# The Supreme Court of South Carolina

Re: Pilot Program for the Voluntary Mediation
of Workers' Compensation Appeals

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ORDER

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Pursuant to the provisions of Article V, §4 of the South Carolina Constitution, the Court adopts the attached procedures and forms for the Pilot Program for the Voluntary Mediation of Workers' Compensation Appeals. This Pilot Mediation Program may be implemented by the Court of Appeals.

The program has the support of the Commission on Alternative Dispute Resolution. The Pilot Program shall be effective November 1, 2011, through November 1, 2014. The Commission on Alternative Dispute Resolution shall provide a report to the Supreme Court of South Carolina at the end of the pilot period which evaluates effectiveness of the Pilot Mediation Program and recommends further action.

IT IS SO ORDERED.

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

September 22, 2011

**PROCEDURES FOR THE PILOT PROGRAM FOR THE VOLUNTARY MEDIATION OF WORKERS' COMPENSATION APPEALS**

1. Purpose. The purpose of the Pilot Program for the Voluntary Mediation of Workers' Compensation Appeals is to afford a meaningful opportunity to the parties in appeals from decisions of the Workers' Compensation Commission to achieve an efficient and just resolution of their disputes in a timely and cost-effective manner as early in the appellate process as possible. Mediation takes place early in the appellate process in order to save the parties the time and expense of an appeal and to give the parties an opportunity to find creative solutions to the dispute.

2. Scope. All appeals to the Court of Appeals from final decisions of the Workers' Compensation Commission, whether directly from the Commission or from the circuit court, may be submitted to voluntary mediation pursuant to the Pilot Program.

3. Notice to the Court. When an appellant files the notice of appeal in a workers' compensation matter, the Clerk of the Court of Appeals shall notify the appellant(s) and respondent(s) that the case is eligible for mediation under the Pilot Program. Parties desiring to engage in voluntary mediation shall file a notice of consent to mediate requesting suspension of the appeal with the Clerk

of the Court of Appeals prior to the expiration of either: (1) the time to order the transcript pursuant to Rule 207, SCACR; or (2) the time to file and serve the appellant's initial brief and designation of matter pursuant to Rules 208 and 209, SCACR. Where the parties do not file a joint notice of consent to mediate, the appeal shall proceed normally under the South Carolina Appellate Court Rules. Nothing in the Pilot Program prohibits parties in any appeal from engaging in voluntary mediation independent of the Pilot Program at any point in the appellate process.

4. Stay Pending Mediation. Upon the timely filing of a joint notice of consent to mediate, the time for ordering the transcript or serving and filing the initial briefs and designation of matter shall be suspended for up to sixty days to enable the parties to mediate the dispute. Within sixty days after the filing of a joint stipulation, the parties may file a joint request for an extension of up to an additional thirty days to complete the mediation process.

5. Selection of Mediator. The parties may choose a mediator or neutral who, in the opinion of all the parties, is qualified by training or experience to mediate all or some of the issues in the appeal. Mediators shall abide by the Standards of Conduct for Mediators in accordance with Appendix B of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

The parties and the neutral shall agree upon compensation. Unless otherwise agreed by the parties, fees and expenses of mediation shall be paid in equal shares per party.

6. Conduct of Mediation. All parties who elect to participate in the Pilot Program shall act in good faith in mediating the appeal. The parties and their representatives shall cooperate with the mediator, and communications during the mediation settlement conference shall be confidential in accordance with Rule 8, South Carolina Court-Annexed Alternative Dispute Resolution Rules.

7. Attendance. The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties: (1) the mediator; (2) all individual parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision-making body of the agency; (3) the party's counsel of record; and (4) for any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

8. Full Resolution. If voluntary mediation is successful, the parties shall file a joint notice of settlement within five days of conclusion of mediation. Within thirty days of filing a joint notice of settlement, the parties shall file a notice of voluntary dismissal which complies with Rule 260, SCACR. Upon request, the Court of Appeals may remand the matter to the Workers' Compensation Commission for approval of any settlement or any award of attorneys' fees in accordance with South Carolina Workers' Compensation Commission Regulations.

9. Partial Resolution. If voluntary mediation is only partially successful, the parties shall file a joint notice of partial settlement with the Clerk of the Court of Appeals within five days of conclusion of mediation. The parties shall identify which issues were settled and which issues remain in dispute. The Clerk of the Court of Appeals shall promptly reinstate the appeal and inform the parties in writing of the reinstatement of the appeal and of the starting date for compliance with further procedural requirements.

10. Failure to Resolve. If the parties notify the Clerk of Court that mediation was unsuccessful, or the parties fail to file a notice of full or partial settlement prior to the expiration of the time to mediate, the Clerk of the Court of Appeals shall promptly reinstate the appeal and inform the parties in writing of the

reinstatement of the appeal and of the starting date for compliance with further procedural requirements.

11. Sanctions. A party or counsel for a party who agrees to participate in the Pilot Program, but fails to abide by its terms without good cause, may be subject to sanctions in accordance with Rule 10(b), of the South Carolina Court-Annexed Alternative Dispute Resolution Rules. A party seeking sanctions may file a motion pursuant to Rule 240, SCACR, in the Court of Appeals.

12. Forms. Forms have been prepared for the use of the parties who participate in the Pilot Program.

13. Application of the South Carolina Court-Annexed Alternative Dispute Resolution Rules. With the exception of Rules 3, 4, 5, 6, 7(e) and (f), 9(b) and (d), and 10(a) of the South Carolina Court-Annexed Alternative Dispute Resolution Rules, the South Carolina Court-Annexed Alternative Dispute Resolution Rules shall apply to any mediation in the Pilot Program to the extent the South Carolina Court-Annexed Alternative Dispute Resolution Rules do not conflict with any South Carolina Appellate Court Rules.

14. Effective Date. The Pilot Program shall be effective for all workers' compensation appeals filed on or after November 1, 2011, through November 1, 2014, unless extended by Order of the Supreme Court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

**OR**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George E. Brown, Circuit Court Judge

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Case No.

---

John Doe, Appellant,

v.

Roe Enterprises, LLC, Employer, Respondent.

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NOTICE OF CONSENT TO MEDIATE

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The parties to this appeal have consented to participate in the Pilot Program for the Voluntary Mediation of Workers' Compensation Appeals. The parties request that the deadlines to order the transcript or file the initial brief and designation of matter be suspended for sixty days.

April 15, 2011

s/ John E. Smith
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Attorney for Appellant

s/Mary P. Jones
Mary P. Jones
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

**OR**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George E. Brown, Circuit Court Judge

---

Case No.

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John Doe, Appellant,

v.

Roe Enterprises, LLC, Employer, Respondent.

---

REQUEST FOR EXTENSION OF TIME

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The parties to this appeal consented to participate in the Pilot Program for the Voluntary Mediation of Workers' Compensation Appeals on ____, 2011. The parties request the time to mediate be extended by thirty days.

April 15, 2011

s/ John E. Smith
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Attorney for Appellant

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

**OR**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George E. Brown, Circuit Court Judge

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Case No. __________

John Doe, Appellant,

v.

Roe Enterprises, LLC, Employer, Respondent.

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NOTICE OF PARTIAL SETTLEMENT

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The parties to this appeal consented to participate in the Pilot Program for the Voluntary Mediation of Workers' Compensation Appeals. The parties have successfully mediated some issues in the appeal, and request that the appeal be reinstated so that the parties may address the remaining issues.

The following issues were settled as a result of the Mediation: ____________________________________________.

The following issues remain in dispute: ____________________________________________.

April 15, 2011

s/ John E. Smith
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

**OR**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George E. Brown, Circuit Court Judge

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Case No.

---

John Doe, Appellant,

v.

Roe Enterprises, LLC, Employer, Respondent.

---

NOTICE OF SETTLEMENT

---

The parties to this appeal consented to participate in the Pilot Program for the Voluntary Mediation of Workers' Compensation Appeals. The parties have successfully mediated all issues in the appeal. The parties agree to file a notice of voluntary dismissal which complies with Rule 260, SCACR, within thirty days.

April 15, 2011

s/ John E. Smith
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s/Mary P. Jones
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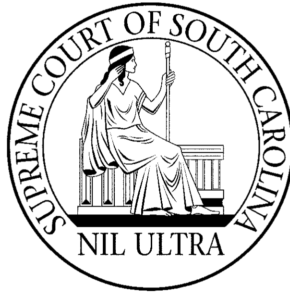


# OPINIONS

OF

# THE SUPREME COURT

AND

# COURT OF APPEALS

OF

# SOUTH CAROLINA

**ADVANCE SHEET NO. 33**
**September 26, 2011**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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| 2011-UP-255-State v. K. Walton | Pending |
| 2011-UP-291-Woodson v. DLI Prop. | Pending |
| 2011-UP-305-Southcoast Community Bank v. Low-Country | Pending |
| 2011-UP-333-State v. W. Henry | Pending |

2011-UP-359-Price v. Investors Title Ins. Pending

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

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Atlantic Coast Builders and Contractors, LLC, Respondent,

v.

Laura Lewis, Petitioner.

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ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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Appeal from Beaufort County
Curtis L. Coltrane, Master in Equity

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Opinion No. 27044
Heard January 7, 2011 – Filed September 26, 2011

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**AFFIRMED**

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Hemphill P. Pride, II, of Columbia, for Petitioner.

John P. Qualey, Jr. and Thomas Calvin Taylor, both of Hilton Head Island, for Respondent.

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**JUSTICE PLEICONES:** Respondent brought an action against petitioner for negligent misrepresentation, unjust enrichment, and breach of contract. The master-in-equity awarded respondent $10,160.79 in damages. The Court of Appeals affirmed. Atlantic Coast Builders and Contractors v. Lewis, Op. No. 2009-UP-042 (S.C. Ct. App. filed Jan. 15, 2009). This Court granted certiorari to review the Court of Appeals' decision. We affirm.

## FACTS

On March 28, 2003, petitioner, acting through a leasing agent, entered into a commercial lease whereby respondent would lease from petitioner property located at 165 Fording Island Road in Beaufort County. The lease provided respondent would lease the property for twelve months at a monthly rate of $3,500. The lease provided in pertinent part:

> 2. Use. Lessee shall use and occupy the premises for Building & Const. office. The premises shall be used for no other purpose. Lessor represents that the premises may lawfully be used for such purpose.
>
> . . .
>
> 5. Ordinances and Statutes. Lessee shall comply with all statutes, ordinances and requirements of all municipal, state and federal authorities now in force, or which may hereafter be in force, pertaining to the premises, occasioned by or affecting the use thereof by Lessee.

Although petitioner represented in the lease that the property could lawfully be used for a building and construction office, the property was zoned "rural," meaning virtually all commercial uses were prohibited.

Upon executing the lease agreement, respondent paid petitioner a $3,500 security deposit. Subsequently, respondent occupied the property and made numerous alterations to it. Respondent repaired the ceiling and interior walls, replaced the flooring and electrical wiring, pressure washed the

exterior, and installed a telephone system. Respondent made rental payments for April and May 2003.

On May 28, 2003, a Beaufort County zoning official served respondent with notice and warning of two violations for respondent's failure to obtain a certificate of zoning compliance before occupying the premises and its failure to obtain a sign permit before erecting a sign. Respondent vacated the property, relocated its business, and ceased making rental payments.

Respondent instituted this action against petitioner, alleging negligent misrepresentation, unjust enrichment, breach of contract, and breach of the covenant of quiet enjoyment. Petitioner denied these allegations and made a counterclaim for breach of contract. The master in equity entered judgment in favor of respondent.

I. Did the Court of Appeals err in affirming the master-in-equity's judgment in favor of respondent?

Petitioner argues the Court of Appeals erred in affirming the master's judgment in favor of respondent on its claims of negligent misrepresentation and breach of contract, and in denying petitioner relief on her counterclaim for breach of contract. We find petitioner's arguments are unreviewable.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (citing Anderson v. Short, 323 S.C. 522, 525, 476 S.E.3d 475, 477 (1996)).

On appeal to the Court of Appeals, petitioner argued the master erred in granting judgment in favor of respondent for negligent misrepresentation and breach of contract. The Court of Appeals affirmed the master pursuant to Rule 220(b), SCACR, finding the master properly granted judgment in favor of respondent.

Petitioner did not appeal all grounds on which the master's judgment was based. Namely, she did not challenge the determination that respondent was entitled to recover based on unjust enrichment. Thus, under the two-issue rule, the Court of Appeals should have declined to address the merits of petitioner's argument since petitioner failed to challenge all three grounds on which the master's judgment was based.[1] See Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). Accordingly, we affirm the decision of the Court of Appeals.

## II. Security Deposit

Petitioner argues the Court of Appeals erred in holding the issue of the security deposit was not preserved. We disagree.

In his initial order, the master failed to address the return of the security deposit, which respondent had sought to be returned from petitioner. Although petitioner filed a Rule 59(e), SCRCP, motion to reconsider the master's initial order, it did not address the issue of the security deposit. Shortly thereafter, respondent filed a Rule 59(e) motion specifically asking

[1] The dissent concludes it was unnecessary for petitioner to argue unjust enrichment on appeal because the master did not award damages for unjust enrichment. While the dissent correctly notes the proper measure of damages for unjust enrichment is the amount of increase in the fair market value of the subject property after improvements, the conclusion that the master did not award damages for unjust enrichment is purely speculative. In fact, the master states, albeit incorrectly, in his order that the measure of damages for unjust enrichment "would be the amount by [which] the defendant was unjustly enriched." Although this is the incorrect measure, one which petitioner has never challenged, the fact that the master explicitly outlines the measure of damages for unjust enrichment suggests he did in fact award damages based on this theory. The two-issue rule applies where, as here, it is unclear upon which of the multiple theories the judgment below is based, and the petitioner does not challenge all possible theories.

the master to consider this issue. Petitioner did not file anything in response to this motion, and never argued to the master that she should retain the security deposit. In its Amended Order, the master found respondent was also entitled to the security deposit, in addition to the damages already awarded.

On appeal, petitioner argued the master erred in awarding respondent the security deposit. The Court of Appeals found the issue was not preserved for appeal.

Because petitioner never argued until direct appeal that she should retain the security deposit, we find the Court of Appeals properly held the issue was not preserved for appeal.[2] See Elam v. S.C. Dep't of Transp., 361

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[2] The dissent would find the issue of the security deposit preserved because petitioner argued at trial she should not be required to return the security deposit because respondent stopped making rent payments in May 2003, but continued to occupy the premises through July 2003, preventing petitioner from renting the property to someone else. Although this argument was raised to the Court of Appeals and to this Court, a close review of the record shows this argument was never made to the master in equity. Further, petitioner's general denial in her Answer that she should return the security deposit is not sufficient to preserve the specific arguments raised to the Court of Appeals.

The dissent also finds this issue preserved because the master ruled on it after respondent raised the issue in a Rule 59(e) motion. This was not sufficient to preserve the issue because petitioner failed to advance to the master the arguments she raised to the Court of Appeals. See McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004) (an appellant cannot raise an issue on appeal that was raised by the respondent at trial, but on which appellant advanced no arguments to the trial court; the argument must have been raised by appellant in order for appellant to raise it on appeal).

S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Accordingly, we hold the Court of Appeals properly found the issue was not preserved for review.

## CONCLUSION

Because petitioner did not appeal the master's finding of unjust enrichment, and the Court of Appeals properly found the issue of the security deposit was not preserved for appeal, the decision of the Court of Appeals is

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The dissent suggests finding this issue unpreserved constitutes "an over-zealous application of appellate preservation rules." This observation fails to recognize, however, the importance of our preservation requirements:

> 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. (Citation omitted). The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Moreover, it is unclear why the dissent focuses such a substantial portion of its discussion on the preservation of petitioner's arguments when it ultimately states it would reverse the master not based on the arguments forwarded by petitioner, but for a reason not advanced by either party.

**AFFIRMED.**[3]

**Acting Justice G. Thomas Cooper, Jr., concurs. HEARN, J., concurring in part and dissenting in part in a separate opinion in which KITTREDGE, J., concurs. TOAL, C.J., dissenting in a separate opinion.**

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[3] The dissent would vacate the master's order and dismiss the case because it finds the lease agreement constituted an illegal contract, requiring us to leave the parties as we found them. We disagree with this conclusion. It is true some courts have taken the position that a lease of premises for a use conclusively prohibited by a zoning regulation is unenforceable because of either the illegality of the purpose itself or the frustration of purpose resulting from the regulation's existence. See 37 A.L.R.3d 1018, § 2[a] (1971). It is only logical that a court would not enforce a lease of this type, as doing so would require the tenant to violate a zoning ordinance. This does not mean, however, the parties should be "left as they are found," entitled to no relief. A lease under which the contemplated purpose violates a zoning regulation is far different than a situation where two parties intentionally contract to do an act prohibited by statute, or which is contrary to public policy. Further, in instances such as this, where a lease contains a provision warranting the use of the premises for the contemplated purpose, courts have held a tenant may be entitled to damages for breach of warranty where the contemplated use is prohibited by a zoning regulation. 37 A.L.R.3d 1018, § 2[a].

**JUSTICE HEARN:** Respectfully, I concur in part and dissent in part. I agree with the majority that the two-issue rule precludes our review of the master-in-equity's entry of judgment against Laura Lewis on Atlantic Coast Builder's (Atlantic) claims for negligent misrepresentation and breach of contract. However, I do not believe our error preservation rules prevent us from considering whether Lewis was entitled to retain Atlantic's security deposit and would reach the merits of that issue.

Atlantic sued Lewis for negligent misrepresentation, breach of contract, and unjust enrichment after Atlantic learned it could not use the premises it leased from Lewis for business purposes, despite the statement in the lease to the contrary. Atlantic learned of this in late May, two months into the one-year lease, and stopped paying rent. However, it remained on the premises through at least July. The master found for Atlantic on all causes of action,[4] awarding Atlantic $6,660.79 in damages, representing the expenditures Atlantic made to improve the premises and specifically excluding those improvements the master did not believe unjustly enriched Lewis. Cross motions for reconsideration under Rule 59(e), SCRCP, were filed. In particular, Atlantic moved for the master to include its security deposit of $3,500, which Lewis never returned, in the calculation of damages. Lewis did not respond to this motion, and the court modified its award to include this amount. On appeal, Lewis argues the master erred in entering judgment against her for negligent misrepresentation and breach of contract. She

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[4] Lewis also counterclaimed for breach of contract and sought to recover the balance of rent payments due under the lease. The master denied this claim because it found Lewis's misrepresentation as to the use of the premises rendered the lease unenforceable. The majority does not reach the issue of Lewis's counterclaim, and I decline to do so as well. In my opinion, Lewis has abandoned this issue as her brief devotes only one page to it that is purely a recitation of facts, devoid of any citation to legal authority, with the summary conclusion that Atlantic breached the lease. *See* Rule 208(b)(1)(D), SCACR; *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding the failure to provide arguments or cite to authority in support of argument constitutes abandonment of issue on appeal).

further argues the master erred in ordering she return Atlantic's security deposit.

Initially, I share the Chief Justice's concern regarding an "over-zealous application" of our long-standing error preservation rules. However, error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure, as noted by the Chief Justice, that we do not reach issues which were not ruled upon by the trial court. Thus, I agree with the Chief Justice that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us. A rule which would permit such an "appeal by consent" is contrary to the very core of our preservation requirement: "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). These rules, however, must also be applied consistently. If our review of the record establishes that an issue is not preserved, then we cannot reach it regardless of the status of the party raising it. This is not a "gotcha" game aimed at embarrassing attorneys or harming litigants, but rather an adherence to settled principles that serve an important function. Surely it is good practice for us to reach the merits of an issue when error preservation is doubtful, but when an issue is clearly unpreserved, we should follow our longstanding precedent and resolve the issue on error preservation grounds.

The master found for Atlantic on all three causes of action: negligent misrepresentation, breach of contract, and unjust enrichment. However, Lewis appealed only the finding of liability for negligent misrepresentation and breach of contract, not unjust enrichment. Accordingly, there is a finding of liability from which no appeal was taken, and our consideration of Lewis's arguments that the master erred in entering a judgment against her is barred by the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.").

The thrust of the Chief Justice's argument against the application of this rule is that the master's order does not award damages for unjust enrichment, correctly noting that the actual expenditures made by Atlantic are not a proper measure for unjust enrichment. *See Barrett v. Miller*, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (Ct. App. 1984) (finding a party could not be unjustly enriched with improvements to real property by more than the increase in the property's fair market value). However, an unappealed ruling, right or wrong, is the law of the case. *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970). From my review of the record, the master intended to award damages for all causes of action, including unjust enrichment. In fact, he went so far as to specifically state he was excluding certain expenditures from his award because they did not unjustly enrich Lewis. Therefore, as the case currently stands before us, the master awarded damages to Atlantic based on a theory of unjust enrichment. And because the master made an alternate finding of liability that Lewis did not appeal, the two-issue rule bars us from considering Lewis's arguments regarding negligent misrepresentation and breach of contract. Unlike the Chief Justice, I do not believe the existence of this procedural bar is questionable and would place no weight on the fact that neither the parties nor the court of appeals raised it.

On the other hand, I agree with the Chief Justice that the precise issue of whether Lewis is entitled to retain Atlantic's security deposit is preserved for review. The majority declines to reach the merits of this issue because it believes the issue was not raised at trial; Lewis failed to raise it in a Rule 59(e), SCRCP, motion; and Lewis did not argue against Atlantic's Rule 59(e) motion. In its complaint, Atlantic requested a return of the security deposit, which Lewis denied in her answer. Furthermore, and more importantly, Lewis's property manager testified Lewis kept the security deposit because Atlantic remained on the property for two months after it breached the lease by failing to pay rent. When the master failed to rule on Lewis's entitlement to the security deposit, it was necessary for Atlantic to make a motion under Rule 59(e) as the issue had been fully raised at trial yet not ruled upon. Indeed, had it not been raised at trial, the question before us most certainly

would be whether it was even proper for Atlantic to make the motion in the first place. Lewis herself was under no obligation to make a similar motion regarding the security deposit; it would be a cruel twist of our preservation rules to require a losing party to request the judge to consider additional damages he forgot to award.

It is also of no consequence that Lewis did not respond to Atlantic's motion. Distilled to its basics, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). So long as these two elements are met, an issue will be deemed preserved. Rule 59(e) motions fill a special niche in our preservation rules to ensure issues raised to but *not* ruled upon by the trial judge can be reviewed on appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). They are not a vehicle through which a party can inject new issues for the court to pass on, and they similarly are not a way to get new arguments in through the back door. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). Here, the parties raised the issue of the security deposit to the master; because the master candidly admitted he just forgot to address it, it was therefore incumbent upon Atlantic to file a post-trial motion. The master then considered the arguments raised during the trial regarding Lewis's entitlement to the security deposit and ruled accordingly. The issue was thus raised to and ruled upon by the trial judge. Requiring Lewis to respond to the motion would be fruitless in these circumstances. Our cardinal error preservation requirements have been met, and I know of nothing in our rules or precedents that would require Lewis to specifically respond to Atlantic's motion or be forever barred from contesting Atlantic's entitlement to the security deposit.

In my opinion, the majority erroneously relies on *McCall v. State Farm Mutual Automobile Insurance Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004), for the proposition that Lewis's failure to respond bars her argument to us. In *McCall*, the defendant raised the door-closing statute as a defense at the summary judgment stage. *Id.* at 381, 597 S.E.2d at 186. The plaintiff, however, did not address the defendant's arguments, *id.*, and the circuit court

dismissed her complaint, *id.* at 375, 597 S.E.2d at 185. The court of appeals therefore held the plaintiff could not challenge the application of the door-closing statute on appeal because the circuit court did not consider "all relevant facts, law, and arguments," rendering the issue unpreserved. *Id.* at 381-82, 597 S.E.2d at 186. The crucial distinction between *McCall* and the case before us today is that the plaintiff in *McCall* completely failed to advance her arguments below. Therefore, the plaintiff would have been raising arguments on appeal that were not made to the circuit court. Here, Lewis is not raising a different argument on appeal. In fact, had she responded to Atlantic's motion, her arguments at that procedural juncture could have only mirrored the argument she made at trial because new or different arguments are not countenanced at the Rule 59(e) stage. It is enough that the master heard her arguments during the trial and was able to rule accordingly, regardless of whether that ruling was in her favor.[5] *See Eubank v. Eubank*, 347 S.C. 367, 373 n.2, 555 S.E.2d 413, 416 n.2 (Ct. App. 2001) ("The 'raised to and ruled on' rule of error preservation requires only a ruling, not necessarily a favorable one."). Although Lewis is bound on appeal to the arguments she raised during the trial, thus ensuring she cannot keep an ace card up her sleeve, the issue nevertheless is preserved. While it is advisable to respond to Rule 59(e) motions, it is not required in these situations.

As to the merits of this issue, the lease provides the security deposit is "security for the performance of [Atlantic]'s obligations under this lease, including without limitation the surrender of possession to [Lewis] as herein provided." The lease also states that upon Atlantic's failure to pay rent and cure the breach after receiving notice, Atlantic must surrender possession of the premises. Because it failed to do so, Lewis's property manager testified Lewis kept the security deposit, precisely as the lease permitted her to do.

[5] This case is therefore different from one where the issue raised in the Rule 59(e) motion was one *not* raised to the court during the trial, and the appellant still failed to respond. That situation is more akin to *McCall* in that the record contains no opposition to the basic premise underlying the motion. As in *McCall*, permitting the appellant to challenge the motion on appeal would be to permit him to argue a ground that was not argued below.

The master found Lewis would be unjustly enriched if she kept the security deposit, but I cannot find any evidence to support this finding. While Lewis may have been unjustly enriched by receiving the benefits of the improvements Atlantic made to the premises, nothing suggests she was similarly unjustly enriched when she kept the security deposit she was wholly entitled to under the lease after Atlantic remained on the property for two months without paying rent. The same is true for Atlantic's claims of negligent misrepresentation and breach of contract; it lost the security deposit not because of any statements Lewis made or her alleged breach of the lease, but rather because it failed to surrender possession and stayed on the premises without paying rent.

Therefore, I would affirm the master's entry of judgment for Atlantic based on the two-issue rule. However, I would reduce Atlantic's award by $3,500 and permit Lewis to keep the security deposit.[6]

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[6] I express no opinion regarding whether Atlantic's lease was an illegal contract. That issue was never raised to the master, the court of appeals, or this Court, and we therefore should not address it. Moreover, I part company with the Chief Justice's view that we may reach this issue because we sit to correct errors of law and the legality of the lease was fairly embraced in the arguments raised on appeal. Lewis's statement of issues on appeal does not mention the illegality of the lease and reads as follows:

> 1. Did the Court of Appeals err in affirming the trial court's grant of judgment against the defendant and the trial court's denial of the defendant's counterclaim?
>
> 2. Did the Court of Appeals err in affirming the trial court's judgment awarding the plaintiff the security deposit?

Additionally, Lewis's arguments concern only which party breached the lease and the representations contained therein. Although it is axiomatic that we sit to correct errors of law, that broad maxim does not trump the longstanding requirement that any error of law we correct must first be argued to us and

**KITTREDGE, J., concurs.**

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supported by authority. Accordingly, I would not reach the issue of the legality of the lease. *See* Rule 208(b), SCACR.

**CHIEF JUSTICE TOAL**: I take issue with the majority's disposal of this case on issue preservation grounds. For reasons set forth below, I do not believe the "two-issue" rule precludes this Court from deciding whether the master-in-equity's (master) award of improvement costs was valid. Also, I fervently disagree with the majority's contention that an issue argued by each party and then ruled upon by the trial court, after the submission of a 59(e) motion, is nevertheless unpreserved. On the merits, I would vacate and dismiss.

In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. To be clear, I do not discount the importance of our issue preservation rules. As an appellate court, we sit to review decisions of lower courts for error. As such, "it is axiomatic that an issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). However, I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests. In light of my view, I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation. When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.

The majority determined not to reach the merits of Lewis's first issue on appeal by invoking the "two-issue" rule. The master found Atlantic proved its claims of unjust enrichment, negligent misrepresentation, and breach of contract. However, the master based the award of $6,660.79 only on Atlantic's actual pecuniary loss, which is the appropriate measure of damages for negligent misrepresentation and breach of contract. *See Quail*

*Hill, LLC v. County of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (plaintiff must prove amount of pecuniary loss suffered as result of negligent misrepresentation); *Bensch v. Davidson*, 354 S.C. 173, 178, 580 S.E.2d 128, 130 (2003) (measure of damages for breach of contract is loss actually suffered by contractee as a result of breach). The proper measure of damages for an unjust enrichment claim is the amount of increase in the fair market value of the subject property due to the improvements made by the plaintiff. *See Stringer Oil Co., Inc. v. Bobo*, 320 S.C. 369, 372–73, 465 S.E.2d 366, 368–69 (Ct. App. 1995) (finding the appropriate measure of owner's unjust enrichment was value of improvements to owner rather than the cost to the person producing the result). Thus, the focus of an unjust enrichment award is on the amount the owner is enriched, not the amount of actual loss to the plaintiff. The record contains no evidence that the value of the subject property increased as a result of improvements made by Atlantic, and the master based damages only on the improvement costs expended by Atlantic. Lewis broadly requested both the court of appeals and this Court to reverse the master's award of damages. Therefore, it was unnecessary for Lewis to argue unjust enrichment on appeal because it had no bearing on the award of damages that Lewis prayed to have reversed. The "two-issue" rule was spotted by neither the court of appeals nor Atlantic. In my opinion, the existence of this preservation bar is questionable, and I elect to resolve that question in favor of preservation.

The majority additionally found Lewis failed to preserve the security deposit issue because she did not file a response to Atlantic's 59(e) motion asking the master to increase the amount of judgment to include the $3,500 security deposit. The majority appears to have misconstrued the instances when a party is required to file a post-trial motion to preserve an issue for appellate review and when such filings are merely optional. The following language is instructive:

> A party *may* wish to file [a 59(e)] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a

> motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

*Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

In this case, the sum total of relief requested by Atlantic in its Complaint included the $3,500 security deposit, and Lewis denied liability for these damages in her Answer. At trial, Lewis argued she should not be required to return the security deposit because Atlantic stopped making rent payments in May 2003, but continued to occupy the premises through July 2003, which prevented Lewis from listing the property for rent.[7] The master

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[7] The majority writes that Lewis did not preserve the security deposit issue because "a close review of the record shows this argument was never made to the master in equity." This is not correct. The trial record before the master contains the following:

> [Atlantic's counsel]: When did you send the notice of default to the Plaintiff regarding the alleged breaches of the lease?
>
> [Lewis's property manager]: . . . I wanted to know if since they had been apprised that they needed to move when they were going to leave the building since they hadn't paid rent, they were still there we couldn't rent it to anybody else and they hadn't paid rent. They were still there in July.
>
> . . . .
>
> Q: You said you did not return the security deposit, where is that—where are those funds now?
>
> A: The security deposit? Well[,] they were in arrears with the rent, the security deposit went to the owner.

amended his initial order to include the award of the security deposit after Atlantic filed a 59(e) motion requesting it. Thus, the issue of the security deposit was raised to the master, Lewis argued she was entitled to retain the security deposit at trial, and the master ruled upon that issue in his amended order. This is what our preservation rules require, and I fail to see why the award of the security deposit is unreviewable.

On the merits, I believe the court of appeals erred in affirming the master's award of damages for Atlantic—an award based on principles of both law and equity. In my opinion, this lease was an illegal contract and, therefore, void and unenforceable. As such, the parties were not entitled to relief under any legal theory, and the Court is constrained to leave the parties as we found them.

The lease agreed to by Lewis and Atlantic was entitled "Commercial Lease." The second clause of the lease states: "Lessee shall use and occupy the premises for Building and Constr. Office. The premises shall be used for no other purpose. Lessor represents that the premises may lawfully be used for such a purpose." In fact, the premises was not zoned for use as a commercial office, and therefore, the lease had no lawful purpose. It is no excuse the parties were unaware of the applicable zoning laws because "citizens are presumed to know the law and are charged with exercising 'reasonable care to protect their interests.'" *Ahrens v. State of S.C.*, __ S.C. __, 709 S.E.2d 54, 61 (2011) (*quoting Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008)); *see also Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 509 (2010) (party not justified in relying on an incorrect statement from a zoning official

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The lease agreement provided that the security deposit served as "security for the performance of the Lessee's obligations under this lease, including without limitation the surrender of possession of the premises to Lessor . . . ." Lewis clearly made the argument that, because Atlantic defaulted by remaining at the premises without paying rent, Lewis was entitled to apply the security deposit to cure that default. Thus, this issue was fully vented at trial.

because party could have referenced the Official Zoning Map to ascertain the correct zoning classification).

It is a well-settled principle of contract law that "a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice." *McConnell v. Kitchens*, 20 S.C. 430, 437–38 (1884); *see also Pendarvis v. Berry*, 214 S.C. 363, 369, 52 S.E.2d 705, 707 (1949) ("'Men may enter into any agreements they please and, as between themselves, may either respect or disregard them. When, however, they are submitted to the courts for adjudication, they must be tested and governed by the law.'") (*quoting Gilliland v. Phillips*, 1 S.C. 152 (1869)). This Court has never addressed the validity of a lease such as this one. However, I believe where the only contemplated use of a lease is for a purpose prohibited by the applicable zoning regulations, the lease is illegal and wholly unenforceable. *See Cent. States Health & Life Co. of Omaha v. Miracle Hills Ltd. P'ship*, 456 N.W.2d 474 (Neb. 1990) (a lease restricting use to a single purpose is unenforceable and relieves the parties of all obligations thereunder). As such, the parties must be left as the court found them. *See* 17A C.J.S *Contracts* § 362 (2011) ("As a general rule, both at law and in equity, a court will not aid either party to an illegal contract . . . but leaves the parties where it finds them.").

> The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, *nor will they enforce any alleged rights directly springing from such contract.*

*Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993) (*quoting McMullen v. Hoffman*, 174 U.S. 639, 654 (1899) (emphasis in original)). The refusal of the courts to entertain litigation based upon an illegal contract can, at times, lead to inequitable results. However, as stated by Lord Mansfield in the landmark case of *Holman v. Johnson*, the illegality doctrine

> is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur action* (out of fraud no action arises). No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. . . . It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis* (better is the condition of the defendant, than that of the plaintiff).

*Holman* (1775) 98 Eng. Rep. 1120, 1121.

Accordingly, in my opinion, Atlantic is not entitled to recover damages in tort, contract, or in equity; and similarly, Lewis cannot recover her counterclaim for attorney's fees and other associated costs. Leaving the parties as they were when litigation ensued, we will not compel Lewis to reimburse Atlantic for its improvement costs or return the security deposit.[8] I would vacate and dismiss.

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[8] Justice Hearn's separate opinion asserts this Court cannot determine *sua sponte* that the contract under which both parties seek relief is illegal. I disagree. Although it is axiomatic that a court may only decide the issues before it, a court is not constrained to decide a case only according to the theories propounded by the parties. To the contrary, an appellate court always has the authority to correct errors of law. *See, e.g.*, *City of Cayce v. Norfolk Southern Ry. Co.*, 391 S.C. 395, 706 S.E.2d 6 (2011) (an appellate court's scope of review is limited to correcting the circuit court's order for errors of law). Each party has asked this Court to interpret the lease agreement, and in my opinion, we cannot enforce a contract whose sole purpose is illegal.

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

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In the Matter of Richard M. Campbell, Respondent.

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Opinion No. 27045
Heard September 7, 2011 – Filed September 26, 2011

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**DEFINITE SUSPENSION**

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Lesley M. Coggiola, Disciplinary Counsel, Susan B. Hackett, Assistant Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Richard M. Campbell, of Greer, pro se.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or definite suspension not to exceed two (2) years. See Rule 7(b), RLDE, Rule 413, SCACR. He requests the suspension

be made retroactive to the date of his interim suspension.[1] In addition, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct in the investigation and prosecution of this matter within thirty (30) days of the imposition of discipline. We accept the Agreement and impose a definite suspension of one (1) year, retroactive to the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

## FACTS

### Matter I

On January 14, 2010, ODC received a complaint regarding respondent. The following day, ODC mailed a copy of the complaint to respondent and requested a response. The request was mailed to respondent's address on file with the South Carolina Bar.

On January 19, 2010, ODC met with respondent to informally discuss the complaint. During the meeting, respondent provided ODC with a different mailing address. By hand-delivery, ODC provided respondent with a copy of the complaint and request for a response.

On February 2, 2010, ODC received a response from respondent. Respondent's letter confirmed that his address was the one he provided ODC during the January 19, 2010, meeting.

On February 12, 2010, ODC mailed a letter asking for additional information to respondent. The letter was mailed to the address provided by respondent on January 19, 2010, and in his February 2, 2010, letter. ODC also informed respondent that his address on file with the South Carolina Bar had not been changed.

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[1] Respondent was placed on interim suspension on May 5, 2010. In the Matter of Campbell, 387 S.C. 550, 693 S.E.2d 401 (2010).

On March 5, 2010, ODC mailed respondent a reminder asking him to respond to the February 12, 2010, letter. This letter was mailed to respondent at the address provided during the January 19, 2010, meeting and in his February 2, 2010, letter. Receiving no response, ODC issued a Notice to Appear and Subpoena for documents on March 26, 2010. These documents were served on respondent by mail on March 29, 2010, and March 30, 2010. The Notice and Subpoena requested respondent's appearance and submission of documents on May 3, 2010. ODC mailed these documents to respondent's address on file with the South Carolina Bar and as provided during the January 19, 2010, meeting and in respondent's February 2, 2010, letter.

On May 3, 2010, respondent failed to appear to respond to questions under oath and failed to provide the subpoenaed documents. As a result of his failure to appear and provide the documents, the Court placed respondent on interim suspension on May 5, 2010.[2] In the Matter of Campbell, id.

Matter II

On April 17, 2009, respondent closed a refinance loan for Complainants. Soon thereafter, respondent's office called Complainants and scheduled an appointment for them to sign additional documents. Complainants appeared at respondent's office at the scheduled date and time. Respondent, however, did not appear for the appointment. After waiting for more than one hour, Complainants left the office. Complainants telephoned respondent on several occasions, but did not receive a response.

On April 19, 2010, the lender contacted Complainants about the note modification agreement. According to the lender, South Carolina law required that the Complainants' signatures on the note

[2] ODC admits it is unable to prove the allegations in the underlying complaint by clear and convincing evidence.

modification agreement be witnessed. The lender included the note modification agreement in its correspondence to Complainants.

When Complainants reviewed the note modification agreement, they realized they had not signed the document. According to the document, the note modification agreement supposedly occurred on May 6, 2009, and was notarized on June 25, 2009, purportedly by respondent's paralegal and sister.

Immediately upon receipt of the lender's request for a signed and witnessed note modification agreement, Complainants executed a note modification agreement with the proper witnesses and promptly returned the properly executed agreement to the lender.

Respondent represents he did not forge the names of the Complainants on the note modification agreement. He admits, however, that it was his responsibility to ensure the document contained Complainants' actual signatures.

On May 17, 2010, ODC mailed a copy of the complaint letter and requested a response within fifteen days. Receiving no response, ODC sent respondent a letter on June 7, 2010, reminding him of his obligation to respond and the fact that a failure to respond is a ground for discipline pursuant to In the Matter of Treacy, 277 S.C 514, 290 S.E.2d 240 (1982). Respondent received this letter as evidenced by his signature on the certified mail card.

Respondent did not respond to ODC's June 7, 2010, letter. On June 23, 2010, ODC issued a Notice to Appear pursuant to Rule 19(c), RLDE, and to provide a statement on the record. Respondent appeared and provided a statement; however, he did not submit a written response to the allegations of misconduct as requested by ODC's earlier letters.

## LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct), Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully fail to appear personally as directed, willfully fail to comply with a subpoena issued under the RLDE, or knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response or appearance), and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.3 (lawyer who possesses managerial authority in law firm shall make reasonable efforts to ensure that firm has in effect measures giving reasonable assurance that non-lawyer's conduct is compatible with the professional obligations of the lawyer; Rule 8.1 (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to the administration of justice).

## CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of one (1) year, retroactive to the date of respondent's interim suspension. In addition, within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct in the investigation and prosecution of this matter. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

**DEFINITE SUSPENSION.**

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

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

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Karen Dallis Carpenter, Petitioner,

v.

James Edward Burr, Frank C. Gavay, Cynthia A. Gesualdi and Susan S. Fisher, Respondents.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal from Horry County
Jocelyn B. Cate, Family Court Judge

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Opinion No. 27046
Heard September 22, 2011 – Filed September 26, 2011

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**DISMISSED AS IMPROVIDENTLY GRANTED**

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James L. Hills and Carolyn R. Hills, both of Hills & Hills, of Myrtle Beach, for Petitioner.

Randall K. Mullins, of N. Myrtle Beach, for Respondents.

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**PER CURIAM:** We granted a writ of certiorari to review the Court of Appeals' decision in Carpenter v. Burr, 381 S.C. 494, 673 S.E.2d 818 (Ct. App. 2009). We now dismiss the writ as improvidently granted.

**DISMISSED AS IMPROVIDENTLY GRANTED.**

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

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

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The State, Respondent,

v.

Jason Michael Dickey, Petitioner.

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ON WRIT OF CERTIORARI

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Appeal from Richland County
James W. Johnson Jr., Circuit Court Judge

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Opinion No. 27047
Heard March 2, 2011 – Filed September 26, 2011

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**REVERSED**

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Lourie A. Salley III, of Lexington, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Christina J. Catoe, and Daniel E. Johnson, all of Columbia, for Respondent.

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**CHIEF JUSTICE TOAL:** Jason Michael Dickey (Petitioner) appeals the court of appeals' decision affirming his conviction of voluntary manslaughter. *State v. Dickey*, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008). We find Petitioner was entitled to a directed verdict on the issue of self-defense. Therefore, we reverse.

## FACTUAL/ PROCEDURAL BACKGROUND

In April 2004, Petitioner was employed as a security guard at Cornell Arms apartments in Columbia, where he also resided. Although not required by his employer for his duties, Petitioner carried a loaded pistol, for which he held a valid concealed weapons permit.

On April 29, 2004, Joshua Boot and his friend, Alex Stroud, met Amanda McGarrigle and Tara West while tailgating at a Jimmy Buffet concert. After several hours of heavy drinking, Boot and Stroud accompanied McGarrigle and West, who were roommates, back to their apartment at Cornell Arms. Stroud testified Boot was "pretty intoxicated" and had consumed up to twenty beers and several shots of tequila throughout the day. As McGarrigle and Boot sat on the couch in her apartment, a neighbor threw a water balloon through an open window, splashing Boot. The water balloon tossing was part of an ongoing joke between neighbors. However, the prank so angered Boot that he threatened to physically assault the person who splashed him.[1] Fearful of trouble, McGarrigle asked Boot to leave the apartment, and Boot refused. He instead went to find the culprit, in what McGarrigle described as an aggressive, angry manner. Boot began banging on neighbors' doors, which prompted McGarrigle to go to the security desk, where Petitioner was on duty, and ask Petitioner to evict her guest. McGarrigle, Petitioner, and McGarrigle's friend, Morteza Safaie, whom she met along the way, searched for Boot on several floors and

[1] Stroud did not witness or hear any commotion concerning the water balloon because he was in West's bedroom at the time.

eventually found him back in her apartment. Boot stepped outside into the hall and Petitioner identified himself as the security guard on duty and asked Boot to leave. According to Safaie and McGarrigle, who were standing in the hallway, Boot responded by shouting expletives at Petitioner and telling him "he couldn't make him do anything," then re-entering the apartment and slamming the door. Petitioner knocked on the door and again asked Boot to leave, without making any threatening comments or gestures or raising his voice. Boot again slammed the door in Petitioner's face. According to Stroud, who, at this point, had come out of West's bedroom, stated that Boot was "awfully" angry and Petitioner seemed "pretty unhappy." While standing outside the door to the apartment, Petitioner called the Columbia police to report the disturbance, and then asked McGarrigle and Safaie to go downstairs to let the officers inside the building. Meanwhile, inside the apartment, Stroud attempted to calm Boot and eventually convinced him they should leave. West witnessed Boot tuck a liquor bottle in his shorts before he exited the apartment.[2]

As Boot and Stroud walked toward the elevator, Petitioner kept his distance and the parties did not exchange words. However, Stroud testified Boot and Petitioner were "staring each other down." Petitioner chose not to ride with Stroud and Boot in the elevator, instead opting to take the stairs. The silence continued in the lobby as Petitioner followed several feet behind the men while they walked toward the exit. Petitioner testified that he noticed a Crown Victoria pass by the lobby windows and thought the police had arrived. He stated he followed Boot and Stroud outside so he could inform the police of the direction they were walking. According to Stroud, Petitioner stood in the vicinity of the Cornell Arms doormat watching them silently as they walked toward Sumter Street. Kristy Ann Murphy witnessed the scene from a bench located in front of the Cornell Arms doorway. She testified that Petitioner asked the men to leave in an unthreatening manner, while Boot shouted obscenities at Petitioner. Stroud testified that the derogatory comments Boot made about Petitioner were directed to Stroud only. After walking halfway down the block, Stroud turned around first and

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[2] Stroud did not see Boot pick up a bottle, but noticed a fifth of vodka on the coffee table earlier in the night.

asked Petitioner, "[W]hy the f--- [are you] following [us]." Stroud testified that Petitioner just stood there, making no gestures or comments. Boot and Stroud then turned and started walking towards Petitioner quickly. Petitioner testified Boot threatened to "whip [his] a--." Stroud testified he made at most two steps, while Boot took two or three big steps, placing Boot nearer to Petitioner than Stroud. Stroud testified further that as Boot advanced toward Petitioner, he was in the mood to fight and planned to harm Petitioner. Petitioner, in turn, testified the two men were covering ground very quickly and if he turned his back he was afraid of being attacked from behind with no way to defend himself.[3] When Boot was approximately fifteen feet away, Petitioner pulled a gun from his pocket. Petitioner testified he pulled the gun to discourage the two men from attacking him. Stroud took a few steps back at the sight of the gun, but Boot continued to advance toward Petitioner in an aggressive manner. Petitioner testified he saw Boot reach under his shirt as he continued forward, and Petitioner feared he was reaching for a weapon.[4] Without warning, Petitioner fired a shot, striking Boot. After the first shot, Boot took another step toward Petitioner. Petitioner's second shot stopped Boot. Petitioner then fired a third shot as Boot dropped to his knees. Petitioner immediately put the gun back in his pocket and called 911.

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[3] Boot was six feet, one inch tall and weighed between 200 and 210 pounds. Petitioner was five feet, eleven inches tall, and weighed 275 pounds. In 2001, the Veteran's Affairs Administration classified Petitioner as thirty percent disabled after he was diagnosed with patella syndrome and underwent several corrective operations, leaving his right foot partially paralyzed. Due to this disability, Petitioner testified he was unable to run. Furthermore, two sets of double doors blocked his entry into Cornell Arms. The first set of doors open into a breezeway and were not locked. However, the second set of doors could only be opened with a key because they locked at 5:00 p.m. each night for security reasons. At the time of death, Boot had a blood alcohol level of .203, over twice the legal limit.

[4] Stroud testified he did not see anything in Boot's hands when he fell. However, Stroud was behind Boot as Boot advanced. Murphy, who at this point was hurrying to the door, fearful of an ensuing fight, stated she may have seen Boot reach under his shirt for something, but was unsure.

The first officer to arrive at the scene heard the three shots. As soon as the officer exited his vehicle, Petitioner stated, "I shot him, I am security for the building. I have a concealed weapons permit, and the gun is in my right front pants pocket. I didn't have a choice. He came at me with a bottle." Investigators found a broken liquor bottle at the scene with a blood smear on the neck of the bottle matching Boot's DNA. According to the State's expert witness, smearing can occur when someone picks up an object or brushes against something.

Subsequently, a Richland County grand jury indicted Petitioner for murder. At the beginning of Petitioner's September 2006 trial, his counsel moved for the dismissal of Petitioner's murder charge pursuant to the recent enactment of the "Protection of Persons and Property Act," which codified the common law Castle Doctrine. S.C. Code Ann. § 16-11-410 (Supp. 2010). The circuit judge denied the motion, finding the Act did not apply to pending criminal cases. Petitioner's counsel twice moved for a directed verdict of acquittal on the ground that Petitioner was acting in self-defense when he shot Boot. The circuit judge denied both motions.

The circuit judge charged the jury on the crimes of murder and voluntary manslaughter, and on the affirmative defense of self-defense. Petitioner's counsel objected to the voluntary manslaughter charge, arguing there was no evidence to support this charge. Petitioner's counsel additionally challenged that the judge's self-defense instructions were inadequate. The circuit judge denied these motions, and the jury convicted Petitioner of committing voluntary manslaughter. The circuit judge sentenced Petitioner to sixteen years' imprisonment. The court of appeals affirmed. *Dickey*, 380 S.C. at 384, 669 S.E.2d at 917. Specifically, the court held the circuit judge: (1) properly denied Petitioner's motion for acquittal on the ground of self-defense; (2) sufficiently instructed the jury on the law of self-defense; (3) correctly submitted the charge of voluntary manslaughter to the jury; (4) adequately instructed the jury regarding the charge of voluntary manslaughter; and (5) properly refused to retroactively apply the "Protection of Persons and Property Act" to Petitioner's case. This Court granted

Petitioner's petition for a writ of certiorari. Petitioner appeals all of the grounds upon which the court of appeals affirmed his conviction. Finding Petitioner was entitled to a directed verdict of acquittal on the ground of self-defense, we reach that issue only. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

## STANDARD OF REVIEW

In criminal cases, the appellate court only reviews errors of law and is clearly bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

## ANALYSIS

"A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury." *Id.* at 292–93, 25 S.E.2d at 648. However, when a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt. *Wiggins*, 330 S.C. at 544–45, 500 S.E.2d at 492–93. We find the State did not carry that burden.

A person is justified in using deadly force in self-defense when:

(1) The defendant was without fault in bringing on the difficulty;

(2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;

(3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and

(4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

*Id.* at 330 S.C. at 545, 500 S.E.2d at 493 (*citing State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

### A. Fault in Bringing about the Harm

South Carolina recognizes a business proprietor's right to eject a trespasser from his premises. *State v. Brooks*, 252 S.C. 504, 510, 167 S.E.2d 307, 310 (1969) (*citing State v. Rogers*, 130 S.C. 426, 126 S.E. 329 (1925)). If the proprietor is "engaged in the legitimate exercise in good faith of his right to eject, he would in such case be without fault in bringing on the difficulty, and would not be bound to retreat." *Id.* (*citing Rogers*, 130 S.C. at 426, 126 S.E. at 329)). Therefore, to withstand a motion for directed verdict as to whether Petitioner, an agent of Cornell Arms, was at fault in bringing about the harm, the State had to disprove Petitioner's claim that he was ejecting Boot in good faith. Even viewing the facts in a light most favorable to the State, the State did not carry this burden.

The court of appeals stated that a jury could have reasonably found Petitioner's decision to exit the building "and brandish his loaded gun . . . was an act reasonably calculated to provoke a new altercation with Boot . . . ." However, the testimony is consistent that Petitioner was not brandishing[5] his

[5] Brandish is defined as "1. to shake or wave (as a weapon) menacingly 2. to exhibit in an ostentatious, shameless, or aggressive manner." *Webster's Third New International Dictionary* 268 (2002).

gun when they were outside, but rather, he pulled the gun from its holster when Boot and Stroud turned and began advancing toward him in an aggressive manner. The State did not produce any evidence to contradict Petitioner's testimony he routinely carried the concealed weapon, and did not deliberately arm himself in anticipation of a conflict that evening. The record establishes Petitioner did not know Boot prior to his attempt to eject him and only did so in his capacity as a security guard, and upon request of a tenant. It is undisputed that Petitioner called the police before ejecting Boot and Stroud, and then immediately called 911 after firing the shots. Petitioner's stated reason for walking outside was to inform the police, whom he thought had arrived, of the direction Boot and Stroud were walking. The State did not rebut Petitioner's stated reason for his exit and, in fact, the only evidence the State offered to prove Petitioner's fault in bringing about the harm was the act of following Boot and Stroud outside. As Petitioner had the right to eject the trespassers from the premises, his decision to exit the building and stand on the doormat to ensure their departure cannot, in and of itself, be construed as acting in bad faith. Had Petitioner accompanied the ejection with threatening words or posture, a jury question may have arisen. *See State v. Wiggins*, 330 S.C. at 547, 500 S.E.2d at 494 (testimony that appellant threatened to "kick both [victim's and sister's] a--es" raised a jury question as to whether appellant was exercising good faith in ejecting victim). However, under these facts, we find Petitioner was exercising his right to eject trespassers in good faith and, as a matter of law, he was without fault in bringing about the difficulty.

### B. Subjective and Objective Belief of Imminent Danger

We find that even the testimony most adverse to the defense, Stroud's testimony, established as a matter of law that Petitioner actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and that a reasonable person of ordinary firmness would have entertained the same belief. "[W]ords accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense." *State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (*quoting State v. Harvey*, 220 S.C. 506, 68 S.E.2d 409 (1951)). We believe such circumstances were present in this

case. It is uncontroverted that Boot was highly intoxicated, acted aggressively over the course of the conflict, that he began advancing toward Petitioner quickly with the purpose of assaulting him, that he continued advancing toward Petitioner after Petitioner pulled the gun, and there was great disparity in the physical stature and capabilities of Boot and Petitioner. Furthermore, the State did not rebut Petitioner's testimony that he saw Boot reach under his shirt as he advanced. To the contrary, West testified she saw Boot place a bottle in his shorts as he left the apartment, and a broken bottle was found on the scene with Boot's blood smear on the neck.[6] Petitioner testified he did not see what Boot was reaching for when he fired the shots, but because Boot continued advancing after seeing the gun, Petitioner believed he was reaching for a deadly weapon. A person has the right to act on appearances, even if the person's belief is ultimately mistaken. *State v. Fuller*, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (*citing State v. Hendrix,* 270 S.C. 653, 244 S.E.2d 503 (1978)). There is uncontroverted testimony that Petitioner acted upon the appearance that Boot had a deadly weapon.

Petitioner testified that, under the circumstances and appearances, he believed he was in actual danger of death or serious bodily harm. We find it reasonable that Petitioner made such an assumption and that a person of Petitioner's stature and limited agility would entertain the same fear when faced with an attack by a belligerent, intoxicated, more agile, and younger male, who appeared to be reaching for a weapon. The State certainly did not rebut these elements of self-defense beyond a reasonable doubt, as the law requires. Therefore, we find that as a matter of law, Petitioner actually believed he was in imminent danger of losing his life, or sustaining serious bodily injury, and that a reasonable person would have entertained the same belief.

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[6] Stroud's testimony that he did not notice Boot pick up a bottle when he left the apartment and did not see anything in Boot's hand after he fell did not affirmatively refute the claims of West and Dickey.

### C. Duty to Retreat

A defendant is not required to retreat if he has "no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in [the] particular instance." *Wiggins*, 330 S.C. at 545, 500 S.E.2d at 493 The court of appeals found "the State provided evidence that, if believed, tended to show Petitioner had other probable means of avoiding the danger than acting as he did." However, the court never specified what evidence it relied on to support that finding. Instead, it focused on whether or not Petitioner was absolved of his duty to retreat under the Castle Doctrine. We do not think it necessary to determine whether curtilage can extend to a public sidewalk, because we find the State failed to disprove beyond a reasonable doubt that Petitioner had no other probable means of avoiding the danger.

As discussed previously, Petitioner was not at fault in bringing about the harm by exiting the building. Once outside, Petitioner was faced with a situation where two younger, intoxicated, and physically superior men were advancing toward him, one with the clear intent to assault him and who was undeterred at the sight of Petitioner's gun. Moreover, the State did not disprove Petitioner's testimony that Boot reached for something under his shirt as he continued toward Petitioner. The testimony is consistent that Boot moved toward Petitioner at a fast pace. Had Petitioner turned his back, he would have likely been attacked from behind as he tried to get through the first set of glass doors. Even if he were able to pass through the first set of doors unscathed, he would likely have been trapped in the breezeway behind the second set of locked doors. Petitioner was classified as permanently disabled and testified that he could not run. Therefore, the uncontroverted facts establish as a matter of law that Petitioner had no other probable means of avoiding the danger other than to act as he did.

## CONCLUSION

For the reasons set forth above, we find the State failed to disprove the elements of self-defense beyond a reasonable doubt. Even viewing the facts

in a light most favorable to the State, the evidence establishes that Petitioner shot and killed Boot in self-defense. Therefore, we reverse the court of appeals and overturn Petitioner's conviction.

**REVERSED.**

**KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion. BEATTY, J., dissenting in a separate opinion.**

**JUSTICE PLEICONES:** I concur, but would reverse on the ground the Court of Appeals erred in upholding the trial judge's decision to charge voluntary manslaughter. Moreover, were I to reach the issues, I would find reversible error in the unconstitutional jury charge on the facts, and I would find that while the evidence established the first three elements of self-defense as a matter of law, there was a jury issue whether petitioner was in the building's curtilage such that he had no duty to retreat. See e.g., State v. Brooks, 252 S.C. 504, 167 S.E.2d 307 (1969).

In my opinion, the dispositive issue here is that of the voluntary manslaughter charge. Taking the evidence in the light most favorable to the State, it shows that at the request of a tenant, petitioner located the combative, intoxicated victim and asked him to leave. Petitioner endured the victim's obscenities, insults, and threats of physical violence calmly, and called the local police to report the incident. As the man began to leave the building, petitioner chose not to enter the elevator with him but instead took the stairway. Petitioner then followed the victim and his companion as they exited the building. As one would expect from a security guard who had just escorted such an individual off the premises, petitioner stood outside the building to make sure the men actually left the area. Compare State v. Brooks, *supra* (right to eject patron from business includes following patron outside).

When the victim and his friend turned and approached petitioner, petitioner felt "afraid" and "outnumbered," then shot the victim.

In my view, there is no evidence that petitioner was so angry and fearful that he lost control, and was rendered incapable of cool reflection. Instead, the evidence reflects that petitioner retained his composure despite the threats and language directed at him by the victim, and only shot when the victim and his friend turned back and approached petitioner outside the building whose occupants he was paid to guard. After the shooting, petitioner again called 911, and reported the events. I simply see no evidence of fear manifesting itself in an uncontrollable impulse to do violence. In my view, the only evidence is that petitioner, admittedly acting out of fear,

nonetheless acted in a deliberate, controlled manner. As such, he could not, as a matter of law, be guilty of voluntary manslaughter. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010).

I concur in the decision to reverse.

**JUSTICE BEATTY:** For reasons that will be discussed, I dissent as I would affirm the decision of the Court of Appeals and, in turn, Dickey's conviction for voluntary manslaughter.

In challenging the decision of the Court of Appeals, Dickey raises seven issues. In response to the divergent views of this Court, I have consolidated the issues under the following two headings: (1) self-defense, which, if found as matter of law, would be dispositive as to the charge of murder; and (2) voluntary manslaughter, a lesser-included offense of murder.

## I. Self-Defense

### A. Motion for a Directed Verdict of Acquittal

Dickey contends the Court of Appeals erred in finding the trial judge properly refused to direct a verdict of acquittal based on self-defense. In conjunction with his self-defense arguments, Dickey claims the Court of Appeals erred in failing to address whether a glass bottle should be considered a deadly weapon under South Carolina law as Dickey believed Boot was armed with a large glass bottle that could have been used to inflict serious bodily harm or death.

"A defendant is entitled to a directed verdict when the [S]tate fails to produce evidence of the offense charged." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Id. at 292-93, 625 S.E.2d at 648. "When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the [S]tate." Id. at 292, 625 S.E.2d at 648.

Once raised by the defense, the State must disprove self-defense beyond a reasonable doubt. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). There are four elements required by law to establish a case

of self-defense. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). The four elements are:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

Id.; State v. Hendrix, 270 S.C. 653, 657-58, 244 S.E.2d 503, 505-06 (1978).

Under the Castle Doctrine, "[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." State v. Gordon, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924). Our appellate courts have recognized that the rule also applies to a person's place of business. Id.; State v. Brooks, 252 S.C. 504, 167 S.E.2d 307 (1969). The absence of a duty to retreat also extends to the curtilage of one's home or place of business. State v. Wiggins, 330 S.C. 538, 548 n.15, 500 S.E.2d 489, 494 n.15 (1998). Curtilage includes outbuildings, the yard around a dwelling, a garden of the dwelling, or the parking lot of a business. Id.

Applying the foregoing to the facts of the instant case, I find that all four elements of self-defense were not established as a matter of law to

warrant a directed verdict. As to the first element of self-defense, a question of fact was created as to whether Dickey was without fault in bringing on the conflict. The State presented undisputed evidence that Dickey followed Boot and Stroud after they left the apartment building. Because Dickey could have remained inside behind the safety of the locked doors to wait for the police, there is evidence that Dickey could have avoided the fatal confrontation.

I disagree, however, with the Court of Appeals' finding that Dickey's actions were "reasonably calculated to provoke a new altercation with Boot, and that Dickey intended to engage in mutual combat." Dickey, 380 S.C. at 394, 669 S.E.2d at 923.

First, this ground was neither raised to the trial judge nor submitted to the jury. Secondly, the Court of Appeals appears to have found that mutual combat was established as a matter of law, which would have precluded Dickey's reliance on self-defense. See State v. Taylor, 356 S.C. 227, 232, 589 S.E.2d 1, 3 (2003) ("Whether or not mutual combat exists is significant because the plea of self-defense is not available to one who kills another in mutual combat." (citation omitted)); State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973) ("To constitute mutual combat there must exist a mutual intent and willingness to fight and this intent may be manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." (citation omitted)). In contrast to the Court of Appeals, I find there was a question of fact as to the requisite intent for the doctrine of mutual combat; thus, mutual combat could have been submitted to the jury. Accordingly, I believe the Court of Appeals' reference to this doctrine was harmless as it did not negate the court's correct finding regarding the first element of self-defense.

In terms of the second and third elements, i.e., Dickey's belief that he was in imminent danger of losing his life or sustaining serious bodily injury, the State presented evidence to create a question of fact as to the "reasonableness" of Dickey's belief that he needed to shoot Boot.

First, the evidence was disputed as to whether Boot was in possession of a deadly weapon and whether he was reaching for one prior to the shooting. Although there is case law to support Dickey's assertion that the glass bottle constituted a deadly weapon, I note that this issue was neither raised to nor ruled upon by the trial judge. Thus, it was not properly preserved for appellate review. See State v. Moore, 357 S.C. 458, 464, 593 S.E.2d 608, 612 (2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for review).

Even assuming the issue was preserved and the Court of Appeals erred in failing to rule on it, it is inconsequential whether the bottle constituted a deadly weapon as a matter of law. Moreover, the jury was specifically instructed that "a deadly weapon is any article, instrument or substance that is likely to cause death or great bodily harm." Furthermore, the State presented evidence that Dickey did not consider himself in imminent danger as Dickey readily exited the locked building and continued the confrontation outside of the apartment building.

As to the fourth element, the "duty to retreat," I find the State presented evidence that Dickey was not immune as a matter of law under the Castle Doctrine as Dickey was not within the curtilage of the apartment building at the time of the shooting. At the time of the shooting, Dickey was on the doormat outside the front door of Cornell Arms. According to the testimony, the doormat was placed near the front of the building on a public sidewalk. As recognized by the Court of Appeals, it is a novel issue in this state as to whether a public sidewalk in front of an apartment building is considered curtilage. Dickey, 380 S.C. at 395, 669 S.E.2d at 924. In ruling that the public sidewalk did not constitute curtilage, the Court of Appeals relied on our state's jurisprudence establishing that curtilage does not extend to a public street. The Court of Appeals also cited cases from other jurisdictions where appellate courts "refused to hold there is no duty to retreat from a sidewalk in front of a business or residence." Id. at 396-97, 669 S.E.2d at 924.

For several reasons, I agree with the decision of the Court of Appeals. Initially, I would note that the court properly relied on this state's case law

discussing curtilage with respect to public streets. The underlying theory in these cases is that a defendant is not immune from the duty to retreat on property where he did not have the right to eject his adversary. A public sidewalk falls within this category as it constitutes public land from which a person could not eject another person. Furthermore, the out-of-state cases cited by the Court of Appeals as well as other secondary authority support this proposition. See Jeffrey F. Ghent, Annotation, Homicide: Duty to Retreat as Condition of Self-Defense When One is Attacked at His Office, or Place of Business or Employment, 41 A.L.R.3d 584 (1972 & Supp. 2011) (analyzing the doctrine of retreat within the general rules of self-defense and discussing state cases where courts have considered where a person attacked at his office or place of business is precluded from relying on his right to self-defense by a duty of retreat). Moreover, regardless of the position of the Cornell Arms doormat,[7] Dickey was on the public sidewalk at the time he shot Boot. Once Dickey left the building and walked onto the public sidewalk, he was under a duty to retreat as the sidewalk was not part of the curtilage of his residence or business.

Furthermore, there is undisputed, quantifiable evidence that Dickey could have easily retreated without incident. The circumstances just prior to the shooting establish that Dickey was aware of the potential threat and had sufficient time to retreat. Dickey testified that he watched Boot and Stroud walk to the corner of Pendleton and Sumter Street before they turned around. At that point, according to crime scene investigators, Boot and Stroud would have been approximately 68 feet from the Cornell Arms doormat on which Dickey stood. Dickey testified that as Boot and Stroud came back in his direction they continued their profane rant and threatened to "whip [his] a--." Once Dickey realized that Boot and Stroud were heading back in his direction in a menacing manner, it would have been reasonable for Dickey to retreat. Thus, without question, Dickey had a duty to retreat; however, the

[7] Dickey has asserted the Cornell Arms mat was flush with the front of the building and, therefore, not on the sidewalk. The position of the doormat or the overhang is not dispositive on the issue of curtilage. If this argument were taken to its logical extreme, curtilage would not be determined by the underlying property but rather the position of a business's accoutrements.

question is whether Dickey could do so safely. This question was one for the jury to resolve.

Additionally, I find disingenuous the majority's reliance on Dickey's claimed disability as support for its holding regarding self-defense. Although Dickey testified he could not run as a result of this disability, there is evidence to the contrary in that he was able to descend several flights of stairs to the lobby in the same time it took Boot and Stroud to ride the elevator.

In view of the foregoing, I agree with the Court of Appeals that Dickey was not entitled to a directed verdict based on his claim of self-defense.

## B. Application of "Stand Your Ground" Law

In conjunction with his "duty to retreat" challenges, Dickey argues the Court of Appeals erred in finding the trial judge properly refused to retroactively apply the "Stand Your Ground" law to this case.

Although Dickey refers to the Act as the "Stand Your Ground" law, it is identified in the South Carolina Code as the "Protection of Persons and Property Act." S.C. Code Ann. § 16-11-410 (Supp. 2010). This Act states, "It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." Id. § 16-11-420(A). The Act became effective on June 9, 2006, and contained a "Savings Clause," which provides in pertinent part:

> The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide.

Act No. 379, 2006 S.C. Acts 2909.

Because this Act was promulgated prior to Dickey's September 2006 trial, defense counsel moved for the trial judge to dismiss Dickey's case based on the "immunity from criminal prosecution" created by the Act. The trial judge denied the motion, finding the Act did not apply as Dickey's case had been pending since April 2004 and, thus, was precluded from the Act's application.

The Court of Appeals held the trial judge properly refused to apply the Act retroactively. In so ruling, the court found the Act creates substantive rights for citizens and, therefore, the Act would only operate retroactively if there was a clear indication from the Legislature that this was intended. Dickey, 380 S.C. at 404-05, 669 S.E.2d at 928. Referencing the Act's savings clause, the court concluded that "the Legislature clearly manifested its intent that the Act be applied prospectively." Id. at 405, 669 S.E.2d at 928. Accordingly, the court held the Act should not have been applied to Dickey's case as the criminal prosecution was pending before the effective date of the Act. Id.

I find the Court of Appeals properly affirmed the trial judge's decision to preclude the application of the Act as the Legislature's intent is clear and unambiguous that the Act is to be applied prospectively. See State v. Varner, 310 S.C. 264, 266, 423 S.E.2d 133, 134 (1992) (recognizing that prospective application is presumed absent a specific provision or clear legislative intent to the contrary). In any event, the evidence presented clearly showed that Dickey was not in his home, business, or vehicle at the time of the shooting.

### C. Sufficiency of Self-Defense Jury Instructions

Finding the trial judge properly submitted self-defense to the jury, I now assess the sufficiency of the judge's jury instructions.

**(1) "*Right to Act on Appearances*"**

In challenging the judge's instructions, Dickey argues the Court of Appeals erred in finding the instruction on the right to act on appearances was adequate "where the instruction did not explain the proper test, which is especially critical where Dickey could see Boot reaching under his shirt." Additionally, Dickey asserts the Court of Appeals "failed to recognize that the right to act on appearances is a separate issue from the second and third elements of self-defense regarding actual danger and reasonable belief of danger."

As an initial matter, I believe Dickey is barred from raising certain arguments to this Court as they were not presented to the trial judge or the Court of Appeals. <u>See</u> <u>State v. Haselden</u>, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

At trial, Dickey's counsel submitted two requests to charge on the right to act on appearances. Although the trial judge instructed the jury on the right to act on appearances, he did not use the specific language requested by Dickey.[8] On appeal, Dickey generally argued that the trial judge "erred by

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[8] The trial judge instructed the jury on the right to act on appearances as follows:

> In deciding whether the defendant was or believed that he was in imminent danger of death or serious bodily injury you should consider all of the facts and circumstances surrounding the offense including the physical condition and the characteristics of the defendant and the victim. . . . [I]t does not have to appear that the defendant was actually in danger. It is enough if the defendant believed that he was in imminent danger and a reasonably prudent person of ordinary firmness and courage

refusing to adequately charge on appearances." Accordingly, I confine my review of this issue solely to a determination of whether the trial judge's instruction on the right to act on appearances adequately covered Dickey's requests to charge.

To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Burkhart, 350 S.C. at 263, 565 S.E.2d at 304. "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." Id. An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007).

Turning to the facts of the instant case, I agree with the decision of the Court of Appeals that the trial judge sufficiently instructed the jury on the right to act on appearances as the instruction essentially "tracked" the language of this Court's opinion in State v. Jackson, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955).[9] Notably, Dickey cited Jackson in support of his two requests. Given the judge's instruction covered the substance of Dickey's

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> would [have] had the same belief. A defendant has the right to act on appearances even though the defendant's beliefs may have been mistaken.

[9] In Jackson, this Court held:

> The test is not whether there was testimony of an *intended* attack but whether or not the appellant *believed* he was in imminent danger of death or serious bodily harm, and he is not required to show that such danger actually existed because he had a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief.

Jackson, 227 S.C. at 278, 87 S.E.2d at 684.

requests, the judge's failure to charge the requests did not constitute reversible error.

### (2) *"Curtilage/Duty to Retreat"*

Dickey asserts the Court of Appeals erred in finding the trial judge correctly refused to instruct the jury on curtilage. In support of this assertion, Dickey claims the Court of Appeals erred in holding that "the duty to retreat was adequately charged based solely on its conclusion that the public sidewalk was not curtilage."

At trial, Dickey's counsel requested the following instruction on curtilage:

> The absence of a duty to retreat extends to the curtilage of the dwelling or place of business. The curtilage is the area of land adjoining a dwelling or business, which includes porches, outbuildings, yards, gardens and parking lots.

Although the trial judge declined this instruction, he charged the jury on the duty to retreat:

> I would charge you that if a defendant is on his own premises or if a defendant is on his own place of business that the defendant had no duty to retreat before acting in self-defense.

As previously discussed, I agree with the Court of Appeals' ruling that Dickey was not within the curtilage of the apartment building as he was on a public sidewalk at the time of the shooting. Even if curtilage should have been charged, I find Dickey's request to charge was an incorrect statement of law. The charge expanded this state's definition of curtilage by adding the phrase "the area of land adjoining a dwelling or business." See Wiggins, 330 S.C. at 548 n.15, 500 S.E.2d at 494 n.15 (defining curtilage to include outbuildings, the yard around a dwelling, a garden of the dwelling, or the parking lot of a business); cf. State v. Brooks, 79 S.C. 144, 149, 60 S.E. 518,

520 (1908) (stating that "one on his land, adjoining a public road, if assaulted by another who is on such road, is bound to retreat before taking the life of his adversary if there is probability of his being able to escape without losing his life or suffering grievous bodily harm" given "he would not have had the right to eject his adversary from the place where he had a right to be").

Accordingly, I believe the Court of Appeals correctly found that self-defense was properly submitted to the jury and the trial judge sufficiently charged the requisite elements.

## II. Voluntary Manslaughter

In view of my conclusion that Dickey was not entitled to a directed verdict of acquittal based on self-defense and the instructions regarding self-defense do not warrant reversal, the question becomes whether the trial judge erred in submitting the lesser-included offense of voluntary manslaughter to the jury or committed error in the substance of the jury instructions.

### A. Submission of Voluntary Manslaughter to the Jury

Dickey asserts the Court of Appeals erred in "failing to reconcile that fear can constitute heat of passion under Wiggins with self-defense as a matter of law under Hendrix." In support of this assertion, Dickey claims the fear required for voluntary manslaughter "must be considerably greater in degree or kind than the rational fear" required for self-defense. Specifically, Dickey believes that "it must be an irrational fear that causes a person to lose control of himself temporarily." He further contends the Court of Appeals erred in finding there was "ample evidence" of heat of passion to support a charge of voluntary manslaughter. Essentially, Dickey avers the evidence supports a finding that "he either shot with malice or in self-defense"; therefore, the jury should not have been instructed on voluntary manslaughter.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." Pittman, 373 S.C. at 572, 647 S.E.2d at 167 (citation omitted). "Heat of passion alone will not suffice to reduce murder to voluntary manslaughter." Id. "Both heat of passion and sufficient legal provocation must be present at the time of the killing." Id. "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Id.

"To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." Id. at 572, 647 S.E.2d at 168 (citation omitted). "In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969).

After the Court of Appeals issued its decision as to Dickey's case, this Court clarified the law with respect to whether fear can constitute sudden heat of passion. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010), cert. denied, 131 S. Ct. 1504 (2011).

In Starnes, the defendant appealed his two murder convictions arguing, in part, that the trial judge erred in failing to charge the jury on the law of voluntary manslaughter. Id. at 596, 698 S.E.2d at 607-08. Starnes claimed he was entitled to the charge as he testified that when one of the victims pointed a gun at him, he felt threatened and was in fear; thus, the threat of imminent deadly assault was sufficient to submit the charge of voluntary manslaughter to the jury. Id. at 596, 698 S.E.2d at 608.

Although the Court found the trial judge properly refused to charge voluntary manslaughter, it clarified the law concerning "how a defendant's fear following an attack or a threatening act relates to voluntary manslaughter." Id. at 597, 698 S.E.2d at 608. Specifically, the Court stated:

> We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence. Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence.
>
> A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter-it will not justify it. This is the distinction between voluntary manslaughter and self-defense. We reiterate that evidence of self-defense and voluntary manslaughter may coexist and that a charge on self-defense **and** voluntary manslaughter may be warranted.

Id. at 598-99, 698 S.E.2d at 609 (second emphasis added).

Applying Starnes to the facts of the instant case, I find the Court of Appeals correctly affirmed the trial judge's decision to submit voluntary manslaughter to the jury as a lesser-included offense of murder. Initially, I note that Dickey conceded the element of sufficient legal provocation; thus, I confine my analysis to the remaining element of heat of passion.

I find the State presented evidence from which the jury could have determined that Dickey's fear manifested itself in an uncontrollable impulse to do violence. Dickey testified that he was "afraid of being hurt or killed." In addition to evidence of Dickey's fear, West and McGarrigle claimed that Dickey looked "angry" and appeared "irritated" during the encounter outside of the apartment. Furthermore, over the course of a short time-period, Dickey endured Boot's profane verbal attack and threats of violence, thus, rendering Dickey incapable of cool reflection as a result of his anger and fear of Boot. In light of this evidence, I disagree with the majority's conclusion that Dickey "acted in a deliberate, controlled manner." It cannot be said that there was no evidence whatsoever tending to reduce the crime from murder to manslaughter.

### B. Trial Judge's Use of an "Illustration" in Charge

In concluding that the trial judge properly submitted the charge of voluntary manslaughter to the jury, the analysis turns to the substance of the judge's instruction.

Dickey argues the Court of Appeals erred in finding the trial judge's illustration during the voluntary manslaughter portion of his charge was not an improper comment on the facts of the case. Specifically, Dickey challenged the following language in the judge's charge:

> By way of illustration and I would point out this is by illustration alone, that if an unjustifiable assault is made with violence with the circumstances of indignity upon a man's person and the party so assaulted kills the aggressor the crime will be reduced to manslaughter.

Dickey claims the illustration was an unconstitutional[10] comment on the facts of the case given "the undisputed nature of the facts and the judge's directive that the exact facts of the case 'will be' manslaughter."

The Court of Appeals rejected Dickey's challenge. In so ruling, the court found the charge, taken as a whole, was not erroneous as it was "unlikely that a reasonable juror would have singled out the illustration portion of the charge and interpreted it as the court's opinion on the facts of this case or as an instruction on the weight to be given to the evidence." Dickey, 380 S.C. at 402-03, 669 S.E.2d at 927.

For several reasons, I agree with the Court of Appeals' finding that the judge's "illustration" did not constitute reversible error. First, the judge was extremely thorough in his instructions and emphasized to the jurors that they were the arbiters of the facts. Secondly, the judge clearly instructed the jury that his instruction was "by illustration alone." Finally, the judge did not impermissibly indicate his opinion as to the weight or sufficiency of the evidence, Dickey's guilt, or any fact in controversy. Significantly, the judge instructed the jury that he was not permitted to have any opinions regarding the facts of the case and that the jury should not construe anything he said during trial as an opinion regarding the facts. See State v. Jackson 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989) ("Under South Carolina law, it is a general rule that a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused.").

Based on the foregoing, I would affirm the decision of the Court of Appeals.

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[10] See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

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

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South Carolina Department of Social Services, Respondent,

v.

Mary C. and Daniel C., Defendants,

Of Whom Mary C. is the, Appellant,

and Daniel C. is the, Respondent.

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Mary C., Appellant,

v.

Daniel C., Respondent.

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Appeal From Greenville County
Rochelle Conits, Family Court Judge

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Opinion No.4891
Heard June 7, 2011 – Filed September 21, 2011

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**AFFIRMED IN PART and REVERSED IN PART**

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David Michael Collins, Jr., and J. Benjamin Stevens, both of Spartanburg; for Appellant.

Albert V. Smith, of Spartanburg; for Respondent Daniel C.

Deborah Murdock, of Mauldin; for Respondent South Carolina Department of Social Services.

Catherine Christophilis, of Greenville; Guardian ad Litem.

Virginia Ravenel, of Columbia; Robert Clark and Don Stevenson, both of Greenville; for Respondent Guardian ad Litem.

**WILLIAMS, J.:** On appeal from the family court, Mary C. (Mother) argues the family court improperly weighed the evidence in a South Carolina Department of Social Services (DSS) intervention action regarding the identity of her daughter's (Anna G.) sexual abuser. In addition, Mother claims the family court erred in assessing attorney's fees against Mother for the substitute counsel representing the volunteer guardian ad litem in the DSS intervention action and in assessing guardian ad litem fees against Mother for the appointed guardian in the private custody action. We affirm in part and reverse in part.

## FACTS

Mother and Daniel C. (Father) were never married but had one child together, Anna G., who was born on December 11, 2004. Shortly after Anna G.'s birth, Mother filed a private custody action on March 4, 2005, against Father, requesting custody of Anna G., child support, contribution from Father for medical expenses from Mother's pregnancy, past and future

medical expenses for Anna G., a visitation schedule, and attorney's fees and costs. In his Answer, Father admitted paternity and agreed to Mother's claims for custody and child support but denied responsibility for Mother's pregnancy costs and attorney's fees.

On June 22, 2007, the parties consented to the appointment of a guardian ad litem (GAL), Catherine Christophilis, in the private custody action. Approximately three months later, Anna G.'s counselor notified DSS she believed Father was sexually abusing Anna G. based on Anna G.'s behavior and statements during the child's therapy sessions. The family court suspended Father's visitation rights while DSS investigated the sexual abuse allegations. After issuing its report, DSS filed an intervention action on March 17, 2008, against Mother and Father, alleging Anna G.'s placement with Father put child at substantial risk of sexual abuse. Father filed an Answer denying the allegations of abuse. Mother filed no responsive pleadings. At that time, a volunteer GAL, Colleen Hinton, was assigned to represent Anna G. in the intervention action.[1]

On May 22, 2008, the family court issued a sua sponte order to continue the final hearing in the private custody action until the sexual abuse allegations in the intervention action were litigated. Then, on August 4, 2008, the family court issued a pre-trial order consolidating the private custody action and the intervention action because "the issues involved in each [were] intertwined and closely related."

The family court held a hearing to resolve the allegations of sexual abuse on September 22 to 26, 2008, October 22, 2008, and January 8, 2009.

[1] Mr. Clark and Mother agree in their briefs that under the GAL Program, a staff attorney is employed on a contract basis to represent the volunteer GAL assigned to any abuse and neglect case. In this case, Robert Clark was assigned to represent Colleen Hinton, the volunteer GAL, for the intervention action. Subsequently, Mr. Clark hired Don J. Stevenson to cover the intervention portion of this case because Mr. Clark was already scheduled to be in court for DSS the same week. Mr. Clark filed a motion for attorney's fees on July 29, 2008, which the family court heard on January 8, 2009.

Although the family court initially consolidated the cases, the family court ruled it would only try the intervention action during the seven-day scheduled hearing because the issues in the custody action could not be addressed until it resolved the allegations of sexual abuse. After hearing testimony from numerous witnesses over the course of seven days, the family court found Anna G. was sexually abused but the perpetrator was unknown. The family court required Mother and Father to each pay the GAL $2,500 in fees for her services in the private custody action. In addition, the family court held Mother and Father must pay $2,593.75 to the substitute attorney (hired by appointed counsel) to represent the volunteer GAL in the intervention action. The family court then ordered that "the DSS portion of this case shall be closed, and DSS shall be dismissed from this action." Neither party objected to or appealed the family court's decision to close the intervention portion of the case. Mother then filed a Rule 59(e), SCRCP, motion to reconsider, which the family court denied. Mother appealed.[2] Neither DSS nor the guardians contest the family court's rulings.

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[2] We note the family court consolidated the intervention and private custody action but only ruled on the intervention portion of the action prior to Mother's appeal to this court. Generally, an order that leaves some further act to be accomplished is considered interlocutory. See Bolding v. Bolding, 283 S.C. 501, 502, 323 S.E.2d 535, 536 (Ct. App. 1984) (dismissing appeal when order appealed from did not finally dispose of the whole subject matter in litigation). However, both parties agree, and we find, the intervention portion of this action should be addressed. First, the parties agree that the family court issued a final order in the DSS portion and separated these cases by consent. Second, we should address these issues based on the equities involved in this case and the best interests of Anna G. She has not seen Father since the family court issued its order, and because the family court has taken no further action in the custody portion of this case, we find dismissal under the circumstances would create an injustice to not only the parties, but more importantly, to Anna G. Additionally, we find support for our decision from Hooper v. Rockwell, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999), in which the supreme court held that an order issued after a merits hearing in a removal proceeding is immediately appealable. The supreme court stated,

## STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 651-52 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the trial court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Lewis, 392 S.C. at 385, 709 S.E.2d at 651-52. The burden is upon the appellant to convince this court that the family court erred in its findings. Id.

## LAW/ANALYSIS

### A. Identity of Child's Sexual Abuser

Mother claims the family court erred in finding that an unknown perpetrator, as opposed to Father, sexually abused Anna G. because DSS established by a preponderance of the evidence that Father abused Anna G. We disagree.

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> [A]ny order issued as a result of a merit hearing, as well as any later order issued with regard to treatment, placement, or permanent plan, is a final order that a party must timely appeal. At that point, investigators and DSS have presented evidence to the family court, the parents or guardians of the child have had an opportunity to challenge the evidence and present their case, and the family court has decided whether the allegations of the removal petition are supported by a preponderance of the evidence . . . .

Pursuant to section 63-7-1650 of the South Carolina Code (2010), DSS may petition the family court for authority to intervene and provide protective services without removal of custody if DSS concludes by a preponderance of the evidence the child is an abused or neglected child and the child cannot be protected from harm without intervention. See § 63-7-1650(A). The family court must hold a hearing to determine whether intervention is necessary within thirty-five days of the filing date. See § 63-7-1650(C). Intervention and protective services must not be ordered unless the family court finds the allegations of the petition are supported by a preponderance of the evidence, including a finding the child is an abused or neglected child and the child cannot be protected from further harm without intervention. See § 63-7-1650(E).

The following evidence was adduced at the seven-day intervention hearing prior to the family court issuing an order finding DSS failed to prove by a preponderance of the evidence that an unknown perpetrator, as opposed to Father, sexually abused Anna G.

Mother and Father met as co-workers at an airline in Greenville, South Carolina. Eventually, Mother and Father commenced a romantic relationship, yet each maintained opposite accounts of their first sexual encounter. In finding the history of the parties' relationship was pertinent to the case, the family court noted the variations in their stories and found Father's version to be credible.[3] At trial, Mother stated she did not remember having sex with Father because of an adverse reaction from a pain medication mixed with alcohol, whereas Father said they were sober and it was a consensual sexual encounter. In any event, the family court found and both parties admitted to having repeated consensual sexual encounters before Mother conceived Anna G. Father admitted to encouraging Mother to obtain an abortion and to cutting off contact with Mother until shortly before Anna

[3] The family court found, "[Mother's] parents were less than happy with this interracial relationship and most distressed when she became pregnant. I believe her version of the initial sexual encounter with [Father] is responsive to her parents' negative reaction to this relationship, thereby diminishing her accountability in this relationship."

G. was born but stated he changed his mind and wanted to become involved in the child's life before Mother gave birth to Anna G.

Mother initially permitted Father informal supervised visitation with Anna G. Approximately three months after Anna G. was born, Mother petitioned the family court for a formal visitation schedule as well as child support. Beginning in April 2005, the family court established a regular visitation schedule for Father with Anna G., which did not include overnight visitation. Father successfully increased his visitation with Anna G., but he was not awarded overnight visitation until July 2007. No allegations of sexual abuse were made prior to the commencement of Anna G.'s overnight visitation with Father.

In May 2007, shortly before Anna G.'s overnight visitation was to begin with Father, Mother scheduled therapy sessions with Ms. Meredith Thompson-Loftis, a specialist in sexual abuse and post-traumatic stress disorders. Ms. Loftis testified that Anna G., who was almost three years old, began to display sexualized behaviors in August 2007, which included masturbating in front of Ms. Loftis, urinating on the floor despite being potty-trained, and stating after prompting from Ms. Loftis that she, her sister, and Father touched and licked her "bottom,"[4] while all were in Father's bed.

Ms. Lynn McMillan, an expert in forensic interviewing of child abuse, testified before the family court. Ms. McMillan stated Anna G. made disclosures about being sexually abused by her sisters and Father in her forensic interview.

Ms. Cindy Stichnoch, an expert in the assessment and treatment of sexual behavior issues in children, testified before the family court. Ms. Stichnoch reviewed the DSS files; the written reports and videos from Anna G.'s sessions with Ms. Loftis and Ms. McMillan; treatment records from Anna G.'s pediatricians; Father's polygraph results; interview reports and affidavits from Mother, Father, and Father's two daughters; and the GALs'

[4] Ms. Loftis testified "bottom" was Anna G.'s word for her vaginal and anal area.

reports. Ms. Stichnoch was highly critical of Ms. Loftis' interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual abuse allegations until a full assessment was conducted. Ms. Stichnoch stated a child of Anna G.'s age is easily influenced, and repetitive sessions and questions about the allegations could inadvertently and inappropriately reinforce those allegations with the child. Ms. Stichnoch also opined that Ms. McMillan inappropriately led Anna G. and continued to repeat the same questions to the child until she was satisfied with Anna G.'s responses.

Dr. Selman Watson, an expert in clinical and forensic psychology, testified at the hearing regarding his psychological evaluations of Mother and Father. Dr. Watson said Father was not a pedophile, and while Dr. Watson believed Anna G. had been sexually abused, he could not conclude with a reasonable degree of medical certainty that Father was the perpetrator.

Dr. Tracy Butcher, Anna G.'s pediatrician, also testified at the intervention hearing. She stated Mother had brought Anna G. to her office for numerous health and allergy issues since Anna G. was born. Mother reported Anna G. suffered from nightmares and sleeping disturbances as early as May 2006, but Dr. Butcher stated Mother's concerns over these issues escalated after overnight visitation commenced. Dr. Butcher testified she was concerned that Anna G. was still breastfeeding at twenty-four months because the child was using this to manipulate Mother. When questioned on cross-examination, Dr. Butcher testified she never observed any indicators that Anna G. was being sexually abused.

Father's two daughters, Jacqueline and Victoria, testified at trial. Both strongly denied that Father had ever acted inappropriately, either towards them or towards Anna G. Jacqueline, who was twenty on the date of trial, stated both she and her sister had a close relationship with Anna G. Jacqueline stated she had slept in the same bed with Father and had also slept in the same bed with Anna G. and her sister, Victoria, but nothing inappropriate happened during those times, and at no point had he ever sexually abused her. Jacqueline also testified she had never seen Anna G. act

out as she had in the presence of Mother or her therapist. Father's older daughter, Victoria, who was twenty-two at the time of the hearing, stated Father was loving and caring and taught his daughters how to be responsible. Victoria testified that because she works with young children as an early childhood major, she knows the differences between "what's curious . . . [and] what's weird. [Anna G.] act[s] just as normal with me as everybody else." Victoria stated while she considered herself "friends" with Mother before the sexual abuse allegations arose, she considered Mother to be overbearing and overprotective, particularly with her instructions to Father on how to parent and care for Anna G. while in Father's custody.

Father's ex-wife, Gwendolyn C., also testified at the intervention hearing. She stated that despite being divorced, she and Father raised Jacqueline and Victoria together, and she never had any reason to believe he inappropriately touched one of their children. While Gwendolyn stated she had to seek court action to require Father to pay child support, she said he was a good father to her daughters and to Anna G. and that based on her observations, Anna G. was extremely affectionate towards and attached to Father.

After hearing testimony over the course of seven days, the family court issued a thirteen-page order, in which it found Anna G. had displayed sexualized behavior, but it could not find by a preponderance of the evidence that Father was the perpetrator. In so finding, the family court held Anna G.'s disclosures were not trustworthy based on the methodology employed by her therapists in eliciting her sexual abuse disclosures. The family court relied on Ms. Stichnoch's and Dr. Watson's conclusions that Anna G.'s therapists engaged in inappropriate leading and suggestive tactics, which were well below the appropriate standard and protocol for such interviews.

Moreover, in explaining the sexual abuse allegations, the family court held Anna G. had an extensive medical history, including digestive and reflux issues, allergies, as well as vaginal soreness and redness, all which were medically documented prior to any abuse allegations. In reviewing the child's medical records, the family court found Anna G.'s yeast infections and

diaper rash were to be treated with ointment prescriptions applied to her vaginal area two to four times per day, and these treatments coincided with Anna G.'s statements that Father touched her "bottom."

The family court emphasized Mother was controlling and micromanaging when it came to Father's visitation and his relationship with Anna G. Both Father and his daughters testified Mother was overbearing when it came to Anna G.'s care while in Father's custody, and the family court found the daughters' testimony to be "extremely credible." A review of Mother's extremely detailed food log and daily routine schedule as well as Mother's medication, vitamin, and supplement instructions to Father supports this conclusion.

While Mother clearly cares greatly for her child, we agree with the family court's finding that the conflict in the parties' parenting skills and Mother's desire to micromanage Father's visitation with Anna G. has partially contributed to the circumstances surrounding these allegations. Moreover, we find it troubling, as did the family court, that Anna G. continued to "display the level of sexualized behavior and distress after having absolutely no contact or visitation with [Father] in over one full year."

While this court has jurisdiction in an intervention action to find facts based on our own view of the preponderance of evidence, when evidence presented in the record adequately supports the findings of the family court, due deference should be given to the family court's judgment based on its superior position in weighing such evidence. Aiken Cnty. Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 93, 403 S.E.2d 142, 144 (Ct. App. 1991). Based on the voluminous testimony from numerous witnesses, we strongly believe the family court was in the best position to determine whether Anna G. was being abused by Father. See Hooper, 334 S.C. at 297, 513 S.E.2d at 367 ("The appellate court is not, however, required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony."). While we recognize conflicting evidence was presented to the family court, we find ample evidence in the record to support the family court's findings

and conclusions and thus defer to the family court on this issue. Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885-86 (1994) ("Since the testimony on this issue is so divergent, we adopt the findings of the Family Court on this issue as the sitting judge was in the best position to determine the credibility of the witnesses.").

**B. Award of Attorney's Fees in DSS Action**

Mother claims the family court committed reversible error when it required her to pay a portion of counsel's attorney's fees because the GAL Program, not Mother, was required to pay appointed counsel for representing the volunteer GAL in this abuse and neglect proceeding. We agree.

The GAL Program, including the services it provides by way of its volunteer GALs, is a creature of state statute, both in funding and in administration. See S.C. Code Ann. § 63-11-570 (2010) ("The General Assembly shall provide the funds necessary for the South Carolina Guardian ad Litem Program to carry out the provisions of [the GAL Program] . . . ."); see also S.C. Code Ann. § 63-11-500 (2010) ("This program must be administered by the Office of the Governor."); S.C. Code Ann. § 1-30-110 (2010) (requiring all funds associated with the GAL Program be administered by the Office of the Governor).

The purpose of the GAL Program is to provide volunteer GALs to serve as court-appointed special advocates for children in abuse and neglect proceedings. See § 63-11-500 ("This program shall serve as a statewide system to provide training and supervision to volunteers who serve as court-appointed special advocates for children in abuse and neglect proceedings within the family court, pursuant to Section 63-7-1620."); see also S.C. Code Ann. § 63-7-1620(1) (Supp. 2010) ("In all child abuse and neglect proceedings . . . [c]hildren must be appointed a GAL by the family court."). Once appointed, legal counsel must be provided to the GAL during the pendency of the abuse and neglect proceeding. See id. ("A GAL serving on behalf of the South Carolina Guardian ad Litem Program or Richland County

CASA must be represented by legal counsel in any judicial proceeding pursuant to Section 63-11-530(C).").

In this case, the legal counsel provided by the GAL Program, Mr. Clark, had scheduling conflicts with other cases and chose to hire another attorney, Mr. Stevenson, to represent the volunteer GAL in the hearing before the family court. Mr. Clark admitted he is paid a flat fee by the GAL Program to represent volunteer GALs. Mr. Clark then sought to recover attorney's fees on Mr. Stevenson's behalf at the close[5] of the intervention action.

In support of the family court's award of attorney's fees, Mr. Clark cites to Rule 41(a), SCRFC,[6] as authority to assess attorney's fees greater than

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[5] Mr. Clark submitted a motion to require Mother and Father pay attorney's fees prior to trial, but the family court did not rule on his motion until after trial was concluded.

[6] Rule 41, SCRFC, states:

> **(a) Limitation on Fees.** In all child abuse and neglect proceedings, the court shall grant to legal counsel appointed for the child subject to child abuse and/or neglect proceedings, a fee not to exceed One Hundred ($100.00) Dollars. The court shall grant to a guardian ad litem appointed for a child subject to such proceedings a fee not to exceed Fifty ($50.00) Dollars.
>
> **(b) Exceptions.** If the court determines that extraordinary circumstances require the award of a fee larger than that which is specified in this rule, the court shall set forth in its order the salient facts upon which the extraordinary circumstances are based and shall award a fee to appointed legal counsel or guardian ad litem in an amount which the court determines to be just and proper.

$100 against Mother based on "extraordinary circumstances." However, Rule 41(a) only pertains to "legal counsel appointed for the child[.]" (emphasis added). Moreover, section 63-7-1620(2) clearly states legal counsel for the child in an abuse and neglect proceeding is not the same as legal counsel for the GAL. See § 63-7-1620(2) ("The family court may appoint legal counsel for the child. Counsel for the child may not be the same as counsel for . . . the child's guardian ad litem."). Because the plain language of Rule 41 clearly does not pertain to legal counsel appointed for the GAL, we find Rule 41 inapplicable.

Mr. Clark also contends that Mother should be responsible for paying these fees, despite the GAL Program being funded by the General Assembly, because the family court has the statutory authority to assess attorney's fees against any party subject to its jurisdiction. We disagree.

First, we find the family court has the authority to assess attorney's fees against parties subject to its jurisdiction pursuant to section 63-3-530(38) of the South Carolina Code (Supp. 2010)[7] as well as Rule 12, SCRFC.[8]

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[7] Section 63-3-530(38) grants the family court exclusive jurisdiction

> to hear and determine an action where either party in his or her complaint, answer, counterclaim, or motion for pendente lite relief prays for the allowance of suit money pendente lite and permanently. In this action the court shall allow a reasonable sum for the claim if it appears well-founded. Suit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court . . . .

[8] Rule 12, SCRFC, states, "If a guardian ad litem is represented by an attorney, the court in its discretion may assess reasonable attorneys' fees and costs."

Despite the family court's broad authority under 63-3-530, we find the General Assembly did not intend for parties in abuse and neglect proceedings to pay legal counsel's attorney's fees when representing volunteer GALs. See Spartanburg Co. Dept. of Soc. Servs. v. Little, 309 S.C. 122, 420 S.E.2d 499 (1992) (finding section 20-7-420(38) (currently 63-3-530(38)), which gives the family court authority to award attorney's fees against a party, is a statute of general authority that may be overridden by a more specific statute limiting the family court's authority). The provisions of the GAL Program, which necessarily include payment of the GAL Program's legal counsel, are statutorily required to be funded by the legislative branch and to be administered by the executive branch. See §§ 63-11-500, -570. Because the General Assembly has already provided for payment of the GAL Program's attorneys, we find Mother should not also be required to pay attorney's fees.

In this instance, the GAL Program paid Mr. Clark a flat fee for his services as part of Mr. Clark's contract with the GAL Program. Mr. Clark stated he had scheduling conflicts with other cases; however, instead of seeking a continuance, in this or any of his other cases, he chose to hire Mr. Stevenson to represent the volunteer GAL. Mr. Clark then sought to recover attorney's fees for Mr. Stevenson's services from Mother. Mr. Clark points to no authority that allows him to seek payment for a substitute attorney chosen by Mr. Clark when Mr. Clark is already being paid by the GAL Program. The substitution of counsel was not due to a conflict in the case that required Mr. Clark's withdrawal but rather out of convenience and as an alternative to seeking a continuance. In similar circumstances, many lawyers who are appointed in abuse and neglect proceedings choose to hire substitute counsel in lieu of serving as appointed counsel. In these instances, the fee arrangement is between the lawyers.

Moreover, if Mr. Clark and the GAL Program are contractually obligated to one another, we do not see how Mr. Clark's decision to hire substitute counsel due to scheduling conflicts should work a financial detriment to Mother. While Mr. Clark was required to represent the GAL by

virtue of his contract with the GAL Program, neither the GAL nor Mother were contractually obligated to Mr. Clark. Because Mr. Clark presented no evidence that he incurred any fees, we find it inappropriate to award fees against Mother. See generally Williamson v. Middleton, 383 S.C. 490, 495-96, 681 S.E.2d 867, 870-71 (2009) (finding attorney could not recover attorney's fees when attorney presented no evidence that client actually incurred fees and when no fee agreement existed between the client and attorney). Accordingly, we reverse the family court's decision on this issue.

### C. Award of GAL Fees in Private Custody Action

Last, Mother contends the family court improperly ordered her to pay $2,500 in GAL fees in the private custody action. We agree.[9]

Appointment of a GAL in a private action is controlled by the South Carolina Private Guardian Ad Litem Reform Act (the Act).[10] When the family court appoints a GAL, it must set forth the method and rate of compensation for the GAL, which includes an initial authorization of a fee based on the facts of the case. See § 63-3-850(A) (Supp. 2010). If the GAL decides it is necessary to exceed the fee initially authorized by the family court, the GAL must provide notice to both parties and obtain the family court's written authorization or the consent of both parties to charge more than the initially authorized fee. Id.

Pursuant to section 63-3-810 of the South Carolina Code (2010), the family court properly appointed a GAL, Catherine Christophilis, in the private custody action. See § 63-3-810(A) ("In a private action before the family court in which custody or visitation of a minor child is an issue, the

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[9] Father did not appeal the family court's decision to require him to contribute towards the attorney's fees or the GAL fees. Thus, the family court's ruling is law of the case as it pertains to Father. See In re Morrison, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting an unappealed ruling becomes law of the case and precludes further consideration of the issue on appeal).

[10] See S.C. Code Ann. §§ 63-3-810 to -870 (2010).

court may appoint a guardian ad litem . . . ."). While Ms. Christophilis is entitled to appropriate fees for her services as a GAL as set forth in the family court's initial appointment order, the family court explicitly reserved ruling on her fees until it resolved the private custody action. When the court addressed the fee issues at the end of the intervention action, Ms. Christophilis admitted she had not filed her fee affidavit with the court. The family court then stated, "Well, your fees are associated with the private action. . . . Just hold your fees until the private action." As a result, the family court took no evidence concerning Ms. Christophilis' entitlement to GAL fees. However, in its order, the family court required Mother and Father to pay a combined $5,000 in GAL fees to Ms. Christophilis, which is $2,500 greater than initially authorized pursuant to the family court's appointment order. Because the family court explicitly reserved all custody issues for the subsequent and separate phase of the proceeding, and as such, did not follow the mandates of section 63-3-850, the family court erred in awarding $2,500 in GAL fees against Mother.[11]

## CONCLUSION

Based on the foregoing, the family court's decision is

**AFFIRMED IN PART AND REVERSED IN PART.**

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[11] In addition, we note when the family court awarded fees to Ms. Christophilis in its order, it failed to "take into account" any of the requisite factors from section 63-3-850(B) (specifically (1) the complexity of the issues before the court; (2) the contentiousness of the litigation; (3) the time expended by the guardian; (4) the expenses reasonably incurred by the guardian; (5) the financial ability of each party to pay fees and costs; and (6) any other factors the court considered necessary). See Loe v. Mother, Father, & Berkeley Cnty. Dep't of Soc. Servs., 382 S.C. 457, 473-74, 675 S.E.2d 807, 816 (Ct. App. 2009) (remanding issue of whether statutory requirements from section 63-3-850(B) were satisfied when family court improperly reviewed the reasonableness of GAL fees pursuant to Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991)).

**HUFF and THOMAS, JJ., concur.**

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

Matthew C. Sullivan, Appellant,

v.

Hawker Beechcraft Corp.
(fka Raytheon Aircraft Co.),
Raytheon Aircraft Co., Teledyne
Continental Motors, Inc., J.P.
Instruments, Inc., Pacific Scientific
Company, Aircraft Belts, Inc., Dukes,
Inc., FloScan Instrument Co., Inc.,
UMA, Inc. dba UMA Instruments, Inc.,
Orlando Avionics Corp. dba Orlando
Aircraft Service, Mena Aircraft
Interiors, Inc., Hickok, Inc.,
The Estate of John William C.
Coulman, Deceased, The Estate
of Eric Johnson, Deceased, Rodrick
K. Reck, Phillip Yoder, and John
Does 1-14 (whose true names
are unknown), Individuals and/or
corporations involved in the design,
manufacture, inspection, installation,
maintenance, servicing, and/or repair
of Beechcraft V35 Bonanza Aircraft
Registration No. N9JQ, its engine,
fuel system, restraint systems, or
component parts, Defendants,

of whom, Pacific Scientific Company, Aircraft Belts, Inc., and Mena Aircraft Interiors, Inc. are Respondents.

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

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Opinion No. 4892
Heard May 4, 2011 – Filed September 21, 2011

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**AFFIRMED**

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Blake Alexander Hewitt and John Nichols, both of Columbia; Jamie R. Lebovits, Ellen M. McCarthy, and Brenda M. Johnson, all of Cleveland, Ohio; Robert V. Phillips, of Rock Hill, for Appellant.

Jim Hunt of Los Angeles, California; Michael Wilkes, Melissa Nichols, and Derek M. Newberry, all of Spartanburg; Russell T. Burke, of Columbia; Susan Hofer and Payton Hoover, both of Charlotte, North Carolina, for Respondents.

**KONDUROS, J.:** Matthew Sullivan appeals the dismissal of Aircraft Belt, Inc. (ABI), Mena Aircraft Interiors, and Pacific Scientific (collectively Respondents) from his civil case for damages arising from an airplane crash. Sullivan argues the trial court erred in dismissing Respondents for lack of personal jurisdiction. Sullivan also contends the trial court erred in failing to

allow him to conduct jurisdictional discovery and amend his complaint for a second time prior to dismissing the lawsuit with prejudice. We affirm.

## FACTS

Sullivan, a resident of Ohio, was injured in July 2005, when the airplane he was traveling in crashed in York County, South Carolina. The airplane was in route from the Ohio State University Airport to Rock Hill, South Carolina. An Ohio resident owned the airplane, a Beechcraft V35 Bonanza, and Sullivan alleged in the complaint it was maintained and serviced in Ohio, Florida, and Arkansas. The original purchaser of the airplane was also an Ohio resident.

Sullivan commenced two lawsuits as a result of the crash. Initially, he filed suit in Ohio state court in April 2006. In that litigation, Sullivan named several defendants including "John Doe" defendants, but never named Respondents. Almost three years after the crash, Sullivan inspected the airplane. Ohio's two-year statute of limitations had expired by the time of inspection, which led him to pursue his action in South Carolina.

On July 23, 2008, Sullivan filed his initial complaint in South Carolina against multiple defendants, including ABI and Mena. On August 25, 2009, Sullivan filed an amended complaint, naming Pacific for the first time.[1] In regards to personal jurisdiction, Sullivan asserted in the amended complaint the trial court had personal jurisdiction under S.C. Ann. § 36-2-803 (A)(4) over all defendants named "because each has caused tortious injury within this State as set forth herein, and each regularly does or solicits business, or engages in a persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this State as contemplated under the statute."

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[1] Some defendants sought to dismiss pursuant to Rule 12(b)(8), SCRCP, due to the pendency of litigation involving the same claim and the same or substantially the same issues. These included: Orlando Avionics Corp. d/b/a Orlando Aircraft Services, Philip Yoder, The Estate of Eric A. Johnson, The Estate of John William C. Coulman, and Rodrick K. Reck.

In response to the amended complaint, Respondents filed motions to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), SCRCP. The trial court heard the motions of ABI and Mena on January 5, 2009. The trial court heard Pacific's motion for lack of personal jurisdiction on January 23, 2009. Respondents argued Sullivan's amended complaint was insufficient to meet Sullivan's burden of making a prima facie showing of jurisdiction and the trial court lacked both general and specific personal jurisdiction. ABI, Mena, and Pacific submitted affidavits in support of their respective motions.

Respondents' affidavits asserted that their principal places of business were outside of South Carolina and at no time did they solicit or conduct business in the state. Additionally, they maintained (1) none of them exceeded one percent of their revenue from sales to customers located in South Carolina in the years leading up to the airplane crash, (2) no goods were produced or services rendered by Respondents in this state, and (3) Respondents never obtained a business license in South Carolina.

Sullivan did not conduct jurisdictional discovery on Respondents prior to the trial court hearing the motions to dismiss in January 2009. Additionally, Sullivan did not offer any affidavits or other evidence to the trial court to support his assertion of jurisdiction over Respondents. Sullivan did not allege that any of the products in the airplane were sold to anyone connected with South Carolina or that any services were performed to or on the airplane in this state. Sullivan relied solely on the long-arm statute for his argument that personal jurisdiction was established.

The trial court entered an order granting Mena's and ABI's motions to dismiss for lack of personal jurisdiction on January 30, 2009. Sullivan then filed a motion for leave to file a second amended complaint, in which he sought to add allegations regarding several defendants, including Pacific. On

April 13, 2009, the trial court entered an order granting Pacific's motion to dismiss for lack of personal jurisdiction.[2] This appeal followed.

## LAW/ANALYSIS

### I. Prima Facie Burden

Sullivan contends the trial court erred in determining his complaint and allegations could not support a finding of personal jurisdiction. Sullivan asserts his amended complaint meets the burden of a prima facie showing of personal jurisdiction and his allegation is not a legal conclusion. We disagree.

Rule 8(a), SCRCP, mandates that a complaint "shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends[.]" Sullivan's allegations of personal jurisdiction are based on section 36-2-803(A)(4) of the South Carolina Code (Supp. 2010), which provides:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> . . .
>
> (4) causing tortious injury or death in this State by an act or omission outside this State <u>if he regularly does</u>

[2] Respondents chose to file their brief jointly because the issues and defenses are substantially similar. While the appeal initially involved the dismissal of other parties, on January 15, 2010, pursuant to agreements between Sullivan and those parties, the trial court issued an order dismissing the following parties: Dukes, Inc.; FloScan Instruments Co. Inc.; The Estate of John William C. Coulman; J.P. Instruments, Inc.; Teledyne Continental Motors; Hickok, Inc.; Orlando Avionics Corp.; Rodrick K. Reck; Hawker Beechcraft Corp.; and Raytheon Aircraft Co.

> or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State[.]

(emphasis added).

"The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis." Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 505, 402 S.E.2d 177, 179 (1991). The trial court must (1) determine whether the South Carolina long-arm statute applies and (2) whether the nonresident's contacts in South Carolina are sufficient to satisfy due process. Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008).

"[T]he party seeking to invoke personal jurisdiction over a nonresident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction." Moosally v. W.W. Nortion & Co, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." Id. at 327, 594 S.E.2d at 882. "When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." Coggshell v. Reprod. Endocrine Assocs., 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). "The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law." Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." Id. at 491, 611 S.E.2d at 508.

Sullivan relies solely on the language of section 36-2-803(A)(4) in arguing the trial court has personal jurisdiction without stating any general factual allegations to support his use of the long-arm statute. The repeating

of the statute is insufficient to support a finding of personal jurisdiction, particularly based on the subsection of the long-arm statute Sullivan chose to plead. A prima facie showing of personal jurisdiction can be made through factual allegations in the complaint or through affidavits that establish a basis for the court to assert jurisdiction over an out-of state-defendant. S. Plastic Co. v. S. Commerce Bank, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992). Sullivan did not submit any affidavits, and in his amended complaint, he did not allege Respondents had any direct contact with South Carolina.

Our state's long-arm statute affords broad power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina. Cockrell, 363 S.C. at 491, 611 S.E.2d at 508; Moosally, 358 at S.C. at 329, 594 S.E.2d at 883. However, even with a liberal construction of the statute and the complaint, Sullivan has failed to allege any facts that show Respondents (1) have regular transactions of business or solicitation, (2) engage in a persistent course of conduct, (3) derive substantial revenue, or (4) consume goods or services rendered in South Carolina. Sullivan's inability to substantiate the trial court's authority over Respondents properly necessitated Respondents' 12(b)(2) motion be granted by the trial court. Thus, the trial court is affirmed.

## II. Jurisdictional Discovery

Sullivan also maintains the trial court erred in denying his request to perform additional jurisdictional discovery that would have allowed him to make a prima facie showing of jurisdiction. We disagree.

"When [the] plaintiff can show that discovery is necessary in order to meet defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless plaintiff's claim appears to be clearly frivolous." Rich v. KIS Cal., Inc., 121 F.R.D. 254, 259 (M.D.N.C. 1988). "However, where a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the court need not permit even limited discovery confined to issues of personal jurisdiction if it will be a fishing expedition."

Id. "When a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery." Tuttle v. Dozer Works Inc., 463 F. Supp. 2d 544, 548 (2006) (quoting Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402 (4th Cir. 2003)); See Roberts v. Peterson, 292 S.C. 149, 152, 355 S.E.2d 280, 281 (Ct. App. 1987) (noting that where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

Sullivan has offered mere speculation and conclusory assertions to support his request for jurisdictional discovery. The affidavits introduced by Respondents specifically deny jurisdictional acts or contacts. The record establishes the trial court's thorough review of all facts presented in favor of Sullivan and well-developed analysis of case law regarding jurisdictional discovery. Based on this court's standard of review, we defer to the trial court's discretion and affirm the trial court's decision.

On appeal, Sullivan argues the trial court misstated the burden the law imposes on a plaintiff at the initial stages of litigation. The order states "even at the initial pleading stage, Plaintiff bears the burden of providing enough evidence to demonstrate that its assertion of personal jurisdiction over the Moving Defendants is meritorious, and that there is sufficient cause to obtain jurisdictional discovery." (emphasis added). Sullivan is correct that a plaintiff is not required to assert he will be "meritorious" on personal jurisdiction; rather, he must demonstrate enough facts to support a prima facie showing. However, this issue is not preserved for review on appeal because Sullivan failed to raise this issue in a Rule 59(e), SCRCP, motion. See Godfrey v. Heller, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (holding when theory of unjust enrichment was first raised in judge's order, appellant should have challenged this basis for recovery by a Rule 59 motion to preserve the issue for appeal). Accordingly, this argument is abandoned.

We find the trial court properly applied the prima facie standard in determining whether or not Sullivan met his burden under Rule 8(a), SCRCP,

and the long-arm statute. Additionally, the trial court did not abuse its discretion in denying jurisdictional discovery. Thus, the decision of the trial court is affirmed.

## III. Dismissal of Second Amended Complaint With Prejudice

Sullivan contends Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006), provides this court with the discretion to modify a lower court's order to find a dismissal is without prejudice. While we agree this court has the discretion to make such a determination, we affirm the trial court's decision to deny Sullivan the right to amend his second complaint with prejudice.

Rule 15(a), SCRCP, provides "[a] party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served[.]" Rule 15(a), SCRCP. "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Id. "Courts have wide latitude in amending pleadings." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). "[T]he decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial [court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." Id.

The supreme court in Spence v. Spence stated that when a plaintiff is not given the opportunity to file and serve an amended complaint and "additional factual allegations or an alternative theory of recovery, which taken as true in a well-pleaded complaint may state a claim upon which relief may be granted," an appellate court affirming the dismissal may modify the order to find the dismissal is without prejudice. Id. at 130, 628 S.E.2d at 881-82. In this case, we find Sullivan, in both his Rule 59(e) motion and in his appellate brief, fails to cite any new factual allegations that would impact the jurisdictional issue. The trial court was within its discretion to deny Sullivan's motion to amend his complaint for a second time.

Because we find the trial court properly denied the motion to amend, we decline to exercise our discretion to find the dismissal was without prejudice and accordingly affirm the trial court.

## CONCLUSION

The trial court properly dismissed Respondents pursuant to their motions to dismiss for lack of personal jurisdiction. Additionally, the trial court was within its discretion to deny both jurisdictional discovery and Sullivan's motion to amend his complaint for a second time. Accordingly, the judgment of the circuit court is

**AFFIRMED.**

**SHORT and GEATHERS, JJ., concur.**