The Supreme Court of South Carolina

In the Matter of Cynthia M. Veintemillas, Respondent

Appellate Case No. 2013-000303

ORDER

The records in the office of the Clerk of the Supreme Court show that on December 4, 2007, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of correspondence dated February 12, 2013, Petitioner submitted her 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 her 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 her 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 she has fully complied with the provisions of this order. The resignation of Cynthia M. Veintemillas shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 22, 2013

The Supreme Court of South Carolina

In the Matter of Edmund Heyward Robinson, Petitioner

Appellate Case No. 2013-000316

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 11, 1975, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated February 14, 2013, 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 Edmund Heyward Robinson 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/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 22, 2013

The Supreme Court of South Carolina

In the Matter of Michael E. Hagan, Petitioner

Appellate Case No. 2013-000343

ORDER

The records in the office of the Clerk of the Supreme Court show that on August 4, 1999, 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 February 19, 2013, 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 Michael E. Hagan 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/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 22, 2013

The Supreme Court of South Carolina

In the Matter of Nancy B. Walker, Petitioner

Appellate Case No. 2013-000311

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1979, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of correspondence to this Court, dated February 15, 2013, Petitioner submitted her 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 her 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 her 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 she has fully complied with the provisions of this order. The resignation of Nancy B. Walker shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 22, 2013

The Supreme Court of South Carolina

In the Matter of Nell H. Figge, Respondent

Appellate Case No. 2013-000294

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1992, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of the State of South Carolina, dated February 13, 2013, Petitioner submitted her 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 her 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 her 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 Nelle H. Figge shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 22, 2013

The Supreme Court of South Carolina

In the Matter of Sally M. Walker, Petitioner

Appellate Case No. 2013-000321

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 14, 1974, 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 February 19, 2013, Petitioner submitted her 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 her 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 her 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 she has fully complied with the provisions of this order. The resignation of Sally M. Walker shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 22, 2013

The Supreme Court of South Carolina

In the Matter of William H. Ivry, Petitioner

Appellate Case No. 2013-000309

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 22, 1992, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of the State of South Carolina, dated February 15, 2013, 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 William H. Ivry 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/ Costa M. Pleicones J.

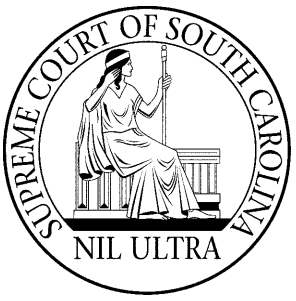
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 22, 2013



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
February 27, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

and

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, of whom South Carolina Department of Health and Environmental Control is, Appellant, and Kiawah Development Partners, II, is, Respondent.

Appellate Case No. 2010-155629

Appeal From The Administrative Law Court
Ralph K. Anderson, III, Administrative Law Judge

Opinion No. 27065
Heard April 17, 2012 – Refiled February 27, 2013

AFFIRMED

Jaquelyn Sue Dickman and Bradley David Churder, of South Carolina Department of Health and Environmental Control, both of Columbia, Davis Arjuna Whitfield-Cargile, of McDougall Law Firm, of Beaufort, and Amy Armstrong, of Pawley's Island, for Appellants.

Gedney M. Howe, III of Gedney M. Howe III, PA, and George Trenholm Walker of Pratt-Thomas Walker, PA, both of Charleston, for Respondent

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Robert Cook, Assistant Attorney General Parkin Hunter, all of Columbia, for Amicus Curiae of Savannah. C. Mitchell Brown and A. Mattison Bogan, of Nelson Mullins Riley & Scarborough LLP, both of Columbia, for Amicus Curiae.

CHIEF JUSTICE TOAL: This case is an appeal from an administrative law court's (ALC) decision authorizing Kiawah Development Partners (Respondent) to construct a bulkhead and revetment on Captain Sam's Spit (the Spit) on Kiawah Island. We affirm.

FACTS/PROCEDURAL BACKGROUND

Kiawah Island is a barrier island fronting the Atlantic Ocean with over ten miles of beachfront. The island is bounded on the south by the Atlantic

Ocean, on the east by the Stono River Inlet, on the north by the Kiawah River, and on the west by the Kiawah River where the river enters the Atlantic through Captain Sam's Inlet. The Spit is located adjacent to Captain Sam's Inlet at the southwest end of Kiawah Island. The Spit is a sandy land formation surrounded on three sides by water—the Atlantic Ocean, Captain Sam's Inlet, and the Kiawah River. Respondent owns Captain Sam's peninsula.

In 1999, the Office of Coastal Resource Management (OCRM) of the South Carolina Department of Health and Environmental Control (DHEC) established a baseline and building set back line twenty feet landward based on information that the Spit had accreted, or grown, and had not been subject to any significant, measurable erosion between 1959 and 1999. The movement of the baseline prompted Respondent to consider development of the Spit. On February 29, 2008, Respondent submitted an application to DHEC for a permit to construct a combination bulkhead and revetment in the area. The application sought authorization to construct a 2,783 foot bulkhead and 2,783 foot by 40 foot articulated concrete block revetment on the shoreline of the Kiawah River.

On December 18, 2008, DHEC issued a conditional permit approving the construction of the erosion control structure for a distance of 270 feet. DHEC refused the permit request for the remaining 2,513 feet based on its concerns regarding cumulative negative impacts, including interference with natural inlet formation and possible adverse effects on wintering piping plovers. DHEC also determined that the project was contrary to the policies set forth in the Coastal Zone Management Program (CZMP). Respondent requested a final review conference by the DHEC Board (the Board), but the Board declined to hold a review conference.

Respondent then requested a contested case hearing before the ALC, and challenged the denial of the construction of a bulkhead and revetment along the remaining 2,513 feet. The Coastal Conservation League (CCL) opposed the construction of any bulkhead or revetment on the Spit, and also requested a contested case hearing challenging the decision to authorize the 270 foot structure, but supporting denial of the remainder. The cases were

consolidated. The ALC granted Respondent's permit to construct the bulkhead and revetment, subject to certain conditions reducing and altering its size. DHEC and CCL (collectively, Appellants) appealed the ALC's order. This Court reversed the ALC and remanded the issue in a decision published November 21, 2011. We subsequently granted Respondent's petition for rehearing, and accepted an amicus brief from the Savannah River Maritime Commission (the SRMC). We now withdraw our initial opinion, and issue this opinion, affirming the decision of the ALC.

ISSUES PRESENTED

The issues in this case are consolidated and clarified as follows:

I. Whether the ALC erred in failing to defer to DHEC's interpretation of the applicable statutes and regulations and whether the ALC had the authority to modify the proposed bulkhead/revetment.

II. Whether substantial evidence supports the ALC's findings that the proposed bulkhead/revetment complies with the Coastal Zone Management Act (CZMA) and the CZMP.

III. Whether the ALC erred in concluding that potential long-range cumulative impacts on the adjacent upland area should not be considered in a critical area permitting decision pursuant to regulation 30-11 of the South Carolina Code of Regulations, and whether substantial evidence supports the ALC's finding that the proposed bulkhead and revetment comply with regulation 30-12 of the South Carolina Code of Regulations.

STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Ann. § 1-23-610(B) (Supp. 2011). This Court will only reverse the decision of an ALC if that decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. "The Court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id.* In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

LAW/ANALYSIS

I. Whether the ALC erred in not deferring to DHEC, and whether the ALC had the authority to modify the proposed construction.

A. Deference

Appellants claim that the ALC erred in failing to defer to DHEC's conclusions in this case, and improperly focused on the fact that DHEC did not conduct a final review process formally adopting the "staff's" findings. Respondent and the SRMC, assert the challenged permitting decision was that of the DHEC staff, because the DHEC Board never acted on the permitting decision. Thus, the decision was not entitled to deference as a matter of law. We disagree.

Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005). "[The Board], not OCRM staff, is entitled to deference from the courts." *Id.* Section 44-1-60(F) of the South Carolina Code provides, "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant . . . may request a contested case hearing before the [ALC]." S.C. Code Ann. § 44-1-60(F) (Supp. 2011).

In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 363 S.C. 67, 70, 610 S.E.2d 482, 484 (2005), LandTech of Charleston, L.L.C. (LandTech) applied to OCRM for a permit to build a bridge across the marshes of the Wando River to Park Island in the Town of Mount Pleasant. OCRM staff deemed Park Island a small island and determined the access-to-small islands regulation, regulation 30-12(N) of the South Carolina Code of Regulations, applied. *Id.* LandTech claimed that the application was governed by the transportation-projects regulation, regulation 30-12(F). *Id.* at 71, 610 S.E.2d at 484. OCRM disagreed, processed the application under the more stringent small island regulation, and granted the permit. *Id.* CCL objected and requested a hearing before the ALC. *Id.* The ALC held that the application was actually governed by the transportation projects regulation, but upheld the permit. *Id.* CCL appealed to the Panel, which affirmed *without analysis*. *Id.* at 72, 610 S.E.2d at 484. CCL then appealed to the circuit court which reversed. *Id.* The court found that Park Island was in fact governed by the access-to-small islands regulation, but that issuance of the permit did not comply with the regulation. *Id.* This Court held that the circuit court should have deferred to the Panel's decision because, "there was no compelling reason to overrule the Panel's decision that the Transportation Regulation governed." *Id.* at 75, 610 S.E.2d at 486.

In the instant case, DHEC's decision to refuse to conduct a Final Review Conference, pursuant to section 44-1-60(F) of the South Carolina Code, is analogous to the Panel decision in *Coastal* to affirm the ALC's decision without analysis. In both situations, regardless of the mechanism,

the staff decision became the agency decision and was entitled to deference. Thus, the appropriate question is not whether DHEC's decision was entitled to deference, but instead whether there was a compelling reason for the ALJ not to defer to this decision.

Where the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). In *Brown*, the employee sustained a compensable injury while working for the employer. *Id.* at 438, 581 S.E.2d at 837. Several years later a question arose whether medical treatment sought by the employee for subsequent falls was related to the injury and thus, whether the employer was required to pay for medical treatment. *Id.* The employer hired a rehabilitation nurse to contact the employee's treating physicians regarding the nature of her conditions. *Id.* The employee's attorney wrote a letter to the rehabilitation nurse and the treating physicians threatening legal action if they discussed the employee's medical condition. *Id.* The employer complained to the Workers' Compensation Commission (the Commission) which ordered the employee's attorney to cease and desist from obstructing contact. *Id.*

This Court held that the South Carolina Workers Compensation Act required physicians to provide employers with pertinent information regarding the treatment of a compensation claimant, but mandated the exchange of *existing* information, and did not authorize other ex parte methods of communication such as that sought by the employer. *Id.* at 439–40, 581 S.E.2d at 838. Thus, the Court reversed because the Commission's conclusions in the case were affected by an error of law. *Id.* at 441, 581 S.E.2d at 839 (citing S.C. Code Ann. § 1-23-380 (A)(6) (Supp. 2002)).

In this case, the ALC noted significant and compelling reasons why deference to DHEC's interpretation of the CZMA, and associated statutes and regulations, would be improper. For example, as discussed *infra*, the ALC disagreed that regulation 30-11(C) authorized DHEC to account for the impact of the proposed project outside the actual areas where DHEC has direct permitting authority. This Court's prior decisions and substantial evidence in the Record support that determination. In other words, the ALC

owed no deference to DHEC's interpretation of statutes and regulations that were erroneous or controlled by an error of law.

B. Modification

Furthermore, the ALC did not exceed its authority by modifying the structure requested by Respondent. As described previously, Respondent sought authorization to construct a 2,783 foot bulkhead and a 2,783 foot by 40 foot articulated concrete block revetment. DHEC approved a structure of 270 feet and refused the request for the remaining 2,513 feet. The ALC concluded that the full extent of the proposed structure was not currently necessary to stabilize the river bank:

> In many locations along the western section, the bulkhead may not be necessary and an ACB mat much shorter in width than forty feet may well suffice to stabilize the riverbank . . . . More specifically, the western section is best suited now and perhaps permanently to the soft approach.

The ALC deleted DHEC's size restriction, and instituted different special conditions limiting the size of the structure.[1]

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[1] The ALC limited the structure in the following pertinent parts:

> 1. Provided:
>
> (i) That care is used in the installation of the requested erosion control structure near its eastern end, adjacent to Beachwalker Park, to avoid covering marsh grass, where practical, unless necessary to prevent significant upland erosion;
>
> (ii) That, for the portion of the proposed erosion control structure to be located west of survey point "F" on [Respondent]'s Exhibit 77, a bulkhead shall not be used

Appellants argue that the ALC exceeded its authority and committed an error of law:

> After determining that the structure applied for by [Respondent] was not necessary, rather than affirming [DHEC]'s decision, the ALC went on to design an erosion control structure for [Respondent] . . . . The ALC relied upon off-the-cuff testimony . . . . If the structure designed by the ALC were to be constructed, neither DHEC nor interested members of the public would be able to determine whether it is constructed in accordance with the permit, as it is unclear what the ALC authorizes.

As Respondent and the SRMC correctly note, the General Assembly has broadly defined the authority of the ALC. The ALC has the same "power at chambers or in open hearing as do circuit court judges" and the authority to issue writs necessary to give effect to its jurisdiction. S.C. Code Ann. § 1-23-630 (2005) (granting circuit judges the power to grant, decline, or modify injunctions). The ALC presides over hearings of all contested cases and must issue a decision in a final written order. *Id.* § 1-23-505(3) (Supp. 2011). If the ALC's final order is not appealed in accordance with the provisions of section 1-23-610 of the South Carolina Code, the certified order has the same effect as a judgment of the court where filed and may be recorded, enforced,

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> where the vertical face of the escarpment is less than 24 inches;
>
> (iii) That for this same western section of the proposed erosion control structure, the ACB mat shall be no greater than eight feet in width; and,
>
> (iv) That [Respondent] shall submit final construction plans to [DHEC] consistent with the permit requested, as modified and approved by the [ALC], before commencing initial construction of the erosion control structure.

or satisfied in the same manner as a judgment of that court. *Id.* § 1-23-600(I) (Supp. 2011).

The ALC is the ultimate fact finder in a contested case, and is not restricted by the findings of the administrative agency. *Risher v. S.C. Dep't of Health and Envtl. Control*, 393 S.C. 198, 207–08, 712 S.E.2d 428, 433 (2011). Additionally, in a contested case proceeding, the ALC sits de novo. *Brown v. S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). It is unlikely the General Assembly intended to vest the ALC with broad authority to hear permit disputes, and conduct a trial on the dispute, but then restrain the court from issuing a decision which reflects the best outcome gleaned from that trial. *See B & A Dev., Inc. v. Georgetown Cnty.*, 372 S.C. 261, 268–69, 641 S.E.2d 888, 893 (2007) (recognizing the principle that when the legislature intends to confine expansive authority, it will expressly provide for such a limitation).

In the instant case, the ALC held a de novo review of the partial denial of Respondent's permit. The evidence and testimony before the ALC in this matter amounted to a Record six volumes and 2,380 pages in length. The ALC then ordered approval of the permit *issued by* DHEC with modifications based on evidence presented during the review. The ALC did not enlarge or otherwise approve a permit substantially different than that requested by Respondent, or originally reviewed by DHEC. The ALC acted in accordance with its authority as conferred and defined by the General Assembly.

II. Whether substantial evidence supports the ALC's findings that the proposed bulkhead/revetment complies with the CZMA and the CZMP.

Appellants argue that the proposed project violates the plain language of the CZMA, and that the ALC erred in concluding that the proposed bulkhead/revetment structure complies with sections 48-39-20,-30, and -150 of the South Carolina Code. We disagree.

A. The CZMA

The CZMA provides, "Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses that will generate measurable maximum dollar benefits." S.C. Code Ann. § 48-39-30(D) (2008). Critical areas include coastal waters, tidelands, beaches, and dune systems. *Id.* § 48-39-10 (2008). Section 48-39-150 of the South Carolina Code sets forth ten general considerations that OCRM must take into account when reviewing any permit concerning activity in a critical area. *Id.* § 48-39-150. Section 48-39-150 also states that "the Department will be guided by the policy statements in Sections 48-39-20 and 48-39-30," along with the ten considerations. *Id.* § 48-39-150 (2008).

The ALC listed all of the relevant considerations of section 48-39-150 and then explained why the evidence presented in the case demonstrated that the proposed construction complied with those considerations and would not have "adverse environmental impacts." The ALC then analyzed the proposed construction in light of the policy statements of sections 48-39-20 and 30 of the South Carolina Code. In section 48-39-20, the General Assembly noted that the coastal zone is rich in a variety of natural, commercial, recreational, and industrial resources. *Id*. § 48-39-20 (2008). The General Assembly observed that ill-planned development threatened to destroy important ecological, cultural, and natural characteristics, as well as, industrial and economic values. *Id.*§ 48-39-20(E). Thus, the legislature enacted regulations in light of competing demands between the urgent need to protect natural systems in the coastal zone "while balancing economic interests." *Id.* at 48-39-20(F). In section 48-39-30, the General Assembly declared the state policy of protecting the quality of the coastal environment and promoting the economic improvement of the coastal zone. *Id.* § 48-39-30(A). Two subsections of that section are particularly pertinent:

> (B) Specific state policies to be followed in the implementation of this chapter are:

(1)To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development.

. . . .

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measureable maximum dollar benefits.

Id. § 48-39-30.

The ALC noted the policy considerations of the CZMA and concluded:

These policy statements require a balancing of economic development benefits and environmental preservation. Even though the focus of the inquiry is on the effects of the project, neither the bulkhead/revetment nor the potential limited residential development will result in any significant harm to the public resources or marine or other plant or animal life, nor significantly impair public access to critical areas . . . . The potential residential development is not ill-planned and will be implemented in a low density, environmentally sensitive manner. It will be subject to local, state, and possibly federal permitting requirements. Neither the proposed bulkhead/revetment nor the potential limited residential development transgresses the policies set forth in these two statutes.

Appellants fail to recognize the ALC's thorough findings of fact supporting the conclusions regarding sections 48-39-20 and 48-39-30. The ALC engaged in an extensive analysis regarding the erosion issues facing the Spit and the consequences this erosion would have on Respondent's ability to prevent the loss of further upland, and concluded:

> Moreover, evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline and prevent the continued erosion of KDP's upland . . . . That evidence clearly establishes a need for erosion control along the disputed shoreline.

The ALC also examined both the testimony regarding possible adverse effects on marine resources and wildlife, and a detailed analysis of the facts presented regarding wintering piping plovers, a threatened species under the Endangered Species Act, and diamond-back terrapins. In this regard, the ALC noted that there had never been a single sighting of a piping plover in the proposed construction area. The ALC also observed that the United States Fish and Wildlife Service propounded a final determination of the critical habitat for piping plovers. That final determination specified the critical area of piping plover habitat as extending one mile north of Captain Sam's inlet, but not extending above the building setback line on the Spit. The ALC cited this fact in rejecting DHEC's contention that future residential development, apart from the proposed project itself, would have an adverse effect on the piping plover. Therefore, if the proposed project and residential development do not occur in critical plover habitat, or in close proximity, it is unlikely to have an adverse effect.

The ALC noted that the diamond-back terrapin has not been listed as an endangered or threatened species in South Carolina. Moreover, the testing data relied upon by CCL's expert was gathered more than fifteen years before the sharp decline in the terrapin population in tidal creeks surrounding Kiawah. CCL's expert could not testify to a reasonable degree of certainty that the proposed construction would have any significant effect on terrapins.

The preceding findings of fact regarding the impact of the proposed project, and the absence of feasible alternatives, demonstrate the substantial evidence in the Record supporting the ALC's conclusion that the project complies with the CZMA.

The CZMP

Appellants also claim that that the proposed activity contravenes the CZMP, including the plan's policies for public open space and the protection of barrier islands, dune areas (outside the critical area), erosion control, and beach and shoreline access.

DHEC developed the CZMP for the coastal zone as required by the CZMA. *See* S.C. Code § 48-39-80 (2008). All state and federal permits must be reviewed for compliance with the CZMP. *Spectre LLC v. S.C. Dep't of Health and Envtl. Control*, 386 S.C. 357, 360, 688 S.E.2d at 844, 845 (2010). The CZMP classifies barrier islands as areas of special significance and dune areas, which fall landward of the beach zones, as areas of "special resource significance." Thus, project proposals for barrier islands "must demonstrate reasonable precautions to prevent or limit any direct negative impacts on adjacent critical areas." CZMP Chapter III (C)(3)(XII)(A)(2). Additionally, project proposals for sand dune areas in close proximity to those dunes in critical areas must also comply with these same direct precautions. *Id*. Chapter III (B). The CZMP also sets forth a policy of increasing the amount of public space in the coastal zone, and protecting those areas in the coastal zone which are inhabited by endangered or threatened species. *Id.*

The ALC concluded that the proposed project did not contravene the CZMP:

> The development techniques and safeguards [Respondent] intends to implement are consonant with the policies in the CZMP. More specifically, I find the low density development . . . that would be employed in the residential development of [the Spit] entail [sic] reasonable precautions. *No evidence was offered to alter this important point.* The many rows of dunes seaward of the setback line would remain essentially intact on a permanent basis to enjoy for their beauty and protection, thereby preserving the strong natural protections deemed desirable by the policies in the CZMP.

. . . .

> The potential residential development on private property will also not impair public open space at Beachwalker Park or along the beach. Finally, the developable area of Captain Sam's peninsula is well outside . . . boundaries of designated critical habitat . . . . It is thus not a Geographic Area of Particular Concern (GAPC) under the CZMP.

(emphasis added).

The ALC's findings on this issue are well supported. The Record contains evidence of the "environmentally-friendly" nature of the proposed residential development. Respondent placed before the court evidence of the proposed structure's effect on public access, and the lack of adverse impact on critical habitats. Thus, reasonable minds could conclude from the evidence in the Record that Respondent's proposed construction complies with the CZMA and the CZMP.

III. Whether the ALC erred regarding the consideration of potential long-range cumulative impacts, and whether the ALC correctly found that the proposed bulkhead/revetment complies with regulations 30-11, and 30-12 of the South Carolina Code of Regulations.

A. Regulation 30-11(C)(1)

Appellants argue that the ALC misconstrued regulation 30-11(C)(1) of the South Carolina Code of Regulations, and erroneously concluded that DHEC lacked authority to consider impacts "outside critical areas when reviewing applications to alter or utilize critical areas." We disagree.

Regulation 30-11(C) provides in pertinent part:

> Further Guidelines: In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions

> regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following:
>
> (1)The extent to which long range cumulative effects of the project may result within the context of other possible development and the general character of the area.

S.C. Code Ann. Regs. 30-11(C)(1) (1999).

Appellants argue that the "area" referred to under this regulation extends beyond the critical area to adjacent upland. According to Appellants, the declarations of section 48-39-20 and -30 of the South Carolina Code indicate the "General Assembly's intent that [DHEC], when acting on critical area permit applications, would not just protect and restore or enhance the critical areas, but rather that the Department would protect . . . all of the resources within the coastal zone."

The ALC concluded that DHEC misconstrued its authority:

> In other words, the area for which [DHEC] has regulatory authority is the critical area, not the high ground outside the critical area. Construing this provision otherwise would lead to a substantial expansion of [DHEC]'s authority to regulate the development of entire communities. Conceivably, [DHEC] could deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development . . . . [DHEC] avers that it has the authority through coastal permitting to deny upland development even against the Town's approval of that development through its zoning process. If the General Assembly had intended to authorize such a considerable expansion of [DHEC]'s authority it is inconceivable that it would have done so with such general language.

We agree with the ALC's conclusion. The importance of the coastal zone is undisputed, as evidenced by the robust statutory regime of the CZMA. However, the expansive power sought by DHEC is not reflected

within that framework. Administrative agencies possess only those powers expressly conferred or necessarily implied to effectively fulfill the duties with which they are charged. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). Appellants' argument lacks a necessary link between the critical permit authority of regulation 30-11(C) and the fulfilling of DHEC's responsibility under the CZMA. Appellants rely on this statutory language to justify their position that critical area permits may be denied due to possible development outside an actual critical area, but within the coastal zone. However, there is no evidence that the General Assembly intended such a reading.[2]

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[2] Our decision in *Spectre, LLC v. South Carolina Department of Health and Environmental Control*, 386 S.C. 357, 688 S.E.2d 844 (2010), is consistent with this holding. In that case, DHEC denied Spectre's storm-water/land disturbance permit because the department found it inconsistent with various provisions of the CZMP, including the following:

> (1) In the coastal zone, OCRM review and certification of permit applications for commercial buildings will be based on the following policies:
>
> (b) Commercial proposals which require fill or other permanent alteration of . . . wetlands will be denied unless no feasible alternatives exist and the facility is water-dependent . . . . The cumulative impacts of the commercial activity which exists or is likely to exist in the area will be considered.

Id. at 364–65, 688 S.E.2d at 847–48.

Spectre appealed and in reversing DHEC, the ALC held that the CZMP did not apply to the property in question. *Id.* at 362, 688 S.E.2d at 846. This Court reversed, finding that the language of the CZMP set forth broad jurisdiction over the coastal zone, thereby supporting DHEC's interpretation of the CZMP regarding the Spectre site. *Id.* at 369, 688 S.E.2d at 850.

Spectre sought to fill isolated freshwater wetlands for commercial development. The CZMP specifically prohibited this activity, and most commercial construction requiring fill of freshwater wetlands. Moreover, unlike the present case, any adverse effects arose from the immediate impact of the proposed fill, and not later development which might have occurred if the fill permit had been granted. In the instant case, as the ALC observed, DHEC did not deny the proposed bulkhead/revetment permit based on immediate adverse impacts on the critical area, but instead upon an assumption that the revetment would lead to residential development of the upland portion of the Spit. While *Spectre* made it clear that the CZMP had the full force of law, the case did not hold that the CZMP authorizes DHEC to deny critical area permits because of the effects of later development of the upland area simply because of its location within the coastal zone.

In *Spectre*, this Court noted DHEC's indirect authority and then pointed to a provision of the CZMP which *explicitly sanctioned*, and served to legitimize, DHEC's denial of the permit. No such language exists here. Had the General Assembly intended to grant DHEC the power to deny critical area permits based on possible upland construction, or permitting authority superior to that of almost all local zoning laws within the coastal zone, specific and enabling language would have been provided. Simply put, DHEC's explicit statutory power narrows and confines the department's indirect authority over the coastal zone.

According to the dissent, there is a parallel in the instant case. Section 48-39-150(A) directs DHEC to base its permitting decision in part on the policies specified in sections 48-39-20 and 48-39-30, and ten general considerations. S.C. Code Ann. § 48-39-150(A) (2008). Subsection 10 requires DHEC to consider the extent to which the "proposed use could affect the value and enjoyment of adjacent landowners." *Id.* § 48-39-150(A)(10). Thus, necessarily, the dissent argues that subsection 10's language provides direct permitting authority over the entire coastal zone via regulation 30-11(C). Reasonable minds may differ as to whether language referring to the "value and enjoyment of adjacent landowners" is analogous to the type of explicit mandate we cited in *Specter*. To the extent the dissent argues that it

Our recent decision in *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C. 633, 723 S.E.2d 191 (2012), is instructive. In that case, proposed renovations to Chapin High School required filling a portion of a stream on the property. *Id.* at 636, 723 S.E.2d at 193. DHEC issued a permit to District 5 of Lexington and Richland Counties authorizing the project. *Id.* at 636–38, 723 S.E.2d at 193–94. Regulation 61–101 of the South Carolina Code of Regulations requires DHEC to deny certification if the proposed activity permanently alters the aquatic ecosystem in the *vicinity* of the project, or if there is a "feasible alternative" with less adverse consequences. *Id.* at 637, 723 S.E.2d at 193 (citing S.C. Code Ann. Regs. 61–101.F.5(a) & (b) (Supp. 2011)). Kim Murphy, a nearby resident, claimed that in considering the vicinity of the project under regulation 61–101, DHECs inquiry should have been limited to the actual 727 feet of stream to be filled. *Id.* at 638, 723 S.E.2d at 194. The ALC rejected this claim, and affirmed the certification. *Id.* Murphy appealed. *Id.*

Although the regulation did not define the term *vicinity*, this Court "interprets an undefined term in accordance with its usual and customary meaning." *Id.*, 723 S.E.2d at 640. Thus, we concluded:

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does, we disagree. However, there can be no difference of opinion as to whether that subsection constitutes enabling language granting DHEC supreme permitting authority throughout the broadly defined coastal zone. It clearly cannot.

Section 48-39-150 is mentioned in Part II, A only with general reference to the ten general considerations provided for by the statute. Thus, it is unclear as to how this provision might serve as the basis of that section. In fact, Part II, A is grounded in a description of the ALC's cogent findings regarding the erosion issues within the critical area, and the impact of the construction on marine resources and wildlife within that area. Nevertheless, bringing clarity to this point is of no moment with respect to the crucial issues of this case.

> Merriam–Webster defines vicinity as meaning "the quality or state of being near: proximity" . . . . Using this accepted meaning of the word vicinity, the regulation clearly includes more than just the project; it logically incorporates the surrounding area. Moreover, a reading to the contrary would render it impossible to ever obtain a certification to fill a portion of a stream as the functions and values of that area would always necessarily be eliminated.

Id. (citation omitted).

In enacting regulation 61–101, the General Assembly intended for DHEC to consider the impacts proposed construction might have on the surrounding area, and thus provided the term *vicinity* in the regulation. However, regulation 30–11 does not contain such language, and the use of the term *area*, and to what it refers, is not ambiguous. *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 361, 641 S.E.2d 763, 768 (Ct. App. 2009) ("We find the statute is ambiguous and, therefore, defer to the Board's interpretation."). Therefore, the ALC correctly concluded that regulation 30-11 does not authorize DHEC to deny a critical area permit based on its assessment of impacts outside that critical area.

The ALC concluded that the potential residential development would "not have deleterious impacts even if the [c]ourt were to consider the effects of the potential residential development." Moreover, the ALC concluded that:

> [T]he numerous measures and safeguards [Respondent] intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects in the critical area . . . . [T]he [c]ourt concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland.

Appellants claimed that any residential development at all is per se ill-planned and should be denied under the regulation. However, the ALC may choose between conflicting evidence, and that decision is no less supported by substantial evidence. *See Coastal*, 363 S.C. at 77, 610 S.E.2d at 487 ("The record contains conflicting evidence concerning the direct and cumulative effects of building the bridge to Park Island. The evidence that the effects will be minimal constitutes substantial evidence supporting the finding that the permit complies with the Effects Regulation."). Thus, the ALC did not err in refusing to consider impacts outside the critical area under regulation 30–11(C), and substantial evidence in the record supports the ALC's decision that the proposed project complies with that regulation.[3]

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[3] We recognize the dissent's contrary position with respect to our interpretation of regulation 30-11(C). However, we respectfully disagree with the notion that we seek to "have it both ways." Instead, we simply have a different view of "incorporation." Regulation 30-11(C) clearly references sections 48-39-20 and 48-39-30. However, this reference does not translate into a grant of permitting authority outside that enumerated by the regulation. Thus, the General Assembly delineated the agency's authority by promulgating three specified criteria to guide its decision making process. Had the General Assembly actually *incorporated* sections 48-39-20 and 48-39-30 to the extent the dissent suggests, subsections (1)–(3) would likely have been unnecessary.

In addition, the dissent misapprehends our reliance on regulation 61-101. It is quite obvious that we do not intend to apply the substance of a water quality certification regulation to the facts of the instant case. Instead, careful reading of our analysis demonstrates that the General Assembly saw fit to provide in regulation 61-101 the appropriate term in directing DHEC to consider the impacts of proposed construction on the surrounding area. If the General Assembly intended for DHEC to do the same pursuant to regulation 30-11(C), similar language would have been provided. Contrary to the dissent's opinion, we do not conclude that regulation 30-11(C) should contain the word "vicinity" or any specific word at all. That is a legislative determination. Instead, we merely assert that the word "area," as used in

B. Regulation 30-12(C)

The ALC did not err in concluding that the proposed revetment met the specific criteria for bulkheads and revetments set forth in regulation 30-12(C) of the South Carolina Code of Regulations.

Regulation 30-12(C) provides in pertinent part:

> (c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation or where public access is adversely affected unless upland is being lost due to tidally induced erosion.
>
> (d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.

S.C. Code Ann. Regs. 30-12(C) (2008).

Thus, bulkheads and revetments will be prohibited where they restrict public access unless upland is being lost to tidally induced erosion, or no feasible alternative to the installation of the structure exists.

i. Adverse Effects on Public Access

The ALC concluded that the proposed structure would degrade public use of the shoreline, but not eliminate public access. The ALC's order states, "Nevertheless, there are other sandy landing spots at low tide in the immediate vicinity in general and specifically as a result of the reduction of the mat as ordered below."

Appellants argue that the ALC's conclusion that some elimination of public access is acceptable ignores a "plain standard of whether public access

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regulation 30-11(C), is unambiguous and refers only to the "critical area" governed by the regulation. Thus, we described our reasoning in *Murphy* as "instructive."

is affected period." Appellants assert that the regulatory standard does not allow any adverse effect on public access. However, this interpretation is inconsistent with the balancing of economic and environmental uses in the coastal zone. *See, e.g.,* S.C. Code Ann. § 48-39-30 (2008) ("The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone."). The ALC noted that public use in the area was "limited." The evidence demonstrates that even this characterization may be generous.

Appellants entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment. However, the persons depicted in the photographs were attending a planned event to pay for CCL legal expenses to contest the granting of the permit at issue in this case. Evidence presented at the hearing confirmed that the sandy bank of the Kiawah River would continue for up to 1500 feet beyond the end of the revetment, and that the structure would not significantly impact or eliminate public access. The OCRM project manager testified:

> Q: I recall in your deposition and in your decision document you said that you determined that the specific project standards found in regulation 30-12(C) do not bar this project; do you recall that?
>
> A: Yeah, the 30-12(C) is the specific regulation that talks about bulkheads.
>
> . . . .
>
> A: And I didn't feel that the regulation gave me the guidance that would require me to out and out deny this permit application.
>
> Q: Why?
>
> A: Well, I think to some extent the structure will affect public access, but I didn't conclude that it's going to be adversely affected to the level where the entire structure should be denied.

Q: Okay. What did you conclude?

. . . .

A: That there might be some minimal adverse effect on public access that was not strong enough to bar the permit from being issued.

Q: Based on the specific project standards?

A: Yes, based . . . yea, just based on that regulation. In other words, I could not read 30-12(C) and conclude that I had to deny this permit.

We agree with Respondent's view that Appellants incorrectly equate their ability to access the area subject to the revetment with the public ability to use that area. As Respondent notes, "There is no contention that the public could not enter upon this area, even if the public's recreational use of the area would be slightly modified."

Substantial evidence in the Record supports the ALC's determination that the proposed structure did not adversely affect public use pursuant to the regulation. However, even if public access is affected, the demonstrated loss of upland and lack of feasible alternatives to the proposed structure support the ALC's determination that the project plainly satisfies regulation 30-12.

ii. Loss of Upland

Appellants also argue that Respondent is not losing upland property. However, Respondent presented a horde of evidence demonstrating their loss of upland due to tidally induced erosion. One witness for Respondent, a licensed surveyor, testified that the current distance between what he determined to be the critical line boundary and the setback line in 2009 was 66 feet. In April 2005, the distance was 90 feet, and in September 2002, the distance was 104 feet. From 2002 to 2009, the distance has moved approximately 38 feet. The witness also calculated that Respondent lost approximately 49,856 square feet of upland between September 2002 and October 2008.

Another witness for Respondent, a licensed engineer, explained the proposed structure's extension onto the shoreline area:

> Q: Why does the block have to go out that far?
>
> A: Well, because this is the zone of erosion and we believe that the shoreline is going to continue to erode. There's some velocity erosion occurring along here, as well, as the erosions coming—and that's part of what's causing this whole phenomenon.

In response, Appellants claim that the Spit is accreting, and that it has actually increased 63.24 acres between 1974 and 2009. Appellants also claim that Respondent's own expert, a coastal geologist, testified that the Spit will continue to grow for 20–25 years. However, Appellants present an incomplete recitation of this testimony.

The expert testified that he expected the oceanfront side of the Spit to continue to sustain itself from incoming sand from the nearby Stono Inlet, but that the stretch of bank on the Kiawah River side, the location of Respondent's upland, was eroding. He further stated that the proposed construction would slow or stop erosion, as is the intended purpose, while at the same time posing no danger to Captain Sam's Inlet. Appellants simply do not demonstrate a lack of evidence of upland erosion, or that the ALC erred in assessing Respondent's evidence. Moreover, Appellants urge this Court to adopt an interpretation of the evidence which runs afoul of the clear language of section 48-39-30 of the South Carolina Code. That section provides:

> In the implementation of this chapter, no government agency shall adopt a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States.

S.C. Code Ann. § 48-39-30 (C) (2008).

The Record supports a view that upland has been lost to tidal erosion, and to hold otherwise would appear to come close to denying Respondent the use of its upland property without just compensation.[4]

iii. Feasible Alternatives

Appellants argue that the ALC made a conclusory finding that there were no feasible alternatives to the proposed structure, and failed to provide any evidentiary support for this finding.

Regulation 30-12(C)(1)(d) provides that bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists. S.C. Code Ann. Regs. 30-12(C)(1)(d) (2008). Respondent presented evidence that the proposed structure is the most environmentally-sensitive solution. Specifically, Respondent's project engineer testified regarding alternative systems:

> We looked at . . . a number of alternatives investigated [sic], bulkhead, riprap, to geo-tubes, a number of things that could have been used, and it was our recommendation that they use the concrete mats . . . . [F]rom all the systems that we were aware of, it seemed like that is the softest most compatible system out there

[4] In *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 379–82, 404 S.E.2d 895, 897–98 (1991), the General Assembly enacted legislation that prevented development seaward of setback lines, in an effort to protect the state's beach and dune environment in the interest of the public. An affected landowner claimed that the legislation was a regulatory taking without just compensation because he was unable to construct more than a walkway on his property. *Id.* This Court upheld the regulation, and the United States Supreme Court reversed. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992). The Supreme Court refused to allow a taking without compensation based solely on the public's interest in preserving the beach area, and remanded the case to this Court for a determination as to whether a principle of common law nuisance or property existed for denying the landowner's intended use of his property. *Id.*

> . . . . We've seen them used in other locations where they become completely naturalized. It's kind of in keeping with the whole essence of Kiawah where . . . we also need engineering solutions that blend with the environment we're creating.
>
> The ALC also noted:
>
> CCL urged that the "alternative" is to do nothing and leave the property as status quo since, they suggested, little erosion may have occurred in the last 10-12 months. However, the testimony . . . clearly established a trend of continuous and significant shoreline erosion along the riverbank for several decades. That evidence clearly establishes a need for erosion control along the disputed shoreline.

The ALC determined that Respondent lost upland due to tidal erosion, and that no feasible alternatives existed to stop continuing loss. The regulation contemplates an adverse impact on public access when these conditions are met. Therefore, the ALC did not err in the application of regulation of 30-12, and substantial evidence in the Record supports the court's determinations.

CONCLUSION

The essence of Appellants' argument is rooted in dissatisfaction with the verbiage and structure of the ALC's order, and not in actual errors of law or the absence of substantial evidence. The ALC acted within the permissible scope of its authority in modifying the existing permit to include a structure no larger than that requested by Respondent or initially reviewed by DHEC. On appeal of a contested case, we must affirm the ALC if the findings are supported by substantial evidence. *Comm'rs. of Pub. Works*, 372 S.C. at 357–58, 641 S.E.2d at 766.

AFFIRMED.

BEATTY, J., concurs. KITTREDGE, J., concurring in result in a separate opinion. PLEICONES, J., dissenting in a separate opinion in which HEARN, J., concurs.

JUSTICE KITTREDGE: I concur in result. I write separately because I agree with Justice Pleicones that the administrative law court (ALC) erred in its construction of the relevant statutes and regulations. As Justice Pleicones persuasively articulates, "permitting decisions are not to be made in a vacuum." For example, Reg. 30-11 speaks broadly to the parameters of what the Office of Coastal Resource Management (OCRM) should consider in assessing whether to issue a permit in the critical area, as OCRM must consider "the general character of the area." Reg. 30-11(C)(1). Subsection (B) of Reg. 30-11 further mandates that OCRM must be guided by the broad policies found in §§ 48-39-20 and -30, including "the urgent need to protect and give high priority to natural systems in the coastal zone while balancing economic interests." *See* S.C. Code Ann. § 48-39-20(F). Thus, the ALC erred in construing the law to restrict the Department of Health and Environmental Control's consideration to the permit's effect on the critical area only. The dissent's view of legislative intent fits like a glove with the statutory and regulatory language, as well as the common sense understanding that a project in a critical area may indeed have a profound impact on the surrounding area.

However, unlike the dissent, I do not believe the error requires reversal. This is so because, in my judgment, the learned trial judge further and carefully considered the evidence concerning the effect of the permit on the "uplands," and found the permit was properly granted under what I believe to be the proper construction of the relevant law:

> Additionally, in this instance, the potential residential development will not have deleterious impacts even if the Court were to consider the effects of the potential residential development. OCRM and [Coastal Conservation League] do not challenge KDP's history of environmentally sensitive development methods, permit adherence record, or any of the specific strategies, methods, and approaches that KDP will use in its limited presidential development of Captain Sam's. Rather, they urge that **any** residential development at all, regardless of

> safeguards and protections, on the now-undeveloped Captain Sam's highland peninsula along the ocean and river, is *per se* "ill-planned." The Court concludes that the numerous measures and safeguards KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to its flora and fauna, and without significant negative effects on the critical area. Even though consideration of the effects of the upland is beyond the purview of the regulation, the Court concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland.

These additional findings of the ALC are supported by substantial evidence. As a result, while I agree with the analytical framework and view of legislative intent as set forth in the dissent, I would affirm the ALC in result only due to its secondary findings under the proper legal framework.

JUSTICE PLEICONES: I respectfully dissent because, in my opinion, this appeal presents legal questions of regulatory and statutory interpretation and not, as the majority views it, questions of substantial evidence. In my opinion, the Administrative Law Judge (ALJ) committed an error of law in interpreting 23A S.C. Reg. 30-11(C), and the error requires we reverse the appealed order and remand for further proceedings. Moreover, the entirety of the order is affected by the ALJ's erroneous view of the balancing required by statutes in the coastal permitting process, an error which also mandates reversal and reconsideration.

The Spit is part of South Carolina's coastal zone,[5] and the structure which is at issue here would be constructed in the critical area.[6] It is the policy of the State to balance development in the coastal zone with concern for sensitive and fragile coastal areas.[7]

Under the Coastal Zone Management Act (CZMA), appellant Department of Health and Environmental Control (DHEC), through the Office of Coastal Resource Management (OCRM), was required to develop a comprehensive coastal management program (CMP) for the coastal zone, and was given the responsibility to enforce and administer the CMP. S.C. Code Ann. § 48-39-80 (2008); *Spectre, LLC v. South Carolina Dep't of Health and Enviro. Cont.*, 386 S.C. 357, 688 S.E.2d 844 (2010). DHEC was also required by statute to enact rules and regulations to enforce the CMP. S.C. Code Ann. § 48-39-80. Section 48-39-150 states the general considerations to be used by OCRM in determining whether to issue a permit for construction in the critical area, and reiterates that the policies found in § 48-39-20 and § 48-39-30 must be honored. The General Assembly required that, in determining whether to permit erosion devices such as the ones at issue here, OCRM must act in the manner it "deem[ed] most advantageous to the State" in order to promote public health, safety, and welfare; to protect public and private property from beach and shore destruction; and to ensure the continued use of tidelands,

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[5] S.C. Code Ann. § 48-39-10(B).
[6] S.C. Code Ann. § 48-39-10(J).
[7] S.C. Code Ann. § 48-39-30(B)(1); 49-39-20(F).

submerged lands, and waters for public purposes. S.C. Code Ann. § 48-39-120(F).

OCRM is charged with two separate, but interrelated responsibilities. As explained in the CMP,

> Two types of management authority are granted in two specific areas of the State. [OCRM][8] has direct control through a permit program over critical areas…Direct permitting authority is specifically limited to these critical areas. Indirect management authority of coastal resources is granted to [OCRM] in…the coastal zone…."
>
> CMP, Chapter II, cited in *Spectre, LLC, supra*.

Pursuant to the authority granted it by the CZMA, DHEC has promulgated permitting regulations "to guide the wise preservation and utilization of coastal resources." Regulation 30-11 is entitled "General Guidelines for All Critical Areas." Subsection (B) restates the general considerations for permitting in critical areas found in § 48-39-150, and specifically states that "In assessing the potential impacts of projects in the critical area, [OCRM] will be guided by the policy statements in Sections 48-39-20 and 48-39-30 . . . ." Subsection (C), entitled "Further Guidelines" reiterates that OCRM's permit decisions in the critical areas must be based in part on the policies in §§ 48-39-20 and-30, and specifically requires that OCRM take into consideration:

> (1) The extent to which long-range, cumulative effects of the project may result within the context of other possible developments and the general character of the area.
>
> Reg. 30-11 C(1)

Read in its entirety, Reg. 30-11 is consistent with the two-prong management approach stated in the CMP. While OCRM's permitting authority is limited

[8] The CMP refers to the Coastal Council, which was abolished in 1994 when its authority was transferred to OCRM. *See* 1993 Act. No. 181.

to critical areas, it is charged with managing the entire coastal zone, and thus permitting decisions are not to be made in a vacuum. For example, Reg. 30-11(B)

specifically provides that in assessing the potential impact of critical area projects, OCRM must be guided by the CZMA policies found in §§ 48-39-20 and -30, both of which are concerned with the coastal zone and its vulnerability to manmade alterations. *See* § 48-39-20(B), (D), (E), and (F); § 48-39-30(A), (B)(1), (2), (5), and (E). Reg. 30-11(C) reiterates the need for the public policies found in these two statutes to be considered in making permitting decisions pursuant to § 48-39-150, the statute governing this bulkhead and revetment. Subsection (C)(1) specifically refers to the long-range cumulative effects of permitting a project in the critical area "within the context of other possible development and the general character of the area."

Both appellants contend the ALC misconstrued Reg. 30-11(C)(1) and misunderstood and misapplied the CZMA. I agree.

A. CZMA

The majority first discusses the ALC's application of the CZMA, that is, §§ 48-39-20 and -30. *See* Part II A, *supra*. In holding that the ALC correctly found that "the proposed construction" met the policy concerns expressed in the statutes, the ALC and the majority focus not solely on the bulkhead/revetment erosion device sought to be permitted, but also on whether the "potential limited residential development transgresses the policies set forth in these two statutes." As the majority notes, the ALC weighed the cost of permitting construction of an erosion control device in a critical area against the benefit to KDP if it can build on the reinforced Spit. I strongly disagree with the ALC's and the majority's focus on the potential economic benefit to a private landowner if the proposed bulkhead/revetment is built, rather than on the benefit, if any, to the public at large of such construction.

We have long held that a purely economic benefit is insufficient as a matter of law to establish an overriding public interest and "does not meet the stated purpose of the [CZMA] to protect, restore, or enhance resources of the State's

coastal zone for present and succeeding generations. This public interest must counterbalance the good of economic improvement. *See* S.C. Code Ann. § 48-39-30(B)(1) and (2)." *South Carolina Wildlife Fed. v. South Carolina Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988); *see also 330 Concord Street Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992). The ALC and the majority misunderstand and misapply the balancing test required by CZMA, allowing a "purely economic benefit" inuring only to a private landowner to outweigh our State's public policy mandate that "[c]ritical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits." S.C. Code Ann. § 48-39-30(D). This error in construction and application of the CZMA mandates reversal.

B. Regulation 30-11(C)

The majority concludes that "there is no evidence that the General Assembly intended that critical area permits may be denied due to possible development outside an actual critical area but within the coastal zone," and that appellants failed to establish "a necessary link between the critical permit authority of Regulation 30-11(C) and the fulfilling of DHEC's responsibility under the CZMA." In my opinion, "the missing link" is found in the language of the Regulation 30-11(C) itself, which specifically references the policies found in § 48-39-20 and § 48-39-30, i.e., the CZMA. As explained below, I cannot reconcile the majority's discussion of § 48-39-20 and -30 in Part II A with its analysis in Part III of Regulation 30-11(C)(1).

In construing §§ 48-39-20 and 48-39-30, the majority considers KDP's residential development plans for the upland areas of the Spit, part of the coastal zone, not just the erosion control issue, a critical area project, to be the proper subject of inquiry. *See* Part II A, *supra*. When called upon to interpret Reg. 30-11, however, the majority holds that there is no evidence that the General Assembly intended for OCRM to consider anything other than the bulkhead/revetment's impact on the critical area itself. *See* Part III A, *supra*. This holding ignores that Reg. 30-11 itself requires DHEC to be guided by, and base its decisions at least in part "on the policies specified in

Sections 48-39-20 and 48-39-30 . . . ." Reg. 30-11(B); Reg. 30-11(C). The majority cannot have it both ways, first holding that the residential development is the proper focus under the statutes, but also that under Reg. 30-11, which specifically incorporates these two statutes, only the bulkhead/revetment's impact on the critical area may be considered. The ALC's order is affected by an error of law in that he misapprehended the proper scope of inquiry under Reg. 30-11. This error requires reversal.

In my opinion, the majority also errs when it adopts the ALC's narrow reading of the term "area" as used in Reg. 30-11(C)(1). "Critical Area" is a defined term in Regulation 30. *See* Reg. 30-1(D)(15). The majority ignores that when the regulation refers to a "critical area" it uses both words, and that to read "area" as "critical area" in this subsection deprives OCRM of its statutory obligation to enforce the public policy of this State in the coastal zone.[9] Thus, when Reg. 30-11 uses the term "Critical Area," it is referring to a specific defined term. "Critical Area" is not the same as "Area" when used in this regulation. *Young v. SCDHEC*, 383 S.C. 452, 680 S.E.2d 784 (Ct. App. 2009) [ALC properly considered area surrounding proposed dock site under Reg. 30-11(C)(1)]. Since the ALJ's decision was controlled by his erroneous belief that all permitting decisions in the critical area must be decided in a vacuum, this error of law requires we reverse and remand.

In determining that he could not consider the impact beyond the critical area, the ALJ also opined that to do so would allow OCRM to "deny critical area

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[9] The majority finds much comfort in the fact that 25A Reg. 61-101 (2011), which is titled "Water Quality Certification," and which "establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341" instructs DHEC to take into consideration the impact of the proposed project on "the aquatic ecosystem in the vicinity of the project." The majority concludes that since Reg. 30-11 does not use the term "vicinity" as does Reg. 61-101, and since "area" is not an ambiguous term, DHEC cannot deny a permit based on its assessment of impacts outside the critical area. I fail to see the relevance of a term used in the water quality regulation to a Coastal Division regulation, especially a regulation that requires DHEC to "to be guided by . . . long-range, cumulative effects of the [bulkhead/revetment on] . . . the general character of the area."

permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development." He went on to state, "In fact, [an OCRM witness] testified he denied the revetment . . . other than adjacent to Beachwalker Park, because he believed potential residential development would destroy the pristine habitat of Captain Sam's. Thus [OCRM] avers that it has the authority through coastal permitting to deny upland development even against [municipal] approval of that development through its zoning process." In my opinion, by law OCRM must take into account the impact of any critical area permit on upland sprawl, general overdevelopment, and pristine habitats since Reg. 30-11(C) specifically incorporates the policies found in §§ 48-39-20 and -30, as well as specifying that the regulation is in aid of fulfilling DHEC's permitting responsibility under § 48-39-150.[10] As the ALJ is the fact finder in this proceeding,[11] he too is charged with these duties and responsibilities.

Further, the ALC misapprehends the interplay between the DHEC permitting process and local zoning laws. The granting of an OCRM permit does not preempt local zoning requirements any more than a project permitted by local zoning ordinances is exempt from state environmental regulation. *See Rockville Haven LLC v. Town of Rockville*, 394 S.C. 1, 714 S.E.2d 277 (2011). Local zoning ordinances serve one purpose in the coastal zone, while State statutes, the CMP, and regulations serve another. The ALJ's order is affected by an error of law requiring reversal.

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[10] The majority reads *Spectre LLC* to limit DHEC's authority to deny critical area permits based upon possible future construction to situations when such a consideration is "explicitly sanctioned." Assuming that such an explicit sanction by the General Assembly is required, I refer the reader to S.C. Code Ann. § 48-39-150(A) (2008), which reiterates that the decision on any critical area permit must be based in part upon "the policies specified in Sections 48-39-20 and 48-39-30" and § 48-39-150(A)(10), requiring permitting decisions to consider "The extent to which the proposed use could affect the value and enjoyment of adjacent owners." Thus, consideration of a critical area permit's effect on future use of property outside the critical area itself is "sanctioned," and in fact is the basis of the majority's analysis in Part II A of its opinion.

[11] S.C. Code Ann. § 1-23-600(A) (Supp. 2010).

I would reverse and remand as the ALJ's order rests on a fundamental misunderstanding of the role of OCRM in managing the State's coastal zone, and of the considerations pertinent to issuance of a permit for an erosion control device in the critical area. The ALJ's errors of law require that he reevaluate the evidence and reexamine his findings of fact and conclusions of law using the correct legal standards. Moreover, despite the dissent's repeated specific references to OCRM's permitting authority in the critical area, more than ten by my count, the majority insists that I would give the agency "direct permitting authority over the entire coastal zone." I am compelled to respond to the majority's patently erroneous characterization of my position.

HEARN, J., concurs.

an employment contract. The contract contained a broad arbitration provision, requiring arbitration of "any controversy or claim arising out of or relating to this contract, or breach thereof." In the underlying action, in which Landers alleges five causes of action, Landers claims he was constructively terminated from his employment as a result of Appellant Neal Arnold's tortious conduct towards him. Appellants moved to compel arbitration pursuant to the employment contract. The trial court found that only Landers' breach of contract claim was subject to the arbitration provision, while his other four causes of action comprised of several tort and corporate claims were not within the scope of the arbitration clause. We disagree.

Landers' pleadings provide a clear nexus between his claims and the employment contract sufficient to establish a significant relationship to the employment agreement. We find the claims are within the scope of the agreement's broad arbitration provision. Thus, we reverse the trial court's order and hold that all of Landers' causes of action must be arbitrated.

I.

In 2005, Landers and two other individuals founded Atlantic Bank & Trust (Bank).[1] Landers purchased 50,000 shares of common stock of Bank's holding company, Atlantic Banc Holdings, Inc. (Holding Company). On February 20, 2007, Landers and Bank entered into a written employment agreement (Agreement). The Agreement contained an arbitration provision which stated: "Except matters contemplated by Section 17 below [Applicable Law and Choice of Forum], *any controversy or claim arising out of relating to this contract, or the breach thereof*, shall be settled by binding arbitration . . . ." (emphasis added).

[1] Bank is a federally-chartered savings bank with branches in South Carolina and Georgia. In June 2011, the Office of Thrift Supervision (OTS), a former federal agency under the United States Department of Treasury, took possession of the business and property of Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as its receiver. In April 2012, the FDIC disallowed Landers' claim he submitted pursuant to 12 U.S.C. § 1821(d)(5) (2006). However, subsection (d)(6) permits a claimant, as a matter of right, to continue an action commenced before the appointment of the receiver. Neither the FDIC nor Appellants oppose the action's continuation before this Court.

The Agreement provided for an initial term of three years' employment for Landers as Executive Vice President and Chief Mortgage Officer and automatic extensions for successive one-year terms unless either party gave written notice of an intent not to extend the contract. The Agreement also stated that after Holding Company established a stock incentive plan, Landers was to receive an option to purchase 65,000 shares of common stock of Holding Company and provided for a lump-sum payment of 2.99 times Landers' base pay in the event his employment was terminated within one year after a change of control.[2]

Pursuant to the Agreement, Landers was to perform his duties "subject to the direction of the [CEO]" and "diligently follow and implement all reasonable and lawful management policies and decisions communicated to him by the [CEO]." Landers was required to "devote substantially all of his time, energy and skill during regular business hours to the performance of the duties of his employment . . . and faithfully and industriously perform such duties." Finally, the Agreement expresses what constituted termination for "cause" and Landers was authorized to terminate the Agreement for cause based upon "a material diminution in the powers, responsibilities, duties or compensation of [Landers]" thereunder.

Bank, like most, suffered financial hardship as a result of the economic collapse in the fall of 2008. In May 2009, Bank's Board of Directors (Board) hired Neal Arnold to serve as CEO and Landers voluntarily accepted the position of president.[3] Thereafter, Arnold began soliciting out-of-state investors to recapitalize Bank. Landers claims he was assured by Arnold that his job was safe despite the impending recapitalization. According to Landers, however, since Arnold's arrival, he was "systematically and deliberately stripped of his authority" as president. Landers contends Arnold began a campaign to "discredit, belittle, demean, and constructively terminate" him. Arnold and other executives stated "Landers had ADD [Attention Deficit Disorder] and was incompetent to perform

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[2] Under the Agreement, a reorganization that results in current stockholders of Bank or Holding Company immediately prior thereto owning less than fifty percent (50%) of the combined voting power constitutes a change of control.

[3] Landers began serving as Bank's Chief Executive Officer (CEO) in October of 2008.

his job" and "incapable of effectively communicating with anyone in performing his job."

Landers alleges that these and other statements were made in front of numerous co-workers. He also claims Arnold's behavior towards him was verbally abusive, demeaning, and generally unprofessional and improper. According to Landers, Arnold routinely called him offensive names and used unseemly language towards him in front of upper-level management and other co-workers. In one instance, Landers contends Arnold even threatened him in a highly aggressive and volatile manner when Landers came to the defense of a junior co-worker. Beginning in September 2009, Landers alleges he was forced to sign in and out whenever he left the office and was required by Arnold to enlist the help of other management personnel when communicating with a certain client because Arnold asserted he was not capable of handling these discussions.

Additionally, Landers contends Arnold steadily and purposefully provided incorrect information to him about the status of Bank's management. Landers claims he was not permitted to see documentation regarding the recapitalization or takeover despite repeatedly asking for such information. The pertinent documents revealed a new management team and Board, neither of which listed Landers as a member. Landers also asserts Arnold repeatedly assured him that he would be entitled to receive payment for the "Change in Control" pursuant to the Agreement, which Appellants now refuse. According to Landers, Appellants also refuse to offer him stock options to which he is entitled under the Agreement.

On December 18, 2009, Landers sent a letter to Arnold "recognizing his constructive termination." Landers expressed he was writing the letter "as a result of [Arnold's] actions over the past six months, especially those over the last 30 days." In the letter, Landers claims Arnold "acted to effectively destroy [his] authority and ability to perform [his] job." In one section, the letter states:

> You have made a concerted effort to undermine my authority, removed much of my authority, changed my duties, have defamed me in front of co-workers, and generally made it impossible for me to perform as President. You continue to withhold vital information and misrepresent facts. As a result, you have effectively terminated me from my position as President of Atlantic Bank.

Arnold accepted Landers' letter of constructive termination several days later.

In January of 2010, Bank and Holding Company sent a Notice of Special Meeting and Proxy to their shareholders. The Notice contained information regarding new investors and proposed amendments to the Articles of Incorporation. According to Landers, the Notice and Proxy Statement contained incomplete and misleading information concerning the effect the recapitalization would have on shareholders of common stock.[4] Landers alleges he was "forced out" of Bank as a result of the concerns that he expressed regarding Arnold's campaign to provide incorrect information about the recapitalization. In his complaint, Landers states: "As a result of Landers' concerns, and in an effort to eliminate Landers as a potential problem, he was stripped of much of his authority as President, defamed, and then terminated by Atlantic Bank."

Lastly, Landers contends he was excluded from his role as a director on the Board in "an ongoing effort to freeze [him] out and strip him of his authority." According to Landers, when he was not permitted to call in to a special Board meeting in May 2010, he went to the meeting in person and was asked to recuse himself. Landers refused to recuse himself and claims he was ejected from the meeting. Landers alleges he is no longer provided necessary information or authority to serve in his capacity as a director.[5]

Landers commenced this action in January 2010. In his complaint, Landers' asserted five causes of action: (i) breach of contract/constructive termination; (ii) slander/slander per se; (iii) intentional infliction of emotional distress; (iv) illegal proxy solicitation pursuant to S.C. Code Ann. § 33-7-220(i) (Supp. 2011);[6] and (v)

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[4] Landers contends the proposed transaction and amendments to the Articles of Incorporation would allow the takeover company, through appointed directors, to pay dividends on its preferred stock but not the common stock. It would also allow directors to take other actions detrimental to the common shareholders, including Landers, and force their share values to zero.

[5] Appellants admit Landers was asked to recuse himself from the Board meeting due to the ongoing litigation and the potential conflict of interest. Appellants contend Landers tendered his resignation from the Board in June 2010.

[6] The text of the statute reads:

wrongful expulsion as a director. Appellants moved to compel arbitration pursuant to the arbitration clause contained in the Agreement and to dismiss or stay the action. The trial court ordered arbitration for Landers' breach of contract/constructive termination claim. However, the trial court denied Appellants' motion to compel arbitration as to the remaining causes of action. In doing so, the court found there was not a significant relationship between the claims and the Agreement. Alternatively, the court found the allegations underlying the claims were unforeseeable at the time the parties entered into the Agreement. Thus, the trial court stayed the breach of contract claim and ordered that the remaining four claims proceed to court.

II.

"The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise." *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). "The determination of whether a claim is subject to arbitration is subject to de novo review." *Id.* (citing *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323) (2009)). However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

III.

Generally, any arbitration agreement affecting interstate commerce, such as the one at issue, is subject to the FAA. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that in the employment context, only transportation

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> A proxy may not be solicited on the basis of any proxy statement or other communication, written or oral, containing a statement which, at the time and in light of the circumstances under which it was made, was false or misleading with respect to a material fact or which omits to state a material fact necessary to make the statements made not false or misleading.

S.C. Code Ann. § 33-7-220(i).

workers' employment contracts are exempted from the FAA's coverage); *see also* 9 U.S.C. §§ 1, 2. Once it is determined that the FAA applies to a dispute, federal substantive law regarding arbitrability controls. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA].").

Whether a party has agreed to arbitrate an issue is a matter of contract interpretation and "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."). Although the intention of parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability. *Am. Recovery*, 96 F.3d at 94.

It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 92 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983)); *accord Zabinski*, 346 S.C. at 598, 553 S.E.2d at 118. "'The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.'" *Am. Recovery*, 96 F.3d at 94 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989)). Such a presumption is strengthened when an arbitration clause is broadly written. *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). Therefore, "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]'" arbitration must generally be ordered. *Am. Recovery, 96 F.3d at 92* (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119.

A clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly. *See, e.g., Prima Paint Corp. v. Flood & Conklin*

Mfg. Co., 388 U.S. 395, 398 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). Courts have held that such broad clauses are "capable of an expansive reach." *Am. Recovery Corp.*, 96 F.3d at 93. Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Thus, the scope of the clause does "not limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship to the contract." *J.J. Ryan*, 863 F.2d at 321. In applying this standard, this Court "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *Id.* at 319; *Zabinski*, 346 S.C. at 597, 53 S.E.2d at 118.

It is within this framework that we must determine whether Landers' claims are within the scope of the Agreement's arbitration clause.

A.

Landers contends that the tort claims of slander and intentional infliction of emotional distress are not within the scope of the arbitration clause.[7] Specifically, Landers asserts they are not subject to arbitration because they do not require reference to or construction of the Agreement. We disagree and find Landers' tort claims bear a significant relationship to the Agreement, such that they must be arbitrated.

In support of his contention, Landers suggests the situation before us is indistinguishable from *McMahon v. RMS Electronics, Inc.*, 618 F. Supp. 189 (S.D.N.Y. 1985). In that case, after McMahon's employment was terminated by RMS, he brought a lawsuit alleging eight causes of action, including three

[7] Because Landers expressly states in his complaint that the slanderous statements were encompassed in his claim of intentional infliction of emotional distress, we find it appropriate to analyze the related claims together.

defamation claims. McMahon alleged that one week before his termination, the president of RMS stated to another employee that McMahon was the "company drunk" and was "interfering with the president's operation of the company." The New York district court denied RMS's motion to compel arbitration as to this defamation claim. The court stated "although the statements regarding McMahon's drinking habits may be relevant to his claim of wrongful termination, the resolution of the defamation claim does not require reference to the underlying contract" and "does not require an interpretation of the contractual agreement between the two parties." *Id.* at 193. The court further stated "the defamation claim is not arbitrable simply because the statements were made during the term of McMahon's employment." *Id.*

We find *McMahon* unpersuasive. Certainly, arbitration is only required where the parties have contracted for it, and "the exact content of the allegedly defamatory statement must be closely examined to see whether it extends to matters beyond the parties' contractual relationship." *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir. 1995); *see also Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir. 2000) (finding that a defamatory explanation which dealt with the termination of plaintiff's employment and his supposed violation of his employment contract was within the scope of a broad arbitration clause). However, under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause. *See J.J. Ryan*, 863 F.2d at 321 (finding that under the significant relationship test, broad arbitration clause does not limit arbitration to literal interpretation or performance of the contract).

Moreover, the allegedly defamatory statements made in *McMahon* related to the employee's general character, whereas here, Landers asserts that the alleged tortious conduct and defamatory statements of Arnold directly related to Landers' ability to perform his duties with Bank. *Cf. Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir. 1989) (statements that broker had lost his license and was "basically a criminal" were relevant to job performance and within the scope of arbitration clause arising out of employment or termination of employment, but not statement that broker was disbarred by lawyer). Landers alleges outrageous statements and conduct that "generally made it impossible for [him] to perform as President." He asserts the alleged tortious conduct of Arnold "discredit[ed], belittle[d], demean[ed], and constructively terminate[d]" him. Furthermore, he

claims the statements were intended to create an impression he was "incapable of performing his job effectively."

We find Landers' tort claims bear a significant relationship to the Agreement. The Agreement contains not only monetary rights and obligations, but also articulates the duties and obligations of Landers and provides that Landers is subject to the direction of the employer, requiring him to diligently follow and implement all policies and decisions of the employer. Furthermore, the Agreement contemplates what constitutes cause for termination, including a "material diminution in [] powers, responsibilities, duties or compensation."

Thus, in light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract.[8] Even assuming the arbitrability of the claims was in doubt, which it is not, we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that Landers' slander and intentional infliction of emotional distress claims are covered by the clause. Thus, we reverse the trial court's order denying Appellants' motion to compel the causes of action of slander and intentional infliction of emotional distress.

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[8] *See Gillepsie v. Colonial Life & Accident Ins. Co.*, No. 08-689, 2009 WL 890579 (W.D. Pa. March 30, 2009) (finding broad arbitration clause applied to claims of sexual harassment and retaliation because the claims related to employee's business relationship with Colonial, not merely disputes relating to specific provisions of the contract in accordance with South Carolina law); *Smith v. Cato*, No. 3:05CV99, 2006 WL 1285521 (W.D.N.C. May 9, 2006) (finding plaintiff's defamation claim, which was based on allegations of employee's gross negligence and misconduct as the grounds for termination, bore a significant relationship to the employment agreement); *Orcutt v. Kettering Radiologists, Inc.*, 199 F. Supp. 2d 746 (S.D. Ohio 2002) (finding claims based on discrimination, harassment, and retaliation that occurred during the course of employment clearly arose out of or related to plaintiff's employment agreement); *Stanton v. Prudential Ins.*, Co., No. 98-4989, 1999 WL 236603 (E.D. Pa. April 20, 1999) (noting that tort claim of intentional infliction of emotional distress was arbitrable since it arose directly from the circumstances leading to plaintiff's termination from employment).

B.

Landers also contends that his corporate claims of illegal proxy solicitation and wrongful expulsion as director are not within the scope of the arbitration provision. Certainly, the question of whether Landers' corporate claims are within the scope of the arbitration clause is admittedly closer than his tort claims discussed above. However, we find untenable Landers' assertion that these corporate claims do not bear a significant relationship to the terms and conditions of his employment contract or any breach thereof. In any event, we cannot say with positive assurance that such claims are not within the scope of the arbitration clause within the Agreement. Thus, we hold these claims are also subject to arbitration.

Illegal Proxy Solicitation

The essence of Landers' illegal proxy solicitation claim is that the proxy statement issued by Bank was materially misleading as to the effect the recapitalization could have on the common shareholders, including Landers.

Although Landers' status as a shareholder did not originally derive from the Agreement,[9] the Agreement does in fact contemplate his status as a shareholder. By Landers' own allegation, Appellants were required to grant him an option to purchase 65,000 additional shares of common stock pursuant to the Agreement.[10]

Furthermore, the Agreement's arbitration clause mandates arbitration of "any controversy or claim arising out of relating to this contract, or the *breach thereof*." (emphasis added). Landers' allegations provide a direct link between his status as a shareholder and the purported breach of the Agreement. Specifically, Landers claims that "because [he] stated his concerns and sought complete, accurate information regarding the transactions [including recapitalization and amendments to the Articles of Incorporation] and its potentially adverse effects, *he was forced out of Atlantic Bank* causing him further injury." Landers further states, "*But for*

[9] According to the Record, Landers purchased 50,000 shares of stock when he founded Bank, not pursuant to any provision in the Agreement.

[10] Landers alleges Appellants have refused to grant him such option.

the proxy solicitation and other misleading information, [he] would not have questioned the material omissions leading to his termination." (emphasis added).

Oldroyd v. Emira Sav. Bank, FSB, 134 F.3d 72 (2d Cir. 1998) is instructive here. In *Oldroyd*, the plaintiff, a former vice president of a bank, alleged he was wrongfully discharged because he informed the United States Treasury Department of illegal loan activity occurring at the bank. In finding the plaintiff's retaliatory discharge subject to arbitration, the Second Circuit Court of Appeals stated:

> In alleging retaliatory discharge, Oldroyd asserts that he was unlawfully terminated by his employer because he informed [the Treasury Department] of the illegal loan activity occurring at ESB. Inasmuch as more than half of Oldroyd's employment contract relates to the subject of termination from employment, there can be no doubt that a retaliatory discharge claim touches matters covered by the employment contract. For example, the contract addresses such matters as what constitutes "cause" for termination, benefits to be provided after termination, notice requirements for termination, termination upon change of control, and related matters. Accordingly, we conclude that since Oldroyd alleges that he was terminated under circumstances giving rise to a retaliatory discharge claim, such claim touched matters covered by the employment agreement and therefore is clearly within the scope of the agreement's arbitration clause.

134 F.3d at 77.

Similarly here, Landers' pleadings link the alleged illegal proxy solicitation to his wrongful termination and the resulting breach of the Agreement. Thus, we conclude his illegal proxy solicitation claim is significantly related to the Agreement. Moreover, this Court cannot say with positive assurance that the proxy cause of action is not within the scope of the arbitration clause. Because any doubt must be resolved in favor of arbitration, we reverse the trial court and find Landers' illegal proxy solicitation claim must be arbitrated.

Wrongful Expulsion as Director

With regard to his wrongful expulsion claim, Landers asserts that he was "frozen out" of and improperly excluded from his role as a member of the Board since

filing the initial summons and complaint on January 21, 2010. He contends his position has materially changed, such that he has suffered a reduction in duties and authorities in his capacity as director.

Landers' pleadings do not inform the Court how he came to be a director and nothing in the Agreement contemplates Landers' position as a director. Thus, we are compelled to conclude that his status as a director does not derive from the Agreement. Nonetheless, Landers asserts that he was wrongfully expelled because he filed suit for breach of the Agreement. As we previously referenced, the Agreement mandates arbitration of any claim arising out of or relating to the breach of the Agreement. By Landers' own contention, the breach of the Agreement resulted in his expulsion as a director. Similar to Landers' proxy solicitation claim, we find the wrongful expulsion claim bears a significant relationship to the Agreement or breach thereof. *See Oldroyd*, 134 F.3d at 77 (finding that because plaintiff alleged he was terminated under circumstances that gave rise to a retaliatory discharge claim, the claim touched matters covered by the employment contract and thus was within the scope of the contract's arbitration clause). Thus, we reverse the trial court's order denying Appellants' motion to compel arbitration of the wrongful expulsion as director claim.

We stress that our decision today is driven by the strong policy favoring arbitration, the nature of the Agreement, and Landers' underlying factual allegations. Certainly, we recognize that even the broadest of clauses have their limitations. However, Landers has essentially pled himself into a corner with respect to each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement. Thus, we reverse the trial court with respect to Landers' remaining four causes of action and hold that each is to be arbitrated.[11] In doing so, we also reject the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable.

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[11] We find it unnecessary to address Appellants' remaining argument regarding the propriety of the potential stay of any non-arbitrable claims. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

C.

We take this occasion to revisit federal jurisprudence regarding the analytical framework to determine whether a broad arbitration clause encompasses certain claims. In the last several decades, two terms—supposedly synonymous—have emerged as leading phraseologies in the analysis. Some jurisdictions, including this Court and the Fourth Circuit, utilize the "significant relationship" term, which we have employed today. Others have preferred the "touch matters" phrase, holding that broad arbitration clauses encompass all claims that "touch matters" covered by the contract or agreement. *See, e.g., 3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008) (noting the liberal federal policy favoring arbitration requires that a court send a claim to arbitration "when presented with a broad arbitration clause . . . as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision"); *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622, 626 (3d Cir. 2003) ("[I]f the allegations underlying the claims 'touch matters' covered by an arbitration clause in a contract, then those claims must be arbitrated, whatever the legal labels attached to them.").

In theory, the two terms are interchangeable. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999) (broad clause reaches every dispute having a significant relationship to the contract and all disputes having their genesis in the contract and the allegations only need "touch matters" covered by the contract); *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061 (5th Cir. 1998) (discussing that broad arbitration clauses embrace all disputes between the parties having a significant relationship to the contract and holding it is only necessary that the dispute touch matters covered by the agreement to be arbitrable).

Yet, over time and in the context of certain cases, it appears a tension has developed regarding interpretations of the two terms. The phrase "significant relationship" has arguably evolved to impose an enhanced burden on the party seeking to compel arbitration. Conversely, "touch matters" has been increasingly construed as requiring a lesser showing on the party desiring arbitration. This tension surrounding the tests for arbitrability and the policy favoring arbitration has been candidly acknowledged by the Fourth Circuit Court of Appeals. "We recognize that requiring a *significant* relationship in order to compel arbitration . . . appears to be at odds with the language of the [] arbitration clause, which only requires that the [] claims "*relate to*" the [agreement]. We recognize as well that to

require such a significant relationship may appear to be in tension with the Supreme Court's mandate that we apply the ordinary tools of contract interpretation in construing an arbitration agreement, and resolve any ambiguities in favor of arbitration." *Wachovia Bank Nat'l Assoc. v. Schmidt*, 445 F.3d 762, 767 n.5 (4th Cir. 2006) (emphasis in original)).

We believe that these terms—"significant relationship" and "touch matters"—were never intended to be separate and independent tests for analyzing the scope of a broad arbitration clause. We employ the "significant relationship" term today only because it is in keeping with our jurisprudence. We merely observe that the two terms were not intended to differ in any meaningful way. Nonetheless, we note that if ever there did appear to be an appreciable conflict between the two phraseologies in the future, given the text of the FAA, the United States Supreme Court's interpretation of such, and the strong policy favoring arbitration, we would necessarily find that the "touch matters" term hues more closely to Congressional intent concerning the FAA.

IV.

In conclusion, we reverse the trial court with respect to each of Landers' remaining four causes of action and hold that each is subject to arbitration.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27224
Heard October 4, 2012 – Filed February 27, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Appellate Defender Robert M. Pachak, both of Columbia, SC for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, all of Columbia, SC, and Solicitor John Gregory Hembree of Conway, SC for Respondent.

CHIEF JUSTICE TOAL: Stephen Christopher Stanko (Appellant), appeals his conviction and death sentence for murder and armed robbery. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On April 8, 2005, at approximately 3:30 a.m., Appellant called his friend, seventy-four year old Henry Turner (the Victim), and falsely informed him that Appellant's father had died. Appellant arrived at the Victim's residence around 4:00 a.m. Later that morning, the Victim drove to a nearby McDonald's restaurant for breakfast. After returning with breakfast, sometime later that morning, the Victim was shaving in front of his bathroom mirror. Appellant approached the Victim from behind with a gun and a pillow as a silencer, and shot him in the back. Appellant then struck the Victim in the head, and fatally shot him in the chest.

Appellant stole the Victim's gray Mazda truck and fled the scene. On the evening of April 8, Appellant visited Columbia's Vista district. Appellant held himself out as a resident of New York City, visiting South Carolina to close a "big deal." Appellant proceeded to spend large amounts of cash and buy drinks for several people he met that night.

On April 9, Appellant travelled to Augusta, Georgia and visited Surrey Tavern. There, Appellant met a woman, and convinced her that he was a businessman in town for The Master's Golf Tournament. Appellant and the woman spent the next several days together, and Appellant stayed at her apartment. The two attended church services together on Sunday, April 10, and she introduced Appellant to her co-workers on Monday, April 11. Appellant left the woman's apartment at approximately 1:00 a.m. on Tuesday, April 12. Later that day, the woman recognized Appellant's picture in the newspaper with a headline alerting her to his alleged involvement in the Victim's murder. She notified police and assisted in Appellant's arrest. Appellant possessed the Victim's vehicle at the time of his arrest. Police searched the vehicle and recovered a bag containing a .357 Magnum caliber double-action revolver, .38 caliber bullets, and a checkbook belonging to the Victim. Testing later revealed that the .357 Magnum fired the bullets recovered from the Victim's body.

On August 25, 2005, the Horry County Grand Jury indicted Appellant for the Victim's murder and armed robbery. The case proceeded to trial, and Appellant relied on an insanity defense. Specifically, Appellant averred that he suffered from central nervous system dysfunction, and at the time of the Victim's murder he did not understand "legal right from wrong." On November 16, 2009, a jury found Appellant guilty of murder and armed robbery. Three days later, following the conclusion of the trial's penalty phase, the jury found beyond a reasonable doubt

the existence of the requisite statutory aggravating circumstance and recommended the trial court sentence Appellant to death. Consequently, the trial court sentenced Appellant to the maximum twenty years' imprisonment for armed robbery and to death by lethal injection for the Victim's murder.

ISSUES PRESENTED

I. Whether the trial court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where Appellant presented an insanity defense.

II. Whether the trial court erred in accepting Appellant's waiver of his trial counsel's conflict of interest where that counsel was subject to a pending accusation of ineffective assistance of counsel for his representation of Appellant in a prior capital murder case.

III. Whether the trial court erred in refusing to disqualify a juror who acknowledged she knew that Appellant received the death penalty for a prior capital murder, and stated unequivocally that she would vote to impose death in every instance where the State proved an aggravating circumstance beyond a reasonable doubt.

IV. Whether the trial court abused its discretion by refusing to grant a change of venue.

V. Whether the trial court erred by allowing all jurors over sixty-five to opt out of jury service.

VI. Whether the trial court erred by ruling that Appellant's execution did not violate the Eighth Amendment to the United States Constitution.

LAW/ANALYSIS

I. Jury Instruction on Inferred Malice

Appellant argues that the trial court erred by instructing the jury that it could infer malice from the use of a deadly weapon where Appellant presented an insanity defense. We agree.

A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803–04 (2009). In *Belcher*, the jury convicted the defendant of murder and possession of a firearm during the commission of a violent crime. *Id.* at 600, 685 S.E.2d at 803. During a gathering of family and friends, the victim and another man began arguing. The defendant intervened, and later shot and killed the victim. *Id.* at 601, 685 S.E.2d at 805.

Testimony at trial demonstrated conflicting versions of the event. *Id.* The State's evidence tended to show that after the defendant confronted the victim, the defendant retrieved a gun and without justification, fatally shot the victim. *Id.* The defendant presented evidence that the victim confronted him without provocation, and with a gun, following the apparent resolution of the argument. *Id.* The defendant claimed he subsequently retrieved a gun and fired on the victim as he approached. *Id.* In accordance with long-standing practice, the trial court instructed the jury that "malice may be inferred by the use of a deadly weapon," and the jury convicted the defendant of murder. *Id.*

This Court reversed, and rejected the traditional jury instruction as inconsistent with our policy-making role in the common law:

> The use of the term "intentional" is instructive. Say for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise."

Id. at 610, 685 S.E.2d at 809 (citing *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 809 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991)). The Court also held that the error in *Belcher* could not be considered harmless:

> Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is entirely conceivable that the only evidence of malice was [the defendant]'s use of a handgun. We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt.

Id. at 611–12, 685 S.E.2d at 809–10 ("In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption . . . . Obviously[,] when a defendant walks into a store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." (alterations in original)).

In the instant case, Appellant presented evidence he had a brain abnormality. A psychiatric expert testified that he performed a psychiatric evaluation and neurological exam on Appellant, and that Appellant demonstrated mild signs consistent with brain dysfunction, including central nervous system dysfunction. According to this expert, Appellant also demonstrated the typical signs of anti-social personality disorder or psychopathy, and at the time of the crime, "you could argue" Appellant did not understand moral or legal right from wrong, as his brain could not process the events. In other words:

> Based on the interview, the review of the records, the neurological evaluation, the brain-imaging evaluation, and the fact that he has received diagnoses of anti-social personality disorder . . . and the—limitations or impairments that anti-socials or psychopaths have, one of the major ones they have is an appreciation for the wrongfulness, or the moral wrongfulness and legal wrongfulness of their actions at the time.

An expert in physiological psychology testified that Appellant suffered damage to the frontal lobe of his brain from two separate incidents. The first incident occurred during Appellant's birth when his brain received a reduced oxygen supply. The second incident occurred during Appellant's teen-age years when he received a blow to the back of his head from a beer bottle, driving his brain forward. Appellant presented psychiatric testimony that he had diminished or lowered function of his brain in the frontal lobe areas, and that there "could" be a causal connection between diminished function in the frontal lobe and mental illness. An expert in neuropsychology and neuroimaging testified that scans of the right hemisphere of Appellant's brain exhibited damage. According to this expert, the damage occurred in the medial gray matter of Appellant's brain at four standard deviations below normal, and an individual with this type of "extreme" damage would have some type of temporal lobe epilepsy. A medical doctor with expertise in Positron Imaging Tomography (P.E.T.) scans and neuropsychiatric disorder testified regarding the actual injury to Appellant's frontal lobe. This expert testified that the damaged lobe of Appellant's brain played an important role in impulse control, judgment, and empathy. In fact, he stated, "This abnormally low

function or abnormality or injury would significantly compromise and impair an individual's ability to exercise judgment, impulse control, control of aggression."

The trial court in this case issued a jury instruction regarding both express and implied malice:

> Malice aforethought could either be express or implied. Express malice is shown when a person speaks words which express hatred or ill-will for another, or when the person prepared beforehand to do the act which was later accomplished. Malice can be inferred from a conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

Appellant's trial counsel took exception to the trial court's instruction, and argued that *Belcher* prevented an inferred malice charge, "[W]e would assert that, in this case, that insanity too is a self-defense, and we would think that the same rationale would apply to this case, and we would ask that charge be deleted, and they be so instructed, and that portion of that be deleted." The trial court overruled trial counsel's objection, and decided to include the objected-to portion of the charge:

> I have read thoroughly *State [v.] Belcher*, [385 S.C. 597, 685 S.E.2d 802 (2009)] decided by the South Carolina Supreme Court in October—on October 12, 2009. I find nothing, absolutely nothing in the Supreme Court opinion that would so indicate—certainly doesn't direct, but even indicate, in any way, that it would be proper under these circumstances for the [c]ourt to charge—or delete that as far as the inference of malice. The Supreme Court didn't indicate that in the slightest. Now—so I respectfully decline to do that.

It is unclear what this Court could have included in *Belcher* to better indicate to the trial court the impropriety of an instruction that malice could be inferred from the use of a deadly weapon in this case. Appellant certainly presented evidence which could have reduced, mitigated, or excused the Victim's murder. The language of *Belcher* is clear, that when this type of evidence is submitted, an instruction regarding inferred malice from the use of a deadly weapon is improper. *See Belcher*, 385 S.C. at 612 n.10, 685 S.E.2d at 810 n.10 ("We overrule all cases involving a homicide or charge of assault and battery with intent to kill where two factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused, or justified the homicide or the charged

[assault and battery with intent to kill.]") Thus, the trial court erred. However, we must determine whether that error requires reversal.

Harmless Error

Errors, including erroneous jury instructions, are subject to a harmless error analysis. *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000).

In *Belcher*, we observed that often in murder cases there will be overwhelming evidence of malice, apart from the use of a deadly weapon. *Id.* at n.8 ("In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption . . . . Obviously[,] when a defendant walks into a store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." (alteration in original)). The instant case is similar.

The State presented uncontested evidence that Appellant shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. Appellant then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended Appellant in possession of the Victim's vehicle and the gun used in the murder. Thus, the evidence of malice in this case is not limited to Appellant's use of a deadly weapon. *See Belcher*, 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun.").

Additionally, we must consider the jury instruction as a whole, and if as a whole the instruction is free from error, any isolated portions which may be misleading do not constitute reversible error. *Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251. This Court will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

In the instant case, the trial court issued a jury instruction consistent with evidence presented by both the State and Appellant. The trial court charged the jury that they could return verdicts of not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty. Therefore, if the jury believed that Appellant could not distinguish moral or legal right from wrong, they could have found him

not guilty by reason of insanity. In addition, the jury could have found that Appellant's mental disease or defect prevented him from conforming his conduct to the requirements of the law, regardless of whether he could make the necessary moral or legal distinctions. Nothing in the trial court's inferred malice charge would have prevented the jury from reaching either of these conclusions.

The trial court instructed the jury that inferred malice may arise when the "deed is done with a deadly weapon." The trial court also stated that malice "can be inferred from conduct showing total disregard for human life." Appellant only contests the "deadly weapon" language. However, if the jury rejected Appellant's insanity defense, which it did, the jury could also find that Appellant's conduct showed a total disregard for human life. Thus, Appellant could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice.

Therefore, although the trial court's charge in this case failed to comply with *Belcher*, this does not constitute reversible error.

II. Trial Counsel's Conflict of Interest

Prior to this trial, a jury found Appellant guilty of a separate murder and recommended a sentence of death. *State v. Stanko*, 376 S.C. 571, 573, 658 S.E.2d 94, 95 (2008). William Diggs represented Appellant at that trial, and Appellant requested that Diggs represent him in the instant case, as well. However, Appellant also filed a post-conviction relief (PCR) application collaterally attacking Diggs's prior representation on the ground that he provided ineffective assistance of counsel. Appellant argues that this gave rise to a conflict of interest, and that the trial court erred in accepting Appellant's "inadequate" waiver of this conflict. We disagree.

On November 15, 2006, the trial court held a hearing to determine Appellant's representation in this case. Diggs stated at that hearing that he did not know of any reason that would preclude his availability for appointment. Appellant spoke at that hearing, expressing his satisfaction with Diggs's efforts in the prior trial and requesting Diggs represent him a second time:

> So, what I'm saying to you is if you choose to appoint [Diggs] as counsel I have no problem with that and would greatly appreciate it actually . . . . I'm familiar with the law. I'm not an idiot to the law and

> I don't and would not raise any kind of argument concerning . . . his representation.

On December 8, 2008, the PCR court held a hearing regarding Appellant's PCR application. At that hearing, Appellant explained his desire to proceed with a PCR application against Diggs, but at the same time retain his representation in the instant case:

> The conundrum that I have is that: In the same sense, this [PCR] may have allegations of ineffective assistance of counsel against him. My argument is . . . just because I feel he may have been ineffective in the first case does not mean that he'll make those same ineffective mistakes in the second; because he's learned from them, or may see them differently. So my conundrum is I don't want to lose him; because I believe in him. He knows my case. He's the one who had the test ordered and found out everything that was wrong with my medial frontal lobe. I don't want to lose him.

The trial court next conducted a hearing on March 4, 2009, to discuss the potential conflict arising from the PCR application and trial counsel's continued representation. The trial judge noted that the continued representation could be a "downright" disqualification of Diggs as trial counsel. However, Appellant explained that he filed the PCR application to "stop the death watch" after this Court turned down his direct appeal. Appellant insisted that the court allow him to retain Diggs as trial counsel:

> I can't say, Your Honor, this is what I'm going to file, but if we play worst case scenario and I did file ineffective assistance of counsel against [Diggs] on any issues, understanding the *Strickland* [*Strickland v. Washington*, 466 U.S. 668, 687–89 (1984)] two-prong test, but that's still prerequisite that I wouldn't trust or believe in him to handle this case, (A) if he did commit errors that, let's say, he even determined as being errors, by looking at that case, I believe that [Diggs] would say, "Maybe I should have done this differently," and in this particular case, which is going use a very similar defense, wouldn't he have learned from that? (B) Even if I did file them, is it not a situation where it would have no effect on this case as long as I do trust and believe in him and his efforts toward this case?

The trial court responded by explicitly asking Appellant whether he wanted to retain Diggs:

> The Court: If I understand you correctly that you want [Diggs] to remain as lead counsel and remain as one of your attorneys in this particular case?
>
> Appellant: Yes.

Appellant continued an unprompted monologue requesting that Diggs represent him regardless of the pending PCR application:

> [B]efore I jump away, I'm going to use an analogy. (A) There's a Solicitor that was in this case and that has been sanctioned by the State for previous misconducts [sic], but he is still a Solicitor. (B) I'm going to use a baseball analogy. If you have Derek Jeter, and in the ninth inning of the final game of the World Series he commits an error that costs the Yankees the game, that doesn't mean that you don't want him back starting next season, and I do. One thing about [Diggs] is he does believe in my case and he understands it's a very in-depth case concerning the defect in my brain, and I would ask—what I don't want to do is say, "Well, Your Honor, is the only way that I can keep [Diggs] is to say that I'm going to waive any [claim]?

To this the trial court responded: "No sir. I'm not asking you to do that." The trial court then asked Diggs whether he found any conflict in his continued representation of Appellant. Diggs responded that he did not, but that the trial court may want to revisit the issue if it appeared later that the PCR theories and the theories used in the instant trial worked to undermine Appellant's case:

> Based upon the—your statements to the Court, and the Court's questioning of [Appellant], [Appellant]'s statements to me, that I will keep [Diggs] as counsel here in this particular matter with the ability for the Court to re-visit in the future should there be any issues in the amended application that either gives the Court any concern, or [Appellant], or [Diggs] concerns as to [Diggs] continued representation in this matter.

On June 5, 2009, the trial court heard the State's Motion to Review Status of Counsel. The State took issue with what it believed to be an "apparent direct

conflict of interest," based on the filing of Appellant's PCR application against Diggs. Diggs stated that he did not feel the PCR application had impacted his relationship with Appellant, his ability to communicate with him, or his ability to effectively represent him in any way. Appellant stated that he had the opportunity to confer with his PCR attorneys, but that nothing had changed regarding his desire to retain Diggs.

The trial court then engaged in a detailed colloquy with Appellant regarding the potential conflict:

> The Court: Do you continue to want to have [Diggs] represent you in this action?
>
> Appellant: Yes sir, I do.
>
> The Court: All right sir, and do you feel that there is a free and open communication between you and [Diggs] despite the fact that the [PCR] application has been filed?
>
> Appellant: Yes, sir, there is.
>
> The Court: And you are able to fully discuss all issues that you deem necessary with him?
>
> Appellant: Yes, sir.
>
> The Court: All right sir, and have you found in any way that he is unresponsive to you or in any way . . . harboring any ill feelings to you because of the filing of the [PCR] application?
>
> Appellant: Not only is he not now, but I do not believe that when we file the supplemental . . . there will be any problems at that time.
>
> . . . .
>
> Appellant: The issues that we're going to raise that have him in it have nothing to do with any issues that would create a conflict or any argument or I feel cause any communicative problems between [Diggs] and myself. They're more at

> trial situations that should have been objected to, things of that nature, and there is, there are two issues. But sir, I do not believe that [Diggs] and I are going to have any problems presenting the second trial.

Thus, the trial court concluded that Appellant "more than expressed" full and complete confidence in Diggs's abilities, and permitted Diggs to continue his representation of Appellant.

A. Preservation

Appellant's argument that the trial court erred regarding an apparent conflict by his trial counsel is unpreserved. This Court has explained the rationale underlying issue preservation as follows:

> The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those arguments.
> . . . .
>
> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724–25 (2000) (citing *Roche v. S.C. Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975)). This explanation is especially pertinent to this case.

Appellant did not object to the appointment of Diggs as counsel, but instead emphatically requested that Diggs continue to represent him. Additionally, both the trial court and the PCR court questioned Appellant as to the wisdom of continuing with Diggs as trial counsel, and verified that Appellant had no objections to this arrangement. Appellant never raised a single objection. Thus, he avoided the critical first step of preservation: convincing the trial court that it ruled incorrectly. Appellant cannot argue now on direct appeal that the trial court erred in acquiescing to his express and informed desire.

B. Waiver

Even if Appellant had somehow preserved his arguments for our review, the trial court did not err. To the extent that this situation gave rise to a conflict of interest, implicating any constitutional right, Appellant was fully informed of that conflict. Appellant's extensive endorsement of Diggs's continued representation constituted a valid waiver. *See Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). Appellant cannot now complain of an error which his own conduct induced. *See State v. Babb*, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("The record in this case clearly establishes that any shortage of time to prepare a defense was not the fault of the trial judge or the State, but rather the fault of [the defendant] in failing to act.").

Appellant's argument regarding trial counsel's alleged conflict is unpreserved. The lack of preservation notwithstanding, the Record demonstrates a knowing and intelligent waiver of any possible conflict.

III. Juror Disqualification

Appellant argues that the trial court erred in refusing to disqualify a juror with prior knowledge of Appellant's unrelated crimes who stated unequivocally that she would vote to impose the death penalty in every instance in which the State proved an aggravating circumstance beyond a reasonable doubt. We disagree.

A prospective juror may be excluded for cause when his views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath. *State v. Sapp*, 366 S.C. 283, 290–91, 621 S.E.2d 883, 886 (2005). When reviewing the trial court's qualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. *Id.* at 291, 621 S.E.2d at 886. The determination of whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have

concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. *Id.* at 291, 621 S.E.2d at 887.

A. Prior knowledge

Juror #480 stated during voir dire that she remembered that Appellant "murdered his girlfriend, and left the daughter for dead." She also stated she heard that following these crimes, Appellant "murdered a man in Conway." The trial court then asked Juror #480 if she could leave her prior knowledge "outside the courtroom," and Juror #480 indicated that she could:

> The Court: You are coming into the courtroom, you listen to all of the facts and evidence presented in this case, make your decision based on the facts and evidence in this case, the law the Court would give to you, and don't let anything that you think you might know about it in the past affect your decision in any way. You understand that?
>
> Juror #480: Yes sir.
>
> The Court: Can you do that?
>
> Juror #480: Yes sir.
>
> The Court: All right, Ma'am. Can you follow the law that the Court would give to you? Even if for some reason you didn't agree with it could you follow the law that the Court would give to you in this case?
>
> Juror #480: Yes sir.
>
> The Court: All right, Ma'am. When you heard about this matter in the past do you remember forming any kind of opinion or belief at that point in time when you heard about it in the past?
>
> Juror #480: No sir. I really don't remember much about it, and just kind of wiped it out.

According to Appellant, Juror #480's prior knowledge was the equivalent of placing improper character evidence and evidence of Appellant's prior death sentence before the jury. Appellant asserts, "If the solicitor in the present case brought up evidence of [Appellant's] prior crimes and death sentence [] during the guilt phase of this trial, it would have been grounds for a mistrial. There is no difference in seating a juror who knows this information from the outset. To believe the juror in this case did not convey this information to the other jurors, especially when she was not instructed otherwise, denies the frailty of human nature."

Appellant relies on *People v. Davis*, 452 N.E.2d 525 (Ill. 1983), in support of his argument. However, *Davis* is inapplicable. In that case, an Illinois jury found Davis guilty of murder. *Id.* at 527. In a separate, bifurcated sentencing hearing, the jury unanimously determined that the necessary aggravating factors existed, and that there were no mitigating circumstances sufficient to preclude imposition of the death penalty. *Id.* Davis argued that the trial court erred in allowing the prosecution to inform the jury that he had received the death penalty for an unrelated murder. *Id.* at 536. To establish the aggravating factor that defendant had murdered two or more individuals, the State introduced certified copies of Davis's prior murder convictions. *Id.*

The Illinois Supreme Court reversed Davis's conviction. The court found that introduction of this evidence may have improperly influenced the jury in two respects. *Id.* at 537. First, if a juror had any uncertainty as to whether Davis qualified for the death sentence, the knowledge that twelve other people previously determined that he did could have swayed that decision. *Id.* Second, the jury's awareness of Davis's prior death sentence could diminish its sense of responsibility and mitigate the serious consequences of its decision. *Id.* Put another way, the jurors may have considered their own decision much less significant than they otherwise would. *Id.*

The facts of the instant case are markedly different from those of *Davis*. The State did not present evidence of Appellant's prior death penalty conviction to the jury. Although the juror in this case admitted that she had prior knowledge of the conviction, the court established that Juror #480 could place that prior knowledge aside and decide the case based solely on the evidence presented at trial.

Appellant's trial counsel also questioned Juror #480 concerning her prior knowledge:

Diggs: Okay. And let's assume that's correct for a moment and you are selected to serve on this jury, would having knowledge about a prior death sentence undermine your ability to be responsible in terms of the—filling the juror responsibilities in this case, in other words, would you feel like we are just kind of going through the motions here for no good reason.

Juror #480: No sir, because I think this is, what, an entirely different matter.

Juror #480's unequivocal answers to the trial court's and trial counsel's questions prevent us from finding that the trial court's qualification of the juror was "wholly" unsupported by the evidence. The court in *Davis* reversed over concerns about the impact the introduction of a prior death sentence might have had on the jury. But here, Juror #480's statements show a lack of clarity regarding Appellant's prior crimes, and there is nothing to suggest that knowledge of those crimes would have any bearing on her jury service. Thus, Appellant fails to demonstrate that Juror #480's prior knowledge improperly affected the verdict, or that the trial court erred in concluding that Juror #480 could faithfully discharge her responsibilities as a juror.

B. Predisposition

Appellant argues that the trial court erred in qualifying Juror #480 because of the juror's unequivocal response that she would vote for death in every case where the State proved murder beyond a reasonable doubt, coupled with an aggravating circumstance proved beyond a reasonable doubt. Juror #480's initial statements demonstrate a troubling likelihood that her view on this issue would have substantially impaired her performance as a juror. However, we find that the trial court sufficiently rehabilitated Juror #480.

In *State v. Lindsay*, 372 S.C. 185, 642 S.E.2d 557 (2007), the Court analyzed the trial court's decision to disqualify a juror who expressed an equivocal view regarding the death penalty. In that case, the trial court asked Juror K if he could impose the death penalty. *Id.* at 190, 642 S.E.2d at 560. Juror K responded that he "didn't really know" if he could or not. *Id.* During subsequent voir dire by trial counsel, Juror K stated that he could listen to both sides in the penalty phase and render the most appropriate penalty, be that life imprisonment or death. *Id.* However, when questioned by the State, Juror K equivocated, and admitted that, in his view, life without parole was a more serious punishment than the death penalty.

Id. at 190–91, 642 S.E.2d at 560. Juror K stated that regardless of the facts of a particular case, he would most likely choose life imprisonment as a punishment rather than death. *Id.* at 191, 641 S.E.2d at 560. The trial court found that Juror K's views on the death penalty would substantially impair his ability to follow the law as instructed. *Id.* at 192, 642 S.E.2d at 561 ("He further noted that when asked about giving the death penalty, Juror K 'took a very big deep [breath] and exhaled as if he were very uncertain as to whether or not he could do that.'"). This Court found that Juror K's equivocal views and noted hesitation provided a reasonable basis for the trial court's conclusion. *Id.* at 193, 642 S.E.2d at 561 ("Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing the juror.")

In *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990), the defendant argued that two jurors should have been disqualified because their responses during voir dire indicated a predisposition towards the death penalty. This Court held that the "ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as it is explained to him." *Id.* at 354, 392 S.E.2d at 161. Despite one juror's disconcerting responses, the juror indicated she would wait until she had been presented with the "entire picture." *Id.* In addition, the juror expressed a willingness to "follow the law," and a respect for mitigating circumstances. *Id.* Thus, the Court concluded that the trial court did not abuse its discretion in qualifying the juror. *Id.* (finding that the other juror was an alternate and any error in seating that juror would be harmless beyond a reasonable doubt).

Appellant's trial counsel questioned Juror #480 regarding her ability to consider life imprisonment without parole even if the State proved murder and an aggravating circumstance beyond a reasonable doubt:

> Diggs: I want you to tell me, once you are on the jury, and you have concluded that there was guilt beyond a reasonable doubt, and then we move into the sentencing phase, and the State begins to present evidence of an aggravating circumstance, which is what the Judge is going to tell you they are required to do in order to ask for a death sentence, okay, and then we get to the end of that hearing and you believe the State did, indeed, present evidence in this case of an aggravating circumstance, coupled with murder, would you be predisposed in that situation to vote death as opposed to life imprisonment?
>
> Juror #480: Yes sir.

Diggs: Okay. And would you do that—without knowing specific facts would it be fair to say you would be in that position in every case?

Juror #480: Well, that's where you said specific facts.

Diggs: Yes Ma'am. Without any specific facts, just that foundation, that two-tiered foundation, so to speak, murder you found beyond a reasonable doubt, and then on top of that an aggravating circumstance beyond a reasonable doubt, you would—in every case where those two factors were combined, would vote death?

Juror #480: Yes sir.

Following this exchange the trial court questioned Juror #480. The trial court explained to Juror #480 that just because an aggravating circumstance is found, this does not mean that the jury automatically recommends a sentence of death. Juror #480 answered that she could vote to impose life imprisonment or death if the State proved an aggravating circumstance beyond a reasonable doubt. Juror #480 also stated that she understood that the jury could not even consider the death penalty if the State failed to prove an aggravating circumstance. Juror #480 answered affirmatively that she could follow the trial court's instruction and apply the law to facts of the case.

This Court's decisions in *Green* and *Lindsay* lead us to the conclusion that the trial court did not err in this case. During trial counsel's voir dire, Juror #480 stated that she would always vote to impose the death penalty when murder and a statutory aggravating circumstance were proven beyond a reasonable doubt. However, within that same colloquy she stated that she could consider all of the evidence in the case and render any one of the four verdicts she felt was best supported by the evidence. Moreover, Juror #480 responded to the trial court's methodical questioning with an affirmative response that she could in fact consider life imprisonment and the death penalty equally only if the State proved the requisite statutory aggravating circumstance. Ultimately, there is evidence in the Record to support the trial court's decision to qualify Juror #480. Her answers on the whole demonstrate an ability and willingness to be impartial and carry out the law as explained to her. Although Juror #480 gave two contradictory answers

during voir dire, the overall balance of her answers does not demonstrate the type of equivocation evident in *Lindsay*.

IV. Refusal to Grant Change of Venue

As referenced in Issue II, a jury in neighboring Georgetown County convicted Appellant of murder, and recommended death, prior to the trial of the instant case. Of the one hundred and twelve potential jurors questioned by the trial court, fifty-six knew about Appellant through pretrial publicity. According to Appellant, of the forty-five qualified jurors, twenty-seven knew about Appellant's previous trial, conviction, and death sentence. Of the seated jurors, at least eight knew the Appellant by name, and as discussed previously, Juror #480 knew of his prior conviction and sentence. Based on these facts, Appellant argues that the trial court erred in refusing to grant a change of venue. We disagree.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. *Sheppard v. State*, 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004). When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. *State v. Caldwell*, 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990), *overruled on other grounds by State v. Evans*, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006). A denial of a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Tucker*, 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999). It is the defendant's burden to demonstrate actual juror prejudice as a result of pretrial publicity. *Caldwell*, 300 S.C. at 494, 388 S.E.2d at 816.

In *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007), the defendant requested a change of venue due to pre-trial publicity regarding his connection to two murders. In September 2002, the body of a woman was found in Spartanburg. *Id.* at 411, 645 S.E.2d at 907. The victim had been strangled, and the crime went unsolved until the defendant's arrest for a February 2003 murder. *Id.* Subsequently, an investigation revealed that semen found on the victim's body matched the defendant's DNA. *Id.*

Trial counsel moved for a change of venue, noting that thirty-nine members of the sixty-eight person jury pool had heard something about the case, and seven of the twelve jurors seated had some knowledge of the case. *Id.* at 412, 645 S.E.2d at 907–08. The trial court concluded that all jurors who had any prior knowledge of the case indicated they could set aside any information, and denied trial counsel's motion. *Id.* at 412, 645 S.E.2d at 908.

In reviewing Evins's appeal, this Court found the United States Supreme Court's decision in *Rideau v. Louisiana*, 373 U.S. 723 (1963), instructive. In that case, the people of Calcasieu Parish in Lake Charles, Louisiana, were "exposed repeatedly and in depth to the spectacle of the defendant personally confessing in detail to the crimes for which he was later charged." *Id.* at 726. In addition, three members of the jury had watched the defendant's televised "interview" in which he confessed to the sheriff, and two members of the jury were "honorary" deputy sheriffs themselves. *Id.* at 725. The failure to change venue in that case compromised the defendant's due process rights. *Id.* at 727.

Clearly the facts of the instant case are more similar to those of *Evins* than of *Rideau*. In denying Appellant's change of venue motion, the trial court concluded that the vast majority of the jurors knew nothing about the case:

> A few of them know [Appellant's] name. That's on the questionnaire they were given . . . . It's no kind of pretrial publicity of any kind. And the one person that said they had some kind of information, again, without equivocation of any kind, indicated that they could set it aside.

This finding is similar to the trial court's conclusion in *Evins* that all members of the jury with any knowledge of the murder due to pretrial publicity indicated they could set that knowledge aside. *Evins*, 373 S.C. at 413, 645 S.E.2d at 908. Interestingly, the defendant in *Evins*, as here, seized on statements by one juror that she had read about his prior crimes, and overstated the juror's knowledge:

> The juror testified on voir dire that the only thing she heard was that the crime had taken place; she specifically testified that she knew no details, did not know the location, she had formed no opinion, could put aside what she had heard, and could be fair and impartial.

Id.

In the instant case, Appellant fails to present even one juror who stated he or she could not ignore exposure to pretrial publicity prior to serving as a juror. In the case of Juror #480, she did not claim to know specific details of the instant case or Appellant's prior conviction, and stated that she could be fair and impartial. Appellant advances broad and unsupported arguments regarding the publicity of this case, but fails to meet his burden of demonstrating actual juror prejudice as a result of that publicity. *See Sheppard*, 357 S.C. at 655, 594 S.E.2d at 468 ("Mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant."). The Record does not support a finding that the trial court ignored actual juror prejudice related to pretrial publicity, and thus, the trial court did not abuse its discretion in denying Appellant's motion to change venue.

V. Juror Opt Out

Appellant asserts that the trial court erred in excusing eighty-five perspective jurors pursuant to section 14-7-840 of the South Carolina Code. Section 14-7-840 allows any person age sixty-five or over to avoid jury service. S.C. Code Ann. § 14-7-840 (Supp. 2011). Appellant argues that allowing these individuals an exemption from jury service violates the "fair cross-section" requirement of the Sixth Amendment to the United States Constitution. We disagree.

The Sixth Amendment requires that a person charged with a crime be able to draw from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). To establish a prima facie violation of the fair cross-section requirement, a defendant must show that (1) the group alleged to be excluded is a distinctive group in the community; (2) the representation of this group in the venire from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). A "distinctive" group has been defined as one that: (1) shows a quality or attribute that defines or limits membership in the group; (2) possesses a cohesiveness of ideas, attitudes, or experiences that distinguishes the purported group from the rest of society; and (3) shares a community of interest that may not be represented in other segments of the population. *State v. Price*, 272 S.E.2d 103, 109 (N.C. 1980).

Section 14-7-840 of the South Carolina Code provides:

> No person is exempt from service as a juror in any court of this State **except** men and women sixty-five years of age or over. Notaries public are not considered state officers and are not exempt under this section. A person exempt under this section may be excused upon telephone confirmation of date of birth and age to the clerk of court or the chief magistrate. The jury commissioners shall not excuse or disqualify a juror under this section. The clerk of court shall maintain a list of persons excused by the court and the reasons the juror was determined to be excused.

S.C. Code Ann. § 14-7-840 (Supp. 2011) (emphasis added).

In the instant case, the trial court excused eighty-five prospective jurors who chose to take advantage of their statutory exemption. Trial counsel objected on the grounds that "sixty-five is not what sixty-five used to be," and that section 14-7-840 was unconstitutional. The trial court rejected trial counsel's argument, and excused the jurors.

In *Duren*, the United States Supreme Court explained the test that must be performed in analyzing an alleged violation of the fair cross-section requirement. In that case, a jury convicted Duren of first degree murder and armed robbery. *Duren*, 439 U.S. at 360. At the time of trial, Missouri law granted women, who so requested, an automatic exemption from jury service. *Id.* (citing M.Rev.Stat. § 494.031(2) (Supp. 1978)). Duren contended that this law violated his right to a trial by a jury chosen from a cross-section of his community. *Id.* The Supreme Court agreed.

First, the Supreme Court held that (1) women were sufficiently numerous and distinct from men, and if they were systematically eliminated from jury panels, the Sixth Amendment's cross-section requirement could not be satisfied. *Id.* at 364 (citing *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975)). Second, the Court noted Duren's statistical evidence that women constituted fifty-four percent of the community, but jury venires contained approximately fifteen percent women. *Id.* at 365–66. The Supreme Court found that these venires were not "reasonably representative" of the community, and such a gross discrepancy between the percentages of women in the community and those participating in jury service mandated the conclusion that women were not fairly represented in the source from which juries were drawn in the community. *Id.* at 366. Finally, Duren demonstrated that this large discrepancy occurred in every weekly venire for nearly

a year. *Id.* The Supreme Court agreed that this indicated that the cause of the underrepresentation was systematic. *Id.* at 367.

Appellant cannot establish a prima facie case under the *Duren* test. There is no evidence before this Court that persons age sixty-five or over are "distinctive." Appellant states that a community of persons aged sixty-five or older are significantly different than a community comprised of all citizens, and that this particular group of citizens holds the same generational values and experiences, and lived through some of the same major world and national events. However, Appellant fails to cite any authority for the proposition that having lived through the same major events would yield monolithic values and experiences. Persons aged sixty-five or older obviously share a quality that limits membership in the group, but Appellant cannot demonstrate that this group as a whole possesses a cohesiveness of ideas, attitudes, or experiences that distinguishes them from the rest of society, or that these persons share a community of interest not represented in other segments of the population. *See Price*, 272 S.E.2d at 109 (outlining the definition of a distinctive group).

Additionally, Appellant fails to present any statistical evidence that the percentage of persons aged sixty-five years or older who participate in jury selection is not a reasonable representation of the community, or that any alleged underrepresentation is due to systematic exclusion of the group in the jury selection process. Thus, there is no basis for a conclusion that the trial court's excusal of potential jurors pursuant to section 14-7-840 of the South Carolina Code violated his constitutional right to a jury constituting a fair cross-section of the community.

In addition, based on the preceding analysis, we take this opportunity to hold that, for the purposes of section 14-7-480, persons age sixty-five or older are not a distinctive group. *See, e.g.*, *Brewer v. Nix*, 963 F.2d 1111, 1112–13 (8th Cir. 1992) ("We conclude that this falls far short of proving the type of distinctive group required for a prima facie case under *Duren*. The age parameters of the group are too arbitrary, and its supposed distinctive characteristics are too general and ill-defined, to satisfy the *Duren* standards.") (holding that Iowa law exempting persons sixty-five or older from jury service did not violate the Sixth Amendment); *Silagy v. Peters*, 905 F.2d 986, 1010–11 (7th Cir. 1990) (holding that persons seventy years of age or older did not constitute a "distinctive" group for purposes of the Sixth Amendment); *United States v. Lynch*, 792 F.2d 269, 271–72 (1st Cir. 1986) ("None of this evidence, however, undercuts our decision in *Barber*, [*Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985)] that persons age 18 to 34 do not sufficiently

blend into one 'cognizable group' so as to permit the making of a prima facie case of juror discrimination simply by showing that the venire underrepresents persons falling within the broad spectrum of those ages."); *State v. Rodgers*, 562 S.E.2d 859, 876–78 (N.C. 2002) (holding that citizens aged sixty-five or over do not constitute a distinctive group for purposes of the Sixth Amendment); *Commonwealth v. Bastarache*, 414 N.E.2d 984, 992 n.10 (Mass. 1980) ("Classifications based on age have been rejected as an 'identifiable group' (for equal protection purposes) or as a 'distinctive' group (for Sixth Amendment purposes) in virtually every Federal case that has dealt with the question.").

VI. Cruel and Unusual Punishment

Appellant argues that the trial court erred in ruling that his execution would not violate the Eighth Amendment to the Constitution. We disagree.

Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citation omitted). There are a number of crimes that beyond question are severe, yet the death penalty may not be imposed for their commission. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.") (citation omitted); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the death penalty may not be applied to a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed). The Eighth Amendment's prohibition against cruel and unusual punishment is viewed through the "evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 560–61 (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)). These evolving standards prohibit the execution of the juvenile defendants and the intellectually disabled.[1] *See Atkins v.*

[1] *See* Act of October 5, 2010 (Rosa's Law), Pub. L. No. 111-256, 124 Stat 2643 (2010), codified at 20 U.S.C. § 1400 *et seq* ("(1) a reference to 'an intellectual disability' shall mean a condition previously referred to as 'mental retardation,' or a variation of this term, and shall have the same meaning with respect to programs, or qualifications for programs, for individuals with such a condition; and (2) a reference to individuals with intellectual disabilities shall mean individuals who were previously referred to as individuals who are 'individuals with mental retardation' or 'the mentally retarded,' or variations of those terms."); *see also* S.C.

Virginia, 536 U.S. 304, 321 ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a [intellectually disabled] offender."); *Roper*, 543 U.S. at 575 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). Section 44-20-30 of the South Carolina Code defines an intellectual disability as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 44-20-30 (Supp. 2011). In *Franklin v. Maynard*, 356 S.C. 276, 278–79, 588 S.E.2d 604, 605 (2003), this Court approved this statutory definition as applicable to the death penalty context.

The threshold determination in this analysis is whether Appellant's alleged mental condition places him within the class of offender that may not executed. As discussed in Issue I, *supra*, Appellant presented expert testimony, as part of an insanity defense, that he suffered from central nervous system dysfunction and diminished or lowered function of his brain in the frontal lobe area. In addition, one of Appellant's experts testified that scans of the right hemisphere of Appellant's brain exhibited damage in the medial gray matter of Appellant's brain at four standard deviations below normal. The expert testified that this type of damage is not seen in "normal" people, and an individual with this type of "extreme" damage would have some type of temporal lobe epilepsy.

However, the State presented compelling counter testimony. An expert in Forensic Psychology testified that she conducted a detailed review of Appellant's personal and criminal history and interviewed Appellant for approximately seventeen hours. The expert diagnosed Appellant as having a severe personality disorder. She pointed out in her testimony that evidence of mental disease or defect manifested only by repeated criminal or other anti-social conduct is not sufficient to establish the defense of insanity. The expert's description of Appellant does not depict an intellectually disabled individual:

Code Ann. § 44-20-30 (Supp. 2011), *amended by* 2011 Act No. 47, § 13 (2011) ("SECTION 13. In Sections 1 through 6 of this act, the terms 'intellectual disability' and 'person with intellectual disability' have replaced and have the same meanings as the former terms 'mental retardation' and 'mentally retarded.'").

> I think he's a highly narcissistic, entitled person, who really feels special. I think he, throughout his life, has not really wanted to work very hard, so he's done a lot of illegal activities for quick gain. He's a very, very smart person, but I would say that, rather than applying himself . . . he would look for the fast deal . . . . Why he doesn't have a conscience, I don't know. I don't think anybody can tell you why he doesn't have a conscience.

An expert in neurology and neuropsychiatry testified that the white matter damage and prefrontal atrophy claimed by Appellant's experts was simply "not there." Moreover, the expert testified directly to the possible occurrence of brain damage during Appellant's birth. According to that expert's review of Appellant's medical records, Appellant received the maximum ten points in the Apgar test given to newborns almost immediately following birth. A diagnostic imager provided expert testimony that the images of Appellant's brain demonstrated no abnormalities and were "perfectly normal." This expert's testimony regarding Appellant's brain scan is illuminating. The expert explained the usual procedure of a P.E.T. scan, and how Appellant's scan differed from that procedure. According to this expert's testimony, patients are normally placed in a controlled environment for approximately one hour prior to the scan. This sequestration ensures a standard brain scan by preventing, as much as possible, exposure to external stimuli. However, in Appellant's case, his trial counsel altered the standard pre-scan routine. Appellant's trial counsel arranged for a psychologist to administer a computer-generated test to Appellant both before and during the pre-scan routine. This test required Appellant to sit in front of a computer screen and click a mouse in response to "yes" or "no" questions. This caused certain areas of Appellant's brain to appear irregular. However, when the expert accounted for the disruption to the pre-scan routine, Appellant's scan appeared normal.

Appellant has an intelligence quotient of 143, and a history of criminal behavior consistent with that of a confidence man. Moreover, Appellant's trial counsel admitted there was no definitive evidence of an intellectual disability, stating, "Your honor, hypofrontality is what *some* experts say is the condition this defendant has." While expert testimony in this case may demonstrate Appellant's inability to adapt, the Record does not show that he is of significant sub-average intellectual functioning.

However, Appellant's trial counsel argued that preventing the State from executing individuals with Appellant's alleged brain dysfunction simply represented a logical step in Eighth Amendment jurisprudence:

> It should be declared unconstitutional and say, "Look, we've taken the step in terms of [intellectual disability]. We've taken the step in terms of age, recognizing that the brain has got to function properly, and in those two cases, the [intellectual disability] and the young age, it doesn't, so we're not going to execute those people," and we shouldn't.

Appellant renews that argument in asking this Court to expand the United States Supreme Court's rationale in prohibiting execution as a punishment for certain offenders. However, trial counsel's argument oversimplifies the underlying reasoning for the Eighth Amendment prohibition on executing juveniles and the intellectually disabled.

In *Roper*, the Supreme Court articulated three differences between juveniles and adults which demonstrate that juveniles cannot reliably be classified as among the worst offenders. *Id.* at 569. First, scientific and sociological evidence demonstrates that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." *Id.* (citation omitted). This often results in impetuous and ill-considered actions and decisions. *Id.* ("[A]dolescents are overrepresented statistically in virtually every category of reckless behavior." (citation omitted)). Second, juveniles are more vulnerable to negative influences and outside pressures. *Id.* ("This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." (citation omitted)). Third, the character of a juvenile is not as well informed as that of an adult. *Id.* at 570 ("The personality traits of juveniles are more transitory, less fixed." (citation omitted)). In addition, according to the Supreme Court, the two distinct social purposes served by the death penalty, retribution and deterrence, are not served by a minor's execution. *Id.* at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). The Court also cited the glaring fact that at the time of the decision, the United States stood alone as the only country in the world that continued to officially sanction the juvenile death penalty. *Id.* at 575.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court relied on a clinical definition of intellectual disability which required not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen. *Id.* at 318. Contrary to trial counsel's assertion in the instant case, the Supreme

Court's decision did not rely on a *simple* finding that an intellectually disabled defendant's brain did not function properly. The Supreme Court found that these persons frequently know the difference between right and wrong and are competent to stand trial. *Id.* However, their diminished capacity frustrated the retributive and deterrent goals of capital punishment. *Id.*

Following the resumption of the death penalty, the Supreme Court maintained that the punishment applied only to the most serious crimes. *Id.* at 319. Thus, the Court reasoned that if the "culpability of the average murderer is often insufficient to justify the most extreme sanction available to the State[,] the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution." *Id.* ("Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the [intellectually disabled] is appropriate."). With respect to deterrence, the Court had previously held that capital punishment could only serve as a deterrent when murder "is the result of premeditation and deliberation." *Id.* (citation omitted). The Court held that this sort of calculation stood at the opposite end of the spectrum from the behavior of the intellectually disabled. *Id.* at 319–20. In addition, this disability was also found to increase the risk that the death penalty would be imposed in spite of factors which may call for a less severe penalty. *Id.* at 320. More specifically, these defendants are more susceptible to false confessions, are less able to provide meaningful assistance to their counsel, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. *Id.* at 320–21.

Appellant's alleged mental abnormalities do not demonstrate an inability to communicate or care for himself adequately, or sub-average intellectual functioning. Instead, his above average intelligence, and behavior before and after the Victim's murder, demonstrate an ability to formulate and execute deliberate plans. *See Enmund v. Florida*, 458 U.S. 782, 799 (1982) (holding that capital punishment can only serve as deterrent when murder is the result of premeditation and deliberation). Thus, his behavior in this case stands at the opposite end of the spectrum from the behavior of an intellectually disabled person. *See Atkins*, 536 U.S. at 319–20 (analyzing the mental capabilities of intellectually disabled offenders). There is simply no justification for finding Appellant's alleged condition similar to those individuals who may not be executed lawfully.[2]

[2] The decisions by other jurisdictions cited by Appellant are not persuasive. For example, the Florida Supreme Court has reversed death penalty convictions based on mental illnesses whose symptoms do not align closely with our state's definition

The trial court properly denied Appellant's motion pursuant to existing law, and did not err in refusing to find that Appellant's death sentence violates the Eighth Amendment.

CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction and sentence.

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

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of intellectual disability. However, even those cases involve debilitating mental illnesses of the type inapposite that of Appellant.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

EnerSys Delaware, Inc., Appellant,

v.

Tammy Hopkins, Respondent.

Appellate Case No. 2011-193446

Appeal from Sumter County
George C. James, Jr., Circuit Court Judge

Opinion No. 27225
Heard January 10, 2013 – Filed February 27, 2013

DISMISSED

William H. Floyd, III and Angus H. Macaulay of Nexsen Pruet, LLC, of Columbia, for Appellant.

George A. Harper, of Columbia, for Respondent.

JUSTICE HEARN: This case presents the question of whether the denial of a motion to disqualify an attorney is immediately appealable. We hold it is not and dismiss the case as interlocutory.

FACTUAL/PROCEDURAL BACKGROUND

From 2002 through 2004, George Harper and his law firm at that time, Jackson Lewis, represented EnerSys Delaware, Inc. in a variety of employment and labor law matters. Harper served as EnerSys' attorney of record in at least five

employment-related lawsuits during this time. However, the relationship between Jackson Lewis and EnerSys deteriorated in 2004 when EnerSys brought a malpractice claim against the firm based on some labor-related legal advice that it claimed resulted in fraudulent testimony.

In 2011, EnerSys filed this action against a former EnerSys employee, Tammy Hopkins, alleging six causes of action including breach of contract based on violations of the confidentiality agreement and various computer use policies and agreements, breach of the duty of good faith and fair dealing, and breach of contract accompanied by a fraudulent act. EnerSys claimed Hopkins had transmitted confidential information, including confidential payroll information, outside of EnerSys and to her personal e-mail account. When EnerSys learned that Hopkins had retained Harper to represent her, it moved to have him disqualified pursuant to Rule 1.9(a) of the Rules of Professional Conduct, Rule 407, SCACR. The circuit court denied the motion, concluding that Harper's previous assistance in developing EnerSys' litigation strategy was insufficient grounds upon which to disqualify him due to the dissimilarities of his previous representations and the current suit. EnerSys then filed this appeal.

LAW/ANALYSIS

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). Generally, a party may only appeal from a final judgment, and piecemeal appeals should be avoided because most errors can be corrected through a new trial. *Id.* at 194–195, 607 S.E.2d at 708. Whether an order issued prior to or during trial is immediately appealable is governed primarily by Section 14-3-330 of the South Carolina Code (1979 & Supp. 2012). *Id.* at 195, 607 S.E.2d at 708.

Section 14-3-330 provides this Court with appellate jurisdiction over:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Accordingly, an order must fall within one of the enumerated subsections to be immediately appealable. *State v. Wilson*, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010).

In this appeal, the order does not affect the merits of the action; hence, subsection (1) would not apply. Similarly, the order was not made in a special proceeding and does not relate to an injunction or appointment of a receiver, and therefore, subsections (3) and (4) are likewise inapplicable. Thus, we must determine whether the order denying the disqualification of an attorney affects a substantial right such that the order is immediately appealable under subsection (2).

In *Hagood*, we considered as an issue of first impression whether an order *granting* a motion to disqualify counsel in a civil trial was immediately appealable. *Hagood*, 362 S.C. at 194, 607 S.E.2d at 708. We held that it is, finding such an order affected the substantial right of the party to have an attorney of one's choosing and was therefore appealable pursuant to section 14-3-330(2). *Id.* at 197-98, 607 S.E.2d at 710. In concluding the right to retain counsel of one's choosing is a substantial right for the purposes of appealability, we noted:

> (1) the importance of the party's right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory

> actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney.

Id at 197, 607 S.E.2d at 710.

Then, in *Wilson*, we considered whether the grant of a defendant's motion to disqualify a solicitor was immediately appealable by the State. 387 S.C. at 599, 693 S.E.2d at 924. We held the pretrial order was not appealable and distinguished *Hagood*, noting that the policy considerations of the right of a party to retain counsel of his choosing and the development of an attorney-client relationship are not factors when considering the disqualification of an assistant solicitor. *Id.* at 602-03, 693 S.E.2d at 926.

As in *Wilson*, we find here that the policy considerations that drove our holding in *Hagood*—such as the right of having an attorney of one's choosing, the importance of the attorney-client privilege, and the unfairness of having to pay to bring a new attorney up to speed on the case—are not implicated. EnerSys contends the denial of this disqualification motion implicates its substantial right to a fair trial, arguing that if Harper shared confidences he learned through his prior representation, a new trial would not provide an adequate remedy. We disagree because in our view, this ostensible danger can be redressed equally as well after trial as through an immediate appeal. Moreover, depending upon the outcome at trial, EnerSys may find an appeal is not necessary. We therefore find no substantial right has been affected by the order, and thus subsection (2) of section 14-3-330 is inapplicable. Accordingly, we hold an order denying a motion to disqualify an attorney is not immediately appealable.

CONCLUSION

Based on the foregoing, we dismiss the appeal as interlocutory.

TOAL, C.J., PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James David Farmer, Respondent,

v.

Florence County Sheriff's Office, Petitioner.

Appellate Case No. 2011-183126

Appeal From Florence County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 27226
Heard December 6, 2012 – Filed February 27, 2013

VACATED AND REVERSED

D. Malloy McEachin, Jr. of McEachin & McEachin, P.A., of Florence, for Petitioner.

Patrick James McLaughlin, of Wukela Law Office, of Florence, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review a Court of Appeals' opinion which construed a counterfeit goods statute[1] in the context of an owner's (respondent's) suit to have the seized goods returned. *Farmer v. Florence Cty. Sheriff's Office*, 390 S.C. 358, 701 S.E.2d 48 (Ct. App. 2010). We now vacate that opinion, and hold the circuit court erred in failing to dismiss respondent's suit.

[1] S.C. Code Ann. § 39-15-1195 (Supp. 2009).

FACTS

Respondent operated a retail store in Florence County. On August 30, 2007, Florence County Sheriff's Office (petitioner) executed a search warrant and seized the store's inventory, consisting of clothing, shoes, movie DVDs, and music CDs. Respondent was subsequently indicted in January 2008 for one count of trafficking in counterfeit goods in violation of S.C. Code Ann. § 39-15-1190 and one count of illegal distribution of recordings in violation of S.C. Code Ann. §§ 16-11-930 and -940 (2003). On January 23, 2008, respondent pled guilty to illegally distributing not more than 25 audiotapes or more than 10 videos in violation of § 16-11-940(C) and the counterfeit goods indictment was dismissed.

In early February 2008, respondent's attorney wrote a letter to petitioner seeking return of the allegedly counterfeit goods. In March 2008, counsel sent a second letter.

Respondent sued petitioner on May 30, 2008, approximately nine months after the goods were seized (August 30, 2007), and approximately four months after respondent pled guilty to piracy and the counterfeit goods charge was dismissed (January 23, 2008). Respondent's complaint alleged:

(1) negligence per se for failing to initiate forfeiture proceedings within a "reasonable time" as provided by § 39-15-1195(B);

(2) negligence in breaching a "heightened duty" to return the goods in a timely manner;

(3) conversion; and

(4) civil conspiracy among petitioner's agents.

Respondent sought special, actual, consequential, and punitive damages, as well as lost profits and interest.

Petitioner answered, alleging among other things that the complaint failed to state a cause of action, that it was immune under the Tort Claims Act (TCA), that respondent had not exhausted his administrative remedies, and that it had not been negligent but in any case, respondent's comparative negligence exceeded that of

petitioner. Respondent filed a motion for summary judgment, seeking return of the counterfeit goods and special damages in the form of lost profits and interest thereon. Petitioner subsequently filed its own summary judgment motion.

The circuit court heard arguments on the summary judgment motions and asked each party to prepare a proposed order. The judge eventually signed an order that did not grant either party the summary judgment it sought, but represented what the trial judge deemed "obviously a reasonable compromise." The order required petitioner to return the alleged counterfeit goods finding petitioner "simply cannot hold [respondent's] property unless it is being held for use in a criminal proceeding." The order cautioned respondent about criminal charges if the goods are in fact counterfeit, and declined any damages hearing if the goods "are returned in substantially the same condition as when seized." The other causes of action were dismissed, the court specifically stating, "the applicability of the [TCA] which remedy [respondent] should pursue, etc., are not mentioned." Both petitioner and respondent appealed.

On appeal, the Court of Appeals affirmed the requirement that petitioner return the goods to respondent, and remanded the question whether petitioner was entitled to summary judgment on respondent's "private causes of action." We granted petitioner's request for a writ of certiorari.

ISSUE

Did the lower courts err in not dismissing respondent's suit?

ANALYSIS

Since this case presents a novel statutory interpretation question, we begin with a review of the statutory scheme applicable to the facts of this case.

Section 39-15-1195 is titled "Seizure and forfeiture; storage and maintenance of seized property; reports to prosecuting agencies; return of seized items." Subsection A provides that upon a violation of § 39-15-1190, which prohibits possession, transportation or distribution of counterfeit property, "all items bearing the counterfeit mark" are "subject to seizure by and forfeiture to any law enforcement agency . . . ." § 39-15-1195(A)(1). Property subject to forfeiture may be seized by the department having authority upon a warrant issued by a court

having jurisdiction over the property. § 39-15-1195(B). The law enforcement agency seizing the property is deemed to have custody of the property [§ 39-15-1195(D)] which it must take reasonable steps to maintain [§ 39-15-1195(F)], and the agency must make a report of the items seized to the "appropriate prosecution agency" "within 10 days or a reasonable period of time after the seizure." § 39-15-1195(G).

Thus, under § 39-15-1195, petitioner had the duty to take reasonable steps to maintain the property seized from respondent's store, and to make a timely report to the "appropriate prosecution agency." § 39-15-1195(F) and (G). There is no allegation by respondent that petitioner breached either duty. Further, while petitioner is deemed to have custody of the property, the property is not subject to replevin.[2] § 39-15-1195(D). The seized property is "subject only to the orders of the court having jurisdiction over the forfeiture proceedings." § 39-15-1195(D). "Proceedings pursuant to Section 44-33-530 regarding forfeiture and disposition must be instituted within a reasonable time with regard to the seized property." § 39-15-1195(C).

Section 44-53-530(a) provides in relevant part:

> Forfeiture of property must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized. The petition must be submitted to the court within a reasonable time period following seizure and shall set forth the facts upon which the seizure was made. The petition shall describe the property and include the names of all owners of record and lienholders of record . . . . A copy of the petition must be sent to each law enforcement agency which has notified the petitioner of its involvement in effecting the seizure. Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the

[2] "Replevin was an action to recover the possession of specific chattels, together with damages for their unlawful detention. Trover was an action for damages arising out of the unlawful conversion of personal property." *Reynolds v. Philips*, 72 S.C. 32, 51 S.E. 523 (1905). The claim and delivery statutes (now codified at S.C. Code Ann. §§15-69-10 et seq.) combine trover and replevin. *Id.*

> petition, including law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure. Owners of record and lienholders of record may be served by certified mail, to the last known address as appears in the records of the governmental agency which records the title or lien.
>
> The judge shall determine whether the property is subject to forfeiture and order the forfeiture confirmed . . . .

Since respondent's goods were seized in Florence County, the Florence County court of common pleas has jurisdiction over any forfeiture-related proceedings. § 39-15-1195(D); § 44-53-320(a).

Petitioner argues that while it has custody of respondent's seized property, the obligation to initiate a forfeiture action in a reasonable time rests with "the Attorney General or his designee or the circuit solicitor or his designee" and not with the law enforcement agency that executed the warrant. § 44-53-530(a). We agree. Further, the Court of Appeals acknowledged as much, relying in its opinion on § 44-53-530. The opinion, however, then states that § 39-15-1195(C) requires law enforcement to institute forfeiture proceedings "within a reasonable time" and concludes petitioner did not "discharge[e] its statutorily mandated responsibility to commence forfeiture proceedings in a timely manner."

We agree with petitioner that it has no statutory authority, much less "mandated responsibility" to commence forfeiture proceedings. While § 39-15-1195(C) does not explicitly identify the party who is to bring the forfeiture proceedings, it does state, "proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time." As § 44-53-530(a) states, and as the Court of Appeals initially recognized, forfeiture proceedings are brought by "the appropriate prosecution authority" with notice to law enforcement. The Court of Appeals erred in finding petitioner breached a statutory duty by failing to bring forfeiture proceedings.

The Court of Appeals also held that petitioner's failure to fulfill its duty to institute a forfeiture proceeding within a reasonable time relieved respondent of his "option" to bring his own action under § 39-15-1195(H)(1). This subsection provides:

> An owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter. Notice of hearing or rule to show cause accompanied by a copy of the application must be directed to all persons and agencies entitled to notice as provided in Section 44-53-530. If the court denies the application, the hearing may proceed as a forfeiture hearing held pursuant to the provisions of Section 44-53-530.

We find that (H) does not represent an "option," but is instead the sole method by which an owner may demand that the prosecuting agency either have law enforcement return the property or institute a forfeiture proceeding.

Respondent contends that a full reading of § 39-15-1195(H) indicates it only applies to innocent owners. Specifically, respondent relies on (H)(2), which allows a court to return a seized item if the owner demonstrates by a preponderance of evidence that he was "innocent" with respect to the use of the property. The threshold question, whether in a forfeiture initiated by the responsible prosecutorial agency or in an owner's § 39-15-1195(H) action, is whether the property is subject to forfeiture. At that juncture, the determination is made whether the property is contraband *per se* or derivative contraband. *See Mims Amusement Co. v. SLED*, 366 S.C. 1, 621 S.E.2d 344 (2005) (contraband *per se* is illegal to possess and therefore not susceptible of ownership while derivative contraband is ordinarily legal to possess but forfeitable if an instrumentality of a crime). Only if contraband is derivative is the owner's knowledge relevant under (H)(2) because only derivative contraband can be returned to an innocent owner. Subsection H was available to respondent.

Finally, it appears that the Court of Appeals' decision was driven in large part by its concerns for respondent's due process rights. As petitioner rightly points out, respondent never asserted any constitutional deprivation either at the circuit court or in his appellate court briefs. While courts should construe statutes as constitutional if possible, there was no reason to reach the due process question here.[3]

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[3] While not properly before the Court, we briefly address the issue in order to dispel any uncertainty created by the Court of Appeals. Were § 39-15-1195 and §

Petitioner also argues that the circuit court erred when it stated that law enforcement "simply cannot hold [respondent's] property unless it is being held for use in a criminal proceeding" and that the Court of Appeals compounded the error by repeating this statement without comment. We agree. Seized property can be held for other than criminal prosecution purposes, as civil forfeiture is available even where no criminal proceeding is contemplated. Moreover, even if a criminal defendant is acquitted or charges are dropped, contraband *per se* (e.g., illegal drugs, counterfeit goods) is never returnable.

CONCLUSION

Respondent's remedy under these circumstances is found in § 39-15-1195(H). Instead of exercising that option, he chose instead to bring this replevin action, a remedy specifically forbidden by § 39-15-1195(D). The circuit court erred in not dismissing respondent's suit, and the Court of Appeals compounded the error. We have been informed that petitioner no longer has custody of the seized property, and express our disappointment that it failed to safeguard the property during the pendency of this matter. Since respondent's attorney acknowledged at oral argument that respondent could not establish that the seized goods were not

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44-53-530 actually subjected to a due process challenge, it appears that both would survive such a challenge by the owner of the seized property. This Court has held the most due process requires is a post-seizure opportunity for an innocent owner "to come forward and show, if he can, why the *res* should not be forfeited . . . ." *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000) (internal citation omitted). Further, whether a prosecutorial delay in instituting forfeiture proceedings violates the owner's due process right is a fact-intensive inquiry subject to the same considerations applicable to a constitutional speedy trial claim. *United States v. $8,850*, 461 U.S. 555 (1983) (length of delay, reason for delay, owner's assertion of right, and prejudice). Obviously no due process claim was made here. Moreover, the Court of Appeals erred in relying on two federal cases involving a statute that provided no owner-initiated option, and further misread *Moore v. Timmerman*, 276 S.C. 104, 276 S.E.2d 280 (1984), which merely reiterates that an owner of seized property must have an opportunity to be heard.

counterfeit within the meaning of § 39-15-1190, however, we need not address whether he would otherwise have a remedy against petitioner. For the reasons given above, the decision of the Court of Appeals is vacated, and the decision of the circuit court reversed.

VACATED AND REVERSED.

TOAL, C.J., BEATTY and KITTREGDE, JJ., concur. HEARN, J., concurs in part and dissents in part.

JUSTICE HEARN: Respectfully, I concur in part and dissent in part. While I wholeheartedly agree with the majority's consideration of the merits, I believe it is not necessary to vacate the court of appeal's opinion and would merely reverse.