subcontractor. Section 42-1-415 provides that such proof must be obtained when the subcontractor is "engaged to perform work."

In the direct appeal of this case, the Court of Appeals first considered Smith Construction's argument that the Commission erred by requiring a contractor to collect proof of insurance from its subcontractor for each job the subcontractor performs. Hardee, 372 S.C. at 417, 642 S.E.2d at 635. The Court of Appeals noted that "Smith Construction contends that a contractor complies with section 42-1-415 by obtaining proof of insurance from its subcontractor once a year." Id. at 417-18, 642 S.E.2d at 635.

Smith Construction, relying on the case of South Carolina Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004), argued section 42-1-415 is satisfied if the contractor obtains proof of insurance the first time it hires a subcontractor in any given year, regardless of the number of jobs the subcontractor performs. Id. at 418, 642 S.E.2d at 635. In contrast, Hardee argued that "a common sense reading of the statute" requires a contractor to demand proof of insurance at the beginning of each new job rather than once a year. Id.

The Court of Appeals held the House case was not controlling as the issue presented in House was whether a contractor had a continuing duty to

collect proof of insurance throughout the term of the work where there is one continuous job, as opposed to a series of separate jobs. Id. at 418-19, 642 S.E.2d at 635. The Court of Appeals stated the issue in the present appeal, however, concerns what is meant by "engaged to perform work" in circumstances "where a contractor employs a subcontractor for a series of separate jobs in a single year." Id. at 419, 642 S.E.2d at 635.

Turning to the language of the statute, the Court of Appeals found "the plain language [of section 42-1-415] contemplates the contractor require proof of insurance for each job the subcontractor performs regardless of the number of jobs the subcontractor performs in a given year." Id. at 419, 642 S.E.2d at 635-36. Noting the statute requires a contractor to collect proof of insurance at the time the subcontractor is "engaged to perform work," the court concluded: "We find the phrase 'engaged to perform work' refers to when a subcontractor begins work at a construction site. The statute is plain and unambiguous and, therefore, it is not our place to change the meaning of the statute." Id. at 419, 642 S.E.2d at 636. The Court of Appeals held that, because Smith Construction did not seek proof of insurance from its subcontractor before it began the Socastee library project, that it was not entitled to transfer liability for Hardee's injury to the Fund. Id. at 420, 642 S.E.2d at 636.

Upon certiorari to this Court, Smith Construction contends the Court of Appeals erred in holding the phrase "engaged to perform work" requires proof of insurance for each job. Smith Construction asserts such a view is "strict and narrow" and "places a heavy burden on contractors and is inconsistent with the legislative purpose of the statute." Smith Construction argues section 42-1-415 "requires the contractor to obtain proof of insurance at one point in time: at the first engagement of the subcontractor. At most, section 42-1-415 requires a contractor to obtain proof of insurance on a yearly basis." In contrast, the Fund maintains that the phrase "engaged to perform work" logically "refers to each job upon which a subcontractor contracts with a contractor for its performance."

Both sides cite the case of South Carolina Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004). In House, a general

contractor verified that a subcontractor had insurance at the time the subcontractor was hired. Id. at 469, 602 S.E.2d at 81. Later, one of the subcontractor's employees was injured, but by that time the subcontractor no longer had insurance coverage. Id. Prior to the injury, the subcontractor's insurance had been terminated and reinstated several times before it was finally cancelled. Id. at 470, 602 S.E.2d at 81-82.

The Court of Appeals in House agreed with the general contractor that section 42-1-415 does not "require a higher-tier contractor to continue to collect proof of insurance coverage from its subcontractor after originally collecting documentation at the time of hire." Id. at 471, 602 S.E.2d at 82 (emphasis added). The court stated it was "loath to read such a requirement into a statute that otherwise contains such straightforward language." Id. at 472, 602 S.E.2d at 83. The court explained that the use of the word "originally" in subsection (C) of section 42-1-415, which provides it is fraud to fail to notify the contractor who "originally" was provided documentation of coverage of a lapse in such coverage, "lends support to the reasoning that the information given at the inception of the engagement is the controlling factor . . . ." Id. (citing S.C. Code Ann. § 42-1-415(C)). We denied certiorari in House.

House stands for the proposition that a contractor does not have a continuing duty to check the validity of the subcontractor's insurance status after the subcontractor is "engaged to perform work."[4] House, however, did not clearly define the meaning of the phrase "engaged to perform work." The Court of Appeals attempted to clarify the phrase in its review in this case. We find the phrase needs further clarification.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Id. "Where the statute's language is plain and

[4] House involved a contract to hire the subcontractor for several jobs; thus, there was only one contract and one point of hire.

unambiguous, and conveys a definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning." Id. at 122, 542 S.E.2d at 739-40. "What a legislature says in the text of a statute is considered the best evidence of legislative intent or will." Id. at 122, 542 S.E.2d at 740. "Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id.

Based on the express language of the statute, we hold the phrase "engaged to perform work" means each time a subcontractor is actually hired to perform work. Thus, if a contractor enters into a contract to hire a subcontractor for one job in January and then enters into another contract to hire the subcontractor for a second job in February, the contractor should verify that the subcontractor still has insurance coverage at the time of the February hiring.[5] This interpretation comports with the usual understanding of "to engage" someone for employment. See Black's Law Dictionary 570 (8th ed. 2004) (defining "engage" as "[t]o employ"); id. at 748 (defining "hire" as "[t]o engage the labor or services of another for wages or other payment"); see also 1 Funk & Wagnalls Standard Dictionary 420 (1974) (defining "engage" as "to bind by a promise" or "to hire").

In the current appeal, although Smith Construction checked for proof of insurance from McDowell at one point in early 2002, it did not check for proof of insurance at the time it actually hired McDowell for the Socastee library project in the summer of 2002; rather, it relied upon the documentation it had received earlier in the year.[6] Because coverage can lapse, Smith Construction should have verified coverage at the time

[5] To the extent that South Carolina Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004) is inconsistent with our decision today, it is not good law.

[6] S. E. Smith, of Smith Construction, testified that he hired McDowell from job to job, and that he did not request a certificate of insurance for each job. Rather, he asked for it earlier in the year and then kept the certificate of insurance on file for the year.

McDowell was hired to do the Socastee library project in order to fall under the protection of the statute.

Although Smith Construction argues it would violate public policy to not allow it to transfer liability to the Fund, we discern no public policy violation that would be created by requiring Smith Construction to comply with the express terms of the statute. It is up to the South Carolina Legislature to change the statute if it intends a different interpretation; further, the legislature could have expressly provided that contractors could verify coverage once per year or some time period other than each time the subcontractor was engaged to perform work.

Consequently, we affirm the Court of Appeals' determination that Smith Construction is not entitled to transfer liability to the Fund because it did not seek proof of insurance when McDowell was engaged to perform the work on the Socastee library project. There is one sentence in the Hardee opinion, however, that states "engaged to perform work" refers to the time the subcontractor actually begins work on a project. Because this date may vary from the date of hire, we modify the opinion to the extent it conflicts with the definition above.

Smith Construction finally argues that verifying insurance at the time the Socastee library project began would not have mattered in this case because the subcontractor's insurance was not cancelled until after the project started. While it is true that a check at that time would not have shown a lack of coverage, we agree with the Fund that this argument ultimately fails on its merits. If Smith Construction had obtained a certificate of insurance from McDowell at the time McDowell was hired for the project and then the coverage was terminated unbeknownst to the parties, Smith Construction would have been entitled to transfer liability to the Fund and the purpose of the statute would have been served.

IV. CONCLUSION

Based on the foregoing, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

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

The Supreme Court of South Carolina

The State, Respondent,

v.

Clifton Lyles, Petitioner.

ORDER

Petitioner was convicted of trafficking in crack cocaine. He was sentenced to imprisonment for thirty years and payment of a $50,000 fine. After an *Anders*[1] review, the Court of Appeals dismissed petitioner's direct appeal. *State v. Lyles*, Op. No. 2008-UP-223 (S.C. Ct. App. filed April 11, 2008).

Petitioner has now filed a *pro se* petition for a writ of certiorari to review the decision of the Court of Appeals. We deny the petition and hold that, as a matter of policy, we will not entertain petitions for writs of certiorari to the Court of Appeals where the Court of Appeals has conducted an *Anders* review.

[1] *Anders v. California*, 386 U.S. 738 (1967).

As this Court explained in *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (1990), the Court of Appeals was created to reduce the State's appellate backlog. The Court has held it will grant certiorari to the Court of Appeals only where special reasons justify the exercise of that power. *Haggins v. State*, 377 S.C. 135, 659 S.E.2d 170 (2008); *In re Exhaustion of State Remedies in Criminal Post-Conviction Relief Cases*, *supra*. Further, Rule 226(b), SCACR, emphasizes the discretionary authority of the Court to review decisions of the Court of Appeals. The rule states, "[a] writ of certiorari . . . will be granted only where there are special and important reasons," and provides examples of reasons which may justify review by this Court.[2] In addition, an individual has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review, and counsel is not required to seek a writ of certiorari after a criminal appeal is decided by the Court of Appeals. *Douglas v. State*, 369 S.C. 213, 631 S.E.2d

[2] Where there are novel questions of law; where there is a dissent in the decision of the Court of Appeals; where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; where substantial constitutional issues are directly involved; and/or where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

542 (2006). Litigants are not required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies for federal habeas corpus review. *In re Exhaustion of State Remedies in Criminal Post-Conviction Relief Cases*, *supra*.

The Court has already identified two categories of Court of Appeals' decisions it will not review. *Missouri v. State*, 378 S.C. 594, 663 S.E.2d 480 (2008) (orders denying certiorari in post-conviction relief cases); *Haggins v. State, supra* (letter denials in post-conviction relief cases).

In *State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991), this Court set forth the process to be followed when counsel submits a brief under *Anders* and petitions to be relieved as counsel. In these cases, the role of the appellate court is to review the brief submitted by counsel, any *pro se* response submitted by the appellant, and the record on appeal to determine whether the appeal contains any issues of arguable merit. *Id.* If an issue is found which has arguable merit, the appellate court will direct the parties to file merit briefs, and the case will proceed under the normal appellate

process. *Id.* On the other hand, if no issues of arguable merit are found by the appellate court, the appeal is dismissed, and the appellant's counsel is relieved. *Id.*

Under this procedure, a decision of the Court of Appeals dismissing an appeal after conducting a review pursuant to *Anders* is not a decision on the merits of the appeal, but simply reflects that the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief. A decision of this nature does not meet the "special and important" standard established by Rule 226(b) and this Court's decisions concerning petitions for writs of certiorari to the Court of Appeals. Accordingly, we deny the petition for a writ of certiorari in this matter. This Court will no longer entertain petitions for writs of certiorari where the Court of Appeals has dismissed an appeal after conducting an *Anders* review.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

February 19, 2009

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

The South Carolina Bar has proposed amending Rule 1.15(f), RPC, Rule 407, SCACR, to replace the terms "depository bank" and "bank" with the term "depository institution." The Bar also proposes amending Rule 1.0, RPC, Rule 407, SCACR, to provide a definition of the term "depository institution." The amendment takes into account the fact that a lawyer may receive funds from, or deposit funds into, a financial institution which does not meet the definition of a traditional bank. These institutions include a traditional bank, credit union, or savings and loan association. These institutions also must be insured by the Federal Deposit Insurance Commission in the case of a bank or savings and loan, or the National Credit Union Share Insurance Fund in the case of a credit union.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend the South Carolina Appellate Court Rules as set forth in the attachment to this Order. Additionally, Rule 412, SCACR, concerning Interest on Lawyer Trust Accounts, contains a similar clause, but fails to note

that a credit union is insured by the National Credit Union Share Insurance Fund. Accordingly, Rule 412(a)(4) is also amended to reflect the correct nomenclature of the insuring entity for a credit union.

This order is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

February 12, 2009

RULE 1.0: TERMINOLOGY

. . .

(d) “Depository institution” means any bank, credit union or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or any successor insurance corporation(s) established by federal or state law.

(e) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association, or in a legal services organization; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association.

(f) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or which has a purpose to deceive.

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(h) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(i) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(j) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(k) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(l) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(m) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(n) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(o) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(p) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

. . .

RULE 1.15: SAFEKEEPING PROPERTY

. . .

(f) A lawyer shall not disburse funds from an account containing the funds of more than one client or third person unless the funds to be disbursed have been deposited in the account and are collected funds; provided, however, a lawyer may treat as equivalent to collected funds cash, verified and documented electronic fund transfers, or other deposits treated by the depository institution as equivalent to cash, properly endorsed government checks, certified checks, cashiers checks or other checks drawn by a depository institution, and any other instrument payable at or through a depository institution, if the amount of such other instrument does not exceed $5,000 and the lawyer has reasonable and prudent belief that the deposit of such other instrument will be collected promptly. If the actual collection of deposits treated as the equivalent of collected funds does not occur, the lawyer shall, as soon as practical but in no event more than five working days after notice of noncollection, deposit replacement funds in the account.

. . .

RULE 412
INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA)

. . .

(a) Definitions. As used herein, the term:

. . .

(4) “Participating Institution” means any bank, credit union or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or any successor insurance corporation(s) established by federal or state law.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Capital City Insurance Company, Appellant,

v.

BP Staff, Inc., and Samuel Blanton Phillips, III, Respondents.

Appeal From Greenville County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 4502
Heard January 21, 2009 – Filed February 13, 2009

REVERSED AND REMANDED

Mark A. Cullen, of West Palm Beach, Florida, for Appellant.

D. Randle Moody, II, of Greenville, for Respondents.

PIEPER, J.: In this case, the trial court dismissed appellant Capital City Insurance Company's (Capital City) complaint of five counts of breach of contract against BP Staff, Incorporated (BP Staff) and one count of fraud against Samuel Blanton Phillips, III (Phillips), pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(8), SCRCP. We reverse the trial court's order and remand the case for further proceedings.

FACTS/PROCEDURAL HISTORY

Capital City is a workers' compensation insurance company in Columbia, S.C. BP Staff is an employee leasing company wholly owned by Phillips and based in Greenville, S.C. Phillips was previously employed by SB Phillips Company (SB), attending to payroll and procurement of workers' compensation insurance for that company prior to starting BP Staff in July 2002.

In August 2002, BP Staff sought workers' compensation coverage through the South Carolina Department of Insurance Workers' Compensation Assigned Risk Insurance Plan and submitted an application that was assigned to Capital City. After reviewing the application, Capital City issued a policy in September 2002 to BP Staff and assigned it a higher premium than a new company would usually receive; BP Staff was assigned an "experience modifier" (modifier) of 1.33 rather than 1.0, meaning BP Staff would be charged an extra $33,000 for every $100,000 of payroll. In essence, Capital City viewed BP Staff as a successor company to SB because the overwhelming majority of workers on BP Staff's payroll were formerly at SB. Thus, Capital City applied SB's modifier to BP Staff's insurance policy.

BP Staff acquired two subsequent policies from Capital City in 2003 and 2004 for its South Carolina operations. Additionally, BP Staff acquired two more policies from Capital City in 2004 covering its Virginia, Georgia, and Alabama operations.

From September 2, 2002, through August 23, 2006, BP Staff appealed Capital City's application of the modifier to its policies in several administrative proceedings that culminated in affirmance of the modifier by the Administrative Law Court. BP Staff then appealed the modifier issue to the South Carolina Court of Appeals, which affirmed application of the modifier on January 16, 2008. See BP Staff, Inc. v. Capital City Ins. Co., Op. No. 2008-UP-060 (S.C. Ct. App. Filed Jan. 16, 2008). However, at the time Judge Breeden's first order was filed on May 8, 2006, which dismissed Capital City's breach of contract and fraud claims, the modifier issue was still

pending administrative appeal before the ALC; by the time he issued the June 3, 2007 order denying the motion to reconsider, the modifier issue had been ruled upon by the ALC and was pending on appeal to this court. We analyze this case based on the record before the trial court.

On July 13, 2005, Capital City commenced the present action, alleging five counts of breach of contract by BP Staff and one count of fraud by Phillips individually. BP Staff and Phillips responded with a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure, asserting the circuit court lacked subject matter jurisdiction, and that Capital City failed to state facts sufficient to constitute a cause of action. Additionally, BP Staff and Phillips later argued in their memorandum in support of dismissal that the case should be dismissed pursuant to Rule 12(b)(8), SCRCP, "because there was another action pending between the parties for the same claim."

At the hearing on November 28, 2005, Capital City argued that although its claimed damages would be impacted by application of the modifier, BP Staff was still in breach of contract for failure to pay any of its premium, with or without the modifier.[1] BP Staff denied it owed Capital City any premiums, including the undisputed amount derived from the 1.0 modifier. Additionally, Capital City contended the administrative court determining the modifier issue was without authority to grant any relief sought for breach of contract or fraud. As such, it asserted the two disputes were substantively different and the case should go forward notwithstanding the pending administrative issue. Alternatively, Capital City asked that the proceedings be stayed until a ruling from the "Appeals Court" was issued.[2]

On January 12, 2006, the trial court granted the motion to dismiss, but the order was not recorded with the clerk of court until May 8, 2006. After

[1] At the hearing, Capital City claimed BP Staff owed approximately $400,000 in unpaid premiums if the 1.0 modifier was applied, or approximately $700,000 if the 1.33 modifier was applied.

[2] Since the modifier issue was pending on appeal before the ALC at the time Capital City made this statement, we interpret Capital City's request to have meant the ALC rather than the South Carolina Court of Appeals.

determining the modifier dispute was the "linchpin regarding any and all disputes between the parties," the court found that "the administrative process will afford the parties an opportunity to address their respective positions and seek a compromise of this matter." Consequently, the court held that, "absent an exhaustion of the [administrative] process, the instant action is premature and should be dismissed" pursuant to Rules 12(b)(6), and alternatively, pursuant to 12(b)(1), and 12(b)(8), SCRCP.

The trial court denied Capital City's motion to reconsider and reinstate on June 30, 2007. This appeal followed.

ISSUES PRESENTED

I. Did the trial court err in dismissing the complaint pursuant to Rule 12(b)(6) when the complaint sets forth sufficient facts to support claims for breach of contract and for fraud?

II. Did the trial court err in dismissing the case for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) when it did so based on a lack of exhaustion of administrative remedies and when such doctrine of exhaustion is not jurisdictional?

III. Did the trial court err in dismissing the case based on the exhaustion of administrative remedies doctrine because the doctrine does not apply?

IV. Did the trial court err in dismissing the case pursuant to Rule 12(b)(8), based upon the exhaustion of administrative remedies doctrine when only the corporate defendant in this case is a party to the administrative proceedings and when the issues to be decided in the administrative proceeding and the trial court are not the same?

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts

sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Id. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. Doe, 373 S.C. at 395, 645 S.E.2d at 247. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Id. at 395, 645 S.E. at 248. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007).

Pursuant to Rule 12(b)(1), SCRCP, the movant challenges the power of the court over the subject matter. "The question of subject matter jurisdiction is a question of law for the court." Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993) (citing Bargesser v. Coleman Co., 230 S.C. 562, 96 S.E.2d 825 (1957)). We are free to decide questions of law with no deference to the trial court. Catawba Indian Tribe of S.C. v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

Pursuant to Rule 12(b)(8), SCRCP, the movant seeks dismissal of a case because another action is pending between the same parties for the same claim. While we utilize the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), each of the components of the rule are determined as a matter of law and thus we apply a de novo standard of review to the grant or denial of this motion. See Miami Sand & Gravel, LLC v. Nance, 849 N.E.2d 671, 676 (Ind. Ct. App. 2006). In other words, we may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law.

LAW/ANALYSIS

The primary focus of this appeal is whether Capital City was required to exhaust the administrative process concerning the proper modifier to BP

Staff's premium before it could proceed on an action for breach of contract and fraud.[3] Therefore, we address the threshold issues of subject matter jurisdiction and exhaustion of administrative remedies first even though the trial court apparently treated them as alternative holdings.

Capital City asserts that the trial court erred in dismissing the case for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) based upon the lack of exhaustion of administrative remedies. We agree.

Subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." See Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93-94, 668 S.E.2d 795, 796 (2008); Ward v. State, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000). This authority is distinct from the doctrine of exhaustion of administrative remedies, which "is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." Ward, 343 S.C. at 17 n.5, 538 S.E.2d at 246 n.5 (internal quotation omitted). Additionally, the doctrine of exhaustion of administrative remedies is often leveraged "to avoid interference with the orderly performance of administrative functions." Id. at 19 n.7, 538 S.E.2d at 247 n.7. Consequently, a "failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." Id. at 17 n.5, 538 S.E.2d at 246 n.5.

In the present case, Capital City's breach of contract and fraud claims are part of the general class of cases which the court of common pleas has jurisdiction to hear. The mere fact that Capital City was also engaged in an administrative proceeding regarding the modifier did not divest the circuit court of its power to hear and determine the claims of breach of contract and fraud. Thus, the trial court had subject matter jurisdiction to hear these types of claims and erred in dismissing Capital City's complaint pursuant to Rule 12(b)(1), SCRCP.

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[3] We need not address whether the modifier issue is properly within the administrative review process since that issue is not in dispute. We only determine what impact that proceeding has on the trial court's determination to dismiss the circuit court action.

Next, Capital City asserts the trial court erred in dismissing the complaint pursuant to Rule 12(b)(6), SCRCP, based upon exhaustion principles because the complaint sets forth sufficient facts to support claims for breach of contract and for fraud, which are not subject to the requirement of exhaustion of administrative remedies. We agree.

The South Carolina Supreme Court has indicated that dismissal may be proper under Rule 12(b)(6), SCRCP, for failure to state a claim where the opposing party is required to exhaust its administrative remedies as a matter of law, but failed to do so. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute). Thus, we must determine whether exhaustion of administrative remedies was required as a matter of law; if not, we next determine whether the court abused its discretion in dismissing the case until exhaustion of the administrative process is complete in order to assist in the disposition of the circuit court proceeding. See Stanton v. Town of Pawley's Island, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) ("[T]he question of whether to require the plaintiff to exhaust administrative remedies was a matter within the sound discretion of the trial judge," which will not be disturbed absent an abuse of discretion).[4]

Initially, we note "[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing Ward, 343 S.C. 14, 538 S.E.2d 245). For example, in Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002), respondent Colonial argued appellant Sand's failure to exhaust administrative remedies

[4] In Stanton, the supreme court further explained that in order to reverse the trial court's order on the issue of exhaustion, the plaintiff "must show that as a matter of law, he was not required to exhaust administrative remedies or that the trial judge's ruling was based upon facts for which there is no evidentiary support." Id. at 128, 420 S.E.2d at 503.

precluded a tort action against third parties. Id. at 412, 632 S.E.2d at 114-15. This court disagreed and held the following:

> If this were an appeal from the denial of the permit through the administrative process in which [the agency] was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit. . . . However, in a tort action against a third party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged . . . . [The agency] is not the appropriate fact finder to answer this question. The jury is.
>
> The basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for the permit denial, would not assist the court in this instance. The alleged wrong is not one which the administrative process was designed to redress. "The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered."

Thomas Sand, 349 S.C. at 413, 563 S.E.2d at 115 (quoting Med. Mut. Liab. Ins. Soc. of Md. v. B. Dixon Evander & Assocs., 92 Md. App. 551, 609 A.2d 353 (Md. App. 1992)).

Here, although Capital City was a party to an administrative proceeding related to the case at bar at the time of Judge Breeden's first order, its breach of contract and fraud claims are not based on a statute for which the

legislature mandates the pursuit of an administrative remedy; in short, Capital City's claims alleging breach of contract and fraud are not wrongs for which the administrative scheme was designed to redress.[5] Accordingly, as in Thomas Sand, Capital City was not required, as a matter of law, to exhaust the administrative process regarding the modifier before filing the current action in circuit court for breach of contract and fraud.

Although the legislature has not mandated exhaustion of the claims, we recognize the trial court's perception that the administrative process, at least in part, would provide some assistance in resolution of the claims pending in the circuit court. Moreover, Capital City possibly could have secured a judgment in the circuit court before the proper modifier was determined and applied by the administrative process, thereby raising the specter of interference with administrative review. On the other hand, any applicable statute of limitations must also be considered. The court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy. See Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) ("The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants."). While the court erred in basing its decision on mandatory exhaustion which was not applicable to this case, we may also determine in a nonmandatory exhaustion context whether

[5] The issue of exhaustion of administrative remedies has recently been addressed by this court in Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental Control, Op. No. 4485 (S.C. Ct. App. Filed Jan. 12, 2009) (Shearouse Adv. Sh. No. 4 at 51). As noted in the concurring opinion, "absent an exception, so long as there is an opportunity for completion and review of a matter, then the parties must avail themselves of the entire administrative process prior to seeking judicial relief." Id. at 68. However, the situation herein differs from that in Oakwood because no opportunity existed for completion or review of Capital City's breach of contract or fraud claims by the administrative process due to the type of claim involved; thus, Capital City's claims were not subject to mandatory exhaustion.

the circuit court abused its discretion in ordering dismissal of the case over some less drastic remedy, such as a continuance or stay, in order to obtain the benefit of the administrative process.[6]

The United States Supreme Court has previously provided guidance resolving the apparent dilemma wherein a party's judicial action is caught between the rock of the statute of limitations and the hard place of continuing administrative proceedings that impact the judicial action. In Carnation Co. v. Pacific Westbound Conference, 86 S. Ct. 781 (1966), the Court held that an action should have been stayed rather than dismissed when the petitioner's treble damages claim "[could] not be easily reinstituted at a later time. Such claims are subject to the [s]tatute of [l]imitations and are likely to be barred by the time the [agency] acts." Id. at 787. Similarly, the Supreme Court previously held that, "[w]hen it appeared in the course of the litigation that an administrative problem, committed to the [agency], was involved, the court should have stayed its hand pending the [agency's] determination." Gen. Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433 (1940). The Supreme Court suggested the case should not be dismissed; rather, "the cause should be held pending the conclusion of an appropriate administrative proceeding." Id. We find this reasoning persuasive. Therefore, where a party would be harmed by the running of the statute of limitations or otherwise prejudiced if its claim is dismissed because a related matter is undergoing administrative review, a trial court seeking to withhold determination of a circuit court case pending resolution of an administrative proceeding that may impact the circuit court case should properly consider a stay or continuance of the judicial action until the administrative proceedings have concluded. Consequently, "[w]here suit is brought after the first administrative decision and stayed until remaining administrative proceedings have concluded[,] judicial resources are conserved and both parties fully protected." United States v. Mich. Nat'l Corp., 419 U.S. 1, 6 (1974).

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[6] We recognize the court's decision was based on mandatory exhaustion. However, due to some overlap in the court's language, we have analyzed the court's order from the perspective of a proceeding not requiring exhaustion as a matter of law. We apply an abuse of discretion standard to the decision to utilize the administrative process prior to disposition of the circuit court case.

In the present case, the trial court dismissed Capital City's breach of contract and fraud claims due to the ongoing administrative proceedings concerning the modifier instead of staying or continuing the circuit court proceeding. However, the court's order does not reflect consideration given to any applicable statute of limitations. See, e.g., S.C. Code Ann. §§ 15-3-530(1) & (7) (2005). A party should not be required to "roll the dice" on whether a collateral administrative proceeding will conclude prior to the running of an applicable statute of limitations in order to preserve a claim properly within the jurisdiction of the circuit court. Even utilizing an abuse of discretion standard based upon the nonmandatory exhaustion context of the breach of contract and fraud claims, we find Capital City would be prejudiced by dismissal in light of the problem posed by any applicable statute of limitations. Thus, the court abused its discretion in ordering a dismissal as opposed to a stay or continuance due to this prejudice.[7]

As previously indicated, as to the breach of contract and fraud claims, Capital City was not required to exhaust administrative remedies as a matter of law. This case is merely impacted by another administrative proceeding, not one itself requiring the exhaustion of the administrative process. Since the complaint adequately sets forth facts supporting the claims in this case, and since the court erred in its disposition of the exhaustion issue, dismissal under Rule 12(b)(6), SCRCP, was likewise improper.

Finally, Capital City asserts the trial court erred in dismissing the case pursuant to Rule 12(b)(8), SCRCP. We agree.

In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. Rule 12(b)(8), SCRCP. The rule has historic ties to a former

[7] We note the possibility a dismissal, as opposed to a stay, in some circumstances may be upheld where there is some assurance there will be no prejudice to any rights of the parties involved; however, we need not reach this issue here today as this case does not present that situation. See, e.g., Mich. Nat'l Corp., 419 U.S. at 5.

statute[8] providing a defendant a similar opportunity to demur; our supreme court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. S.C. Public Serv. Comm'n v. City of Rock Hill, 268 S.C. 405, 408, 234 S.E.2d 228, 229 (1977); see also James F. Flanagan, South Carolina Civil Procedure 96-97 (2d ed. 1996). We find this approach consistent with modern day practice under rules similar to our Rule 12(b)(8). See, e.g., Beatty v. Liberty Mut. Ins. Group, 893 N.E.2d 1079, 1084 (Ind. App. Ct. 2008) (applying 12(b)(8) dismissal "where the parties, subject matter, and remedies are precisely the same, and it also applies when they are only substantially the same."). Accordingly, we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).[9]

Here, while we respectfully recognize that the administrative claim may have some relationship or impact upon the circuit court action, we also recognize that the administrative proceeding and the circuit court action are fundamentally and structurally different from each other. Therefore, based upon the record herein, dismissal of Capital City's action under Rule 12(b)(8), SCRCP, was improper.[10]

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[8] The former statute, Section 10-642(3) of the South Carolina Code (1962), read in part as follows: "The defendant may demur to the complaint when it shall appear upon the face thereof that: (3) There is another action pending between the same parties for the same cause."

[9] Under the peculiar facts of this case, our conclusion pursuant to Rule 12(b)(8) would be the same even if we applied an abuse of discretion standard as to the trial court's Rule 12(b)(8) analysis.

[10] Because of our disposition herein, we need not address appellant's claim that the court erred in applying its ruling equally to both BP Staff and Phillips.

CONCLUSION

Accordingly, we reverse the trial court order and remand this case for further proceedings. Since there was a request to stay that the circuit court did not address, the parties, upon remand, may request that the trial court impose a stay or continuance as may be appropriate.[11]

REVERSED AND REMANDED.

WILLIAMS and GEATHERS, JJ., concur.

[11] We note that BP Staff's petition for certiorari in the administrative matter regarding the modifier is currently pending before the South Carolina Supreme Court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Laser Supply and Services, Inc., Appellant,

v.

Orchard Park Associates, d/b/a Orchard Park Apartments, Respondent.

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 4503
Heard October 7, 2008 – Filed February 19, 2009

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

E. Wade Mullins, III, of Columbia, for Appellant.

R. Patrick Smith, of Greenville, for Respondent.

GEATHERS, J.: This breach of contract action arises from a dispute over the completion of remediation construction at the Orchard Park Apartments in Greenville, South Carolina. Appellant Laser Supply & Services, Inc. (Laser) seeks review of the circuit court's order awarding damages and attorney fees to Respondent Orchard Park Associates (Orchard).

The essence of Laser's appeal is a challenge to the ruling that the parties' contract called for completion of work on a "per building" basis, rather than completion of work when the specified quantities of materials had been exhausted. We affirm in part, reverse in part, and remand for additional findings on the issue of attorney fees and costs.

FACTS/PROCEDURAL HISTORY

On or about March 4, 2003, Laser and Orchard entered into a contract for roof repair work at the Orchard Park Apartments in Greenville (the roof contract). Later, on April 1, 2003, the parties entered into a separate contract for exterior wood siding repair and replacement at the same site (the siding contract). Incorporated into the siding contract is a document entitled "EXHIBIT I - SCOPE OF WORK." Exhibit I limits the quantities of materials that may be used for the work and requires Orchard's approval of a change order prior to Laser's use of quantities exceeding those limits. Notably, the contract affirms that, prior to its execution, Laser had inspected the premises for job conditions. However, Laser did not perform such an inspection prior to executing the contract.

Exhibit I also includes a payment schedule allowing Laser to submit invoices after the completion of work on specified buildings and requiring Orchard to remit payment within twenty-one days of each invoice date. Laser began the remediation work in April 2003 and submitted its first invoice to Orchard on April 11, seeking payment for the completion of work on the clubhouse, shop, and four apartment buildings, even though Laser did not actually complete work on those buildings until sometime after May 1. Laser's first five invoices were approved for payment soon after Laser submitted them. However, Orchard did not actually process payments on those invoices until August 8.

ConAm Management Corporation (ConAm) was responsible for administering both contracts on behalf of Orchard. ConAm's Southeast Regional Maintenance Director, David Young (Young), drafted the contracts

and oversaw Laser's work progress. Soon after Laser began the remediation, Young noticed workmanship defects that remained unresolved for several weeks, despite his repeated requests for corrections. He also noticed that Laser was unnecessarily exceeding the quantity limits on materials. On May 1, Young requested Laser to submit a daily or weekly wood usage control sheet. Nonetheless, Laser did not submit usage logs as the project progressed.

On June 2, Young directed Laser to cease further work on the buildings until it addressed and resolved certain workmanship defects. On June 19, Young presented a punch list to Laser and set June 27 as a deadline for resolution of the listed items. Laser did not meet that deadline. On July 31, Laser submitted a request for a change order to allow for additional materials to complete the siding contract, but Orchard denied this request.

On August 12, Laser sent an e-mail to ConAm's Regional Portfolio Manager, John Deneen, and to Young notifying them that August 15 would be Laser's last day on the job. Orchard later notified Laser that it was terminating the contract and that it would hire a replacement contractor to finish the project. By November 20, Orchard signed a remediation contract with another contractor, Services Unlimited. Services Unlimited completed the work by December 19, and Orchard paid Services Unlimited a total of $41,400.

Several months later, Laser filed an action for breach of contract, along with several other causes of action, against Orchard and ConAm. Orchard responded with a breach of contract counterclaim and several other counterclaims. Orchard and ConAm then filed separate motions for summary judgment on all of Laser's claims on the ground that Laser failed to obtain the necessary licensure for the work required by the contracts. The circuit court granted Orchard's and ConAm's summary judgment motions and entered

judgment against Laser on all of its claims. Laser appealed the circuit court's summary judgment order; however, this court dismissed the appeal because of Laser's failure to comply with Rule 207, SCACR.[1]

As to Orchard's counterclaims, Orchard elected to abandon all of its claims except the breach of contract claim relating to the siding contract. The circuit court conducted a trial on the breach of contract claim and awarded Orchard damages in the amount of $36,795 and attorney fees and costs in the amount of $86,923.87.[2] The circuit court later issued a Supplemental Order reducing the damages award to $24,195. This appeal follows.

ISSUES

1. Did the circuit court err in concluding that the parties to the siding contract intended for the work to be completed on a "per building" basis?

2. Did the circuit court err in finding that Laser breached the siding contract?

3. Did the circuit court err in awarding damages to Orchard in the amount of $24,195?

4. Did the circuit court err in awarding attorney fees and costs to Orchard in the amount of $86,923.87?

STANDARD OF REVIEW

A cause of action for breach of contract seeking money damages is an action at law. Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470,

[1] Rule 207, SCACR, requires the appellant to make satisfactory arrangements in writing with the court reporter for furnishing the transcript and to order the transcript within ten days after the date of service of the notice of appeal.
[2] The parties consented to a bench trial in lieu of a jury trial.

476, 642 S.E.2d 726, 729 (2007) (internal citations omitted). In an action at law tried without a jury, this court reviews the trial court's decision to correct only errors of law. Seago v. Horry County, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008) (internal citations omitted). The trial court's factual findings will not be disturbed on appeal unless there is no evidence in the record that would reasonably support its findings. Id.

LAW/ANALYSIS

I. Parties' intent for completion of work

Laser contends that the circuit court erred in concluding that the siding contract unambiguously required completion of the work on a "per building" basis. Laser argues that (1) the contract was ambiguous with regard to the required scope of work; and (2) extrinsic evidence showed that the parties intended for the work to be considered complete when the quantities of materials specified in the contract had been exhausted. We disagree.

When interpreting a contract, a court must ascertain and give effect to the intention of the parties. Chan v. Thompson, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990). To determine the intention of the parties, the court "must first look at the language of the contract . . . ." C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. See Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (internal citations omitted). Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it. Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984). A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent

unreasonableness, or the parties' failure to guard their rights carefully. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997).

Whether an ambiguity exists in the language of a contract is also a question of law. S.C. Dep't of Natural Res.s v. Town of McClellanville, 345 S.C 617, 623, 550 S.E.2d 299, 302-03 (2001). A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who (1) has examined the context of the entire integrated agreement; and (2) is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business. Hawkins, 328 S.C. at 592, 493 S.E.2d at 878. Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties. McClellanville, 345 S.C. at 623, 550 S.E.2d at 303 (internal citations omitted). The determination of the parties' intent is then a question of fact. Id.

In the instant case, the siding contract's language concerning the scope of work is incapable of more than one meaning, when viewed objectively by a reasonable person who has examined the context of the entire contract and is aware of the practices and terms as generally understood in the construction industry. See Hawkins, 328 S.C. at 592, 493 S.E.2d at 878. Exhibit I includes a payment schedule allowing invoices to be submitted **only after** the completion of work on specified buildings. Exhibit I also limits the quantities of materials that may be used for the work and requires Orchard's approval of a change order prior to Laser's use of quantities exceeding those limits.

Further, the second and third pages of Exhibit I to the siding contract contain the following provisions:

> This contract is issued as a UNIT PRICE/NOT TO EXCEED CONTRACT and all repairs shall be itemized by building and invoiced at the scheduled price. A log of material quantities used at each building shall be kept and initialed by both the Contractor and Regional Maintenance Director and shall

> accompany the respective invoices. Should any unforeseen conditions arise which require materials of dimensions and classification not included within this Contract, Contractor shall provide as [sic] estimate of costs and Regional Portfolio Manager shall be notified and shall verify actual conditions and receive ConAm's approval before Contractor commences work in this area.
>
> . . .
>
> THIS IS A TURNKEY OPERATION AND NO ADDITIONAL CHARGES SHALL BE APPLIED TO THIS CONTRACT.

(emphasis in original).[3]

Reading the contract as a whole, the only reasonable interpretation of the scope of work provisions is that the parties intended for remediation work to be performed on all of the buildings listed in the payment schedule. If the parties had intended for completion of work to be reached when the specified quantities of materials had been exhausted, there would have been no logical reason for them to have included language addressing change orders for use of quantities exceeding specified limits.

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[3] A "turnkey operation" (or "turnkey contract") is known in the construction industry as a fixed-price, schedule-intensive construction contract in which the contractor agrees to a wide variety of responsibilities. Black's Law Dictionary 344 (8th ed. 2004). A "unit-price contract" is a contract in which payment is made at specified unit rates for each of the different types of work performed or materials furnished. See L-J, Inc. v. S.C. State Highway Dep't, 270 S.C. 413, 425, 242 S.E.2d 656, 661 (1978) (dictum). In unit price contracts, there are usually items of work which will be required to be performed, but the precise dimensions of the work cannot be determined in advance of performance. Id. A party estimates the units of work or material of each type anticipated to be required for completion of the project. Id. at 425-26, 242 S.E.2d at 661.

Laser argues in the alternative that, if the contract was unambiguous, the circuit court improperly considered extrinsic evidence. Laser assigns error to the circuit court's reference in its order to certain testimony and exhibits - outside the four corners of the contract - to support its interpretation of the contract.[4] It is reasonable to infer that the circuit court was setting forth alternative grounds for its interpretation of the contract. In any event, any error in considering the extrinsic evidence was harmless because the circuit court's interpretation based on the extrinsic evidence presented at trial was consistent with the contract's language. See Jensen v. Conrad, 292 S.C. 169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987) (holding that a judgment will not be reversed for insubstantial errors not affecting the result).

II. Laser's Breach

Laser argues that the circuit court erred in finding that Laser breached the contract because Orchard did not give Laser an opportunity to complete the contract requirements and because Orchard waived the contract requirements.[5] We disagree.

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

[5] Laser also contends that Orchard substantially breached the contract by delaying payment on several invoices. The circuit court did not directly address this question in its order, and Laser did not raise the question in its motion for reconsideration. Therefore, this question is not preserved for review. See Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 234, 647 S.E.2d 488, 497 (Ct. App. 2007) (holding that issue was not preserved for review where master did not address issue in order and appellant did not file a motion for reconsideration to obtain a ruling on the issue).

The determination of whether a party has breached a contract is a question of fact. See Jones v. Ridgely Commc'ns, Inc., 304 S.C. 452, 455-56, 405 S.E.2d 402, 404 (1991) (affirming jury instruction stating that issues of whether there was a breach of contract or whether there was cause to terminate employee were questions of fact). Likewise, the determination of whether one's actions constitutes waiver is a question of fact. See Madren v. Bradford, 378 S.C. 187, 194, 661 S.E.2d 390, 394 (Ct. App. 2008). The trial court's factual findings will not be disturbed on appeal unless there is no evidence in the record that would reasonably support the findings. Seago, 378 S.C. at 422, 663 S.E.2d at 42.

The siding contract allows Orchard to terminate the contract for cause. The contract's definition of "cause" reads, in pertinent part, as follows:

> [T]he term "cause" shall include, without limitation, Contractor's refusal or neglect to supply a sufficient number of properly skilled workmen or a sufficient quantity of materials of proper quality at any time. Contractor's failure to properly perform all Work in keeping with the progress of the Owner's general construction schedule for the project or to properly perform any term, covenant or condition contained in this Contract.

The record contains competent evidence that Laser breached the siding contract and that cause existed for the contract's termination as early as the beginning of April 2003. At that time, Laser was providing defective workmanship and, thus, was not properly performing the required work or abiding by the contract's express terms. Young had to make numerous requests for corrections and had to warn Laser of possible termination. Laser's contention that Orchard did not give Laser an opportunity to complete the punch list work is unpersuasive in light of the evidence that Young made repeated requests, throughout the months of April, May, and June, for Laser

to correct deficiencies in its work. Additionally, as early as April 11, Laser submitted an invoice for work that had not actually been completed, in contradiction of the contract's terms.

Laser's waiver argument is also unavailing. A waiver is the intentional relinquishment of a known right. Arcadian Shores Single Family Homeowners Ass'n, Inc. v. Cromer, 373 S.C. 292, 301, 644 S.E.2d 778, 783 (Ct. App. 2007). Admittedly, the record contains some evidence that Young, as a representative of Orchard, may have waived certain contract requirements by his verbal communications with Laser's representatives. However, there was equally competent evidence that Orchard did not waive the requirements relating to the quality of the work to be performed, which Laser breached.

In sum, there is competent evidence in the record that reasonably supports the circuit court's finding that Laser breached the siding contract. Therefore, we must affirm that finding. See Seago, 378 S.C. at 422, 663 S.E.2d at 42.

III. Damages

Laser argues that the siding contract's termination clause does not provide for the damages awarded by the circuit court because it does not address calculation of damages in the event that the property owner's costs to complete the contract exceed the contract balance. We disagree.

The siding contract's termination clause states, in pertinent part, the following:

> In the event of termination for cause, Contractor shall not be entitled to receive any further payment until the entire project of which the Work is a part is completely finished. At that time, if the amount earned but not paid to Contractor before termination plus the unearned portion of the Contract Price at the

> time of termination **exceeds** the cost incurred by Owner in finishing the Work, **Owner shall pay to Contractor the amount of such excess**. If the amount earned but not paid to Contractor before termination plus the unearned portion of the Contract Price at the time of termination **exceeds** such cost, **Contractor shall pay to Owner the amount of such excess**. The cost incurred by Owner shall include, for purposes of the calculations referred to in the two preceding sentences, Owner's cost of furnishing materials and finishing the Work, Owner's attorneys' fees and any damages incurred by Owner by reason of Contractor's default, plus a markup of ten percent (10%) general overhead and ten percent (10%) profit on all of such items of cost.

(emphasis added).

The circuit court found that the second and third sentences in the termination clause contemplate the same factual scenario, but yet mandate opposing outcomes. The court implicitly held that this particular paragraph in the contract was ambiguous and found that there was a scrivener's error in the third sentence in the termination clause. The circuit court found that the parties intended for the word "exceeds" in the third sentence to mean "exceeded by" after hearing testimony that the parties considered the termination clause to operate as a typical termination clause in the context of a construction project.[6] In effect, the circuit court reformed the siding contract. See Jordan v. Foster, 264 S.C. 382, 386, 215 S.E.2d 436, 438 (1975) (holding that trial court properly reformed instrument after hearing testimony concerning scrivener's error in drafting instrument).

[6] It is reasonable to infer that the circuit court, and the witnesses who testified on this point, meant to say "is exceeded by."

The circuit court's reformation of the third sentence in the termination clause is supported by competent evidence. Witnesses for both parties testified that the contract required the contractor to pay the property owner the amount of the cost to complete the contract less the contract balance.

Laser also argues that there was insufficient evidence to support Orchard's claimed replacement costs. We disagree. At trial, Orchard introduced a copy of its contract with Services Unlimited, dated November 20, 2003. That contract sets the total price for the work at $41,400. Further, there was testimony that, by December 19, Services Unlimited had completed the remediation work that Laser began in April. The record also shows payments totaling $41,400 that Orchard made to Services Unlimited.

Additionally, Laser contends that Orchard failed to minimize its liquidated damages because of its delay in completion of the project. We disagree. The evidence shows that the length of time between Laser's last week on the project (August 15) and the date of Orchard's contract with Services Unlimited (November 20) was reasonable due to the necessity of re-bidding the work and allowing potential contractors to inspect the site.

In sum, the damages award was supported by competent evidence and was properly calculated according to the formula in the siding contract's termination clause.

IV. Attorney Fees

Laser argues that the award of attorney fees and costs, $86,923.87, is not supported by the record because (1) the roof contract is not in the record, and, thus, there is no evidence that any fees or costs associated with the roof contract would be supported by a contractual provision allowing attorney fees; (2) the amount of attorney fees and costs awarded is unreasonable in light of the amount of the damages awarded ($24,195); (3) Orchard obtained only $24,195 out of the $123,930 it was seeking throughout the litigation and was unsuccessful on several of its claims; and (4) the contractual provision

for attorney fees does not authorize an award of litigation costs. There is some merit to the first ground raised by Laser, but we disagree with Laser's remaining contentions.

The review of attorney fees awarded pursuant to a contract is governed by an abuse of discretion standard. See S.C. Elec. & Gas Co. v. Hartough, 375 S.C. 541, 550, 654 S.E.2d 87, 91 (Ct. App. 2007) (concluding that, when an award of attorney fees is based upon a contract between the parties, the determination of the fees is left to the discretion of the trial court and will not be disturbed absent an abuse of discretion). An appellate court will not reverse an award unless it is based on an error of law or is without any evidentiary support. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) (holding that an abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support). When an attorney's services and the value of those services are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989).

A. Reasonableness of Fee Amount

In Baron, the South Carolina Supreme Court held that the trial court did not abuse its discretion in awarding attorney fees to the plaintiff, even though the award was greater than the plaintiff's recovery. The court concluded that the trial court had properly applied the relevant factors, which are as follows: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. Id. at 384-85, 377 S.E.2d at 297-98.

Here, the siding contract provision authorizing attorney fees states,

> Contractor shall be liable to Owner for all attorneys' fees expended by Owner in furtherance of Owner's

> rights against Contractor under this Contract. In the event of any litigation or arbitration arising out of the subject matter of this Contract or the Work (whether instituted by Owner, Contractor or another entity), **the party to this Contract determined by the court or arbitrator to be primarily liable or at fault shall be obligated to pay the attorneys' fees of the other party to this Contract**, the amount of which shall be determined by the court or arbitrator and included in the judgment.

(emphasis added).

At trial, counsel for Orchard, Donald Harper, presented an affidavit setting forth itemized time entries and itemized expenses that his office incurred in representing Orchard in this case from the time that Laser filed its complaint through the beginning of July 2006. The affidavit also explained the nature and difficulty of the services rendered, counsel's professional standing in the community, and the rates customarily charged in the Greenville area for similar legal services. However, the affidavit does not sufficiently indicate how much pre-trial time was solely attributable to the roof contract, for which no evidence of a contractual provision authorizing fees was introduced at trial due to Orchard's abandonment of claims related to the roof contract. Further, the affidavit does not sufficiently indicate which expenses, if any, were solely attributable to the roof contract. Therefore, this court has no way of discerning whether the time and expenses solely attributable to the roof contract were de minimis or much more significant (for example, lengthy segments of a deposition devoted to the roof contract only).

On its face, Harper's affidavit, combined with the beneficial results obtained, generally supports the reasonableness of the attorney fee award. However, if the affidavit includes any fees or expenses that are attributable solely to the roof contract, that part of the award would not be supported by the evidence. The roof contract was not presented at trial, and, therefore, the

record contains no evidence of a contractual provision authorizing an award for attorney fees and expenses related solely to the roof contract.

It is possible that much of counsel's time on the case was attributable to both contracts simultaneously or solely the siding contract. However, any portion of the award that is attributable solely to the roof contract would not be supported by the record. Therefore, it is necessary to remand the issue of attorney fees to the circuit court to determine if the affidavit includes any fees or expenses that are attributable solely to the roof contract. See Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 660-61 (1993) (holding that reversal of fee award and remand is appropriate where there is a lack of evidence). While this may not be an easy task for Harper, and while he may have to resort to rough estimates, this task is a necessary one, especially in light of the amount of fees requested.

B. Costs

Laser argues that the circuit court erroneously included expenses in the attorney fees award. However, Laser does not cite any authority supporting its argument. Therefore, Laser has abandoned this argument. See Rule 208(b)(1)(D), SCACR (requiring the citation of authority in the argument portion of an appellant's brief); Hunt v. Forestry Comm'n, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (holding that issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal).

C. Disparity with Damages Award

The disparity in the amount of the damages award and the attorney fees award, by itself, does not invalidate the latter. See Rice v. Multimedia, Inc., 318 S.C. 95, 101, 456 S.E.2d 381, 385 (1995) (addressing disparity of damages award and fee award and noting that the amount of recovery and the contingency of compensation are only two of the six factors to be considered by the trial court in determining an appropriate attorney fees award); Baron Data, 297 S.C. at 385, 377 S.E.2d at 297-98 (concluding that attorney fees

award was supported by the record despite the fact that it exceeded damages award). With the exception of any possible fees and expenses attributable solely to the roof contract, the amount of the fee award was reasonable in light of all of the Baron factors applied by the circuit court. Therefore, its disparity with the damages award does not demonstrate an abuse of discretion on the part of the circuit court.

CONCLUSION

The circuit court properly concluded that the siding contract unambiguously required the work to be completed on a "per building" basis. Further, the circuit court properly concluded that Laser breached the siding contract and that Orchard was entitled to damages in the amount of $24,195. Therefore, we affirm those conclusions in the circuit court's order.

As to the attorney fees award, any part of the award that is attributable solely to the roof contract is not supported by the record. The circuit court must make additional findings on the time that Harper spent, and the expenses incurred by Harper, that are attributable solely to the roof contract and modify the award accordingly. Therefore, we reverse the attorney fees award and remand the case to the circuit court for additional findings.[7]

Accordingly, the circuit court's order is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HEARN, C.J., and HUFF, J., concur.

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[7] This court need not address Appellant's remaining arguments, as they are either non-dispositive or manifestly without merit. See Rule 220(b)(2), SCACR (stating that a point that is manifestly without merit need not be addressed); Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (holding that remaining issues need not be addressed when the resolution of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Stinney and Cynthia Stinney, Individually and as Parents and Natural Guardians of Maurice Stinney, a minor over the age of fourteen years, and Marquise Stinney, Appellants,

v.

Sumter School District 17, Respondent.

Appeal From Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 4504
Heard October 21, 2008 – Filed February 19, 2009

REVERSED

Dwight C. Moore, of Sumter, for Appellants.

Robert T. King, of Florence, for Respondent.

GEATHERS, J.: This action arises from the expulsion of two high school students following a physical altercation on school grounds. The Board of Trustees for Sumter School District 17 (the Board) upheld the expulsion decision, and the students, Marquise and Maurice Stinney, and their parents (collectively, the Stinneys) filed a civil action for damages against the District.[1] The circuit court granted partial summary judgment to the District, dismissing the Stinneys' cause of action for denial of due process. We reverse.

FACTS/PROCEDURAL HISTORY

On September 23, 2003, students Dennis Fortune and Desmond Smith approached Marquise and Maurice Stinney, who were walking through the school parking lot on their way to football practice.[2] A heated exchange of words took place, and a faculty member, Coach Joe Norris, sensed tension between the students. He attempted to intervene and to prevent an altercation, but the students began fighting. Coach Norris wrestled one of the students to the ground to prevent him from entering the fight. Another faculty member, Coach Warren Coker, tried to intervene in the fight. At this time, one of the students inadvertently struck Coach Coker in the face. Other school officials and students then arrived to break up the fight. Marquise, Maurice, Dennis, and Desmond were immediately suspended from school grounds.

The next day, Sumter High School's Assistant Principal, Randy Gold, notified the Stinneys that Marquise and Maurice had been charged with violating District policy due to "Assault (simple) Fighting in back parking

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[1] The record contains more than one spelling for "Marquise" (also set forth as "Marquis"), but the father's affidavit and the signature line for Marquise's affidavit employ the former spelling. We therefore defer to the former spelling and order that the case caption be amended accordingly.

[2] All four students are now past the age of majority.

lot" and that the students were facing a recommendation of expulsion for the remainder of the school year. The notification letter also advised the Stinneys of an upcoming evidentiary hearing on the expulsion recommendation. The letter advised the Stinneys that they should present all testimony and evidence that they wanted the hearing panel to consider and that they could appear with an attorney if they so desired. Additionally, the letter admonished the Stinneys that no additional evidence would be considered in any appeal of the hearing panel's decision.

After separate evidentiary hearings for Marquise and Maurice, the hearing panel accepted the recommendation to expel both students, and the District so notified the Stinneys.[3] The Stinneys then obtained an attorney and appealed the hearing panel's decision to the District Superintendent, Dr. Zona Jefferson. Dr. Jefferson upheld the expulsion decision, and the Stinneys then appealed to the Board. On November 4, 2003, the District notified the Stinneys that the Board had upheld the decision.

The Stinneys did not appeal the Board's decision to the circuit court. Rather, on September 16, 2005, the Stinneys filed a civil action in circuit court against the District, seeking damages based on the following causes of action: Failure to Follow Disciplinary Procedures, Denial of Due Process, Negligence, and Failure to Supervise. The first cause of action, Failure to Follow Disciplinary Procedures, alleges that the District failed to follow its policies and procedural manual governing the discipline of students. The second claim, Denial of Due Process, alleges that the District's actions and omissions deprived the students of their due process rights under the state and federal constitutions. In particular, this claim states, in pertinent part,

> Due to the Defendant's acts of commission and omission, the Plaintiff's [sic] were denied the right to due process under the State and Federal Constitutions including, but not limited to the following particulars:

[3] Dennis and Desmond were also expelled for the remainder of the school year.

a. In denying the student-Plaintiffs equal protection of the law;

b. In abridging the privileges and immunities of the student-Plaintiffs.

The third claim, Negligence, contends that the District was negligent in failing to prevent harm to the students and in failing to comply with disciplinary guidelines. The fourth claim, Failure to Supervise, contends that the District failed to properly supervise the students in their care. The damages claimed by the Stinneys include expenses to transport Marquise and Maurice to another school and psychotherapy expenses.

The District sought summary judgment on all causes of action, and the circuit court granted summary judgment on the due process claim only. The sole ground for partial summary judgment was the Stinneys' failure to exhaust their administrative remedies. The order specifically stated that the Stinneys "failed to fully exhaust all remedies afforded to them by the [District] in these types of proceedings." This appeal follows.[4]

[4] After the Stinneys filed a notice of appeal, the District filed a motion to alter or amend the circuit court's order. The District sought clarification of the order due to a perceived inconsistency with the circuit court's written instructions to opposing counsel for drafting the order. The District sought dismissal of all claims related to the expulsion proceedings, rather than solely the due process claim, on the ground that the Stinneys failed to exhaust their administrative remedies. The circuit court has not yet ruled on the District's Rule 59(e) motion, presumably because the motion involves matters over which the circuit court had already lost jurisdiction when the Stinneys served their notice of appeal. See Rule 205, SCACR (stating that upon service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal).

ISSUE ON APPEAL

Did the circuit court err in granting summary judgment on the Stinneys' due process claim?

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard that the trial court applies under Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is proper when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Adamson v. Richland County School Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998).

LAW/ANALYSIS

The Stinneys assert the following grounds for their challenge to the circuit court's grant of partial summary judgment: (1) a direct appeal to the circuit court from the Board's expulsion order under S.C. Code Ann. § 59-63-240 is a judicial remedy; therefore, they exhausted their administrative remedies despite their failure to directly appeal under section 59-63-240;[5] (2) S.C. Code Ann. § 1-23-380 allows them to file a civil action for damages in circuit court, in lieu of a direct appeal from the Board's expulsion order; and (3) exhaustion was not required in their case because a direct appeal to circuit court under section 59-63-240 would not have provided adequate redress. We agree.

[5] Section 59-63-240 provides that the action of the Board may be appealed "to the proper court."

General Law on Exhaustion of Administrative Remedies

The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law. Adamson, 332 S.C. at 125, 503 S.E.2d at 754. The doctrine is not jurisdictional. Id. Whether administrative remedies must be exhausted is a matter within the circuit court's sound discretion, and this decision will not be disturbed on appeal absent an abuse of discretion. Hyde v. S.C. Dept. of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994).

The general rule is that administrative remedies must be exhausted absent circumstances that support an exception to application of the general rule. Hyde, 314 S.C. at 208, 442 S.E.2d at 583. When an adequate administrative remedy is available to determine a question of fact, one must seek the administrative remedy or be precluded from pursuing relief in the courts. Id.

Adequacy of Administrative Appeal

The Stinneys contend that a direct appeal from the Board's decision to the circuit court would not have provided them with an adequate remedy. They argue that, because the school year in question would have ended by the time that the circuit court could hear the appeal, an order allowing the students to be reinstated at school would be meaningless for Marquise, a high school senior, and Maurice, who already had the option of petitioning for reinstatement for the following school year.

We agree that a direct appeal would not have provided the Stinneys with any immediate relief. The students' reinstatement to school pending an appeal of the Board's expulsion order is effectively prohibited by S.C. Code Ann. § 59-63-240 (2004). This statute provides that a student who has been recommended for expulsion may be suspended from school and all school activities during the time of the expulsion procedures. Therefore,

theoretically, the Stinneys would still accumulate at least a portion of the damages described in their complaint (i.e., transportation and psychotherapy expenses) regardless of the outcome of any direct appeal to circuit court. Further, the Stinneys would be unable to seek damages in a direct appeal to circuit court. See James Academy of Excellence v. Dorchester County School Dist. Two, 376 S.C. 293, 300, 657 S.E.2d 469, 472-73 (2008) (holding that the circuit court, while sitting as an appellate court in an administrative case, exceeded its authority in holding an evidentiary hearing on the issue of damages). Under these circumstances, a direct appeal would likely have been futile. One does not have to exhaust administrative remedies when it would be futile to do so. Ward v. State, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000); see also Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 342 S.C. 34, 39, 535 S.E.2d 642, 645 (2000).

Judicial review under section 1-23-380

Further, there is merit to the Stinneys' argument that S.C. Code Ann. § 1-23-380 allows them to file a civil action for damages in circuit court, in lieu of a direct appeal from the Board's expulsion order. The statute "does not limit utilization of or the scope of judicial review **available under other means of review, redress, relief**, or trial de novo provided by law." S.C. Code Ann. § 1-23-380(A) (Supp. 2007) (emphasis added).

In any event, judicial review under section 1-23-380 is a judicial, rather than administrative, remedy. See § 1-23-380(A) ("A party who has exhausted all administrative remedies available **within the agency** and who is aggrieved by a final decision in a contested case is entitled to judicial review . . . .") (emphasis added); S.C. Code Ann. § 1-23-310(2) (2005), as amended by Act. No. 334, § 3, 2008 S.C. Acts 3301, 3303 (defining "agency" as "each state board, commission, department, or officer, **other than the legislature, the courts, or the Administrative Law Court,** authorized by law to

determine contested cases") (emphasis added); see also Jean Hoefer Toal et al., Appellate Practice in South Carolina 48 (2d ed. 2002). Therefore, the Stinneys exhausted all levels of administrative review.

CONCLUSION

The Stinneys have established that they have exhausted all of their administrative remedies. Therefore, the circuit court's rationale for granting summary judgment on the Stinneys' due process claim was erroneous.[6]

Accordingly, the circuit court's order is

REVERSED.

HEARN, C.J., and HUFF, J., concur.

[6] In view of our disposition of the above issues, we need not address the Stinneys' remaining arguments. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (holding that an appellate court need not address remaining issues when the resolution of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Motor Vehicles, Appellant,

v.

Josef Scott Holtzclaw, Respondent.

Appeal From Richland County
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 4505
Heard December 11, 2008 – Filed February 19, 2009

AFFIRMED

Frank L. Valenta, Jr., of Blythewood, for Appellant.

Steve Wayne Sumner, of Greenville, for Respondent.

HEARN, C.J.: Department of Motor Vehicles (DMV) appeals the Administrative Law Court's (ALC) dismissal of its appeal from the South Carolina Division of Motor Vehicle Hearings (DMVH). DMV contends the ALC erred in upholding the DMVH Hearing Officer's order rescinding

Joseph Holtzclaw's suspended driver's license and designation as a Habitual Offender. We affirm.

FACTS

Holtzclaw was convicted of three separate traffic violations[1] for driving an automobile under a suspended license. Pursuant to sections 56-1-1020 and 56-1-1090 of the South Carolina Code (2006 & Supp. 2008), DMV sent Holtzclaw an official notice that, because he had accumulated three violations within a three year period, Holtzclaw had been declared a Habitual Offender, and his driver's license was suspended for five years. DMV also advised Holtzclaw that, pursuant to section 56-1-1030 of the South Carolina Code (Supp. 2007), he had the right to a hearing to present cause why he should not be declared a Habitual Offender. Two days before Holtzclaw's suspension was due to begin, he sent notice to the DMVH requesting a hearing. On the following day, Holtzclaw made a motion in municipal court to have the most recent conviction reopened in order to have a new hearing.[2] The municipal court granted Holtzclaw's motion to reopen the conviction on Ticket 32881DE on the ground that Holtzclaw "was uninformed of the ramifications of entering a plea without consultation with his attorney." The prosecuting attorney, who was present at Holtzclaw's motion, consented to the reopening, as indicated by the signature on the order. The order also indicated it was issued pursuant to Ishmell v. South Carolina Highway Department, 264 S.C. 340, 215 S.E.2d 201 (1975).

Upon receipt of the municipal court's order to reopen the last ticket, the DMV replied directly to the judge in a letter, stating: "The Department is in receipt of the attached order(s), however, we are unable to process the order due to the following: . . . The request to re-open the case does not appear to be timely." The municipal court did not respond to the DMV's communication.

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[1] Holtzclaw was convicted for Ticket 56318DN on November 9, 2005; Ticket 57397DN on February 22, 2006; and Ticket 32881DE on March 16, 2006.

[2] Holtzclaw had previously appeared and pled guilty to Ticket 32881DE.

Thereafter, the DMVH held a hearing pursuant to Holtzclaw's request. Holtzclaw testified in support of his motion, and also introduced the municipal court's order reopening his final conviction. Ultimately, the DMVH Hearing Officer rescinded Holtzclaw's driving suspension and found his driving record did not support the requirements for a Habitual Offender because the requisite third conviction for driving on a suspended license was nullified when the municipal court re-opened Holtzclaw's final ticket. DMV appealed the Hearing Officer's order to the ALC, which dismissed the appeal. DMV now appeals this determination.

STANDARD OF REVIEW

The DMVH is authorized to hear contested cases arising from the DMV. S.C. Code Ann. § 1-23-660 (Supp. 2008). Therefore, the DMVH is an agency under the Administrative Procedures Act. S.C. Code Ann. § 1-23-310 (Supp. 2008). Appeals from Hearing Officers must be taken to the ALC. § 1-23-660. Section 1-23-610 of the South Carolina Code (Supp. 2008) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency. "The review of the administrative law judge's order must be confined to the record." S.C. Code Ann. § 1-23-610(C). The court of appeals may reverse or modify the decision only if substantive rights of the appellant have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law. Id.

LAW/ANALYSIS

DMV asserts the ALC erred in upholding the Hearing Officer's order rescinding Holtzclaw's suspended driver's license. DMV maintains that under section 22-3-1000 of the South Carolina Code (2007), the municipal court lacked jurisdiction to hear a motion to reopen Holtzclaw's third conviction. We agree; nevertheless, we affirm the ALC's dismissal of DMV's appeal.

Sections 56-1-1020 and 56-1-1090 of the South Carolina Code (2006 & Supp. 2008), provide a person will be deemed a Habitual Offender if he or she is convicted of the requisite number of offenses during a three year period, and will lose driving privileges for five years from the date of that determination:

> An [sic] habitual offender shall mean any person whose record as maintained by the Department of Motor Vehicles show that he has accumulated the convictions for separate and distinct offenses described in subsections (a), (b) and (c) committed during a three-year period . . . :
>
> (a) Three or more convictions, singularly or in combination of any of the following separate and distinct offenses arising out of separate acts:
> . . .
>
> (4) Driving a motor vehicle while his license, permit, or privilege to drive a motor vehicle has been suspended or revoked . . . .

§ 56-1-1020.

As described above, Holtzclaw was convicted of three violations of driving on a suspended license within a five month period. Consequently, the DMV was correct to send Holtzclaw an official notice of his impending declaration as a Habitual Offender. In addition, Holtzclaw was within his rights to request a contested hearing before the DMVH regarding that status determination made by the DMV. See S.C. Code Ann. § 56-1-1030 (Supp. 2008).

However, the record reveals Holtzclaw appeared and pled guilty in municipal court to the third driving violation on March 16, 2006. Magistrates generally have jurisdiction over traffic offenses that are subject to the penalties of either fine or forfeiture not exceeding $500 or imprisonment not exceeding thirty days. See S.C. Code Ann. § 22-3-550 (2008). Similarly, a

municipal court presumptively has jurisdiction over traffic offenses and criminal cases to the same extent as that conferred on magistrates. See S.C. Code Ann. § 14-25-45 (Supp. 2008). Moreover, under section 22-3-1000 of the South Carolina Code (2007), a motion for a new trial from a case heard by a magistrate may not be heard unless made within five days from the rendering of the judgment.

As established in section 14-25-45, the municipal court in this case clearly had subject matter jurisdiction to hear a general motion to reopen a conviction of a driving violation. "Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000) (citations omitted); see also State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

The municipal court's order to reopen reflects Holtzclaw made his motion on May 2, 2006, outside of the five days allowed under section 22-3-1000. By virtue of that statute, DMV contends the city judge had lost authority to consider Holtzclaw's motion for a new trial; therefore, the order reopening the case is void. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely 'voidable.'" Thomas & Howard Co., Inc. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995) (citation omitted).

The situation here is analogous to the issue before the supreme court in State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (2008). In Campbell, a defendant pled guilty to several charges; however, the defendant later refused to testify at his co-defendant's trial, pursuant to his plea agreement. Id. at 214-15, 656 S.E.2d at 372. The State moved to vacate the defendant's sentence, but did not do so within ten days of defendant's sentencing, or the completion of his co-defendant's trial. Id. The plea judge allowed the motion, and re-sentenced the defendant. Id. at 215, 656 S.E.2d at 373. On appeal, the defendant/appellant maintained the plea judge lacked subject matter jurisdiction to hear the State's motion outside of the ten days provided in Rule 29, SCRCrimP. Campbell, 376 S.C. at 215, 656 S.E.2d at 373.

The supreme court discussed Rule 29's temporal restriction within the more general rule that a trial judge is without jurisdiction to consider a criminal matter once the term of court, during which judgment was entered, expires. Campbell, 376 S.C. at 215, 656 S.E.2d at 373; State v. Hinson, 303 S.C. 92, 399 S.E.2d 422 (1990). While affirming that the ten day limitation is jurisdictional, and ultimately reversing the plea judge's consideration of the State's motion outside of time, the supreme court emphatically stated the rule did not involve subject matter jurisdiction. Campbell, 376 S.C. at 216-17, 376 S.E.2d 373-74. "When [the supreme court] used the 'lack of jurisdiction' language, [it] meant that the trial court simply no longer has the power to act in a particular manner because the term of court has ended." Id. at 216, 376 S.E.2d at 373. This, the court said, is more in line with the evolution of this state's jurisprudence regarding jurisdiction since the Gentry decision. Id. (citing Gentry, 363 S.C. 93, 610 S.E.2d 494).

We find the period of time for motions for new trials prescribed in section 22-3-1000 is similar to the ten day limit in Rule 29 and discussed in Campbell. Consequently, if the municipal court erred in entertaining Holtzclaw's motion to reopen his case, this was an error of the municipal court's exercise of jurisdiction, and does not implicate its general grant of subject matter jurisdiction. "[W]hen there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction." Piana v. Piana, 239 S.C. 367, 372, 123 S.E.2d 297, 299 (1961) (citation omitted).

> There is a wide difference between want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal.

Id. (quoting Jackson City Bank & Trust Co. v. Fredrick, 271 N.W. 908, 909 (Mich. 1935)).

Indeed, DMV is probably correct in its assertion the municipal court erred in hearing Holtzclaw's motion to reopen; however, whereas a judgment entered without subject matter jurisdiction is void, the improper exercise of jurisdiction by a court, albeit decidedly wrong, is as binding as a proper exercise of jurisdiction, is merely voidable, and must be attacked on direct appeal. Id.; Matter of Morrison, 321 S.C. 370, 372, 468 S.E.2d 651, 652 (1996). Therefore, the proper recourse to challenge any alleged error in reopening Holtzclaw's case should have been made in a direct appeal from the municipal court's order. Fryer v. S.C. Law Enforcement Div., 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006); Coon v. Coon, 356 S.C. 342, 347-48, 588 S.E.2d 624, 627 (Ct. App. 2003), aff'd as modified, 364 S.C. 563, 614 S.E.2d 616 (2005).

DMV asserts this case is similar to Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006). In Godwin, the defendant, Godwin, was convicted of criminal domestic violence, and some eight years after the conviction, made a motion to set aside the conviction and/or a motion for a new trial in municipal court. Id. at 223, 634 S.E.2d at 60. The town appeared and argued the municipal court lacked jurisdiction to hear the motion because it was untimely. Id. The court agreed, and denied Godwin's motion; however on appeal, the circuit court agreed with Godwin, and granted a new trial based on "substantial justice." Id. On appeal, this court vacated the circuit court's grant of a new trial, finding "the municipal court correctly held Godwin's challenge to his conviction was untimely, and the circuit court erred in failing to grant the Town's motion to dismiss for lack of jurisdiction." Id. at 225, 634 S.E.2d at 61.

DMV's argument that Godwin and the case before us are similar is compelling at first blush; nevertheless, a crucial distinction between these two cases necessitates our affirmance: the appeal taken from the motion for a new trial in Godwin was a direct appeal from the municipal court, first by Godwin, then the Town; here, no appeal was taken from the municipal court's order. DMV correctly points out that it was not a party to the underlying traffic violation or the motion to reopen and that therefore, only the prosecuting body, which actually signed off on the municipal court's motion to reopen at the time, would have been able to appeal the decision. We

believe this is the proper policy to follow, as the DMV appears to be a record keeping agency in this instance. It is solely within the court's province to decide the guilt or innocence on a particular charge, before the result is reported to the DMV.

Accordingly, the DMV's position in this case is an improper collateral attack on the valid, even if improvidently decided, order of the municipal court. Moreover, because the third violation conviction case was merely reopened, Holtzclaw could still be found guilty of driving under a suspended license, at which time DMV could once again seek to have Holtzclaw deemed a Habitual Offender. Because the municipal court's entertainment of Holtzclaw's motion to reopen outside of the five day limitation in section 22-3-1000 did not involve subject matter jurisdiction, any error in its resulting order was voidable, rather than void, and only subject to direct appeal. The dismissal by the ALC in this case is therefore

AFFIRMED.

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