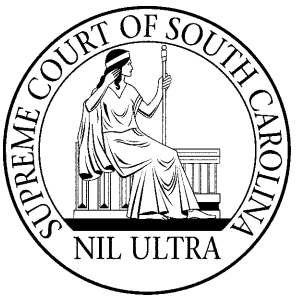

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
May 16, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Atlantic Coast Builders and Contractors, LLC, Respondent,

v.

Laura Lewis, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27044
Heard January 7, 2011 – Re-filed May 16, 2012

AFFIRMED IN PART, REVERSED IN PART

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

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

JUSTICE HEARN: Atlantic Coast Builders and Contractors, LLC brought an action against its landlord, Laura Lewis, for negligent

misrepresentation, unjust enrichment, and breach of contract. Atlantic also sought a return of the security deposit it paid pursuant to its lease with Lewis. The master-in-equity entered judgment in favor of Atlantic, and the court of appeals affirmed. *Atlantic Coast Builders & Contractors, LLC v. Lewis*, Op. No. 2009-UP-042 (S.C. Ct. App. filed Jan. 15, 2009). We granted certiorari.

Our original opinion affirmed the court of appeals, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 722 S.E.2d 213, 215 (2011), and this matter is before us again on a petition for rehearing. Upon further review, we grant the motion, dispense with further briefing and oral argument, and substitute this opinion for our original one. We now affirm the court of appeals' decision in part and reverse it in part.

FACTUAL/PROCEDURAL BACKGROUND

On March 28, 2003, Lewis agreed to lease certain property she owned in Beaufort County, South Carolina to Atlantic. The lease was for a term of twelve months, with $3,500 in rent due per month. As relevant to this case, the lease also provided as follows:

> 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.
>
> . . . .
>
> 14. Lessor's Remedies on Default. If Lessee defaults in the payment of rent, or any additional rent, or defaults in the performance of any other covenants or conditions hereof, Lessor may give Lessee notice of such default and if Lessee does not cure any such default within 10 days . . . then Lessor may

> terminate this lease on not less than (30) thirty days' notice to Lessee. . . .
>
> 15. Security Deposit. Lessee shall deposit with Lessor on the signing of this lease the sum of [t]hree thousand five hundred and 00/100 [d]ollars ($3,500) as security for the performance of Lessee's obligations under this lease, including without limitation the surrender of possession to Lessor as herein provided.

Atlantic subsequently took possession of the premises and began operating them as a building and construction office. Additionally, Atlantic made several alterations to the building, including repairing the ceiling and interior walls, replacing the flooring and electrical wiring, pressure washing the exterior, installing a telephone system, and erecting an exterior sign. In accordance with the terms of the lease, Atlantic also made rental payments for April and May 2003.

In May 2003, however, Atlantic learned that the property's zoning effectively prohibited all commercial uses. After receiving notice and warnings from Beaufort County that its use of the property was in violation of the zoning ordinance, Atlantic ceased paying rent under the lease. Yet, it did not surrender possession of the premises until July of that year, at the earliest. Atlantic subsequently brought this action against Lewis for negligent misrepresentation, unjust enrichment, breach of the lease, and breach of the covenant of quiet enjoyment.[1] Furthermore, Atlantic's

[1] Lewis counterclaimed for breach of contract, and the master denied her relief. Although Lewis has raised this issue on appeal, we find it abandoned as the argument in her brief 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).

complaint sought a return of its security deposit, which Lewis contended she retained because Atlantic remained on the premises without paying rent.[2]

The master found for Atlantic on all causes of action, 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. The master made no findings regarding the security deposit in his order. 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 in the calculation of damages. Lewis did not respond to Atlantic's motion, and the court modified its award to include this amount.

On appeal, the court of appeals affirmed pursuant to Rule 220(b), SCACR. *Atlantic Coast Builders*, Op. No. 2009-UP-042. We granted Lewis's petition for a writ of certiorari.

---

[2] Lewis denied Atlantic's entitlement to the security deposit in her answer. Moreover, the following exchange took place during the trial between Atlantic's counsel and Lewis's property manager:

> Q. When did you send the notice of default to the Plaintiff regarding the alleged breaches of the lease?
>
> A. . . . 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.

ISSUES PRESENTED

I. Did the court of appeals err in affirming the master's award of damages to Atlantic for negligent misrepresentation and breach of contract?

II. Did the court of appeals err in affirming the master's return of the deposit to Atlantic?

LAW/ANALYSIS

I. NEGLIGENT MISREPRESENTATION AND BREACH OF CONTRACT

Lewis first argues the court of appeals erred by affirming the master's entry of judgment against her for negligent misrepresentation and breach of contract. We do not reach the merits of Lewis's argument as we find it procedurally barred by the two-issue rule.

"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." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). In the present case, the master found for Atlantic on all three causes of action: negligent misrepresentation, breach of contract, and unjust enrichment. However, Lewis appealed only the findings of liability for negligent misrepresentation and breach of contract, not unjust enrichment. Accordingly, there is a ground for liability from which no appeal was taken, and our consideration of Lewis's arguments is barred by the two-issue rule.

The Chief Justice would not find that the two-issue rule applies in this case. The thrust of her argument 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). Thus, in her view, the master did not enter judgment in favor of Atlantic on its unjust enrichment claim and no unappealed theory of liability exists to trigger the two-issue rule.

However, our review of the record shows 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. While his calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case. *See Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970). Therefore, the master awarded damages to Atlantic based on a theory of unjust enrichment, and because the master made this alternate finding of liability from which Lewis did not appeal, the two-issue rule bars us from considering Lewis's arguments regarding negligent misrepresentation and breach of contract.

In the Chief Justice's view, applying the two-issue rule to this case is an "over-zealous application" of our long-standing error preservation rules because she does not believe the rule's application is clear. We certainly share her concerns about a hypertechnical application of a procedural bar to appellate arguments, but 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. We therefore agree that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us. In fact, 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).

Nevertheless, these rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it. This is so regardless, to use the Chief Justice's terms, of the "life-blood litigant or criminal defendant" before us.

However, this is not a "gotcha" game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function. While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved. Here, we 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. Therefore, the two-issue rule precludes our consideration of Lewis's arguments.

II. SECURITY DEPOSIT

Lewis argues next that the court of appeals erred in affirming the master's return of the security deposit. We agree.

As a threshold matter, the court of appeals held, and Justice Pleicones ultimately agrees, that this issue was never raised to the master and therefore is not preserved for review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). A review of the record, however, reveals this not to be the case. In its complaint, Atlantic requested a return of its security deposit, which Lewis denied in her answer. Furthermore, Lewis's property manager testified that Lewis kept the security deposit because Atlantic remained on the property for two months after it breached the lease by failing to pay rent. This issue accordingly was raised to the master, and the court of appeals erred in finding otherwise.[3] Then, when prompted by Atlantic's Rule 59(e) motion after he candidly forgot to do so, the master ruled on this issue. Our core preservation requirements therefore have been met, and there is no procedural bar to us considering this question.

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,

[3] Thus, Atlantic did not raise a new issue in its Rule 59(e) motion. We therefore do not reach Justice Pleicones's contention that Lewis herself was obligated to file a Rule 59(e) motion regarding the security deposit to preserve it for review.

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. The master, however, found Lewis would be unjustly enriched if she kept the security deposit, but we 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 because Atlantic failed to pay rent. Atlantic's remaining claims of negligent misrepresentation and breach of contract similarly are not avenues to justify it getting the security deposit back; Atlantic lost it 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. Accordingly, none of Atlantic's theories of recovery encompasses a return of the security deposit under these facts, and the master erred in including it in his calculation of damages.

In sum, we find the court of appeals erred in concluding this issue was not preserved for review. As to the merits, we hold Lewis is entitled to retain the deposit. We consequently reduce Atlantic's award by $3,500.[4]

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[4] We express no opinion regarding the Chief Justice's contention that 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 do not address it. If a question is not presented for our review, we should not answer it no matter how much we may want to do so. For as former Chief Judge Alex Sanders famously wrote, "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985). This rule is not without exception, and we can set aside our preservation rules to find a contract illegal because we "will not 'lend [our] assistance' to carry out the terms of a contract that violates statutory law or public policy." *Ward v. W. Oil Co.*, 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010). However, the Chief Justice correctly acknowledges that whether a lease whose purpose is

CONCLUSION

For the foregoing reasons, we affirm the court of appeals as to the entry of judgment against Lewis for negligent misrepresentation and unjust enrichment. However, we reverse the court of appeals' conclusion that Lewis's entitlement to the security deposit is not preserved for review. On the merits of that issue, we reverse the master and reduce Atlantic's award by $3,500 to $6,660.79.

KITTREDGE, J. and Acting Justice G. Thomas Cooper, Jr., concur. TOAL, C.J., concurring in result in part and dissenting in part in a separate opinion. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

---

contrary to the applicable zoning regulations is void *ab initio* is a question of first impression in this State. Thus, we are not lending our assistance to an illegal agreement in this case because, as the law currently exists, the contract is not illegal. The situation before us therefore is not one where we would be enforcing a contract to do a criminal act, for example, which unquestionably is void *ab initio* under our law. In those circumstances, *Ward* correctly recognized that we may *sua sponte* invalidate the parties' agreement.

CHIEF JUSTICE TOAL: I concur in the result reached by Justice Hearn for the majority on the issue of the security deposit, and dissent from her majority on the issue of improvement costs. I take issue with the 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 award of improvement costs was valid. Additionally, I join Justice Hearn in disagreeing with Justice Pleicones's position that although Atlantic requested the return of the security deposit in its complaint and Lewis denied liability for returning it in her answer, the security deposit issue was nevertheless a "new issue" when Atlantic submitted its 59(e), SCRCP, motion. On the merits, I would vacate and dismiss this case on the ground that the lease agreement was an illegal contract.

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. Cty. 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.

On the merits, I believe the court of appeals erred in affirming the master's award of damages for Atlantic. In my opinion, this lease was an illegal contract and, therefore, void and wholly unenforceable. As such, the parties were not entitled to relief under any legal theory, and in my opinion, 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. S.C. Ret. Sys.*, 392 S.C. 340, 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. Cty. 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 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 whose sole purpose is contrary to local zoning regulations. 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) (holding that when a lease restricts the use of a premises to a single purpose that is prohibited by zoning regulations, that lease 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.").

Justice Hearn's majority opinion would have us interpret and enforce the lease simply because neither party argued the lease agreement was illegal. Under this theory, courts would be hamstrung to interpret contracts that are wholly illegal simply because the parties who seek relief under the contract do not suggest its illegality. Our jurisprudence supports that a court's

authority to declare a contract void *ab initio* is impervious to our issue preservation rules:

> 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)). In *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 692 S.E.2d 516, this Court specifically noted that issue preservation rules were "inapplicable as the Court will not 'lend its assistance to carry out the terms of a contract that violates statutory law or public policy." *Id.* at 274,692 S.E.2d at 519. The Court then cited a number of other authorities that support the proposition that a court may void a contract as unenforceable regardless of whether the issue of the contract's legality was developed in lower courts. *Id.* at 274–75, 692 S.E.2d at 520 (citing *Hyta v. Finley*, 53 P.3d 338, 340–41 (Idaho 2002) (holding that an appellate court could *sua sponte* raise issue of whether an underlying contract was illegal); *Parente v. Pirozzoli*, 866 A.2d 629, 635 (Conn. App. Ct. 2005) ("'It is generally true that illegality of a contract, if of a serious nature, need not be pleaded, as a court will generally of its own motion take notice of anything contrary to public policy if it appears from the pleadings or in evidence, and the plaintiff will be denied relief, for to hold otherwise would be to enforce inappropriately an illegal agreement.'") (internal quotations omitted)). As it relates to issue preservation, courts of this state should operate as well-behaved children, but only when spoken to by well-behaved litigants. In this case, I do not believe the court can enforce, and thereby condone, a contract whose sole purpose is illegal.

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* (an action does not arise from a fraud). 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* (stronger 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, I would not compel Lewis to reimburse Atlantic for its improvement costs or return the security deposit. I would vacate and dismiss.

JUSTICE PLEICONES: I concur in part and dissent in part. I agree that the two issue rule precludes our review of Lewis's appeal of the judgment in Atlantic's favor. I further agree that the issue of the security deposit was raised by the pleadings, and that a defense witness testified to Lewis's rationale for not returning the deposit. I also agree that the master neglected to rule on the security deposit issue, that Atlantic filed a Rule 59(e) motion, that Lewis did not respond to this request, and that the master filed an amended order requiring Lewis to return the security deposit to Atlantic. Our rules of issue preservation require that where a trial judge rules upon a new issue in response to a party's Rule 59(e) motion, the other party must challenge that new ruling by making its own Rule 59(e) motion in order to preserve the issue for appellate review. Coward Hund Constr. Co, Inc.. v. Ball Corp., 336 S.C. 1, 578 S.E.2d 56 (Ct. App. 1999); Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993). In my opinion, the issue whether the master erred in ordering Lewis return the security deposit is not before us as she made no Rule 59(e) motion challenging the master's amended order. Coward Hund, *supra*; Pelican Bldg. Ctrs., *supra*.

I would affirm the decision of the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Neeltec Enterprises, Inc., d/b/a Fireworks Supermarket, Petitioner,

v.

Willard Long, d/b/a Foxy's Fireworks, and d/b/a Fireworks Superstore, Respondent.

ON WRIT OF CERTIORARI

Appeal from Colleton County
A. Victor Rawl, Special Referee

Opinion No. 27125
Heard April 3, 2012 – Filed May 16, 2012

REVERSED AND REMANDED

Robert J. Thomas and Robert P. Wood, both of Rogers Townsend & Thomas, of Columbia, for Petitioner.

Bert G. Utsey, III, of Peters Murdaugh Parker Eltzroth & Detrick, of Walterboro, for Respondents.

PER CURIAM: Petitioner appealed an order requiring it to substitute two corporations as defendants in its SCUTPA[1] suit in lieu of the individual (Long) against whom it had brought suit. The Court of Appeals dismissed petitioner's appeal finding it was not immediately appealable under S.C. Code Ann. § 14-3-330 (1977 and Supp. 2011). Neeltec Enterp., Inc. v. Long, 391 S.C 177, 705 S.E.2d 57 (Ct. App. 2011). We granted certiorari to review that decision, and now reverse, finding the order is immediately appealable under S.C. Code Ann. § 14-3-330(2)(a). The matter is remanded to the Court of Appeals for consideration of the merits.

FACTS

Petitioner has long operated a fireworks store near I-95. It advertises its store "Fireworks Supermarket" on billboards along I-95. Defendant Long is alleged in petitioner's complaint to own and operate a competing fireworks store currently named "Fireworks Superstore" located closer to the I-95 exit than is petitioner's "Fireworks Supermarket." As a result, cars exiting the interstate will encounter Long's store before reaching petitioner's business. Petitioner alleged that Long first changed his store's name to closely resemble petitioner's. Petitioner then redecorated the outside of his building facing I-95 traffic with an advertising display. Defendant Long allegedly retaliated by moving a 45- foot long, 9-foot tall storage container onto his property, effectively blocking travelers' views of petitioner's wall advertisement. Petitioner alleged that, by his actions, defendant Long had violated the SCUTPA. Defendant Long answered, and subsequently filed a "Motion for Summary Judgment or, in the Alternative, for Substitution of Parties." Long asserted he never owned the Fireworks Superstore, but that it had been owned by Hobo Joes, Inc., when the suit was commenced and was now owned by Foxy's Fireworks Superstore, Inc., both South Carolina corporations. He sought either summary judgment because petitioner had sued the wrong party

[1] South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 et seq. (1985 and Supp. 2011).

or an order, pursuant to Rule 21, SCRCP, that Long be dropped as a party and that Hobo Joe's and Foxy's Fireworks be added as defendants.

The special referee granted defendant Long's motion in part, finding he was not "the proper defendant for the claims presented" and ordering that Hobo Joe's and Foxy's Fireworks Superstore "be substituted as Defendants instead of Willard Long." In addition, the referee conditionally permitted petitioner to file an amended complaint if it "wishes to articulate a conspiracy claim against [Long] individually . . . ." Petitioner appealed and the Court of Appeals dismissed the appeal.

ISSUE

Did the Court of Appeals err in dismissing this appeal?

ANALYSIS

This is an appeal from an order requiring the plaintiff, at the request of the named defendant, to remove him from the suit and substitute two different defendants.[2] Since no specialized statute applies here, appealability is determined by § 14-3-330 which provides in pertinent part:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> . . .
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal

[2] This is neither a "misnomer" situation, nor one involving a non-existent party. Compare McCullar v. Estate of Campbell, 381 S.C. 205, 672 S.E.2d 784 (2009); Griffin v. Capital Cash, 310 S.C. 288, 423 S.E.2d 143 (Ct. App. 1992).

> might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

An interlocutory order which affects a substantial right, and either in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues an action, is immediately appealable under § 14-3-330(2)(a). The right of the plaintiff to choose her defendant is a substantial right within the meaning of this subsection. Cf. Chester v. South Carolina Dep't of Pub. Safety, 388 S.C. 343, 698 S.E.2d 559 (2010) (on appeal from order requiring plaintiff to join parties as defendants, Court recognized common law right of tort plaintiff to choose her defendant); see also Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) (order disqualifying party's chosen attorney is immediately appealable under § 14-3-330(2)). Moreover, this order effectively discontinues petitioner's suit against Long, thus bringing the order under 2(a).

In a 1933 case, the Court considered an appeal by the defendant from an order substituting an individual plaintiff for a corporate plaintiff. The defendant did not immediately appeal the substitution order, but instead sought to appeal it after judgment. The Court held

> [F]rom the court's order no appeal was taken by [the defendant]. On the contrary, as stated, she elected to file an answer and go to trial on the issues made by the pleadings. Clearly, in these circumstances, the question here made is *res adjudicata*. [Defendant], by her failure to appeal from the court's order of substitution, is now estopped to deny that [the individual] was the proper party to prosecute the action.
>
> Watts v. Copeland, 170 S.C. 449, 456-7, 170 S.E. 780, 783 (1933).

Watts holds that a party who does not immediately appeal an order of substitution may not appeal this interlocutory order after final judgment. This Court has held that an interlocutory order that falls within the purview of § 14-3-330(2)(a) must be immediately appealed if it is to be considered at all, and that there is no review available after final judgment. E.g., Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985). We hold the order of substitution is appealable under § 14-3-330(2)(a), and that the failure to take such an immediate appeal would bar consideration of the order in an appeal from final judgment. Watts, *supra*.

The Court of Appeals and respondent rely on the portion of the special referee's order conditionally allowing petitioner to file an amended complaint naming Long individually as a co-conspirator with his companies. Leaving aside the validity of such a claim,[3] the judge's suggestion that he might permit the plaintiff to sue the original defendant on a legal theory of the referee's choosing is irrelevant to the appealablility of the order of substitution.

CONCLUSION

The order requiring petitioner to discontinue its SCUPTA suit against respondent Long affects petitioner's substantial right to name its defendant. This interlocutory order is immediately appealable under § 14-3-330(2)(a). Watts, *supra*. The decision of the Court of Appeals dismissing the appeal is reversed, and the matter remanded for consideration of the merits of petitioner's appeal.

REVERSED AND REMANDED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, JJ., and Acting Justices James E. Moore and J. Ernest Kinard, Jr., concur.

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[3] See McMillan v. Oconee Mem. Hosp., 367 S.C. 559, 626 S.E.2d 884 (2006).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Jermaine Goins, Petitioner,

v.

State of South Carolina, Respondent.

Appeal from Darlington County
Paul M. Burch, Circuit Court Judge

Opinion No. 27126
Submitted March 21, 2012 – Filed May 16, 2012

AFFIRMED

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

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen C. Ratigan, Office of the Attorney General, of Columbia, for Respondent.

JUSTICE HEARN: Michael Jermaine Goins pled guilty to possession with intent to distribute crack cocaine, second offense, and possession with intent to distribute crack cocaine within the proximity of a school. He received a negotiated ten-year sentence for both convictions, to run concurrently. We granted certiorari to review the circuit court's denial of post-conviction relief (PCR). Goins argues the PCR court erred in failing to find plea counsel ineffective for allowing Goins to plead guilty when the drugs obtained were found pursuant to an illegal search. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Goins, a guest at the Darlington Motel, returned to his room to find police officers waiting for him inside. According to Goins, the police told him they did not have a warrant but they suspected someone in the room had been selling drugs. He further claimed the police told him they found drugs in a shirt pocket of one of the shirts in the room, and they subsequently arrested him. Goins' plea counsel testified at the PCR hearing that he believed the police were waiting in Goins' motel room to arrest him on distribution charges and that the drugs at issue were found on his person in a search incident to the arrest, as well as in the room.

Goins was indicted for distribution of crack cocaine, distribution of crack cocaine within the proximity of a school, possession with intent to distribute crack cocaine, and possession with intent to distribute crack cocaine within the proximity of a school. According to plea counsel, Goins was prepared to go to trial but he ultimately decided to plead guilty to the two possession charges because the State offered to drop the distribution charges. He therefore accepted the plea offer and pled guilty, specifically acknowledging during the plea colloquy his understanding that by pleading guilty, he would not be able to allege that the evidence against him was illegally obtained through an unconstitutional search and seizure. Goins received a negotiated sentence of ten years, to run concurrently, on both possession charges. He later appealed, but withdrew it and filed for PCR.

At the PCR hearing, Goins argued counsel was ineffective in advising him that the drugs at issue in his charges for possession with intent to distribute were legally seized by police and that he would likely lose a suppression hearing. According to Goins, the police entered his room at the Darlington Motel without a search warrant, arrest warrant, or valid consent and thus the drugs were the product of an unconstitutional search. Nevertheless, he testified he pled guilty after being advised the drugs were lawfully obtained, and he denied there were any other charges that were dropped in exchange for his plea. Goins therefore contended that he would not have negotiated a plea had he been informed the search was potentially unconstitutional.

Counsel testified the police had gone to the motel to arrest Goins on distribution charges based on a video they had of him selling drugs. Although he said Goins consistently denied being the individual on the tape, counsel noted that it "looked just like [Goins]" and he thought the State had still photographs of the transaction as well. Counsel acknowledged that he had informed Goins that "the law favored the landlord," and he thought it was unlikely they would prevail in a suppression hearing. However, when asked whether this conclusion led Goins to plead guilty, counsel stated that it was not until "the Solicitor agreed to drop the distribution charge that [Goins] became much more amenable to a plea" and that "[Goins] agreed to negotiate because there was no mystery as to what would happen if he went out there and pled guilty. He would get the ten years." He also noted that if Goins had elected to proceed with the suppression hearing, he would have lost the plea deal.

The PCR court found Goins' testimony was not credible and counsel's testimony was credible. The court concluded the drugs at issue had been found "when the police came to [Goins'] hotel room to serve the distribution warrant." The court's order further stated counsel properly advised Goins of his belief that he would not prevail in the suppression hearing. The court also found that Goins "chose to plead guilty after the State offered to dismiss two charges and recommend a ten year sentence." Ultimately, the court held Goins failed to prove counsel was ineffective or that he was prejudiced by

counsel's performance and dismissed his application with prejudice. We granted certiorari to review the PCR court's order.

LAW/ANALYSIS

Goins contends his plea counsel was ineffective for erroneously advising him to accept the plea offer when a suppression hearing would likely have resulted in those charges being dismissed. Because we find no prejudice, we disagree.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must first demonstrate that counsel was deficient and then must also show this deficiency resulted in prejudice. *Id.* To satisfy the first prong, a defendant must show counsel's performance "fell below an objective standard of reasonableness." *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722 (2001). "However, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal quotation omitted).

To satisfy the second prong of the analysis in the context of an allegation that a guilty plea was improvidently accepted, the "'defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

The applicant in a PCR hearing bears the burden of establishing he is entitled to relief. *Lomax v. State*, 379 S.C. 93, 100, 665 S.E.2d 164, 168 (2008). "This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Id.* at 101, 665 S.E.2d at 168. The PCR court's findings on matters of credibility

are given great deference by this Court. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

The Fourth Amendment generally protects a motel guest from unwarranted intrusions where police have entered a guest's room under no other authority than the consent of an employee. *See, e.g., Stoner v. California*, 376 U.S. 483, 490 (1964) (noting that "a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. That protection would disappear if it were left to the unfettered discretion of an employee of the hotel" (internal citations omitted)); *United States v. Jeffers*, 342 U.S. 48, 50 (1951) (excluding evidence as illegally obtained where officers, without a warrant, obtained a key to the hotel room of defendant's aunts—with whom he was staying—and conducted a search while the occupants were away); *State v. Moultrie*, 271 S.C. 526, 529, 248 S.E.2d 486, 488 (1978) (noting that "a hotel manager may not effectively consent to a search of a guest's room"). However, police are allowed to enter a hotel room to arrest an occupant when acting pursuant to a valid arrest warrant. *State v. Sims*, 304 S.C. 409, 419, 405 S.E.2d 377, 383 (1991). Entry without a warrant also can be justified in some cases where exceptional circumstances are present. *See Jeffers*, 342 U.S. at 52. Furthermore, a warrantless search made incident to that arrest would likewise be permissible provided it is "substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." *State v. Freiburger*, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005).

Although the PCR court found that the police were in Goins' room to serve a warrant on the distribution charges, there is no evidence to support this finding in the record. Absent a warrant or exigent circumstances, the law is clear that a motel owner cannot lawfully consent to a search of a guest's room. However, in his PCR testimony as to why he advised against proceeding with the suppression hearing, counsel stated: "I told him in the suppression hearing that the law favored the landlord or basically that the proprietor of the motel being able to consent - - excuse me. Being able to unlock the door and let someone in." This unqualified statement is clearly inaccurate considering the search and seizure jurisprudence that specifically

recognizes a landlord or motel owner does not enjoy an unfettered right to grant entry into the rented guest rooms of his establishment. We therefore agree with Goins that counsel informing him he could not have prevailed in the suppression hearing was erroneous and does not reflect "reasonable professional judgment."

Nevertheless, there is evidence to support the PCR court's finding that Goins failed to prove he would have gone to trial absent the erroneous legal advice. The PCR court's order found that Goins "chose to plead guilty after the State offered to dismiss two charges and recommend a ten year sentence," and we find this conclusion well-supported by evidence in the record. Counsel testified at the PCR hearing the reason Goins became interested in negotiating a plea was the State's offer to drop the distribution charges—not because he feared a negative result at the suppression hearing. Furthermore, during the guilty plea colloquy, counsel informed the judge that although he had prepared to go to trial, he was able to negotiate the plea after the State offered to dismiss the distribution charges. Although Goins testified at the PCR hearing that he accepted the plea because of the erroneous advice on the suppression of the evidence, his testimony specifically was found not to be credible. We therefore find evidence to support the PCR court's finding that Goins failed to prove he was prejudiced by counsel's ineffective assistance because he has not demonstrated he would have gone to trial absent the erroneous advice.

CONCLUSION

Although counsel provided ineffective assistance in failing to properly advise Goins on the law regarding whether a motel owner can freely admit police into a rented room, Goins has failed to prove this advice was his reason for electing not to go to trial and has thus failed to establish prejudice. We therefore affirm the circuit court order denying Goins' PCR application.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Joey Ellis, Appellant.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 27127
Heard February 7, 2012 – Filed May 16, 2012

AFFIRMED

Appellate Defender Breen Stevens, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

John Benjamin Aplin, of South Carolina Department of Probation, Parole, and Pardon Services, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Joey Ellis (Appellant) appeals the circuit court order revoking and terminating his probation. Appellant argues that the circuit court lacked subject matter jurisdiction because the probation violation warrant was not issued during the term of his probation. We disagree.

FACTUAL/PROCEDURAL HISTORY

On March 4, 1997, Appellant pled guilty to burglary in the second degree, and attempted burglary in the second degree.[1] The court sentenced Appellant to an indeterminate sentence not to exceed six years pursuant to the Youthful Offender Act (YOA) for the burglary in the second degree conviction. The court also sentenced Appellant to fifteen years' imprisonment, suspended upon the service of five years' probation, for the attempted burglary in the second degree conviction. Appellant was released from YOA custody and placed on conditional release supervision in December 1997.[2] On October 19, 2004, Appellant's YOA conditional release supervision ended, and the Department of Probation, Parole, and Pardon Services (DPPPS) began supervising Appellant on his five year term of probation.

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[1] Appellant asserts that he pled guilty to grand larceny and was sentenced to an indeterminate sentence not to exceed six years under the Youthful Offender Act. However, the Record does not contain any documentation regarding this charge.

[2] As Appellant's Brief notes, transcript references state that Appellant was released on YOA conditional release supervision in December 1997. However, documentation accompanying his notice of appeal states that he was released on YOA conditional release supervision on March 24, 1998. The use of either date has no effect on this Court's analysis.

On February 15, 2008, DPPPS issued a citation alleging Appellant violated his probation in the following respects:

> [Appellant] has willfully violated conditions 1, 7, 9, 10 and special conditions of his probationary sentence in the following particulars; By [sic] failing to report for an office visit since 11/08/07 having missed his visits scheduled for 12/12/07, 01/02/08, 01/09/08 and 02/06/08. By being $70.00 in arrears on supervision fees; By [sic] being $2,131.00 in arrears on court ordered restitution leaving an unpaid balance of $3,904.19.

On April 28, 2008, DPPPS issued an arrest warrant charging Appellant with an additional violation, "The offender has failed to follow the advice of his supervising agent in that he failed to report for his General Sessions Court hearing on April 24, 2008 at 2:00 p.m. as instructed to do so in writing on February 15, 2008."

On October 20, 2008, Appellant appeared in court and argued that he could not have violated the conditions of his probation as alleged, because the term of probation had already expired pursuant to the sentence imposed by the sentencing judge in 1997. According to Appellant, his probation for the second degree burglary charge should have started upon commencement of his YOA conditional release in December 1997 and not the conclusion of the YOA sentence in October 2004. In other words, Appellant asserted that the YOA sentence and his term of probation ran concurrently. The court disagreed, finding that Appellant was still on probation and subject to the charged violations. The court then terminated Appellant's probation and re-instated five years of the suspended sentence. Appellant filed a timely notice of intent to appeal this probation revocation. This Court certified the appeal pursuant to Rule 204(b), SCACR.

ISSUE PRESENTED

Did the circuit court err in revoking Appellant's probation?

STANDARD OF REVIEW

The decision to revoke probation is addressed to the discretion of the circuit court judge. *State v. White*, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950). This Court's authority to review the findings of a lower court on this issue is confined to the correction of errors of law, unless it appears that the action of the circuit court amounted to a manifest abuse of discretion. *Id.*

LAW/ANALYSIS

Appellant argues that the circuit court erred as a matter of law in revoking his probation because the probation violation warrant was not issued during Appellant's term of probation, and thus the circuit court was without subject matter jurisdiction. We disagree.

A trial judge may impose a term of years but provide for a suspension of a part of the imprisonment, and place the defendant on probation after a designated portion of the term of imprisonment is served. *Thompson v. S.C. Dep't of Pub. Safety*, 335 S.C. 52, 55, 515 S.E.2d 761, 763 (1999). "Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant's 'term of imprisonment,' as is actual incarceration, *parole*, and the suspended portion of a sentence." *Id*. (citation omitted) (emphasis added). The term parole means a conditional release from imprisonment and *does not* suspend the running of the prisoner's sentence. *Crooks v. Sanders, Superintendent of State Penitentiary*, 123 S.C. 28, 34, 115 S.E. 760, 762 (1922).

In *Thompson v. South Carolina Department of Public Safety*, 335 S.C. 52, 515 S.E.2d 761 (1999), this Court addressed whether the phrase "term of imprisonment" meant only the actual period of incarceration. The defendant, John Thompson, was convicted of three counts of felony DUI and received two consecutive YOA sentences not to exceed six years, and a concurrent ten year sentence suspended upon service of five years' probation. *Id.* at 54, 515 S.E.2d at 762. The probationary sentence was to begin following service of the YOA sentences. *Id.* at 54–55, 515 S.E.2d at 762. On May, 18, 1993,

Thompson was released from prison and began serving his five year probationary sentence. *Id.* DPPPS notified Thompson that his license would remain suspended until May 28, 2007—the five year probationary period, followed by three consecutive three year statutory suspensions. *Id.*

The felony DUI statute provides in pertinent part, "The Department of Motor Vehicles must suspend the driver's license of any person who is convicted or receives sentence upon a plea of guilty or nolo contendere pursuant to the [felony DUI] section for a period to include any *term of imprisonment* plus three years." S.C. Code Ann. § 56-5-2945 (2006) (emphasis added). Thompson brought a declaratory judgment action seeking to construe the phrase "term of imprisonment." *Thompson*, 335 S.C. at 55, 515 S.E.2d at 762. The court of appeals held that the term meant only the actual period of incarceration, and this Court reversed. *Id.*

This Court explained the relationship between incarceration, probation, and parole:

> In sentencing a trial judge may impose a term of years but provide for a suspension of a part of such imprisonment, and the placing of a defendant on probation after serving a designated portion of the term of imprisonment . . . . Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant's term of imprisonment, *as is actual incarceration, parole, and the suspended portion of a sentence, or supervised furlough.*

Id. at 55–56, 515 S.E.2d at 763 (citation omitted) (emphasis added).

In *Crooks v. Sanders, Superintendent of State Penitentiary*, 123 S.C. 28, 115 S.E. 760 (1922), this Court cited with approval a definition of parole adopted by the Supreme Court of Indiana.

> During that time he was out on parole he *was not a free citizen*; he was, as we have seen, still a prisoner, and notwithstanding his

> prison bounds were not so contracted as the prison bounds of an insolvent debtor, at the time our laws recognized imprisonment for debt, still he was given prison bounds . . . All the consequences of the judgment were upon him, except that he had leave of absence from prison.

Id. at 36, 115 S.E. at 763 (citing *Woodward v. Murdock*, 24 N.E. 1047, 1048 (Ind. 1890)) (emphasis added).

In 1997 Appellant was sentenced under the YOA to an indeterminate sentence not to exceed six years, and on December 19, 1997, he was released on YOA parole. The sentencing judge's order simply stated, "Probation to begin after sentence now serving." Based on the plain language of the order, and pursuant to *Thompson* and *Crooks*, Appellant's sentence ended following the conclusion of his parole and entire YOA sentence on October 19, 2004. The probation term set to begin following a "sentence now serving" began at that time and would end no earlier than October 19, 2009. DPPPS issued a citation alleging Appellant violated his probation on February 15, 2008, followed by a probation revocation warrant on April 28, 2008. Both of these documents granted the circuit court the authority to revoke Appellant's probation.[3,4] *See State v. Felder*, 313 S.C. 55, 57, 437 S.E.2d 42, 43 (1993)

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[3] Circuit courts gain the authority to revoke a defendant's probation through issuance of a probation revocation warrant pursuant to section 24-21-450 of the South Carolina Code or through the use of a citation and affidavit in lieu of a warrant pursuant to section 24-21-300 of the South Carolina Code. S.C. Code Ann. § 24-21-450 (2007); S.C. Code Ann. § 24-21-300 (2007); *Felder*, 313 S.C. at 56–57, 437 S.E.2d at 43. Our past jurisprudence has spoken to the issue of whether the warrant or citation confers subject matter jurisdiction on the revoking court. *See Felder*, 313 S.C. at 56, 437 S.E.2d at 43. Section 24-21-300 states that the "issuance of a citation or warrant during the period of supervision gives jurisdiction to the court . . . at any hearing on the violation." S.C. Code Ann. § 24-21-300 (2007). However, subject matter jurisdiction refers to the power of a court to hear and determine cases of the general class to which the proceedings in question belong. *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). The circuit court clearly has

("South Carolina Code Ann. § 24-21-300 (1989), however, permits the use of a citation and affidavit in lieu of a warrant.").

Appellant urges this Court to adopt the reasoning of *State v. Lee*, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002). In that case, the court of appeals ruled that a circuit court had validly placed a defendant on both probation and

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subject matter jurisdiction to adjudicate probation violation revocations. *See* S.C. Const. Art. 1, § 11 (stating that the circuit court is the general trial court with original jurisdiction in civil and criminal matters). Thus, citations and warrants simply confer authority on those courts already in possession of jurisdiction.

[4] We note that Appellant's YOA conditional release ended on October 19, 2004, which was seven years after the YOA sentence was originally imposed. According to section 24-19-50 of the South Carolina Code, Appellant's period of custody under the YOA could not exceed six years. S.C. Code Ann. § 24-19-50 (2007). Thus, it appears that Appellant's YOA sentence should have ended on March 4, 2003, and that he spent an additional nineteen months under the restrictions of his YOA sentence than section 24-19-50 allows. Consequently, Appellant's probationary sentence would have concluded in March 2008, instead of October 2009. Nevertheless, the Record does not reflect that Appellant contested the validity of that conditional release in the current action. Thus, it is not properly preserved for review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (citation omitted). However, even if Appellant had successfully argued this point, this factual anomaly has no effect on the circuit court's authority to revoke Appellant's probation. If Appellant's YOA sentence ended in March 2008, the April 2008 probation revocation warrant would not have been issued during Appellant's term of probation. However, the February 2008 citation would have still been issued during the term of probation, and conferred revocation authority on the circuit court.

parole. The defendant, Lee, was sentenced to ten years' imprisonment, suspended upon the service of five years' probation. *Id.* at 127, 564 S.E.2d at 373. The judge ordered Lee's probation to begin "upon . . . release from sentence now serving, to include any early release program/supervision." *Id.* Lee was later paroled, and began his probation that same day. *Id.* at 128, 564 S.E.2d at 374. Subsequently, Lee was charged with violating various conditions of his parole and probation. *Id.* Following a hearing, the circuit court terminated Lee's probation and revoked three years of the original ten year suspended sentence. *Id.*

Lee appealed the decision, and argued that the circuit court lacked authority to place a defendant on both probation and parole at the same time. *Id.* at 132, 564 S.E.2d at 376. According to the court of appeals, the phrase "release from sentence now serving, to include any early release program/supervision," meant that Lee's probation would begin when he was released from incarceration. *Id.* at 133, 564 S.E.2d at 376. Thus, his probation and parole ran simultaneously. Appellant seeks to draw a parallel between the "sentence now serving" language of his own probation order, and that found in *Lee*.

According to Appellant, his probation should have begun following his release from actual incarceration in 1997, and thus his five year term of probation would have expired in 2002, six years prior to the circuit court obtaining the authority to revoke his probation. However, the court of appeals' reasoning in *Lee* is incompatible with this Court's prior holdings that a defendant's sentence does not end with his mere release from physical incarceration in the event he is placed on parole or supervised release. *See Thompson*, 335 S.C. at 55, 515 S.E.2d at 763; *see also Crooks*, 123 S.C. at 36, 115 S.E. at 760. A defendant's release from a sentence does not mean his mere release from physical custody. Thus, a term of probation set to begin upon completion of a term of imprisonment, cannot begin simply due to a defendant's parole or supervised release from incarceration absent a specific

and valid order from the sentencing court that the term of probation is to run *concurrently* with the defendant's parole.[5]

Appellant's sentence of probation for his attempted burglary in the second degree conviction began after his parole concluded for his conviction for burglary in the second degree, and not following his release from incarceration. Thus, the circuit court did not abuse its discretion in revoking Appellant's probation.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[5] This holding should not be interpreted to allow the circuit court to impose probation to run concurrently with parole when statutory provisions or this Court's prior rulings hold otherwise. For example, in *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002), this Court interpreted section 24-21-560 of the South Carolina Code to mean that defendants convicted of no-parole offenses are placed in a community supervision program (CSP) upon their release. S.C. Code Ann. § 24-21-560 (2007). This Court found that the General Assembly intended that program to serve as a more stringent term of probation for these offenders, in lieu of normal probation. *Dawkins*, 352 S.C. at 167, 573 S.E.2d at 785. Thus, a circuit court could not, in this instance, order a defendant to serve probation concurrently with CSP.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Bickerstaff, M.D.,
and Barbara Magera, M.D., Appellants,

v.

Roger Prevost d/b/a Prevost
Construction, Inc., Respondent.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4972
Heard February 29, 2012 – Filed May 16, 2012

REVERSED AND REMANDED

Steven L. Smith, of Charleston, for Appellants.

Frank M. Cisa, of Mt. Pleasant, for Respondent.

LOCKEMY, J.: In this appeal, Charles Bickerstaff and Barbara Magera (Appellants) argue the circuit court erred in finding it lacked jurisdiction to consider Appellants' motion to set the rate of interest. Appellants contend: (1) the rate of interest applicable post-judgment was established in a prior order of the circuit court, and that order is the law of the case; (2) the circuit court erred in declining to consider matters not affected by this court's decision in the initial appellate process; (3) a post-judgment interest rate of 1% per day is punitive and grossly disproportionate to the amount of principal; and (4) the imposition of excessive post-judgment interest violates the Equal Protection Clause of the United States Constitution. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Appellants entered into a contract with Roger Prevost d/b/a Prevost Construction, Inc. (Prevost) for interior remodeling of their home. The home experienced significant water damage when a broken water line to the washing machine flooded the first floor of the residence. Thereafter, Appellants brought an action against Prevost alleging negligence and breach of implied warranty of workmanship as a part of the remodeling work. Prevost answered Appellants' complaint, and counterclaimed for breach of contract, implied contract/quantum meruit, and foreclosure of its previously filed mechanic's lien. Included in Prevost's counterclaims was a request for interest on any payment due pursuant to the contract, at the agreed-upon "daily rate of 1%."

A May 2006 jury trial resulted in a $6,437.62 verdict in favor of Prevost. Prevost made a post-trial motion for attorney's fees and prejudgment interest under the contract. The contractual provision at issue stated: "Payment due under this Contract but not paid shall incur a daily interest rate of 1% from the date the payment is due." The circuit court subsequently issued an order awarding Prevost $6,437.62 in attorney's fees and prejudgment interest as defined under the contract. Thereafter, Appellants appealed the circuit court's award of prejudgment interest to this court.

On March 28, 2007, Appellants filed a motion for leave to deposit funds into the register of the court. The circuit court granted Appellants'

motion, finding that pursuant to the underlying contract, prejudgment interest on the $6,437.62 judgment accrued at the rate of 1% per day. The court also found post-judgment interest continued to accrue at the statutory rate of 11.25% per annum. Prevost subsequently filed a motion requesting the court alter or amend its order to provide that post-judgment interest accrues at the rate of 1% per day. The circuit court denied Prevost's motion, stating the following in a footnote:

> The parties agree that the Order regarding Leave to Deposit Funds into the Register of the Court and the calculation of interest on the judgment contained therein has no bearing on the ultimate calculation of interest on the judgment; that matter will ultimately be determined by the Appellate Court. Therefore, the parties agree that the calculation of pre and post-judgment interest contained in the Order regarding Leave to Deposit Funds is limited to the actual deposit of funds and relief requested in the motion.

In January 2009, this court affirmed the circuit court's award of prejudgment interest. See Bickerstaff v. Prevost, 380 S.C. 521, 670 S.E.2d 660 (Ct. App. 2009). Subsequently, Appellants' petition for certiorari was denied. Following remittitur, Appellants filed a motion to set the rate of interest requesting the circuit court determine whether the judgment award should accrue post-judgment interest at the rate set by law or the rate established by the parties' contract. The circuit court found Appellants' motion was "not a motion to enforce a judgment or take action consistent with the appellate court's ruling, and, therefore, [the circuit court did] not have the authority to modify or set an interest rate." The circuit court found that "in regards to this matter and all other matters," the decision of this court was the law of the case, and concluded that the 1% per day interest rate affirmed by this court applied to prejudgment and post-judgment interest. This appeal followed.

LAW/ANALYSIS

I. Order Granting Motion for Leave to Deposit Funds

Appellants argue the rate of interest applicable post-judgment was established in the circuit court's order granting Appellants' motion for leave to deposit funds into the register of the court, and that order is the law of the case. We disagree.

In its order, the circuit court found

> The judgment entered at the trial of this matter is a principal sum of Six Thousand Four Hundred Thirty-Seven and 62/100 ($6,437.62) dollars. Interest on this principal, pursuant to the underlying contract between the parties, accrued at the rate of One Percent per day prejudgment, and the judgment of the Court reflected the same. It continues to accrue post-judgment interest at the statutory rate of 11.25% per annum.

Appellants maintain this language establishes a post-judgment interest rate of 11.25% per annum. Prevost contends the Appellants' argument ignores the circuit court's subsequent order denying Prevost's motion to alter or amend wherein the circuit court stated in a footnote

> The Court has consulted with the attorneys regarding the status of this motion by telephone on several occasions. The parties agree that the Order regarding Leave to Deposit Funds into the Register of the Court and the calculation of interest on the judgment contained therein has no bearing on the ultimate calculation of interest on the judgment; that matter will ultimately be determined by the Appellate Court. Therefore, the parties agree that the calculation of pre and post-judgment interest contained in the Order regarding Leave to Deposit Funds is limited to the

> actual deposit of funds and relief requested in the motion.

Prevost argues this footnote clearly establishes that the order denying Appellants' motion for leave to deposit funds had no bearing on the ultimate calculation of interest and was limited to the actual deposit of funds and the relief requested by Appellants. Appellants maintain that because Prevost's motion to alter or amend was denied, the comments made by the circuit court in the footnote were "merely dictum" and the order denying Prevost's motion to alter or amend is final and unappealable.

We agree with Prevost. The post-judgment interest rate was not established by the circuit court. The circuit court specifically noted in its order denying Prevost's motion to alter or amend that the calculation of post-judgment interest was "limited to the actual deposit of funds and the relief requested in the motion," and this court would ultimately determine the rate of post-judgment interest. Furthermore, Appellants admit in their reply brief that "[p]rior to remittitur, there had been absolutely no discussion, no hearing, and no ruling of any nature related to the question of the rate to be imposed post-judgment."

II. Court of Appeals Decision

Appellants argue post-judgment interest was not an issue before this court during the first appeal, and therefore, the circuit court erred in finding this court's January 2009 decision was the law of the case. We agree.

The circuit court determined it lacked jurisdiction to hear matters involving post-judgment interest. The court found the decision of this court was the law of the case, and concluded that the 1% per day interest rate affirmed by this court applied to prejudgment and post-judgment interest. The circuit court noted Appellants' motion to set the rate of interest was "not a motion to enforce a judgment or take action consistent with the appellate court's ruling, and, therefore, [the circuit court did] not have the authority to modify or set an interest rate." In a footnote, the circuit court stated

> Our Courts have held that the statutory interest rate under § 34-31-20(B) "is applicable only in the absence of a written agreement between the parties fixing a different rate of interest." Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 326 S.C. 460, 466, 483 S.E.2d 796 (Ct. App. 1997), *rev'd on other grounds by* Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E.2d 617 (1999) (citing Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc., 272 S.C. 289, 251 S.E.2d 738 (1979)). Further, "if a contract has specified a lawful rate of interest to be paid after maturity, the same rate will apply on the judgment entered on the contract." Id. This Court has no authority to modify the interest rate that was affirmed on appeal or rule on matters that were not remanded from the Appellate Court, but notes that these cases are controlling as to the issue of post-judgment interest.

We agree with Appellants that the sole issue before this court in the first appeal was prejudgment interest. This court clearly noted in its opinion that "[t]he award of prejudgment interest is the only issue before us on appeal." Bickerstaff, 380 S.C. at 524, 670 S.E.2d at 661. Pursuant to Rule 205, SCACR, "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal," but nothing shall prohibit the lower court from proceeding with matters not affected by the appeal. Here, the issue of post-judgment interest was not affected by the first appeal to this court. Because the circuit court retains jurisdiction over matters not affected by the appeal, including the authority to enforce any matters not stayed by the appeal, we find the circuit court had the authority to rule on the issue of post-judgment interest. See Rule 241(a), SCACR. Accordingly, we reverse the circuit court's determination that it lacked jurisdiction and remand for reconsideration of the issue of post-judgment interest.

III. Constitutional Claims

Appellants argue a 1% per day post-judgment interest rate is punitive, grossly disproportionate to actual damages, and violates the Equal Protection Clause of the United States Constitution. Because Appellants failed to raise these arguments to the circuit court, they are not preserved for our review. See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (holding issues must be raised to and ruled upon by the circuit court to be preserved for appellate review); see also State v. Powers, 331 S.C. 37, 42-43, 501 S.E.2d 116, 118 (1998) (finding constitutional arguments are not an exception to the rule, and if not raised to the circuit court are deemed waived on appeal).

CONCLUSION

We reverse the circuit court's determination that it lacked jurisdiction and remand for reconsideration of the issue of post-judgment interest.

REVERSED AND REMANDED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Forest Byrd, Appellant,

v.

Judy Livingston and
TIAA Timberlands, II,
LLC, Respondents.

Appeal From Newberry County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 4973
Heard April 24, 2012 – Filed May 16, 2012

AFFIRMED

B. Michael Brackett, of Columbia, for Appellant.

Blaney A. Coskrey, III, of Columbia, and Timothy D. Savidge, of Prosperity, for Respondents.

SHORT, J.: Forrest Byrd (Byrd) appeals from the trial court's order finding an agreement to settle a lawsuit relating to a land purchase was enforceable. Byrd argues the court erred in: (1) finding his son was not a party to the agreement; (2) concluding the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds on all terms of the agreement; (3) not applying the law of joint contracts to the motion to enforce the agreement; (4) finding the agreement did not contain a condition precedent; and (5) ruling the agreement's provision that included his son was severable from the remainder of the agreement. We affirm.

FACTS

Byrd entered into a contract to purchase property from Judy Livingston (Livingston) in May 2007, after being the winning bidder at a private auction. Byrd paid the full purchase price, and Livingston executed and delivered a general warranty deed for the property to Byrd in July 2007. Two days prior to executing the deed, Livingston executed and delivered a sixty-six-foot right-of-way easement over and across the subject property to TIAA Timberland, II, LLC (TIAA). This easement was recorded a little more than two hours after Byrd's deed was recorded. Byrd filed a complaint on September 10, 2008, against Livingston and TIAA, asserting five causes of action: (1) quiet title; (2) reformation; (3) breach of contract; (4) breach of contract accompanied by a fraudulent act; and (5) fraud or negligent misrepresentation. Byrd alleged Livingston concealed the right-of-way, and he accepted the deed based on her representations that Newberry County zoning ordinances required the right-of-way. TIAA filed an answer denying the allegations and counterclaimed, seeking "a declaratory judgment that it has an easement, express, implied by prior use, implied by necessity, and/or a prescriptive easement over [Byrd's] property." Livingston also filed an answer, denying all allegations. Following pretrial discovery, Byrd, Livingston, and TIAA attended a mediation conference on November 23, 2009, which resulted in all three parties signing an "Agreement in Principle"

(Agreement).[1] The Agreement stated, "this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties"; however, the Settlement Agreement was never signed.

On February 19, 2010, Livingston and TIAA (Respondents) filed a motion to enforce the Agreement. Byrd filed a motion in opposition. A hearing on the motion was held on June 30, 2010. Byrd asserted that because his son would not execute the proposed Settlement Agreement, he himself was no longer bound by the Agreement and was unwilling to execute the Settlement Agreement. Respondents argued the November 23, 2009 Agreement was a valid, enforceable, stand-alone contract. The trial court issued its order on July 30, 2010, finding the Agreement enforceable against Byrd, Livingston, and TIAA, and ordering the parties to prepare and execute a formal settlement document embodying the terms of the Agreement. Byrd filed a Rule 59(e), SCRCP, motion for reconsideration, which the court denied. This appeal followed.

STANDARD OF REVIEW

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009); see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (finding enforcement of the terms of a settlement agreement is a matter of contract law); Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (stating a release agreement is a contract and contract principles of law should be used to determine what the parties intended); Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622

[1] During discovery, Byrd's son purchased a tract of land adjacent to Byrd's parcel. The purchase on July 31, 2009, was almost ten months after Byrd had filed his complaint against Livingston and TIAA. The dirt road, the subject of Byrd's lawsuit, crosses his son's property before it crosses Byrd's property; therefore, the easement also burdens his son's property. Byrd did not move to add his son as a party to the litigation when his son purchased his land.

(Ct. App. 1986) (applying the general rules of contract construction to a settlement agreement). An action to construe a contract is an action at law. Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct. App. 2008). In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, this court is free to decide questions of law with no particular deference to the trial court. Silver, 376 S.C. at 590, 658 S.E.2d at 542.

LAW/ANALYSIS

I. Byrd argues the trial court erred in finding his son was not a party to the Settlement Agreement. We disagree.

Byrd maintains that because the November 23, 2009 Agreement referenced his son's parcel as well as his own, his son was intended to be a necessary party to a final agreement, and because his son did not sign the Settlement Agreement, he himself is not bound by the Agreement. The court found the Agreement was not enforceable as to Byrd's son, and the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement. The Agreement's three-word reference to Byrd's son's property was included in one of its paragraphs:

> 25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock – express grant superceding [sic] and canceling the 66' grant, son's parcel included.

The trial court noted that in Byrd's son's affidavit, he stated:

> I am not, and never have been, a party to the legal action [between Byrd, Livingston, and TIAA]. . . . I did not attend, and was not represented at, the

> mediation conference . . . held on or about November 23, 2009. My father spoke to me about the mediation after the fact and explained to me the Agreement in Principal [sic] that was the product of the mediation. I was not involved in the negotiation of the terms of the Agreement in Principal [sic]; I did not authorize anyone to speak for me or to act on my behalf with respect to the Agreement in Principal [sic]; and I did not sign the Agreement in Principal [sic] . . . . I do not agree with the terms of the Agreement in Principal [sic], and I will not sign either the Agreement in Principal [sic] or a more formal and detailed written settlement agreement based on the terms of the Agreement in Principal [sic].

The court found the record contained no evidence warranting a finding that Byrd acted with actual or apparent authority by including his son in the Agreement. The court also found nothing in the record to contradict his son's sworn statement. The Agreement stated "[t]he undersigned parties . . . have reached an agreement in principle" and was signed by Byrd, Livingston, and TIAA's agent. It further stated, "[l]itigation dismissed, mutual releases among all parties." We find the evidence supports the court's determination that Byrd's son was not a party to the Agreement, the Agreement was not binding as to Byrd's son, and the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement.

II. Byrd next argues the trial court erred in concluding the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds on all terms of the Agreement. We disagree.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Patricia Grand Hotel, L.L.C. v. MacGuire Enters., Inc., 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). "The 'meeting of minds' required to

make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." Wright v. Trask, 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct. App. 1997).

Byrd argues the subsequent conduct of the parties to the Agreement demonstrated the intended and understood involvement of Byrd's son, and asserts as proof that his son was identified in the proposed Settlement Agreement as a party to the Agreement. However, the trial court found the subsequent actions of the attorneys show the parties' intent to settle the case: (1) the attorneys' emails "demonstrate[d] that Byrd's attorney believed the settlement to be binding but had apparently run into problems getting his own client to sign the documents," and Byrd's attorney asked to be relieved as his counsel; (2) "counsel's lack of compliance with the Scheduling Order in the case also strongly indicates that everyone believed the case to be settled"; (3) Byrd's attorney withdrew a pending motion; (4) the parties obtained and recorded a new survey as contemplated by the November 23, 2009 Agreement; and (5) Byrd paid his one-third share of the cost of the survey as contemplated by the November 23, 2009 Agreement. Therefore, the court found it was "impossible to reconcile these actions by Byrd and his attorney with Byrd's current position that he did not intend to be bound." We find no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement.

III. Byrd also argues the trial court erred finding the Agreement did not contain a condition precedent. We disagree.

"A condition precedent to a contract is 'any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate

performance arises.'" Brewer v. Stokes Kia, Isuzu, Subaru, Inc., 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005) (quoting Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994)). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Id. (internal quotation marks omitted).

Byrd claims the three words used in the Agreement referencing Byrd's son's property created a condition precedent that required Byrd's son to ratify the Agreement and sign the more formal and detailed Settlement Agreement to follow. Byrd argues the alleged condition precedent was not satisfied; therefore, his performance under the Agreement is excused. However, the trial court found there was no condition precedent to be found in the three words in the Agreement referencing his son's parcel. Further, the court found "Byrd's duties with respect to the Agreement are not conditional, either expressly or impliedly," and the inclusion of his son's property was "not so essential to the Agreement as to constitute a condition precedent or to excuse [Byrd's] non-performance under the Agreement." The court continued:

> [Byrd] should not be rewarded for asking that a term be included in the Agreement and then seek to avoid the Agreement once his son expresses a desire to not join the [settlement agreement]. In short, the Agreement cannot be read to excuse compliance due to the non-cooperation of a person who is not a party to the Agreement. . . . The law does not and should not sanction a party's own request that a term be included, only to later argue that its very inclusion renders an agreement unenforceable.

We find no error in the trial court's ruling that the Agreement did not contain a condition precedent to his alleged obligation with respect to a final settlement agreement.

IV. As to the remaining issues, we adopt the trial court's order. See Grosshuesch v. Cramer, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

AFFIRMED.

FEW, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Curtis Lee Elgin, Appellant.

Appeal From Fairfield County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No.4974
Heard February 15, 2012 – Filed May 16, 2012

AFFIRMED

Appellate Defender Elizabeth Franklin-Best, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody J. Brown, all of Columbia; Solicitor Douglas A. Barfield, of Lancaster, for Respondent.

WILLIAMS, J.: Curtis Lee Elgin (Elgin) appeals his conviction for murder, arguing the circuit court erred in failing to grant him a new trial after the court discovered a juror engaged in misconduct during the course of the trial by discussing the case with the juror's mother. We affirm.

FACTS/PROCEDURAL HISTORY

Audre Belton (the victim) was shot to death inside her home in Winnsboro, South Carolina, on her birthday, February 8, 1993. After not hearing from the victim in over a week, the victim's sister and her husband went to the victim's home. They discovered the victim's body in a back bedroom of her home. The victim had been shot four times.

Initially, the police had few leads on the case. An onsite investigation revealed the following: an outside screen from a window had been removed but there was no sign of forced entry; the bullet holes in the home were from a .22 caliber gun; the thermostat was set at 52 degrees; and one fingerprint and two palm prints were recovered but did not match Elgin's prints.

Approximately four months later, a police officer discovered a discarded .22 caliber gun next to a dumpster at the Uniroyal Tire manufacturing plant, which was within a five-minute walk from the victim's home. The gun was later identified as the gun used in the victim's murder. The gun was traced back to a father and son who purchased the gun from Carolina Furniture, but subsequently returned the gun on trade.

Jimmy Ray Douglas (Jimmy Ray) and his father, Harold Douglas, own Carolina Furniture. Jimmy Ray testified he repurchased the .22 caliber gun from the customer where it was subsequently stored in a cabinet in his father's office. Jimmy Ray testified his father moved the gun at some point into the glove compartment of his truck. After the police inquired about the gun, Jimmy Ray discovered the gun was missing from his father's glove compartment. Jimmy Ray testified Elgin stocked and delivered furniture for Carolina Furniture around the time of the victim's murder, and he and his

father permitted delivery personnel to drive his father's truck to the front of the store every night upon closing.

The police stopped Elgin in July 1993, approximately one month after discovering the gun. Elgin said he knew who the victim was because his girlfriend lived about five doors down from her. He would see the victim occasionally when he would walk back and forth to his girlfriend's house. When asked, Elgin told the police he saw the gun when he accompanied Jimmy Ray's father to a home about a surety bond and recalled seeing him unlock his glove compartment to retrieve the gun. Elgin told police he did not know where the key to the glove compartment was kept.

No further information was uncovered about the victim's murder for several years. In 1996, Raymond Barnes (Barnes), an inmate at Fairfield County Detention Center, contacted police, claiming his cellmate, Elgin, had confessed to murdering the victim. Barnes testified that on or about June 27, 1996, Elgin confessed the following details: (1) the murder occurred in February; (2) the body was discovered a week or two after the murder; (3) the victim was Audre Belton; (4) the victim was "light skinned with long pretty black hair . . . a beautiful lady"; (5) the victim was shot with a .22 caliber on a .32 frame; (6) Elgin stole the gun from a furniture store where he worked; (7) the murder occurred inside the victim's home; (8) Elgin had a key to her house from a delivery of furniture; (9) Elgin went into the victim's home to rob her, but she was not there when he arrived; (10) Elgin wore socks on his hands to prevent leaving prints; (11) the victim returned when he was inside and began "hollering"; (12) Elgin shot her multiple times but said she would not die and that is when Elgin shot her in the back of the head; (13) Elgin turned the thermostat up and was concerned his prints might be on the thermostat; and (14) Elgin threw the gun behind a dumpster at the Uniroyal Tire manufacturing plant.

Barnes further testified that Elgin had contact with the victim because Elgin had offered to cut her grass and was in the victim's neighborhood because his cousin lived next door to the victim. Barnes testified he had never been to Winnsboro and had no relatives or friends in Winnsboro.

Further, Barnes received no assistance on his federal sentence from his testimony and was released from prison by the time of Elgin's trial.

Elgin's other cellmate, Lindsay Goins (Goins), was also interviewed by police, but the police did not obtain a statement from Goins until December 2004. Goins testified he mostly overheard conversations between Barnes and Elgin concerning the victim, but Elgin had told Goins that he had killed a girl that "[did] not stay too far from [Goins]." Goins' testimony largely corroborated that of Barnes. Two other inmates, Robert Green and Virgil Pauling, eventually came forward to testify but recanted their statements at trial.[1]

On July 9, 2009, the jury convicted Elgin of murder, and the circuit court sentenced him to fifty years imprisonment. Elgin filed a motion for a new trial one week later. He claimed the State presented insufficient circumstantial evidence to submit his case to the jury and juror misconduct warranted a new trial. Elgin attached an affidavit to his new trial motion from a private investigator, Amos Jones (Jones), who contacted Roxanna Young (the juror), one of the jurors in Elgin's murder trial. In his affidavit, Jones stated he met with the juror after being contacted by Elgin's niece, Latasha Fant (Ms. Fant). Ms. Fant stated the juror approached her in the parking lot of the Dollar General and told Ms. Fant that she was very sorry the jury found Elgin guilty. The juror told Ms. Fant that she was only

[1] Green wrote a letter to the solicitor's office in February 2007, in which he claimed that Elgin told him he was hired to kill a woman. Green recanted his statement at trial and admitted that he and Elgin had a sexual relationship and was angry with Elgin at the time he wrote the letter to police. Pauling gave a statement to police in May 2006, in which he stated that he had known Elgin since Pauling was a child and was incarcerated with Elgin at the time Elgin confessed to murdering the victim. Pauling told police Elgin killed the victim and was paid to kill her by Jimmy Ray's wife. Pauling disavowed the entire statement at trial, stating he was actually never incarcerated with Elgin, but had only heard rumors in the community about the victim's murder. Pauling stated he lied in hopes of lessening his sentence and admitted to previously giving false information on another cellmate.

twenty-four years old and had never served on a jury prior to Elgin's trial. As a result, the juror was somewhat confused about what to do with the information she received during the trial, so she spoke to her mother about the trial proceedings.

The juror told Jones that she and four other jurors did not think the State had proven its case against Elgin, but one of the jurors continually maintained Elgin was guilty. The juror stated she spoke to her mother twice about the trial, and her mother told her Elgin was not guilty but was being framed for the victim's murder. The juror's mother stated she heard that Jimmy Ray's father killed the victim because he did not want the victim to date Jimmy Ray. Jimmy Ray's father paid the victim to leave town, and when she remained in town and kept the money, the father killed the victim. The juror stated she did not know whether her mother's story was true, but her mother's story weighed heavily on her mind and impacted her decision. The juror told Jones her decision to vote guilty was not based solely upon the evidence at trial, but largely in part upon the information received from her mother.

The circuit court held a hearing on Elgin's new trial motion on September 25, 2009. The juror was sworn in and told the circuit court she spoke to her mother in contravention of the court's instructions. When questioned by the court as to what the juror's mother told her, she stated, "My mother just basically – she just told me that she had heard that Curtis Elgin – basically he wasn't the one that did the murder or whatnot, but he was framed for it." The juror reiterated what Jones had sworn to in his affidavit about Harold Douglas murdering the victim.

Neither the State nor Elgin contested the juror's actions constituted juror misconduct. The circuit court found the juror engaged in misconduct by speaking to her mother during the course of the trial. However, the circuit court reasoned, "The information she received, while it was improper, was far from prejudicial to the defendant, but in fact was conceivably favorable to him." In response, Elgin contended this outside information improperly influenced the juror's decision. While it did not implicate Elgin, because a

murder for hire scenario was introduced at trial, her mother's corroboration that it was a murder for hire suggested that Elgin was the murderer. The State argued this information could not be prejudicial since Elgin was innocent in the mother's story. Furthermore, the murder for hire scenario was presented at trial and was not a novel idea or theory that was not otherwise before the jury for its consideration. The circuit court agreed with the State and found the juror's misconduct did not prejudice Elgin. Accordingly, it denied Elgin's motion for a new trial.[2]

STANDARD OF REVIEW

The decision to grant or deny a mistrial is within the sound discretion of the circuit court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

LAW/ANALYSIS

Elgin contends the circuit court erred when it denied his request for a new trial based on a juror's discussion of the case with the juror's mother during the course of Elgin's trial. We disagree.

Jury misconduct that does not affect the jury's impartiality will not undermine the verdict. State v. Pittman, 373 S.C. 527, 555, 647 S.E.2d 144, 159 (2007). The circuit court may exercise broad discretion in assessing the prejudicial effect of an allegation of juror misconduct due to an external influence. Harris, 340 S.C. at 63, 530 S.E.2d at 627. The circuit court should

[2] The circuit court also denied Elgin's challenge to the sufficiency of the evidence. Elgin does not challenge this ruling on appeal.

consider three factors when making this determination: (1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice. Id. The circuit court's finding will not be disturbed absent an abuse of discretion. Id. at 63, 530 S.E.2d at 627-28.

In the case at hand, both parties agreed, and the circuit court found, the juror's discussion of the case with her mother constituted juror misconduct. Accordingly, the relevant inquiry is whether the juror's misconduct prejudiced Elgin. See State v. Galbreath, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct. App. 2004) (holding that when a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice).

We conclude the juror's discussion with her mother cannot reasonably be found to have prejudiced Elgin. First, the juror testified under oath she did not tell other members of the jury that she discussed the case with her mother. Second, the evidence, although largely circumstantial, indicated Elgin had reason to be near victim's home and knew where the victim lived. Elgin had knowledge of, and access to, the gun used to murder the victim by virtue of his employment at Carolina Furniture. Moreover, Elgin gave incriminating statements to his cell mates that contained details that the cellmates would not otherwise know. Third, the circuit court instructed the jury to determine Elgin's guilt or innocence based on the evidence presented at trial. Furthermore, the juror's decision that Elgin was guilty indicates her mother's statement did not influence her verdict. See State v. Kelly, 331 S.C. 132, 142-43, 502 S.E.2d 99, 104-05 (1998) (finding juror's misconduct in sharing pro-death penalty pamphlet with other jurors during penalty phase of capital murder trial did not violate defendant's rights to fair trial). We find consideration of these three factors demonstrates Elgin was not prejudiced in this instance.

Furthermore, the juror's testimony before the circuit court reiterates Elgin was not harmed by the juror's discussion with her mother as the juror told the circuit court twice that her mother told her Elgin was not guilty of the

murder. See State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005) ("The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence."). Although the juror admitted in her affidavit that her conversations with her mother influenced her decision, we cannot find prejudice where none exists. Because the circuit court separately interviewed this juror under oath and was satisfied she had reached a fair and impartial verdict, we defer to the circuit court's decision to deny the new trial. See State v. Bantan, 387 S.C. 412, 423, 692 S.E.2d 201, 206 (Ct. App. 2010) (holding that in determining juror misconduct, the circuit court is in the best position to determine the credibility of the jurors; therefore, this court should grant it broad deference on this issue).

CONCLUSION

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

AFFIRMED.

THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Greeneagle, Inc., Appellant,

v.

South Carolina Department of Health and Environmental Control, Respondent.

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 4975
Heard April 26, 2012 – Filed May 16, 2012

AFFIRMED

W. Thomas Lavender, Jr., Leon C. Harmon, and Joan W. Hartley, all of Columbia, for Appellant.

Carlisle Roberts, Jr., Jacquelyn S. Dickman, and Etta R. Williams, all of Columbia, for Respondent.

PIEPER, J.: Appellant Greeneagle, Inc. (Greeneagle) appeals from an order of the Administrative Law Court (ALC) upholding Respondent South Carolina Department of Health and Environmental Control's (DHEC) decision to deny Greeneagle's landfill permit application. On appeal, Greeneagle argues the ALC erred as a matter of law by finding DHEC properly denied its permit application because the proposed landfill was

inconsistent with the 2007 York County Solid Waste Management Plan. We affirm.

FACTS

In 2005, Marvin Taylor and Hall Rogers, who later incorporated Greeneagle, became interested in locating a long-term construction, demolition, and land-clearing debris (C&D) landfill (the proposed landfill) in York County. After identifying a site for the proposed landfill, Greeneagle submitted a demonstration of need (DON) request and a request for a consistency review to DHEC. On April 25, 2006, DHEC issued a DON approval letter, wherein DHEC evaluated the information and determined that pursuant to the DON regulations, there was a need for the proposed landfill. The following month, DHEC issued a preliminary consistency determination for the proposed landfill based upon its review of the local plan of record, the 1994 Catawba Region Solid Waste Management Plan (1994 Plan). DHEC's preliminary finding was that the proposed landfill was consistent with the 1994 Plan and the South Carolina Solid Waste Management Plan. However, the preliminary consistency determination indicated that DHEC could not make a final consistency determination until the potential permit was ready for issuance. The preliminary consistency determination also indicated that York County was in the process of preparing a new solid waste management plan and if York County revised or replaced the 1994 Plan during the permitting process, DHEC would review the newest plan of record to make the final consistency determination.

Greeneagle began to undertake the design, engineering, and field work necessary to support an application package for the proposed landfill. During this time, York County adopted by ordinance a new solid waste management plan on February 28, 2007 (2007 Plan). Approximately one year after York County adopted the 2007 Plan, Greeneagle submitted its completed permit application to DHEC. On May 19, 2008, DHEC notified Greeneagle by letter that DHEC could not issue a permit for the proposed landfill because it had determined that the proposed landfill was not consistent with the 2007 Plan. In an internal memorandum, DHEC indicated that it had reviewed information relevant to the adoption of the 2007 Plan and it was satisfied that York County had properly adopted the 2007 Plan. DHEC also indicated in

the memorandum that it had determined the proposed landfill was inconsistent with the 2007 Plan because the 2007 Plan provided that the county's current and projected capacity needs for C&D waste could be adequately addressed with existing facilities and the potential for expansion of existing facilities.

Two months after DHEC denied Greeneagle's permit application, Greeneagle filed a request for a contested case hearing in the ALC. After a hearing, the ALC issued an order finding no evidence existed to support Greeneagle's allegations that DHEC unlawfully denied its permit application. The ALC also found that DHEC thoroughly reviewed the application, made appropriate DON and consistency determinations pursuant to the requirements of the South Carolina Solid Waste Policy and Management Act (SWPMA) and the applicable regulations, and properly determined that Greeneagle's permit application was not consistent with the 2007 Plan. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard of review for appeals from the ALC. Murphy v. S.C. Dep't of Health & Envtl. Control, __ S.C. __, 723 S.E.2d 191, 194 (2012). The APA provides this court may reverse or modify the ALC's decision only if the substantive rights of a party have been prejudiced due to: constitutional or statutory violations; an agency exceeding its authority; unlawful procedure; an error of law; a clearly erroneous view of evidence in the record; or an abuse of discretion. S.C. Code Ann. § 1-23-610(B) (Supp. 2011). "As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence." Murphy, __ S.C. at __, 723 S.E.2d at 194 (internal quotation marks omitted). "Substantial evidence" sufficient to support a finding of the ALC is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) (internal quotation marks omitted). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an

administrative agency's finding from being supported by substantial evidence." Id. (internal quotation marks omitted).

ANALYSIS

Greeneagle argues the ALC erred by upholding DHEC's decision because (1) DHEC improperly merged or comingled the DON and consistency requirements in deciding to deny its permit application, and (2) DHEC's finding that the proposed landfill was inconsistent with the 2007 Plan constituted an improper delegation of DHEC's permitting authority.[1] We disagree.

The SWPMA requires a person to obtain a permit from DHEC before operating a solid waste management facility. S.C. Code Ann. § 44-96-290(A) (2002). For purposes of the SWPMA, a C&D landfill is considered a "solid waste management facility." S.C. Code Ann. § 44-96-40(49) (2002). Under the SWPMA, DHEC has the sole authority to issue, deny, revoke, or modify permits. S.C. Code Ann. § 44-96-260(2) (2002); see also Se. Res. Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 402, 408, 595 S.E.2d 468, 471 (2004) (holding DHEC is the final arbiter on permitting). Therefore, DHEC is charged with ensuring solid waste management facilities meet the requirements for permitting. Se. Res. Recovery, Inc., 358 S.C. at 408, 595 S.E.2d at 471.

The permitting section of the SWPMA provides, "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by [DHEC]." S.C. Code Ann. § 44-96-290(E) (2002). This section also prohibits DHEC from issuing a permit "unless the proposed facility or expansion is consistent with . . . the local or regional solid waste management plan and the state solid waste management plan . . . ." S.C. Code Ann. § 44-96-290(F) (2002). The planning section of the SWPMA sets forth requirements that the counties must adhere to when developing a local solid waste management plan. S.C. Code Ann. § 44-96-80 (2002). In

[1] Greeneagle does not contend that the decision of the ALC was arbitrary or capricious.

particular, the planning section of the SWPMA requires each local plan to include "an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period." S.C. Code Ann. § 44-96-80(A)(3) (2002).

The determination of need and of consistency are two separate and distinct factors in the permitting process, and the SWPMA does not expressly require DHEC to follow any specific procedures in making decisions regarding need and consistency. Se. Res. Recovery, Inc., 358 S.C. at 408, 595 S.E.2d at 471. Nor does the SWPMA expressly define the term "need." The SWPMA does, however, require DHEC to promulgate regulations to carry out its responsibility of making decisions regarding the DON requirement. S.C. Code Ann. § 44-96-290(E) (2002). These regulations require DHEC to look to the number of surrounding disposal facilities when determining whether there is a need for a new solid waste facility. S.C. Code Ann. Regs. 61-107.17(D)(3) (Supp. 2007).[2] "Where there are at least two commercial disposal facilities under separate ownership within [a ten-mile radius][3] that meet the disposal needs for the area, e.g., that accept special waste and, if applicable, are capable of handling additional tonnage, no new disposal capacity will be allowed." S.C. Code Ann. Regs. 61-107.17(D)(3)(a) (Supp. 2007).

Substantial evidence supports a finding that DHEC's DON determination was separate and distinct from its consistency determination. In the April 25, 2006 letter, in which DHEC notified Greeneagle that it had determined there was a need for the proposed landfill in the corresponding planning area, DHEC specifically distinguished between the DON requirement and the consistency requirement as separate steps in the review process. The letter further provided that DHEC had decided to approve the DON based upon the applicable regulations, indicating there was a

[2] This regulation was in effect at the time DHEC made all of its determinations regarding the proposed landfill. This regulation was amended effective June 26, 2009.

[3] The 2009 amendment changed this to a twenty-mile radius.

geographical need for a C&D landfill. See S.C. Code Ann. Regs. 61-107.17(D)(3) (Supp. 2007) (requiring DHEC to make a DON determination prior to making a consistency determination based upon the number of existing C&D landfills within a ten-mile radius of the proposed landfill). At the hearing, Arthur Braswell, the former director of DHEC's Solid Waste Management Division, testified that DHEC did not rely on anything in the local plan in its decision to approve the DON. Braswell further testified that had Greeneagle asked for a DON determination on the same day that York County adopted the 2007 Plan, DHEC's decision to approve the DON would not have changed. This evidence indicates the "need" assessed by DHEC in making its DON determination was a geographical need, solely dependent upon the number of existing landfills within the statutorily defined area of the proposed landfill.

On the other hand, DHEC notified Greeneagle in two subsequent letters that DHEC made preliminary and final consistency determinations based upon its review of the current York County solid waste management plan. Kent Coleman, who is the director of DHEC's Division of Mining and Solid Waste Management, testified at the hearing that DHEC ultimately concluded the proposed landfill was not consistent with the planning effort of York County because York County had adequate landfill capacity to meet its disposal needs. This evidence indicates that the "need" assessed by DHEC in making its consistency determination was a disposal need, which depended upon whether the existing landfills had the capacity to adequately dispose of the current and projected amount of C&D waste produced in York County. Because DHEC independently assessed the geographical need for the proposed landfill based upon the number of existing facilities and the disposal need based upon the capacity of those existing facilities, we find DHEC did not merge or comingle its determination of need with its consistency determination.

To support its argument that DHEC's consistency determination constituted an improper delegation of DHEC's permitting authority, Greeneagle relies on the supreme court's opinion in Southeast Resource Recovery, Inc. v. South Carolina Department of Health & Environmental Control, 358 S.C. 402, 595 S.E.2d 468 (2004) (SRRI). In SRRI, the supreme court held DHEC's practice of allowing the counties to determine whether a

proposed solid waste management facility was consistent with the local solid waste management plan constituted an impermissible delegation of authority. Id. at 408, 595 S.E.2d at 471. More recently, this court determined in York County v. South Carolina Department of Health & Environmental Control, that there was no meaningful distinction between the counties' consistency determinations in SRRI and an emergency county ordinance that declared all proposed landfills not yet permitted by DHEC were inconsistent with the local solid waste management plan. __ S.C. __, 723 S.E.2d 255, 256-57 (Ct. App. 2012). This court found that in both situations, the county was making a consistency determination regarding a proposed landfill, which was a power that only DHEC could exercise. Id.

The present case is distinguishable from both SRRI and York County. As required by the SWPMA, the 2007 Plan provided an analysis of York County's current and future capacity to manage solid waste. See S.C. Code Ann. § 44-96-80(A)(3) (2002) (providing each local solid waste management plan must include "an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period"). Based upon this analysis, the 2007 Plan indicated that York County could address its current and projected capacity needs for C&D waste with existing facilities and the potential for expansion of existing facilities. Unlike the emergency ordinance in York County and the letters of consistency in SRRI, the 2007 Plan did not directly make a consistency determination by expressly declaring the proposed landfill inconsistent with the local solid waste management plan.

Even if we were to assume that the 2007 Plan was an effort by York County to usurp DHEC's authority by indirectly controlling DHEC's permitting decision, substantial evidence exists that DHEC, not the county, determined the proposed landfill was inconsistent with the local solid waste management plan. At the hearing, Jana White, who is the manager of DHEC's Solid Waste Planning and Grants Section, and Kent Coleman both testified that DHEC did not simply rely upon the capacity determination provided in the 2007 Plan. According to White and Coleman, DHEC conducted its own analysis and independently verified that York County had accurately identified the amount of waste it currently generated; made a logical projection of how much waste the county would generate in the future

based on population and tons per person; and that the existing facilities had the capacity to adequately handle the current and expectant amount of waste. White and Coleman both testified that the need analysis in the 2007 Plan did not undermine DHEC's permitting authority and it played no role in DHEC's consistency determination. Based on this evidence, we find DHEC did not improperly delegate its permitting authority by allowing York County to determine whether the proposed landfill was consistent with the local plan.[4]

CONCLUSION

For the foregoing reasons, the decision of the ALC is hereby

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

[4] In light of our disposition herein, we decline to address Greeneagle's remaining arguments. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address all issues on appeal when the disposition of one issue is dispositive).