

## Error Preservation in South Carolina: Beware the "Two Issue" Rule.

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Because I am an appellate lawyer, error preservation is the bane of my existence. I don't care if the trial judge excluded your evidence, kicked a puppy, or made the jury deliberate through the Clemson-Carolina game. If you don't preserve the error, I can't help you.

As of Monday, I no longer care if the judge awarded the plaintiff damages for breach of contract. We'll be appealing the unjust enrichment claim, too.

"But wait!" I hear you cry. "Breach of contract and unjust enrichment are mutually exclusive! If the plaintiff has a remedy at law, equity doesn't apply!" You are right, of course. (And also, you can stop shouting now.) And when the judge awards damages for actual pecuniary loss, rather than for the increase in the fair market value of the property, it certainly looks like the plaintiff won on its legal theories rather than its equitable one.

But as I said, after Monday that doesn't matter, because on Monday the South Carolina Supreme Court decided *Atlantic Coast Builders v. Lewis*. In *Lewis*, the plaintiff sued on theories of breach of contract, negligent misrepresentation, and unjust enrichment. The judge found for the plaintiff on all three theories and awarded damages as measured at law. The defendant appealed the judgment on the basis of the legal theories underlying the damages award. That seemed reasonable to everyone involved, including the plaintiff (who did not argue any error preservation problem) and Court of Appeals, which ruled on the merits and affirmed the award.

Unfortunately, it did not seem reasonable to the Supreme Court, which held that the "two issue" rule required the defendant to appeal the equitable theory, as well. Under the two issue rule, if an award is based on more than one ground, you have to appeal them both; otherwise, the non-appealed ground provides an independent basis for affirming the judgment. So, in *Lewis* if the defendant had appealed the breach of contract finding but not the negligent misrepresentation one, the two-issue rule would bar consideration of the breach of contract finding.

*Lewis* takes this one giant leap further, holding that you must appeal the equitable theory even if

the trial judge did not (and could not, because law precedes equity) award equitable relief. This doesn't make much sense to me. Practically speaking, there is no judgment the equitable claim, so there is nothing for the defendant to appeal. It's not quite the same as requiring an appeal by a prevailing party, but it comes awfully close.