The Supreme Court of South Carolina

In the Matter of
Ralph Phillips, Jr., Deceased.

ORDER

The Commission on Lawyer Conduct has filed a petition advising the Court that Mr. Phillips passed away on February 26, 2010, and requesting the appointment of an attorney to protect Mr. Phillips' clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Paul Zion, Esquire, is hereby appointed to assume responsibility for Mr. Phillips' client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Phillips maintained. Mr. Zion shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Phillips' clients. Mr. Zion may make disbursements from Mr. Phillips' trust account(s), escrow account(s), operating account(s), and

any other law office account(s) Mr. Phillips maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Phillips, shall serve as notice to the bank or other financial institution that Paul Zion, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Paul Zion, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Phillips' mail and the authority to direct that Mr. Phillips' mail be delivered to Mr. Zion's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
March 10, 2010

The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(1), SCACR, since February 1, 2010. This list is being published pursuant to Rule 419(d)(1), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2010, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(1), SCACR.

Columbia South Carolina
March 15, 2010

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 15, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Spartanburg Regional Medical Center, Appellant/Respondent,

v.

Oncology and Hematology Associates of South Carolina, LLC, d/b/a Cancer Centers of the Carolinas, Respondent/Appellant,

and South Carolina Department of Health and Environmental Control, Respondent,

AND

Oncology Hematology Associates of South Carolina, LLC, d/b/a Cancer Centers of the Carolinas, Respondent/Appellant,

v.

South Carolina Department of Health and Environmental Control, Respondent,

and Spartanburg Regional Medical Center, Appellant/Respondent.

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

Opinion No. 26785
Heard October 8, 2009 – Filed March 15, 2010

AFFIRMED AS MODIFIED

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JUSTICE WALLER: This is a cross-appeal from the circuit court's order which affirmed in result the decisions of the DHEC Board and the administrative law court (ALC) which awarded **two** Certificates of Need (CON) for the development of two additional radiation oncology centers in the Spartanburg/Union/Cherokee service area. We affirm as modified.

PROCEDURAL BACKGROUND

In June 2002, appellant/respondent Spartanburg Regional Medical Center (SRMC) filed a CON application with respondent South Carolina Department of Health and Environmental Control (DHEC).[1] The CON was for a regional cancer center with a linear accelerator[2] to be located on the campus of Upstate Carolina Medical Center, an acute care hospital in Gaffney, Cherokee County. In October 2002, respondent/appellant Oncology Hematology Associates of South Carolina, LLC, d/b/a Cancer Centers of the Carolinas (CCC) applied for a CON with DHEC for a radiation oncology center with a linear accelerator to be located near the campus of Mary Black Hospital (Mary Black) in Spartanburg.[3] CCC's planned linear accelerator at Mary Black would be approximately three miles from the Gibbs Regional Cancer Center (Gibbs Center), which is affiliated with SRMC and where the only other three linear accelerators in the service area are located.[4]

---

[1] SRMC is a public hospital that is part of the Spartanburg Regional Health Services District, which is a political subdivision of South Carolina.

[2] A linear accelerator is used by radiation oncologists to provide external radiation treatments to cancer patients. The CON Act defines "radiation therapy facility" as "a health care facility which provides or seeks to provide mega-voltage therapeutic services to patients through the use of high energy radiation." S.C. Code Ann. § 44-7-130(23) (2002).

[3] CCC is a private oncology practice established in 1976 with eight Upstate locations.

[4] SRMC described its proposal for the linear accelerator in Cherokee County as a "Gibbs Center satellite." The proposed Gaffney location is over 20 miles from the Gibbs Center in Spartanburg. If SRMC's CON was solely approved, it would retain its status as the exclusive provider of radiation therapy in the tri-county service area of Spartanburg, Cherokee and Union. Conversely, if only CCC's application was approved, there would be four linear accelerators in the service area, **all** in Spartanburg County. If both CONs got approval, the service area would go from three to five linear accelerators.

DHEC staff deemed the two CON applications competing.[5] DHEC held a project review meeting in February 2003 where both SRMC and CCC presented their proposed projects. On March 31, 2003, DHEC issued its decision letters which granted a CON for SRMC, but denied the CCC application.

Thereafter, CCC sought a contested case hearing before the ALC on both of DHEC's decisions. After months of discovery, the ALC held a five-day hearing in December 2003. In June 2005, the ALC issued its order upholding DHEC's decision to grant SRMC a CON, but reversing the DHEC decision to deny CCC's CON application. The ALC found the two CON applications were **not** competing "because granting both Applications will not exceed the need for linear accelerator facilities and the services which they provide." The ALC further found that both applications were consistent with the 2001 State Health Plan. Accordingly, the ALC ordered DHEC to issue a CON for each proposed project.

DHEC, SRMC and CCC all petitioned the South Carolina Board of Health and Environmental Control (the Board) for review of the ALC's decision. After a hearing in January 2006, the Board decided neither petitioner had proved the ALC had erred; therefore, the Board affirmed the ALC's decision.

SRMC and CCC petitioned the circuit court for judicial review of the Board's decision. A hearing was held in December 2007, and in January 2008, the circuit court affirmed the Board and ALC orders **in result**. SRMC and CCC filed cross-appeals, and the case was subsequently certified to this Court, pursuant to Rule 204(b), SCACR.[6]

---

[5] See S.C. Code Ann. § 44-7-130(5) (2002) (defining "competing applicants" as two health care facilities who apply for CONs "to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities").

[6] The orders in this case have been stayed and therefore no additional linear accelerators have been added in the tri-county service area.

FACTS

Pursuant to the CON Act,[7] DHEC is designated as the sole state agency for control and administration of the granting of CONs which includes the preparation of the State Health Plan. See S.C. Code Ann. §§ 44-7-130(8) & -140 (2002). The purpose of the Health Plan is to outline the need for medical facilities and services in the State. The Health Plan is used as one of the criteria for reviewing projects under the CON program.

The parties agree that the 2001 Health Plan governs the instant case because it was the plan in effect when the CON applications were filed in 2002. See S.C. Code Ann. Regs. 61-15 § 504 (Supp. 2008). The 2001 State Health Plan set the capacity of **each** linear accelerator at 7,000 treatments per year, with a realistic load being 80 percent of capacity, or 5,600 treatments per year.[8] Under the 2001 Health Plan, new linear accelerators would only be approved if the following conditions were met:

> A. All **existing** units in the service area have performed at a combined use rate of 80 percent of capacity (5,600 treatments per unit) for the year immediately preceding the filing of the applicant's CON application; **and**
>
> B. **an applicant must project that the proposed service will perform a minimum of 3,500 treatments annually within three years of initiation of services, without reducing the utilization of existing [linear accelerators] in the service area below the 80 percent threshold**.

(Emphasis added). Consequently, an application for a linear accelerator CON in the tri-county service area at issue must establish that in its third-year of operations, the projected number of treatments for the new accelerator

[7] S.C. Code Ann. § 44-7-110 *et seq.* (2002).

[8] Thus, the aggregate 80 percent threshold for the three linear accelerators in the Spartanburg/Union/Cherokee service area is 16,800 (5,600 * 3).

exceeds 3,500 treatments, and the existing accelerators will provide at least 16,800 treatments.

The 2001 State Health Plan outlined the following criteria under which a linear accelerator project would be reviewed:

a. Compliance with the Need Outlined in this Plan;
b. Community Need Documentation;
c. Distribution (Accessibility);
d. Projected Revenues;
e. Projected Expenses;
f. Financial Feasibility; and
g. Cost Containment.

See S.C. Code Ann. Regs. 61-15 § 802.

The Health Plan also specifically states that when evaluating CON applications for linear accelerators, "[t]he benefits of improved accessibility will be **equally weighted** with the adverse affects [sic] of duplication." (Emphasis added). Furthermore, the regulations clarify that while a project "does not have to satisfy every criterion" to be approved, "no project may be approved unless it is consistent with the State Health Plan." S.C. Code Ann. Regs. 61-15 § 801(3). DHEC assigns the relative importance of the project review criteria for the specific project applied for, and the relative importance "must be consistent for competing projects."[9] Regs. 61-15 § 801(2).

SRMC filed its CON in June 2002 after determining that its three existing linear accelerators at the Gibbs Center had exceeded the 80 percent threshold for the 12-month time period of mid-May 2001 through mid-May

[9] DHEC originally assigned slightly different relative importance of project criteria for the two projects at issue in the instant case. By the time of the project review meeting, however, the project criteria and their relative importance had been aligned for both projects.

2002.[10] The portion of SRMC's CON application dealing with Need focused on the growing population of Cherokee County. In determining the cancer incidence rate for Cherokee County, SRMC utilized data from both the South Carolina Central Cancer Registry (the SC Registry) and Claritas Corporation (Claritas).[11] SRMC projected over 3,500 treatments in the third year for the Cherokee facility without reducing the existing Spartanburg linear accelerators' utilization below the 80 percent threshold.

In the Need portion of CCC's CON application, CCC asserted that the tri-county area had a projected need for two additional linear accelerators – its own proposed project **and** SRMC's Cherokee County proposal. Using Claritas population data along with **age-specific** cancer incidence data from the National Cancer Institute's Surveillance, Epidemiology, and End Results (SEER) program, CCC predicted that its proposed Spartanburg facility would perform 6,325 treatments in the third year without reducing SRMC's existing linear accelerators' utilization below the 80 percent threshold.

DHEC found that SRMC's application "better" met the following criteria than CCC's "competing" application:

> Criterion 1. Need – Compliance with the State Health Plan;
>
> Criterion 3b. Distribution (Accessibility) – The proposed service should be located so that it may serve medical underserved areas (or an underserved population segment) and should not unnecessarily duplicate existing service or facilities in the proposed service area; and

[10] From May 2001 through May 2002, SRMC's three linear accelerators performed 18,278 treatments.

[11] Pursuant to S.C. Code Ann. Regs. 61-15 § 202(11), population statistics provided in the CON application must be "consistent with those generated by the State Demographer, State Budget and Control Board." Claritas is a national company specializing in population and demographics data.

> Criterion 22. Distribution – The existing distribution of the health service(s) should be indentified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population.

See S.C. Code Ann. Regs. 61-15 § 802.

CCC thereafter filed for a contested case hearing before the ALC. The five-day hearing was extensive in terms of both witness testimony and exhibits. The parties took issue with many aspects of each other's proposed project, specifically targeting assertions regarding, *inter alia*, financial feasibility studies, service to indigent populations, desirability of the project from the community perspective, and expert qualifications of witnesses.

Without a doubt, however, the issue of need was central to the case because CCC argued that DHEC had erred at the outset by characterizing the applications as competing. See S.C. Code Ann. § 44-7-130(5) (defining "competing applicants" as two health care facilities who apply for CONs "to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would **exceed the need** for services or facilities") (emphasis added). CCC contended that because the addition of two linear accelerators would not exceed the need for radiation therapy in the tri-county service area, both applications could be approved. CCC further argued that if only one application should be approved, its own better met the project criteria.

At the contested case hearing, both SRMC and CCC changed their third year projections from what they originally had proposed in their applications, although the methodology used was identical.[12] The projection methodology utilized was the following:

[12] Both SRMC and CCC focused on the entire tri-county service area at the contested case hearing. In contrast, in the original CON applications, SRMC focused its projections on only Cherokee County, while CCC focused on Spartanburg and Union counties.

(1) Calculate the anticipated number of new cancer cases in the service area by applying a cancer incidence rate to the projected population;

(2) Assume that 60 percent of the new cancer cases would require radiation therapy with a linear accelerator; and

(3) Assume that each case, i.e., patient, would receive 25 radiation treatments.

Using state-specific data from the SC Registry,[13] SRMC projected that the total treatments **in 2006** for the entire tri-county service area would be 22,346.[14] Using Claritas data and age-adjusted SEER data, CCC projected that the total treatments in 2006 for the entire tri-county service area would be 27,172.

According to SRMC, its projection of 22,346 treatments would support its existing three linear accelerators in Spartanburg, plus the additional new one in Cherokee; however, SRMC's projections would **not** support a fourth accelerator because that would require a projection of at least 23,800 treatments.[15]

[13] Data from the SC Registry is based upon the **actual number** of reported cancer cases in South Carolina.

[14] Because the State Health Plan's provides that a linear accelerator would only be approved if the third year projections for utilization are met, the parties focused on 2006 as the expected third year. There were indications that, due to the delays involved with litigation, 2006 would not be the **actual** third year of utilization.

[15] The 23,800 figure is arrived at by adding 16,800 (the minimum number of treatments needed to reach the 80% threshold for the three existing accelerators), plus 3,500 (the minimum number of treatments needed for SRMC's new accelerator in the third year), plus another 3,500 (the minimum number of treatments needed for CCC's new accelerator in the third year).

CCC argued that its projection of 27,172 treatments would support SRMC's existing three linear accelerators in Spartanburg, plus the addition of **both** a new SRMC accelerator in Cherokee and a new CCC accelerator in Spartanburg, because its projection exceeded 23,800 treatments.

CCC further argued that the Claritas and age-adjusted SEER data were more appropriate data sources for the projections because cancer incidence rises as a person ages. One of CCC's witnesses, Dr. Mark O'Rourke, a medical oncologist, explained that "to estimate how many cancers are expected from a population, we need to know what proportion is in the different age groups." Because SRMC did not use age-specific data for its projections, Dr. O'Rourke opined that those projections were underestimated. On the other hand, SRMC argued that a historical review of SEER data compared with actual South Carolina cancer incidence indicated that SEER overestimated cancer incidence by approximately 5 percent.

In the written ALC decision, the ALC phrased the dispositive issue in the case as follows:

> Did the Petitioner, CCC, prove by a preponderance of the evidence that [DHEC] erred in its determination that CCC's and SRMC's applications were competing, so that only one additional linear accelerator was needed in the service area composed of Cherokee, Spartanburg and Union Counties and only one application could be approved, or is it feasible and within the guidelines established in the statute, regulations and State Health Plan that both facilities could be approved?

In the numerous findings of facts, the ALC specifically noted Dr. O'Rourke's testimony and found him to be "a very credible witness." The ALC further found his testimony supported the conclusion that the two CON applications were not competing.

In addition to the findings of fact and conclusions of law sections, the ALC's written order included an "Analysis" section. In this section, the ALC

found the two CON applications were **not competing** and that both were consistent with the requirements of the State Health Plan. The following is an excerpt from the order:

> After reviewing the voluminous exhibits, extensive testimony, and taking into account the totality of circumstances in the tri-county service area in this case, I find that the two applications are not competing because granting both Applications will not exceed the need for linear accelerator facilities and the services which they provide….
>
> The record is replete with evidence that both the aging population and the general class of cancer patients in the tri-county service area – particularly those in the more rural areas – need easier access to radiation treatments. Moreover, the rapidly expanding population in the urban areas of the tri-county region establishes the need for the additional Spartanburg facility.
>
> I find that a preponderance of the evidence establishes that the projected population growth in the service area justifies granting both [CONs], and that the projected growth will enable both facilities to meet the requirement of 3,600[16] treatments per year for each linear accelerator by their third year of operation. Moreover, I find that the preponderance of the evidence supports the conclusion that each facility is financially feasible.

As stated above, both the Board and the circuit court affirmed the ALC's order that both CONs be issued.[17]

[16] This is apparently a scrivener's error and should be 3,500.

[17] The circuit court affirmed in result only; in addition to affirming the ALC's decision, the circuit court also found that CCC's application "better" met the requirements of the State Health Plan than SRMC's application.

ISSUES

1. Is there substantial evidence to support the ALC's findings that the CON applications are not competing and both CONs should be issued? (SRMC's appeal)

2. Did the circuit court, Board, and ALC err in granting SRMC's CON application? (CCC's appeal)

SCOPE OF REVIEW

The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact. See S.C. Code Ann. §§ 1-23-600; 44-7-210; Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 573, 577, 595 S.E.2d 851, 853 (Ct. App. 2004).

On appeal from a contested CON case, the reviewing court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. §§ 1-23-380(5). Judicial review of administrative agency decisions is therefore "limited to a determination of whether they are supported by substantial evidence." Roper Hosp. v. Board of S.C. Dep't of Health and Envtl. Control, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991). After considering the entire record, this Court "need only find … evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached." Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (citation and internal quotation marks omitted).

The Court may, however, reverse or modify the Board's order if the appellant's substantial rights have been prejudiced because the administrative decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f)

arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 1, 6, 664 S.E.2d 471, 473-74 (2008) (citing S.C. Code Ann. § 1-23-380(5)).

SRMC's Appeal

In its brief, SRMC argues six separate issues on appeal related to the ALC's order. Given our scope of review, however, the determinative issue in this case is whether there is substantial evidence to support the ALC's findings and/or whether the ALC made an error of law. See S.C. Code Ann. § 1-23-380(5). More specifically, we must decide whether the ALC's conclusion that the two applications are **not** competing is legally correct. We hold it is.

We note initially that the purpose of the CON Act "is to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120(2002).

As noted above, the CON Act defines "competing applicants" as two health care facilities who apply for CONs "to provide similar services or facilities in the same service area within a time frame as established by departmental regulations **and whose applications, if approved, would exceed the need for services or facilities**." S.C. Code Ann. § 44-7-130(5) (emphasis added). It is well-settled that "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. S.C. Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

The ALC found that granting both CON applications would **not** exceed the need, and therefore, the applications were **not** competing. From a factual perspective, there is abundant evidence in the record to support this based on CCC's data projections. Moreover, it is hard to interpret the plain language of section 44-7-130(5) any other way than the manner in which the ALC

interpreted it: If granting both applications would not exceed the need, then the applications are not competing and both may be granted (provided all other relevant criteria are met). See Brown v. S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.").

The ALC also specifically found that both SRMC and CCC met the relevant project criteria. Again, there is an abundance of evidence to support this finding. While the ALC correctly noted that each proposed project has its strengths and advantages, this does not mean the other completely lacks merit.

Accordingly, we affirm the decision to grant both CONs. We find the evidence substantially supports the legal conclusion that the two applications were not competing. Moreover, based on the evidence presented, the granting of both CONs does not violate the State Health Plan and will further the overall purpose of the statute. See § 44-7-120.

We have reviewed SRMC's individual arguments raised on appeal and find that two merit brief discussion. First, SRMC argues the ALC failed to make specific findings of fact.

This Court has made clear that "[t]he findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Able Communications, Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). To simply recite conflicting testimony is insufficient. Id. In Able, the Public Service Commission's order contained no findings of fact at all and a conclusory finding that the proposed paging service rates were reasonable. The Able Court held that appellate review was "impossible" because all it could do was speculate as to "the reasons underlying the decision." Id.

SRMC argues the ALC failed to "choose" one set of data projections over another and therefore ran afoul of the Able holding. We disagree. The

ALC's order was far from conclusory. There are findings of fact, credibility determinations, conclusions of law, and legal analysis in the written order. Although SRMC correctly notes that in the findings of fact section the ALC lists both sets of data projections, the legal analysis outlined in the ALC order demonstrates an acceptance of CCC's predictions and specifically reflects that the ALC took into account the aging population. Only CCC's data projections separated the data by age cohorts. Therefore, we need not speculate about why the ALC reached the decision it did because the written order makes the reasons manifest. In other words, the rule outlined in Able and its progeny has not been breached.

SRMC also argues the circuit court order must be vacated because it included improper findings of fact and credibility determinations. We agree. Because the circuit court was sitting in an appellate capacity, it was bound by the same scope of review discussed above. It was error for the circuit court to go beyond that scope and make additional findings.

Accordingly, we affirm as modified and vacate the circuit court order. The Board's decision which affirmed the ALC's ruling to issue both CONs stands.

CCC's Appeal

Although CCC acknowledges in its brief that: (1) the appropriate standard of review is the substantial evidence test, and (2) it offered evidence there was sufficient need in the tri-county area for two linear accelerators, CCC nevertheless argues it was error to grant SRMC's CON application. However, because CCC does not challenge the ALC's ruling that the applications are non-competing, its argument about which application is "better" is irrelevant. We find CCC's argument wholly meritless. As discussed at length above, the ALC order which granted **both** CON applications is well supported by substantial evidence.

CONCLUSION

We vacate the circuit court's order but affirm the Board's decision which in turn affirmed the ALC's written order to grant both CONs.

AFFIRMED AS MODIFIED.

PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. TOAL, C. J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent from the majority's opinion and would reverse the circuit court's decision affirming in result the decisions of the DHEC board and the ALC.

The Administrative Procedures Act specifically requires an agency's order in a contested case to "include findings of fact and conclusions of law . . . ." S.C. Code Ann. § 1-23-350 (2005). "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Comm'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (citation omitted). "This Court will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C.*, 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999).

"Where material facts are in dispute, the administrative body must make specific, express findings of fact." *Able Comm'ns, Inc.*, 290 S.C. at 411, 351 S.E.2d at 152 (citation omitted). "Implicit findings of fact are not sufficient." *Id.* "[A] recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues." *Id.* As a result, "[i]t is impossible for an appellate court to review the order for error, since the reasons underlying the decision are left to speculation." *Id.*; *see also Grant v. Grant Textiles*, 372 S.C. 196, 641 S.E.2d 869 (2007) (reversing Workers' Compensation Commission in part because the full commission failed to set forth the underlying facts upon which it relied to support its conclusion); *Kiawah Prop. Owners Group*, 338 S.C. 92, 525 S.E.2d 863 (finding it impossible for this Court to review public service commission orders that merely recite each party's general position on the issue and then announce the one it chooses to follow); *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 507 S.E.2d 328 (1998) (reversing public service commission's decision on the rate of return on common equity because that decision was not adequately documented in the findings of fact).

In this case, the majority points out that the ALC's order lists both sets of data projections in the findings of fact section. However, the ALC's order never explicitly makes a finding of fact indicating which data projections were ultimately relied upon in making its decision. The lack of explicit findings of fact clearly does not meet the standards set forth in *Able* and its progeny. The only way to arrive at a finding of fact concerning data projections is to imply that the ALC relied on CCC's data projections. However, *Able* states that implicit findings of fact are not sufficient. *Able Comm'ns, Inc.*, 290 S.C. at 411, 351 S.E.2d at 152. Thus, it is impossible for this Court to review the order for error because the reasons underlying the decision are left to speculation.

The circuit court sits as a reviewing court that must determine if the ALC's decision is supported by substantial evidence in the record. *See* S.C. Code Ann. § 1-23-380 (Supp. 1998).[18] While the circuit court attempted to salvage the ALC order, the circuit court's determinations are also speculative at best. The circuit court should have remanded the order so that the ALC could have fulfilled its responsibilities to the parties. It is not the circuit court's responsibility to create an acceptable order when the ALC fails to do so. *See Kiawah Prop. Owners Group*, 338 S.C. at 97, 525 S.E.2d at 865.

In conclusion, because the ALC's order does not meet the standards set forth in *Able* and its progeny by not expressly finding facts indicating which data projections were ultimately relied upon in making its decision, I would reverse the circuit court's decision affirming in result the decisions of the DHEC board and the ALC.

[18] The procedure for reviewing decisions by the ALC under section 1-23-380 has changed to allow for appeals to the court of appeals instead of the circuit court. *See* S.C. Code Ann. § 1-23-380 (Supp. 2008).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sonya L. Watson, Stacy Watson, Curtis L. Watson, and Shirley Watson Individually and as Parents of Sonya L. Watson, Stacy Watson, and Thelma Watson, Plaintiffs,

v.

Ford Motor Company, TRW, Inc., TRW Vehicle Safety Systems, Inc., and D&D Motors, Inc., Defendants.

Willie E. Carter, as Personal Representative of the Estate of Patricia Ann S. Carter, Deceased, Plaintiffs,

v.

Ford Motor Company, TRW, Inc., TRW Vehicle Safety Systems, Inc., and D&D Motors, Inc., Defendants,

of whom Sonya L. Watson, Stacy Watson, Curtis L. Watson and Shirley Watson , Individually and as Parents of Sonya L. Watson, Stacy Watson, and Thelma Watson, and Willie E. Carter, as Personal Representative of the Estate of Patricia Ann S. Carter, Deceased, are the Respondents,

and Ford Motor Company is the Appellant.

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26786
Heard February 5, 2009 – Filed March 15, 2010

REVERSED

C. Mitchell Brown, William C. Wood, Jr., Elizabeth H. Campbell, and A. Mattison Bogan, all of Nelson, Mullins, Riley & Scarborough, of Columbia, Elbert S. Dorn, and Nicholas W. Gladd, both of Turner, Padget, Graham & Laney, of Columbia, for Appellant.

James Edward Bell III, of Bell Legal Group, of Georgetown, James Walter Fayssoux, Jr., of Anderson

Fayssoux & Chasteen, of Greenville, and Kevin R. Dean, of Motley Rice, LLC, of Mt. Pleasant, for Respondents.

CHIEF JUSTICE TOAL: Following a single vehicle accident, Respondents Sonya L. Watson and the Estate of Patricia Carter filed a products liability suit against Appellants. A jury found against Appellant Ford Motor Company ("Ford") and awarded Respondents $18 million in compensatory damages. On appeal, Ford argues that the trial court erred in several respects and that these errors warrant a new trial.

FACTUAL/PROCEDURAL BACKGROUND

On December 11, 1999, Watson was driving a 1995 Ford Explorer along with three other passengers including Patricia Carter. Shortly after entering Interstate 385, Watson lost control of the vehicle, which then veered off the left side of the interstate and rolled four times. Watson and Carter were ejected from the vehicle. Watson suffered severe injuries that rendered her quadriplegic; Carter died in the accident. Respondents filed a products liability suit against Ford, D&D Motors, Inc., and TRW Vehicle Safety Systems, Inc. alleging that the cruise control system and the seatbelts were defective and seeking actual and punitive damages.

At trial, Watson testified that when she entered the interstate, she promptly set the cruise control, but shortly thereafter, the Explorer began to suddenly accelerate. Watson testified that she reached down in an attempt to grasp the gas pedal, but was stopped by her seat belt and that she then pumped her brakes to no avail before crashing. Watson's father testified that on two occasions prior to the accident, the Explorer suddenly accelerated while he was driving. As a result, he took the vehicle into D&D Motors, and the technicians determined that the new floor mats were upside-down and needed to be turned over.[1]

[1] A service invoice sheet included in the record confirms that Mr. Watson

Respondents' theory of the case was that the Explorer's cruise control system was defective because it allowed electromagnetic interference (EMI) to affect the system. EMI is an unwanted disturbance caused by electromagnetic radiation that interferes with an electric circuit. To support this theory, Respondents presented Dr. Antony Anderson, an electrical engineer from Britain. Dr. Anderson testified as to his theory that EMI can interfere with the speed control component of a cruise control system and cause a vehicle to suddenly and uncontrollably accelerate. He concluded that on the day of the accident, EMI interfered with the Explorer's cruise control system, which caused it to suddenly accelerate and resulted in the accident. Dr. Anderson further opined that Ford could have employed a feasible alternative design to prevent EMI. Specifically, he testified that Ford could have used "twisted pair wiring" in order to prevent EMI from passing between the wires and had Ford used the twisted pair wiring, the accident would not have occurred.

In addition to Dr. Anderson's testimony, Respondents presented testimony from Bill Williams who was qualified as an expert on "cruise control diagnosis" as well as evidence from four witnesses who testified as to other similar incidents in which their Explorers suddenly accelerated without the driver's input.

Ford argued that Dr. Anderson's EMI theory was unreliable and lacked any scientific foundation, and to counter the theory, Ford presented their cruise control expert, Karl Passeger. Passeger testified that EMI signals have no effect on a cruise control system and that the system contains a watchdog feature that automatically checks for improper signals and resets the cruise control computer if it is not operating correctly. Additionally, Ford suggested that the floor mats could have caused the sudden acceleration as they had on previous occasions.

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brought the Explorer into D&D Motors to "[check] gas pedal for sticking," but that D&D Motors determined that the pedal would "stick into floor mat" when it was pushed hard and the "customer needs to turn floor mats back over."

The trial court issued a lengthy jury charge on the law of products liability. During deliberations, the jury submitted a question to the trial court asking, "Can we consider other causes of cruise control malfunction other than EMI?" The trial court responded, "You may consider any and all evidence which was properly admitted at trial and give it the weight that you think it deserves." The jury found Ford liable on the cruise control products liability claim, but found against Respondents on their defective seat belt claim and on their claim for punitive damages. The jury awarded compensatory damages of $15 million to Watson and $3 million to the Estate of Patricia Carter.

We certified this case pursuant to Rule 204(b), SCACR, and Ford presents the following issues on appeal:[2]

I. Did the trial court err in qualifying Bill Williams as an expert in cruise control systems?

II. Did the trial court err in allowing Dr. Anderson's expert testimony regarding EMI and alternative feasible design?

III. Did the trial court err in allowing evidence of other incidents of sudden acceleration in Explorers?

[2] Although Ford presented several other issues on appeal, we find that these three issues are dispositive to the outcome. Therefore, we decline to address the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that the Court need not rule on remaining issues when the disposition of prior issues is dispositive).

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, this Court may only correct of errors of law. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings. *Id.*

LAW/ANALYSIS

I. Expert Testimony

The jury and the trial court each have distinct roles and separate responsibilities that they must execute during a trial. The jury serves as the fact finder and is charged with the duty of weighing the evidence admitted at trial and reaching a verdict. The trial court, on the other hand, is charged with the duty of determining issues of law. As a part of this duty, the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law. Once the trial court makes a ruling that the particular evidence is admissible, then it is exclusively within the jury's province to decide how much weight the evidence deserves. Importantly, the trial court is never permitted to second-guess the jury in their fact finding responsibilities unless compelling reasons justify invading the jury's province. *See Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 692 (1995).

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge. Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. *See* Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. *See* Rules 602 and 701, SCRE.

For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is

reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 515, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).

Only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. *See State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence"). It is against this backdrop that we analyze whether the trial court erred in admitting the challenged expert evidence.

A. Bill Williams' Testimony

Ford argues that the trial court erred in qualifying Bill Williams as an expert on cruise control diagnosis. We agree.

A person may be qualified as an expert in a particular area based upon knowledge, skill, experience, training or education. Rule 702, SCRE. In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather, should make an inquiry broad in scope. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). The qualification of a witness as an expert is within the trial court's discretion, and this Court will not reverse that decision absent an abuse of discretion. *Fields*, 376 at 555, 658 S.E.2d at 85.

During the motion *in limine* to determine whether Williams qualified as a cruise control expert, Williams testified that he had worked in the automotive industry as a trainer, consultant, software developer, and writer

since the early 1980s and was currently conducting seminars to train automobile technicians who focus on the brake systems in vehicles. On cross-examination, Williams admitted that he had no professional experience working on cruise control systems prior to this litigation. He also admitted that he had not conducted any comparison of the Explorer's cruise control system to any other system and acknowledged that he had never taught or published papers on cruise control systems. The trial court ruled that Williams qualified as an expert in "the training and operation of the cruise control and brakes" and allowed him to testify as to "cruise control diagnosis."

In our view, there is no evidence to support the trial court's qualification of Williams as an expert in cruise control systems. Williams had no knowledge, skill, experience, training or education specifically related to cruise control systems. Rather, it appears he merely studied the Explorer's system just before trial, which he indicated in his testimony to the jury: "This is how I taught myself the [Explorer's] cruise control, or speed control system." While Williams may have been qualified as an expert in other aspects of automobile components, such as the brake system, the trial court failed to properly evaluate Williams' qualifications specific to cruise control systems. *Compare Wilson*, 357 S.C. at 452, 593 S.E.2d at 605 (holding that the trial court erred in refusing to qualify a medical doctor as an expert in biomechanics where the doctor had training in biomechanics, had been qualified as a biomechanics expert in other states, and had some educational background in biomechanics); *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995) (holding that the trial court erred in failing to qualify a plastic surgeon as an expert in the field of family practice where the plastic surgeon served as a professor who provided instruction to family practitioner residents and where family practitioners referred their patients to him for diagnosis). Accordingly, we hold that the trial court erred in qualifying Williams as a cruise control expert.

Notwithstanding this error, to warrant reversal, Ford must show that it was prejudiced by the admission of this evidence. *See Fields* 376 S.C. at 557, 658 S.E.2d at 86. Prejudice is a reasonable probability that the jury's

verdict was influenced by the challenged evidence. *Id.* (finding that the trial court's error in failing to qualify an expert was harmless error since the testimony would have been cumulative).

In this case, we do not believe that this error alone prejudiced Ford's defense. Williams' testimony essentially consisted of a description of the system accompanied by models and diagrams of the components. Moreover, the jury heard Ford extensively question Williams' qualifications on cross-examination regarding his knowledge of cruise control systems in an attempt to impeach his credibility on the subject. Furthermore, the trial court prohibited Williams from testifying to matters outside of his scope, specifically noting he could not testify as to electrical engineering matters.

Trial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to "expert" testimony. In this case, however, we hold that the trial court's error in qualifying Williams as an expert in cruise control diagnosis did not prejudice Ford.

B. Dr. Anderson's Testimony

Ford argues that the trial court abused its discretion in admitting Dr. Anderson's expert testimony. Specifically, Ford claims that Dr. Anderson was not qualified to testify as to alternative designs and his theory regarding EMI as the cause of the sudden acceleration failed to meet the reliability requirements. We agree.

As a primary matter, we reject Respondents' argument that because Dr. Anderson presented technical evidence, as opposed to scientific evidence, his testimony did not have to meet the reliability requirements. The trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge. *See White*, 382 S.C. at 270, 676 S.E.2d at 686 (holding that all expert evidence must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter); *see also Kumho*

Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) (holding that in determining the admissibility of evidence pursuant to Rule 702, FRE, the same reliability requirements apply to all types of expert evidence).

Turning to the merits of Ford's argument, in order for Dr. Anderson's expert testimony to be admissible, the trial court had to find not only that Dr. Anderson was an expert based on his knowledge, skill, experience, training, or education in the field of EMI and its affect on automobiles, but also that the substance of his testimony was reliable. With regard to the reliability requirement, in *Council*, this Court listed several factors that the trial court should consider when determining whether scientific expert evidence is reliable:[3]

> (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

Id. at 19, 515 S.E.2d at 517 (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)).

We find that the trial court erred in admitting Dr. Anderson's testimony as to both an alternative feasible design and his EMI theory. With regard to alternative feasible design, Dr. Anderson failed to meet Rule 702's fundamental requirement that the witness be qualified in the particular area of expertise. Dr. Anderson's background involved working with massive

[3] The test for reliability for expert testimony does not lend itself to a one-size-fits-all approach. *See White*, 382 S.C. at 274, 676 S.E.2d at 688 (holding that the *Council* factors provided no useful analytical framework to evaluate the reliability of expert dog tracking evidence). However, in this case, Dr. Anderson's testimony was based on scientific principles and theories, and therefore, the *Council* factors are applicable and relevant to the reliability determination in this case.

generators which have entirely different electrical wiring systems and different voltage levels. He had no experience in the automobile industry, never studied a cruise control system, and never designed any component of a cruise control system. Moreover, Respondents failed to show that the substance of his testimony that twisted pair wiring would have cured the EMI defect was reliable. Dr. Anderson declared that the twisted pair wiring would have prevented EMI but did not explain how twisted pair wiring could be incorporated in to a cruise control system and did not offer any model comparison. Furthermore, Dr. Anderson concluded that this design was economically feasible, but offered no evidence to support this conclusion. Thus, his testimony on this matter lacked any scientific basis and contained no indicia of reliability. Accordingly, we hold that the trial court erred in admitting this testimony because Dr. Anderson was not qualified to testify as to alternative designs to the Explorer's cruise control system and his testimony was not reliable.

Turning to the testimony regarding EMI and its effect on the cruise control system, initially we question whether Dr. Anderson was qualified as an expert on this subject. Again, Dr. Anderson had no experience with automobiles and specifically no experience with cruise control systems. In fact, Dr. Anderson had not even operated an automobile with a cruise control system before this litigation. Nonetheless, assuming Dr. Anderson was properly qualified as an expert in this area, we find that his testimony was not reliable. Dr Anderson first learned of sudden acceleration occurring in automobiles in 2000 after he was contacted by a television news station that was investigating automobile accidents. Dr. Anderson admitted that his theory had not been peer reviewed, he had never published papers on his theory, and he had never tested his theory. He also admitted that he would not be able to determine exactly where the EMI which he opined caused the cruise control to malfunction originated or what part of the system it affected. He further testified that it would not be possible to replicate the alleged EMI malfunction of a cruise control system in a testing environment. To support his theory that EMI caused the Explorer to suddenly accelerate, Dr. Anderson pointed to only one document, a 1975 National Highway Safety Transportation Administration (NHSTA) report concluding that EMI can

cause a cruise control system to malfunction. However, the NHTSA issued superseding report in 1989, which specifically rejected the EMI theory.

In our view, there is no evidence indicating that Dr. Anderson's testimony contained any indicia of reliability. He had never published articles on his theory nor had he tested his theory. Importantly, Dr. Anderson admitted that it was not possible to test for EMI. Furthermore, although it is not a prerequisite in South Carolina that scientific evidence attain general acceptance in the scientific community before it is admitted, we find it instructive that not only has the underlying science not been generally accepted, Dr. Anderson's theory was rejected in the scientific community. *See Council*, 335 S.C. at 21, 515 S.E.2d at 518 (recognizing and taking in to consideration the fact that the science underlying DNA analysis evidence has been generally accepted in the scientific community in determining whether such evidence was reliable). Therefore, because there is no evidence in the record to show that the substance of Dr. Anderson's testimony was reliable, we hold that the trial court erred in admitting this testimony.[4]

In our view, the trial court's error in admitting Dr. Anderson's testimony is largely based on solely focusing on whether he was qualified as an expert in the field of electrical engineering and failing to analyze the reliability of the proposed testimony.[5] Respondents did not offer Dr.

[4] Several courts have excluded expert testimony regarding theory that EMI may cause a cruise control system to malfunction. *See Federico v. Ford Motor Co*., 854 N.E.2d 448 (Mass. App. Ct. 2006) (upholding the trial court's decision to exclude testimony that EMI would cause malfunction); *Turker v. Ford Motor Co.*, 2007 WL 701046 (Ohio App. 2007) (affirming the trial court's decision that expert testimony on EMI was unreliable); *Jarvis v. Ford Motor Co.*, 1999 WL 461813 (1999) (S.D. N.Y. 1999) (excluding the portion of the expert's testimony regarding EMI); *Baker v. Mercedes Benz of North America*, 163 F.3d 1356 (1998) (finding the trial court did not abuse its discretion in finding that plaintiff's expert testimony regarding EMI should be excluded).

[5] This is evident from the trial court's ruling: "[Dr. Anderson] does have

Anderson to testify generally as to the electrical wiring of a circuit system in an automobile. Rather, Respondents sought to introduce Dr. Anderson's testimony to determine a fact in issue based on a scientific hypothesis. The trial court was thus required to examine the substance of the testimony for reliability, and in failing to make this threshold determination, the trial court erred as a matter of law in admitting Dr. Anderson's testimony.

We find that Ford was prejudiced by the admission of this testimony. The only evidence Respondents presented to support their theory that the vehicle was defective was Dr. Anderson's testimony. We also note that Respondents may not rely solely on the fact that an accident occurred to prove their products liability case under a negligence theory since South Carolina does not follow the doctrine of *res ipsa loquitur*.[6] *See Snow v. City of Columbia*, 305 S.C. 544, n.7, 409 S.E.2d 79, n.7 (Ct. App. 1991) (noting that South Carolina does not recognize the rule of *res ipsa loquitur*). Thus, in the absence of any admissible evidence in the record to support their products liability claim, the jury impermissibly speculated as to the cause of the accident.

II. Evidence of Other Incidents

Ford argues that the trial court erred in admitting evidence of similar incidents involving sudden acceleration in Explorers. We agree.

Evidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between the accidents tending to prove or disprove some fact in dispute. *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). This rule is based on

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[requisite] education, knowledge, experience, and would be of scientific help to the jury in this case . . . but he's going to be qualified as an expert in the field of electrical engineering."

[6] *Res ipsa loquitur* is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence.

relevancy, logic, and common sense. *Id*. A plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue. *Id*. In *Buckman v. Bombardier Corp.*, the District Court set forth factors that a court should consider when admitting evidence of other incidents to support a claim that the present accident was caused by the same defect: (1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents. 893 F. Supp. 547, 552 (E.D. N.C. 1995) (citing *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir. 1985)).

Respondents introduced the deposition testimony from a separate case of a former Ford employee who investigated a number of claims of unintended acceleration of Explorers driven in Britain. The former employee read from an email where he referenced "35 incidents that have been categorized as unexplainable" in which the vehicles suddenly accelerated. Additionally, Respondents presented three witnesses, one of whom testified by video deposition, who recalled incidents in which their Explorers suddenly accelerated and their cruise control would not disengage.

In our view, Respondents failed to show that the incidents were substantially similar and failed to establish a special relation between the other incidents and Respondents' accident. First, the products were not similar because most of the other incidents involved Explorers that were made in different years from the Watson Explorer and were completely different models with the driver's seat located on the right side of the vehicle. More importantly, Respondents failed to show a similarity of causation between the malfunction in this case and the malfunction in the other incidents and failed to exclude reasonable explanations for the cause of the other incidents. Respondents only presented the testimony of the other drivers and did not present any expert evidence to show that EMI was a factor in the malfunction in the other incidents. Accordingly, this evidence was not relevant because Respondents failed to show that evidence of these incidents made the existence of the EMI defect in this case more probable. *See* Rule 401, SCRE (defining "relevant evidence" as evidence having any

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence); *see also Whaley*, 362 S.C. at 483-84, 609 S.E.2d at 300 (holding that evidence of other employee complaints and injuries should not have been admitted because the plaintiff failed to show that the injuries stemmed from the same or similar circumstances as the plaintiff's injuries).

Furthermore, we find that this evidence was highly prejudicial. Courts require a plaintiff to establish a factual foundation to show substantial similarity because evidence of similar incidents may be extremely prejudicial. *See id.* at 483, 609 S.E.2d at 300 (recognizing that evidence of other accidents may be highly prejudicial). Respondents' counsel highlighted this improper evidence in closing arguments and thereby possibly induced the jury to speculate as to other causes of the accident not supported by any evidence. For these reasons, we hold that trial court erred in admitting this evidence.

CONCLUSION

The trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements, such as qualification of experts, reliability of the substance of the testimony, and substantial similarity of alleged similar incidents, before a jury may hear the evidence. If these preliminary requirements are not met, as a matter of law, the trial court may not permit the jury to consider the evidence. In this case, we hold that those threshold admissibility requirements were not met, and therefore, the trial court erred in qualifying Williams as a cruise control expert, in admitting Dr. Anderson's testimony, and in admitting evidence of similar incidents. Accordingly, we must reverse the jury's verdict against Ford.

WALLER, BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the result reached here, but write separately as I do not agree with the majority's analysis of the expert witness issue involving Dr. Anderson, or its analysis of the admissibility of the evidence of other acceleration incidents.

First, the majority posits the trial judge's gatekeeper role with respect to expert testimony as consisting of these three parts:

1. Is the subject matter of the testimony beyond the knowledge of a lay person, thus requiring an expert to explain it?

2. Is the particular witness qualified as an expert in this field?

3. After evaluating the witness' testimony, is it reliable?

As explained below, I disagree with this framework when the subject of the expert testimony is scientific.[7]

I fundamentally disagree with the majority that the first gatekeeper function under Rule 702 is a determination whether the subject matter is beyond a lay person's knowledge and thus requires an expert to explain it. It is certainly true that some types of issues or evidence are *ipso facto* beyond the ken of a lay jury, and nearly always require that the claim be supported by expert testimony. Classically, this is so where the issue is one of medical malpractice. E.g. Linog v. Yempolsky, 376 S.C. 182, 656 S.E.2d 355 (2008). There are myriad other areas, however, where both lay and expert testimony may be presented. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (sanity); Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007) (intoxication); Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997) (cause of throttle sticking). I therefore disagree with the majority to the extent it now holds that expert testimony is

[7] See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (scientific reliability factors not applicable to non-scientific experts).

admissible only when it is "required" or "necessary" for the jury to understand evidence or an issue. See Rule 702 (expert witness may be called if testimony would assist the jury).

In my view, the proper gatekeeper role under Rule 702, SCRE, is that described in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999):

1. Is the underlying science reliable?

2. Is the expert witness qualified?; and

3. Would the evidence assist the trier of fact to understand the evidence or to determine a fact in issue?

Here, the underlying science involving the impact of electromagnetic interference (EMI) on electrical systems is reliable, and Dr. Anderson is qualified as an expert on that subject. I would hold, however, that his testimony fails the third prong of the Council test. In my view, Dr. Anderson's testimony did not assist the jury since he was unable to support his opinion that EMI was a probable cause of cruise control acceleration other than by reference to his own opinion. Cf. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (court not required to admit opinion evidence connected to event only by the expert's *ipse dixit*); see also Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004) n. 5 (while witness was expert in field, open question whether that science is "reliable" to determine this accident caused the plaintiff's injuries).

I agree with the majority that the trial judge erred in exercising his gatekeeper function and permitting Dr. Anderson to testify since Dr. Anderson was unable to link EMI to the sudden acceleration, other than by his own opinion. Wilson, *supra*; Joiner, *supra*. I do not agree, however, with the majority's view that only an electrical engineer who was also an expert in automobile and/or cruise control systems would be competent to testify, or with its characterization of Dr. Anderson's testimony as lacking "reliability." I would confine the reliability issue to the underlying science: electrical

engineering and the EMI phenomenon. See State v. Council, *supra* (first gatekeeper decision is whether the underlying science reliable as determined under the factors in State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990)).

I also agree with the majority's conclusion that the trial court erred in admitting the evidence of unexplained acceleration in other Ford Explorers. Unlike the majority, however, I do not see any meaningful distinction in either the year of manufacture or in the fact that the other models were right hand drive, since the relevant inquiry is whether the Explorers were equipped with identically engineered cruise control and electrical systems. Since, however, the only causal link between these accelerations and that alleged to have occurred here was that of Dr. Anderson's EMI theory, which should not have been admitted, I would hold that this evidence too was wrongfully admitted.

I thus concur in the decision to reverse this jury verdict, but reach that result by a different route than that taken by the majority.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

G. Dana Sinkler and Anchorage Plantation Home Owners Association, Petitioners,

v.

County of Charleston, Charleston County Council and Theodora Walpole and John D. Walpole, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26787
Heard January 21, 2010 – Filed March 15, 2010

REVERSED

G. Trenholm Walker, Francis M. Ervin, and Sara E. DeWolf, all of Pratt-Thomas & Walker, of Charleston, for Petitioners.

County Attorney Joseph Dawson, III, Deputy County Attorney Bernard E. Ferrara, Jr., Assistant County Attorney Austin A. Bruner, all of North Charleston; and Gerald M. Finkel, of Finkel Law Firm, of Charleston, for Respondents.

JUSTICE BEATTY: G. Dana Sinkler and Anchorage Plantation Home Owners Association (collectively, Petitioners) brought this action against the County of Charleston, Charleston County Council, and Theodora and John D. Walpole (collectively, Respondents) challenging an ordinance rezoning the Walpoles' property, Anchorage Plantation, from agricultural to a Planned Development (PD) district. Upon review, the circuit court ruled the ordinance was invalid and that the property should retain its agricultural classification. The Court of Appeals reversed, holding the rezoning to a PD was proper. Sinkler v. County of Charleston, Op. No. 2008-UP-297 (S.C. Ct. App. filed June 5, 2008). We granted a petition for a writ of certiorari to review the decision of the Court of Appeals and now reverse.

I. FACTS

A. Background of Dispute.

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the Enabling Act) granted local governments the authority to create planning commissions to implement comprehensive plans governing development in their communities.[1] In 1999, Charleston County Council enacted the County of Charleston Comprehensive Plan.

[1] See S.C. Code Ann. § 6-29-320 (2004) ("The county council of each county may create a county planning commission."); id. § 6-29-510(A) (stating a local planning commission shall develop and maintain a comprehensive plan to guide development in its area of jurisdiction).

The Comprehensive Plan designated Wadmalaw Island part of the Agricultural Area of Charleston County, where the preferred land uses included farming and resource management, along with "preservation of the rural community character." The Comprehensive Plan further provided that development in areas classified as Agricultural Preservation within the Agricultural Area "should primarily support the needs of the farming industry, secondarily allowing for compatible residential development."

The Enabling Act permits the governing body of a county to adopt zoning ordinances to help implement a comprehensive plan. S.C. Code Ann. § 6-29-720 (2004 & Supp. 2009). Charleston County Council enacted the Charleston County Zoning and Land Development Regulations (ZLDR) in 2001 to implement its Comprehensive Plan.

Petitioners separately own properties on Wadmalaw Island that are adjacent to a tract of land (roughly 750 acres) owned by the Walpoles. The Walpoles' property was used as a tomato farm and was zoned AG-15, an Agricultural Preservation classification.

Under the ZLDR, the AG-15 classification allows a "maximum density" of one dwelling unit per fifteen acres on interior land, with a "minimum lot area" of three acres. ZLDR § 4.4.3(A). For land within one thousand feet of the OCRM[2] critical line, the AG-15 zoning classification allows a maximum density of one dwelling unit for every three acres. ZLDR § 4.4.3(B). The configuration of the Walpoles' land limited it to a maximum of 107 dwellings under the AG-15 zoning restrictions.

On June 20, 2003, the Walpoles applied to have their property rezoned to a PD district. Charleston County Council adopted an ordinance rezoning the Walpoles' property from AG-15 to a PD district on February 17, 2004. Under the ordinance, the minimum lot size was reduced to one acre, although the allowed uses remained the same as those under the AG-15 classification.

[2] OCRM refers to the Office of Ocean and Coastal Resource Management of the South Carolina Department of Health and Environmental Control.

The maximum number of dwellings on the property remained unchanged at 107.

Petitioners brought this declaratory judgment action in 2004, asserting the ordinance rezoning the Walpoles' property was invalid because Charleston County Council exceeded its authority and violated provisions of the Enabling Act and the ZLDR in approving the change.

B. Circuit Court's Ruling.

The circuit court found the ordinance rezoning the Walpoles' property from AG-15 to a PD district was invalid and that the property remained zoned AG-15. The circuit court concluded Charleston County Council exceeded its authority and violated the provisions of both (1) the Enabling Act and (2) the ZLDR.

(1) The Enabling Act. The circuit court first found the ordinance did not meet the essential standards for establishing a PD as provided by sections 6-29-720 and -740 of the Enabling Act.

The circuit court stated the ordinance violated section 6-29-720, governing zoning methods, because the proposed PD plan that was approved failed to meet the statute's definition of a PD. Section 6-29-720 defines a PD as follows:

> [A] development project comprised of housing of different types and densities and of compatible commercial uses, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development and is characterized by a unified site design for a mixed use development[.]

S.C. Code Ann. § 6-29-720(C)(4) (Supp. 2009) (emphasis added).

The circuit court noted the development in the proposed area is residential, the same type of development that is already authorized under its current zoning of AG-15. The court stated, "Distilling the PD Ordinance to its essence, its primary effect was simply to reduce the minimum lot size for the up-to-107 residential dwelling units."

The court found the PD plan submitted to Charleston County does not call for "housing of different types and densities and of compatible commercial uses, or shopping centers, office parks, and mixed-use developments," nor is it "characterized by a unified site design for a mixed use development" as required by section 6-29-720(C)(4).

Respondents had alternatively argued that County Council could implement its own zoning districts and did not have to meet the requirements of a PD district provided in the Enabling Act, based on the portion of section 6-29-720(C) that reads as follows:

> The zoning ordinance may utilize the following [listing cluster developments, floating zones, performance zoning, and planned development districts, among others] or any other zoning and planning techniques for implementation of the goals specified above. Failure to specify a particular technique does not cause use of that technique to be viewed as beyond the power of the local government choosing to use it[.]

S.C. Code Ann. § 6-29-720(C).

The circuit court observed that, "[w]hile the County is correct that the legislature did not confine it to the categories of zoning districts listed in S.C. Code Ann. § 6-29-720(C), in this instance the County actually employed one of the enabling statute's specifically defined categories, 'planned development district,' and specifically referred to the Enabling Act as the basis for its authority in § 3.5.1, ZLDR." Accordingly, the circuit court concluded the ordinance was intended to implement a PD as described in section 6-29-720(C) rather than "some new, alternative . . . zoning category."

The circuit court further found the ordinance violated section 6-29-740 of the Enabling Act, entitled "Planned development districts," which allows variances from lot size, use, and density requirements contained in other ordinances and regulations through establishment of a PD. Section 6-29-740 provides in relevant part:

> In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that will result in improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.

S.C. Code Ann. § 6-29-740 (2004) (emphasis added).

The court found that, in comparison to the AG-15 zoning, the proposed PD plan simply reduces the required lot size from three acres to one acre, but it includes "no elements that result in improved design, character, and quality of a new mixed use development." The court stated the proposed plan calls for up to 107 residential dwellings, but the AG-15 zoning already allows this residential use, so "the proposed plan cannot . . . be considered to be a 'new mixed use development.'" The court also noted the proposed plan does not specifically identify any particular land as open space or impose any requirement that the owners preserve open space; moreover, "the proposed plan does not result in more open space than AG-15 zoning, since each would allow up to 107 single family houses."

(2) The ZLDR. As an additional ground for invalidating the ordinance, the circuit court found the ordinance violated the ZLDR. The court noted the ZLDR sections defining the AG-10 and AG-8 zoning districts include the provision that an owner may reach maximum density only through the PD process, citing § 4.5.3(B), ZLDR (for AG-10) and § 4.6.3(B), ZLDR (for AG-8). "On the other hand, the ZLDR sections governing the more restrictive AG-25 and AG-15 districts have no parallel provision allowing any adjustment to any of the standards through a planned development district or the 'Planned Development process.'" The court concluded County Council did not intend for a property owner to be able to reduce the residential standards of property zoned AG-15 through a PD process and that the ZLDR do not allow the use of a PD to modify the restrictions of the AG-15 district for residential development.

C. Review by the Court of Appeals.

The Court of Appeals reversed, finding the Walpoles' property was properly rezoned to a PD based on "the deference provided local governing bodies and the flexibility created through the Enabling Act." Sinkler v. County of Charleston, Op. No. 2008-UP-297 (S.C. Ct. App. filed June 5, 2008), slip op. at 2.

The Court of Appeals found "the circuit court exceeded the applicable scope of review because a reviewing court should practice judicial restraint and not supplant its judgment for the local governing authority's judgment." Id. (citing Bob Jones Univ. v. City of Greenville, 243 S.C. 351, 133 S.E.2d 843 (1963)). In addition, citing Lenardis v. City of Greenville, 316 S.C. 471, 472, 450 S.E.2d 597, 598 (Ct. App. 1994), the Court of Appeals stated the appellate court "must leave [the disputed] decision undisturbed if the propriety of that decision is even 'fairly debatable.'" Id.

As to the Enabling Act, the Court of Appeals cited the prefatory language in section 6-29-720(C), which states "[t]he zoning ordinance may utilize the following or any other zoning and planning techniques for implementation of the goals specified above. Failure to specify a particular

technique does not cause use of that technique to be viewed as beyond the power of the local government choosing to use it." Id. at 3 (quoting S.C. Code Ann. § 6-29-720(C)) (alteration and emphasis in original). The court stated "Sinkler [Petitioners] [had] argued the County Council did not avail itself of this curative language because County Council utilized one of the definitions," but that it "need not explore Sinkler's argument as this court defers to the County Council's judgment regarding the plan." Id. "In the ordinance, the County Council found that the plan met Article 3.5 of the ZLDR . . . ." Id.

The Court of Appeals also found County Council's decision was not arbitrary or capricious, citing Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). Id. "County Council reviewed the plan for the property multiple times and the county staff recommended rezoning the property. Accordingly, County Council's decision was neither arbitrary nor capricious." Id. at 3-4.

As to the circuit court's finding that the ordinance conflicted with the provisions of the ZLDR, the Court of Appeals held there was no conflict and nothing to suggest that County Council could not change an ordinance that it created. Id. at 4.

The Court of Appeals concluded that, since Petitioners had failed to show that the enacted ordinance conflicted with state law or the ZLDR, that County Council's decision was arbitrary and unreasonable, or that the rezoning violated Petitioners' constitutional rights, it would not substitute its judgment for that of County Council, and it held the circuit court erred in concluding County Council exceeded its lawfully delegated authority. Id. This Court granted a petition for a writ of certiorari to review the decision of the Court of Appeals.

II. LAW/ANALYSIS

Petitioners assert the Court of Appeals erred in (1) applying the wrong standard of review, (2) reversing the circuit court's invalidation of the ordinance on the basis it violates the provisions of the Enabling Act, and

(3) reversing the circuit court's invalidation of the ordinance on the basis it conflicts with the ZLDR.

Because we find it dispositive, we direct our attention to Petitioners' argument that it was error to reverse the circuit court's determination that the rezoning ordinance was invalid because it violated the Enabling Act.

As noted above, the circuit court ruled the ordinance did not meet the qualifications for a PD as contained in sections 6-29-720 and -740 of the Enabling Act. The circuit court first found a PD requires "housing of different types and densities" and mixed use, as expressed by section 6-29-720. The court found the only change effected by the zoning ordinance in this case was to reduce the lot sizes so as to allow the property owners to avoid the density restriction mandated by the AG-15 category; all other factors remained the same as the AG-15 category.

Section 6-29-720 of the Enabling Act defines a PD as follows:

> [A] development project comprised of housing of different types and densities and of compatible commercial uses, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development and is characterized by a unified site design for a mixed use development[.]

S.C. Code Ann. § 6-29-720(C)(4) (emphasis added).

The circuit court also found the ordinance violated section 6-29-740 of the Enabling Act, governing "Planned development districts," because it includes "no elements that result in improved design, character, and quality of a new mixed use development" as required by the statute. Section 6-29-740 states in relevant part that a PD should "result in improved design, character, and quality of new mixed use developments" and, moreover:

> The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.

Id. § 6-29-740.

The Court of Appeals found the ordinance did not violate the Enabling Act, stating it would defer to County Council's recitation in the ordinance that it satisfied the requirements for a PD and accord County Council the flexibility and authority contemplated in the Enabling Act.

We hold the circuit court properly concluded the ordinance did not meet the parameters for a PD. As found by that court, the only effect of the ordinance in this instance was to allow the Walpoles to reduce the lot sizes for the property, thus avoiding the restrictions mandated by AG-15 zoning. The ordinance did not provide for housing of different types and densities and compatible commercial use, and it did not create a new mixed use development as contemplated in the statutes of the Enabling Act. The property continued to have only residential dwellings and the ordinance did not plan for future diversity of development. As noted in the excerpt quoted from section 6-29-740 above, PD plans "must encourage innovative site planning for residential, commercial, institutional, and industrial developments within" the PD districts. S.C. Code Ann. § 6-29-740.

As one treatise has observed, a PD is a zoning method that is used to create a planned mix of residential and commercial uses for the benefit of the community, as opposed to having only a single-use district:

> The planned unit development, in contrast to Euclidean zoning which divides a community into districts and explicitly mandates certain uses, . . . is a district in which a planned mix of residential, commercial, and even industrial uses is sanctioned subject to restrictions calculated to achieve compatible and efficient use of the land.

83 Am. Jur. 2d Zoning and Planning § 396 (2003). The goal of a PD district is to have diversification of use and to create, in essence, a self-contained, planned community:

> In addition to facilitating flexibility in zoning, the planned unit development also seeks to grant diversification in the location of structures and other site qualities. Thus, the goal of planned unit development is achieved when an entire self-contained little community is permitted to be built within a zoning district, with the rules of density controlling not only the relation of private dwellings to open space, but also the relation of homes to commercial establishments such as theaters, hotels, restaurants, and quasi-commercial uses such as schools and churches.

Id. § 398 (footnotes omitted).

The definitions of commentators and courts vary with the kind of planned unit development under discussion, but the description set forth above has been cited by several commentators. See, e.g., 3 Patricia E. Salkin, American Law of Zoning § 24:8 (5th ed. 2009) (citing the description and its source, the Supreme Court of Pennsylvania, which applied this definition in Cheney v. Village 2 at New Hope, Inc., 241 A.2d 81 (1968)). Accordingly, the essence of a PD under the Enabling Act is that the property will provide for mixed use. See id. at § 24:9 ("Unlike *Euclidian* zoning which forces land development into a preconceived pattern, planned unit development permits the inclusion of a variety of housing types, lot sizes, and even nonresidential uses on a single tract."); Palmer/Sixth St. Props., L.P. v. City of Los Angeles, 96 Cal. Rptr. 3d 875, 878 n.2 (Ct. App. 2009) (noting a land use plan adopted for a specific area of Los Angeles defined a "mixed use" project as "[a]ny Project which combines a commercial use with a residential use, either in the same building or in separate buildings on the same lot or lots" (citing Plan, § 4, Definitions)); Trail v. Terrapin Run, LLC, 920 A.2d 597, 606 (Md. Ct. Spec. App. 2007) (stating planned development "means more than just a subdivision or the concept would be unnecessary" and that "[t]he definition

itself 'includes' different uses by virtue of its reference to mixed use development").

Respondents alternatively asserted that they did not have to meet the parameters of a PD under the Enabling Act because County Council was free to employ other zoning techniques, citing the prefatory language of section 6-29-720(C) governing zoning methods, which allows County Council to use one of the enumerated techniques or other techniques. We agree with the circuit court that County Council clearly chose to employ the PD process for the Walpoles' property and, once having invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act, and we reverse the Court of Appeals' determination on this point.

III. CONCLUSION

Based on the foregoing, we reverse the decision of the Court of Appeals and hold the circuit court properly invalidated the ordinance rezoning the Walpoles' property from AG-15 to a PD district because the requirements for a PD district under the Enabling Act were not met.

REVERSED.[3]

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

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[3] To the extent Petitioners assert the Court of Appeals applied the wrong standard of review, we find no error. The Court of Appeals found Petitioners failed to show the ordinance conflicted with state law or the ZLDR or that County Council had exceeded its lawfully delegated authority. We conclude the cases cited by the Court of Appeals are correct statements of the law in this area. However, because we agree with Petitioners that the circuit court properly invalidated the ordinance on the basis it violated the Enabling Act, we need not reach the remaining argument that the ordinance also violated the ZLDR.

The Supreme Court of South Carolina

In the Matter of Donna Seegars Givens, Respondent.

ORDER

On February 18, 2010, respondent was arrested and charged with "Drugs/Unlawful prescription drugs, blank prescription – 1st offense" in violation of S.C. Code Ann. § 44-53-0395 (2002). The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, of Rule 413, SCACR. Respondent has filed a return requesting the Court deny the petition.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that R. Davis Howser, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Howser shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Howser may make disbursements from respondent's trust account(s), escrow

account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that R. Davis Howser, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that R. Davis Howser, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Howser's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

March 4, 2010

The Supreme Court of South Carolina

In the Matter of E. W. Cromartie, II,

Respondent.

ORDER

On March 3, 2010, respondent entered into a written plea agreement waiving indictment and arraignment and pleading guilty to one count of Evasion of Income Tax Payments in violation of 26 U.S.C. § 7201 and two counts of Aggravated Structuring in violation of 31 U.S.C. § 5324(a)(3). The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, and requesting the Court appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension, but opposes appointment of an attorney to protect his clients' interests.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Matthew Richardson, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Richardson shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Richardson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Matthew Richardson, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Matthew Richardson, Esquire, has been duly appointed by this Court and has the authority to receive

respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Richardson's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Costa M. Pleicones A.C.J.
FOR THE COURT

Toal, C.J., not participating

Columbia, South Carolina

March 9, 2010

The Supreme Court of South Carolina

In re: Amendments to Rule 608,
South Carolina Appellate Court Rules

O R D E R

The South Carolina Bar has filed two petitions seeking amendments to Rule 608, South Carolina Appellate Court Rules. The proposed amendments were adopted on January 21, 2010, by the House of Delegates.

In its first petition, the Bar seeks an amendment to Rule 608(d), which would provide that lawyers who serve as members of the General Assembly are exempt from appointments under the rule. In its second petition, the Bar requests that a lawyer who serves as a member of the Resolution of Fee Disputes Board and completes an assignment under Rule 416, South Carolina Appellate Court Rules, be given credit for one appointment. Additionally, the Bar requests a Circuit Chair or Executive Chair of the Resolution of Fee Disputes Board be given credit for two appointments per appointment year.

Pursuant to Article V, § 4, of the South Carolina Constitution, we grant the Bar's requests to amend Rule 608, South Carolina Appellate Court Rules, as set forth in the attachment. The amendments shall be effective July 1, 2010, the commencement of the next appointment year.[1]

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
March 8, 2010

[1] The Court made substantial amendments to Rule 608 by Order dated December 17, 2009. The Bar's proposed amendments alter the amended version of Rule 608, which becomes effective July 1, 2010.

Amendments to Rule 608, South Carolina Appellate Court Rules

(1) Rule 608(d)(1), which becomes effective July 1, 2010, is amended by adding the following subsection:

> **(Q)** Members who are serving as members of the General Assembly.

(2) Rule 608(f)(4), which becomes effective July 1, 2010, is amended by adding the following subsection:

> **(D)** A member who serves as a member of the Resolution of Fee Disputes Board and completes an assignment under Rule 416 shall receive credit for the appointment under this rule. The Circuit Chair of the Resolution of Fee Disputes Board shall notify the appropriate clerk of court of the completed assignment, and the clerk shall mark the list to reflect the appointment. A member serving as Circuit Chair or Executive Chair shall receive credit for two appointments during the appointment year. The Executive Chair or the South Carolina Bar shall notify the appropriate clerk of court, and the clerk shall mark the list to reflect the appointments.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Toni M. Ward and J.W. Ward, Respondents,

v.

Toni Cooke Evans, David A. Nexsen, Winyah Nursing Home, LLC, and Sentry Bank and Trust, Defendants,

of whom Toni Cooke Evans and David A. Nexsen are Appellants.

Appeal From Williamsburg County
Haigh Porter, Special Referee

Opinion No. 4653
Heard November 16, 2009 – Filed March 10, 2010

AFFIRMED

E. Leroy Nettles, Sr., and Marian D. Nettles, both of Lake City, for Appellants.

Brooks R. Fudenberg, of Mt. Pleasant, William M. O' Bryan, Jr. of Kingstree, and Gregory B. Askins, of Hemingway, for Respondents.

SHORT, J.: Toni Cooke Evans and David A. Nexsen (collectively, Appellants) appeal from the special referee's order awarding an easement to Toni M. Ward and J.W. Ward (collectively, Respondents), arguing the special referee erred in finding (1) Respondents have a thirty-foot easement by express grant across Evans' land; (2) Respondents have an easement by necessity across the lands owned by Appellants; (3) the paved portion of Nathan Road running adjacent to Evans' tract of land is a public road; and (4) the initial easement did not extinguish through the doctrine of merger. Appellants also argue the special referee considered improper factors in his final order. We affirm.

FACTS

Respondents sought to establish an easement across land owned by Evans for ingress and egress to their 4.39-acre tract of land. Nexsen is the caretaker of Evans' land and also has an oral lease of hunting rights on Evans' land.

I. Deeds

In a deed dated June 4, 1963, A.M. Schreiberg conveyed a 4.39-acre tract of land in the center of a parcel of land known as "Smith Farm" to James Hinnant, Frank McGill, J.D. O'Bryan, Jr., Moses Collis, and Charles Moore, all as Trustees.[1] The deed stated Schreiberg wanted the "land be converted into a recreation park for the benefit of the . . . residents of Kingstree and immediate community." (Emphasis added). The deed further stated it was Schreiberg's "wish and desire to convey said tract or parcel of land to

[1] This was a small parcel out of hundreds of acres of land owned by Schreiberg. The deed was recorded in the Office of the Clerk of Court for Williamsburg County in Deed Book "A-69" at page 210. The original Schreiberg deed and plat referenced 4.39 acres; however, the new plat drawn on March 7, 2006 for Respondents referenced 4.38 acres. The discrepancy is due to the use of different surveying equipment. For the purpose of this opinion, we reference the parcel as 4.39 acres to be consistent with the original deed.

Trustees to be held and developed for [a recreation park] so long as the same is used therefore." However, the deed provided the following condition in paragraph number four:

> [I]f at any time said premises are not used for the purpose herein mentioned for a period of two successive years, then in such case the said premises shall revert to and reinvest in [Schreiberg], his heirs and assigns, freed and discharged of the trusts, limitations and provisions herein mentioned.

The deed further provided for a right-of-way for the construction of a road or highway for ingress and egress to the 4.39-acre parcel of land:

> [A] right-of-way thirty feet in width for the construction of a road or highway over the adjoining lands of [Schreiberg] from the lands of the Estate of T.M. Gilland on the South to the Kingstree-Sumter Highway on the North, or Northeast as a means of ingress and egress to the said above described premises along the general location of the present road between the points above mentioned, with the right, however, to said Trustees to have said road relocated as may be necessary for the purpose of making a more direct line between the points mentioned. With the right power and privilege to said Trustees to construct, or have constructed, a road or highway on and along the line so laid out as aforesaid.[2]

The deed referenced a plat made on May 23, 1963 and recorded in the Office of the Clerk of Court for Williamsburg County.[3] The plat shows the

[2] The deed allowed the Trustees to relocate the road as necessary to make a direct line, which was done at some point.

[3] The plat was recorded in Plat Book "11" at page 94.

road running beside the property and ending at Sumter Highway. Schreiberg died testate on May 7, 1987. A review of the Warrant of Appraisements filed with the Probate Court indicated the 4.39-acre parcel was not included in or made a part of Schreiberg's estate. The 1963 deed provided if the property was not used as a "recreation park" for a period of two successive years, the title was to revert to and reinvest in Schreiberg. Therefore, on September 7, 2001, as a result of the property having "not been used for recreational purposes for a number of years," Moore, the last living Trustee named under the June 4, 1963 deed, deeded the 4.93 acres in fee simple for the sum of five dollars to Allan Levin and Mitzi Kirshtein, who were the residuary beneficiaries under Schreiberg's Will.[4] The 2001 deed incorporated the language from the 1963 deed, and specifically included the thirty-foot right-of-way as a means of ingress and egress to the property.[5]

Levin and Kirshtein sold the 4.39 acres in fee simple to Respondents on January 26, 2006. The deed referenced the 1963 Schreiberg deed and the 2001 deed from Moore to Levin and Kirshtein. The deed also incorporated the language from the 1963 deed, and specifically included the thirty-foot right-of-way as a means of ingress and egress to the property.[6] On March 21, 2006, a new plat drawn for Respondents was recorded in the Office of the Clerk of Court for Williamsburg County.[7] The plat shows a paved county road S-45-643, "Nathan Road," running parallel to Respondents' 4.39-acres parcel of land.

Prior to receiving the 4.39 acres in 2001, Levin and Kirshtein received four other parcels of land on May 29, 1987 from Schreiberg's Will: 158 acres, 44 acres, 1 lot, and 18 acres.[8] On March 10, 1993, Levin and Kirshtein sold

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[4] The 4.93 acres was assigned the tax map number of 45-128-010.

[5] The deed was recorded in the Office of the Clerk of Court for Williamsburg County in Deed Book "A-488" at page 223.

[6] The deed was recorded in the Office of the Clerk of Court for Williamsburg County in Deed Book "A-595" at page 239.

[7] The plat was recorded in Book "S-1128" at page 4-A.

[8] These parcels of land were assigned tax map numbers of 45-128-001; 45-128-009; 45-128-012; and 45-128-015.

the forty-four-acre parcel to Aubrey and Delellis Judy.[9] On November 21, 1994, the Judys sold the land to Kingstree Forest Products, which was owned by Ronald Hammon.[10] The deed stated the conveyance was "made subject to easements and restrictions of record and otherwise affecting the property." Kingstree Forest Products then sold the parcel, among other land, to Richard Carlyle Cooke on July 29, 1998.[11] On February 10, 2003, Cooke deeded the land to Evans.[12]

II. Easement

At some point in time, the thirty-foot easement referenced in the 1963 deed was relocated, changed to sixty feet, paved, and became known as Nathan Road. Jean Brown, who lives on Nathan Road, testified that when she was young, everyone used the road to go to the river to swim, and she remembered the road always being a public road. Aubrey Judy also testified the road was used by the public. On September 16, 1976, the South Carolina Department of Transportation (SCDOT) added the road to the State Highway System. Robert Cherinko, who also lives on Nathan Road, testified that SCDOT maintained the paved portion of the road and the county plowed the dirt road. However, on September 16, 1993, at the request of the Legislative

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[9] The deed was recorded in the Office of the Clerk of Court for Williamsburg County in Deed Book "A-303" at page 058; however, the record on appeal does not contain a copy of this deed.

[10] The deed was recorded in the Office of the Clerk of Court for Williamsburg County in Deed Book "A-335" at page 014.

[11] The deed was recorded in the Office of the Clerk of Court for Williamsburg County in Deed Book "A-414" at page 044.

[12] Appellant Evans was formerly married to Richard Cooke and received the land in their divorce. The deed was recorded on February 26, 2003 in the Office of the Clerk of Court for Williamsburg County in Book "A-547" at page 157.

Delegation, SCDOT took action to remove a section of Nathan Road from the State Highway System.[13]

After he bought the land in 1994, Hammon placed a cable across the road. He testified that no one had access to the property except the people who had property there. He said the public was not allowed to use the road but it "wasn't a big issue" to him that some people used it, and he did not have the land posted. Cooke maintained the cable after purchasing the land from Hammon in 1998, but he had a gate installed across the road after his father died on the property. He also posted the land. Toni Ward testified the gate is almost physically impossible to go around because it continues deep into the woods and barbed wire is strung through the trees to prevent people from walking around the gate. She testified that before the road was gated, people used Nathan Road for driving, walking, and biking. Levin also testified he thought the public used the road prior to the gate being placed in the road. Brown further testified that pedestrians still used the road even after the cable was in place and she was never told she was trespassing when she used the road. Cherinko testified the whole neighborhood still used the road after the cable was put up, and he was never told he was trespassing.

Respondents testified they contacted Nexsen in 2002 to have the gate removed to access their property, and Nexsen told Respondents he did not have to move the gate because he owned the gate, the road, and all the property behind it. However, within a few days of a second conversation about moving the gate, Nexsen moved the gate down the road, approximately fifty feet north of the property line. After the gate was moved, Respondents purchased the additional 4.39-acre parcel of land from Levin and Kirshtein. The gate's new location was still blocking the paved road leading to Respondents' new land. J.W. Ward testified he asked Nexsen if he could hang a lock on the gate so he could access his property; however, Nexsen told him "to keep [his] hands off of it or he would put the sheriff on [him]."

[13] In a letter dated June 8, 2007, the Kingstree Town Manager, Cornelia Bell, informed Respondents' attorney the Town of Kingstree had not taken any action to close the road.

Thereafter, Respondents had a new survey drawn and hired an attorney to handle the dispute.

III. Litigation

On October 26, 2006, Respondents filed a complaint against Appellants arguing (1) the roadway is a public roadway; (2) they have an express grant of easement to the road; (3) they are entitled to a prescriptive easement to the road; (4) they are entitled to an easement by necessity; and (5) they are entitled to an easement by implied use.[14] Respondents sought an order from the court requiring the immediate removal of the gate, and enjoining Appellants from further blocking the roadway. Respondents also sought monetary damages in the amount of $10,000 as a result of being unable to make improvements to their property.

The complaint was originally filed in the court of common pleas in Williamsburg County; however, on Respondents' motion, the parties consented to refer the case to a special referee, with direct appeal to the court of appeals. A two-day trial was held on April 21, 2008 and May 8, 2008. On June 9, 2008, the special referee filed his order finding Respondents are the owners of the 4.39-acre parcel of land, together with a thirty-foot right-of-way, via an easement by express grant and an easement by necessity. The special referee also found the paved extension of Nathan Road was a public road to the end of the pavement. As a result, he ordered Appellants to remove the gate and fence blocking the easement. This appeal followed.

STANDARD OF REVIEW

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d

[14] Winyah Nursing Home, LLC and Sentry Bank and Trust were also named as defendants because Respondents believed they "may claim an interest in or a lien upon the land surrounding or underlying the easement." However, neither of these defendants are a party to this appeal.

633, 635 (1998). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

Appellants argue the special referee erred in finding Respondents are the owners of a thirty-foot easement by express grant across Evans' land because the easement conveyed in the original deed automatically terminated two years after the property ceased to be used as a ballpark. We disagree.

An easement is a right given to a person to use the land of another for a specific purpose. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008). An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription. Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006). "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." Id. (quoting Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965)). When land is subdivided, platted into lots, and sold by reference to the plats, a buyer acquires a special property right in the roads shown on the plat. Ward, 378 S.C. at 233, 662 S.E.2d at 455-56. Further, "[i]f the deed references the plat, the grantee acquires a private easement for the use of all streets on the map." Id. at 233, 662 S.E.2d at 456 (quoting Davis v. Epting, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct. App. 1994)). Once an easement is referenced in a plat, the easement is dedicated to the use of the owners of the lots, their successors in title, and to the public in general. Id. The purpose of the recording statute is to protect a subsequent buyer without notice; therefore, once recorded, deeds and easements are valid to subsequent purchasers without notice. Id. at 233, 662 S.E.2d at 455.

The 1963 deed specifically provided for a thirty-foot right-of-way for the construction of a road or highway for ingress and egress to the property. Additionally, the deed referenced a plat dated May 23, 1963, which shows the road running beside the property and ending at Sumter Highway. Thus, the 1963 deed created a thirty-foot easement by express grant across Evans' land. See Frierson, 371 S.C. at 67, 636 S.E.2d at 875.

However, the 1963 deed provided that if the property was not used as a recreation park for a period of two successive years, the title was to revert to and reinvest in Schreiberg. As a result, Appellants argued the easement conveyed in the original deed automatically terminated two years after the property ceased to be used as a ballpark, which they assert was about 1981. Therefore, Appellants asserted the 4.39 acres, including the thirty-foot easement, reverted to Schreiberg at that time, and thereafter, the land was conveyed to the Judys in 1993.

The evidence presented by Appellants only pertains to when the land may have ceased to be used as a ballpark. In a letter dated July 27, 2006, Lee Lineberger, Vice President of Customer Services at Santee Electric Cooperative, Inc., stated its records indicated it supplied electrical service to the ballpark in 1980 and at least a portion of 1981.[15] Jean Brown, who lives on Nathan Road, testified she thought it was used as a ballpark until 1983 and later because her nephew played there. Waylon Carter, who did contract work for Carlyle Cooke, testified his children played ball at the ballpark in 1979 or 1980. Danny Brown, the building official for Williamsburg County, testified he played ball at the park in the 1970s and early 1980s. Respondents testified they did not know when Schreiberg Park ceased to be used as a ballpark, but it was not being used as one when they moved there in 1994. Aubrey Judy, who had previously owned Evans' land, testified during his deposition that the ballpark had been discontinued for several years when he and his wife purchased the property in 1993, but he did not know the exact date it ceased being used. Robert Cherinko, who also lives in Nathan Road, testified the ballpark never closed, but that people just stopped using it at

[15] Schreiberg granted Santee Electric Cooperative a utilities easement over the land on March 10, 1976.

some point. Levin testified he did not know when the ballpark ceased being used. Carolyn Lesmeister, who did the title abstract, testified she did not see anything in the public record indicating when Schreiberg Park had ceased to be used as a recreational park other than the 2001 deed to Levin and Kirshtein, which stated the land had "not been used for recreational purposes for a number of years."

In his order, the special referee noted that "some portion of the subject lot was used for a ballpark." However, the deed stated the land was to be used as a recreation park, not just as a ballpark. To determine what uses the deed may have intended by stating the land was to be used as a recreation park, the special referee looked to the American Heritage Dictionary, which defined "recreation" as "refreshment of one's mind or body after labor through diverting activity."[16] Thus, he determined the term recreation park was a broad definition that could include using the land as a ballpark, but the land could also be used for walking, "tennis, track, nature watching, or sundry other recreational purposes for the benefit of the residents of Kingstree and immediate community."

While the evidence presented by Appellants may have established when the land ceased to be used as ballpark, it fails to prove when the 4.39 acres ceased to be used as a recreation park, the broader definition provided in the 1963 deed. Therefore, we find Appellants failed to meet their burden of proof, and we affirm the special referee's determination that Respondents are the owners of the 4.39-acre parcel, including the thirty-foot right-of-way, which is the paved extension of Nathan Road. Because we affirm the special referee's result that Respondents are the owners of the 4.39-acre parcel and thirty-foot easement, we need not address Appellants' remaining arguments. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

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[16] The special referee also noted the dictionary definition of "recreation" gave the adjective form of the word as "recreational."

CONCLUSION

Accordingly, the special referee's order is

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Sierra Club, Appellant,

v.

South Carolina Department of Health and Environmental Control and Chem-Nuclear Systems, LLC., Respondents.

Appeal From Richland County

John D. Geathers, Administrative Law Court Judge

Opinion No. 4654

Heard November 21, 2009 – Filed March 10, 2010

AFFIRMED IN PART AND REMANDED IN PART

James S. Chandler, Jr., and Amy E. Armstrong, both of Pawleys Island, for Appellant.

Elizabeth M. Crum, Jacquelyn Sue Dickman, Sara S. Rogers, all of Columbia, Evander Whitehead, of North Charleston, and Mary D. Shahid, of Charleston, for Respondents.

LOCKEMY, J.: The Sierra Club appeals the Administrative Law Court's (ALC) determination that it failed to present sufficient evidence to warrant a revocation of Chem-Nuclear's license renewal. This case involves whether Chem-Nuclear was in compliance with certain Department of Health and Environmental Control (DHEC) regulations. Specifically, the Sierra Club argues Chem-Nuclear's current disposal practices fail to comply with section 7.11, concerning engineered barriers, of regulation 61-63 (Supp. 2009). Additionally, the Sierra Club maintains Chem-Nuclear's current disposal practices fail to comply with section 7.23.6, concerning separating water from waste, of regulation 61-63 (1992). Finally, the Sierra Club maintains Chem-Nuclear failed to comply with all requirements set forth in section 7.10 of regulation 61-63 (Supp. 2009). The ALC did not rule on whether Chem-Nuclear was in compliance with section 7.11, 7.23.6, and all requirements of 7.10; accordingly, we cannot review whether the ALC erred. The ALC found the Sierra Club failed to present sufficient evidence that established Chem-Nuclear was not in compliance with sections 7.10.1, 7.10.2, 7.10.3, and 7.10.4 and found the Sierra Club failed to present evidence demonstrating Chem-Nuclear violated section 7.18 and the ALARA test. We find there is sufficient evidence in the record to support these findings and affirm. However, we remand this case to the ALC for a ruling on whether Chem-Nuclear's current waste disposal practices are in compliance with sections 7.11, 7.23.6, and 7.10.5-7.10.10 of regulation 61-63.

BACKGROUND

South Carolina is an agreement state for the disposal of low-level radioactive waste (LLRW) under the United States Atomic Energy Act. 42 U.S.C §2021 (2005). In 1969, South Carolina became an agreement state after it enacted the Atomic Energy and Radiation Control Act, codified in sections 13-7-10 through 13-7-460 of the South Carolina Code (Supp. 2009). Federal and state laws require LLRW disposal facilities be located on state-owned land. 24A S.C. Code Reg. 61-63, § 7.27.1 (1992). In accordance with section 7.27.1, Chem-Nuclear leases the land from the state for a term of ninety-nine years and is in the business of disposing LLRW at the Barnwell facility. Chem-Nuclear began disposal operations at the Barnwell site in 1971 pursuant to license number 97. Since 1971, Chem-Nuclear has been the only operator of the Barnwell facility, and prior to the present action, Chem-Nuclear renewed its license seven times. The Barnwell facility is licensed and overseen by South Carolina through DHEC. To continue operations at the Barnwell site, Chem-Nuclear must follow certain regulations.

PROCEDURAL HISTORY

In 2000, Chem-Nuclear timely submitted its renewal application for license number 97 to DHEC. Thereafter, DHEC published a notice concerning a public hearing on the Chem-Nuclear renewal application. After holding a public hearing, on March 15, 2004, DHEC renewed Chem-Nuclear's license. The Sierra Club and Environmentalists, Inc., another environmental organization, challenged DHEC's decision to the ALC on April 1, 2004. Chem-Nuclear filed pre-trial motions for summary judgment, arguing the petitioners lacked standing because they could not prove an injury in fact from the continued operation of the disposal facility at the Barnwell plant. The ALC dismissed only Environmentalists, Inc., from the action for lack of standing and found the Sierra Club had standing.

Subsequently, the Sierra Club petitioned for administrative review and requested an adjudicatory hearing. In its petition, the Sierra Club challenged DHEC's decision and maintained the proposed license, as conditioned, failed to adequately protect public health, safety, and the environment. As conditioned, the Sierra Club argued DHEC authorized Chem-Nuclear to continue nuclear waste management and disposal practices at the Barnwell landfill that failed to maintain radiation releases to the public as low as

reasonably achievable. The Sierra Club cited to federal and state statutes as well as to DHEC regulations in support of its assertion. Finally, the Sierra Club maintained its members would suffer injuries in fact in the form of lost property values and diminished health, safety, and use and enjoyment of their property and natural resources.

On appeal, the ALC reviewed DHEC's decision de novo and noted the Sierra Club, as Petitioner, carried the burden of proving its case by a preponderance of the evidence. The ALC noted the requirements necessary for DHEC to issue a license by citing to regulation 61-63 of South Carolina Code of Regulations (Supp. 2008). In particular, the ALC cited section 7.18 of regulation 61-63 which provides: "Reasonable efforts should be made to maintain releases of radioactivity in effluents to the general environment as low as is reasonably achievable (ALARA)."

Ultimately, the ALC found the Sierra Club failed to present evidence warranting the reversal of the renewal of license no. 97 based on section 7.10.1 of regulation 61-63, which requires that the issuance of the license not constitute an unreasonable risk to the health and safety of the public. Additionally, the ALC found the Sierra Club failed to present sufficient evidence to warrant the reversal of license number 97's renewal because Chem-Nuclear's disposal practices failed to satisfy the requirements of section 7.10.2 and 7.10.3 of the regulation 61-63. Third, the ALC found the Sierra Club failed to demonstrate that Chem-Nuclear's operations at the Barnwell Facility did not comply with section 7.10.4 of regulation 61-63, which addresses the protection of inadvertent intruders on the site. Finally, the ALC found the Sierra Club failed to show that Chem-Nuclear violated section 7.18 and the ALARA standard therein. The ALC ruled accordingly because Chem-Nuclear and DHEC demonstrated adherence to ALARA, as set forth in regulation 61-63, sections 3.4.2 and 7.18, by taking appropriate measures to address tritium migration from the Barnwell facility and the potential for releases from other radionuclides that are contained in the waste burial site.

However, the ALC found the Sierra Club raised legitimate issues and presented evidence suggesting further studies were needed to evaluate the scientific and economic feasibility of employing or implementing designs and operational procedures at the Barnwell site that will: (1.) shelter the disposal

trenches from rainfall and prevent rainfall from entering the trenches; (2.) provide temporary dry storage facilities for the storage of waste received during wet conditions; and (3.) provide for sealing and grouting the concrete disposal vaults to prevent the intrusion of water to the maximum extent feasible. In order to address these concerns, the ALC ordered Chem-Nuclear to conduct studies to address the concerns within 180 days.

Thereafter, the Sierra Club filed a motion to reconsider and to alter or amend the ALC's findings and conclusions. In its motion, the Sierra Club argued the ALC failed to address issues brought before the court. Additionally, the Sierra Club argued there were several inconsistencies between some of the findings and the conclusions. Specifically, the Sierra Club maintained there was a fundamental disconnect between the portion of the ALC's order that sustained the decision to renew Chem-Nuclear's license and the portion of the order that required Chem-Nuclear to conduct further studies. In its motion for reconsideration, the Sierra Club specifically mentioned sections 7.11 and 7.23.6 of regulation 61-63 and argued Chem-Nuclear's current disposal practices are not in compliance with these sections. The ALC did not specifically rule on the Sierra Club's motion but generally denied their motion for reconsideration.

The Sierra Club appealed the ALC's decision to the DHEC Board for review because prior appellate procedures were in effect. All parties expected the DHEC Board to review the ALC's decision at its July 2006 meeting; however, on July 1, 2006, the General Assembly amended the appeals procedures for permits and licenses issued by DHEC and other agencies. In order to determine the Act's effect on its case, Chem-Nuclear then filed a petition with the South Carolina Supreme Court. In response, our supreme court issued an opinion indicating the DHEC Board no longer had jurisdiction to hear the case and directed DHEC to transfer the appeal to this court. Chem-Nuclear Sys., LLC v. S.C. Board of Health & Envtl. Control, 374 S.C. 201, 648 S.E.2d 601 (2007). This appeal follows.

STANDARD OF REVIEW

The standard of review for a court reviewing the decision of the ALC is set forth in the Administrative Procedures Act. S.C. Code Ann. § 1-23-610 (Supp. 2009). "The review of the administrative law judge's order must be confined to the record." § 1-23-610 (B). Under section 1-23-610 (B), our

court may affirm or remand the case for further proceedings. Additionally, this court may reverse or modify the decision of the ALC if its findings, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§1-23-610 (B). The decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." Id. at 605, 670 S.E.2d at 676.

LAW/ANALYSIS

The Sierra Club argues Chem-Nuclear's landfill fails to comply with certain DHEC regulations that require the use of engineered barriers to isolate the wastes from water and the surrounding earth. Specifically, the Sierra Club contends Chem-Nuclear's landfill fails to meet the technical requirements of sections 7.10, 7.11, and 7.23.6 of regulation 61-63. In response, DHEC argues the ALC, in determining whether a license should be renewed, must apply the criteria set forth in section 7.10 of regulation 61-63 rather than apply criteria set forth in sections 7.11 and 7.23.6. Assuming sections 7.11 and 7.23.6 are applicable to Chem-Nuclear's license renewal, DHEC argues the Sierra Club failed to preserve these issues for review. Even if preserved, DHEC maintains the Sierra Club misapprehends the

legislative intent of regulation 61-63. We address each issue and sections 7.10, 7.11, and 7.23.6 in turn.

I. Applicability of sections 7.11 and 7.23.6

As Chem-Nuclear and DHEC first argue, section 7.10 specifically applies to "Requirements for Issuance of a License." In contrast, the scope of section 7.11 applies to "Conditions of Licenses," while the scope of section 7.23 applies to "Disposal Site Design for Near-Surface Disposal." We find section 7.11 is an extension of section 7.10 as the Sierra Club argues. Furthermore, Chem-Nuclear is the only LLRW plant in the state, and it appears the scope of regulation applies broadly. See section 1.1 of regulation 61-63 (stating "[e]xcept as otherwise specifically provided, these regulations apply to all persons who receive, possess, use, transfer or acquire any radioactive material . . . "). Therefore, we believe Chem-Nuclear must be in compliance these regulations as a whole.

II. Preservation

Next, Chem-Nuclear and DHEC argue the Sierra Club's first issue is not preserved for review. Specifically, the Respondents maintain the Sierra Club failed to raise RHA 7.11 or RHA 7.23 in its prehearing statement and never amended its prehearing statement to include the regulations at issue. In support of its assertion, Chem-Nuclear cites McNeely v. South Carolina Farm Bureau Mutual Insurance Co., 259 S.C. 39, 190 S.E.2d 499 (1972). The only pertinent section of the McNeely opinion states: "The estoppel issue argued by appellant in his brief was not made by the pleadings nor raised in the exceptions. Accordingly that issue is not before this Court." Id. at 41, 190 S.E.2d at 499.

We do not find McNeely, an insurance case, persuasive. Specifically, we do not believe McNeely holds that, as a general rule, only those claims presented in a prehearing statement will be considered on appeal. Instead, we find the general preservation rule, that an issue must be raised to and ruled upon in order to be preserved for review, should apply. See Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the AL[C] are not preserved

for appellate consideration."). Therefore, we must determine whether this issue was properly before the ALC.

As Chem-Nuclear argues, the Sierra Club did not specifically mention section 7.11 or section 7.23.6 in its prehearing statement. However, the Sierra Club raised overall compliance with regulation 61-63 in its prehearing statement. Specifically, in its prehearing statement under "specific statutory and regulatory provisions giving rise to the controversy," the Sierra Club cites DHEC regulations 61-72 and 61-63. Additionally, in its prehearing statement, under "issues to be presented for determination, including any claims or defenses expected to be raised" the Sierra Club includes: "Whether the proposed renewal license would violate state and federal environmental law and regulations . . . ." The Sierra Club then specifically mentions certain sections of the regulations. Accordingly, we construe these statements broadly to include the applicable sections of regulation 61-63.

Furthermore, we believe the Sierra Club overcame the "ruled upon" requirement for preservation. Here, the Sierra Club submitted a post-trial motion requesting the ALC rule on these issues which the ALC generally denied without addressing specific issues. Pursuant to Rule 40 of the South Carolina Administrative Law Court (2009): "Issues raised on appeal but not addressed in the [final] order are deemed denied." Therefore, under the current version of the Administrative Law Rules, because these issues are deemed "denied" they satisfy the "ruled upon" preservation requirement. See id.

As additional support for the "ruled upon" preservation requirement, we look to Pye v. Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). In Pye, the South Carolina Supreme Court identified a ruling by a trial court or a post-trial motion as the two ways to preserve an issue for appeal. 369 S.C. at 566, 633 S.E.2d at 511. The Pye court held an issue was preserved for review when Pye raised such issue to the trial court through a Rule 59(e) motion. 369 S.C. at 565, 633 S.E.2d at 510. Though the trial court never ruled on the issue the motions raised, the Pye court found the issue was preserved by stating: "[A]n exception to this rule exists where an issue is raised but not ruled upon at a Rule 59(e) hearing." Id. (emphasis in original). In its holding, the court noted lawyers cannot force trial courts to address an issue,

and a proper Rule 59 request is sufficient without a specific judicial decision on the issue. Id. at 566, 633 S.E.2d at 511. Therefore, because the Sierra Club properly filed a Rule 59(e) motion with the ALC, we believe these issues are preserved even though the ALC did not specifically rule on them.[1]

III. Issues on the Merits

a. Section 7.11 Regarding Engineered Barriers

The Sierra Club's first main argument is that Chem-Nuclear's current disposal practices fail to comply with the technical requirements of section 7.11 of regulation 61-63. Specifically, section 7.11.9 requires Chem-Nuclear to "incorporate engineered barriers for all waste classifications. The engineered barriers shall be designed and constructed to complement and improve the ability of the disposal facility to meet the performance objectives in this part." Additionally, section 7.11.10 states:

> The engineered barriers shall be designed and constructed of materials having physical and chemical properties so as to provide reasonable assurance that the barriers will maintain their functional integrity under all foreseeable conditions for at least the institutional control period. No reliance may be placed on the engineered barriers beyond the institutional control period.

Furthermore, pursuant to section 7.11.11 through 7.11.11.7, Chem-Nuclear's disposal practices are required to be designed to meet the following objectives:

> (1.) to minimize the migration of water onto the disposal units.

[1] We note the South Carolina Supreme Court recently found Rule 59(e) applicable to ALC actions. See Home Med'l Sys., Inc. v. S.C. Dept. of Revenue, 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009).

> (2.) to minimize the migration of waste or waste contaminated water out of the disposal units.
> (3.) detection of water and other liquids in the disposal units.
> (4.) temporary collection and retention of water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures without the contamination of groundwater or the surrounding soil.
> (5.) facilitation of remedial methods without disturbing other disposal units.
> (6.) reasonable assurance that the waste will be isolated for at least the institutional control period.
> (7.) prevention of contact between the waste and the surrounding earth, except for earthen materials which may be used for backfilling within the disposal units.

The Sierra Club contends the ALC's factual findings establish that Chem-Nuclear's landfill fails to comply with section seven. Specifically, the Sierra Club argues "the landfill design fails to achieve the 'isolation of wastes from the biosphere inhabited by man and his food chains' and fails to meet the technical requirements of section 7.10 and 7.11." In particular, the Sierra Club argues the engineered barriers do not: (1.) minimize the migration of water into the disposal units; (2.) minimize the migration of waste or waste contaminated water out of the disposal units; (3.) provide for the detection of water and other liquids in the disposal units; (4.) provide for the temporary collection and retention of water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures without the contamination of groundwater or the surrounding soil; and (5.) prevent the contact between the waste and the surrounding earth.

We remand this issue to the ALC and instruct it to apply its factual findings to the technical requirements of these regulations. Specifically, we believe section 7.11 imposes additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to addresses whether Chem-Nuclear is in compliance with section 7.11. We cannot determine whether the ALC erred without a specific ruling.

Accordingly, we find it proper to first give the ALC an opportunity to rule on whether Chem-Nuclear was in compliance with section 7.11.

b. Section 7.23 Regarding Contact of Water and Waste

The Sierra Club's second main argument is that Chem-Nuclear's disposal practices fail to comply with section 7.23.6 of regulation 61-63. Specifically, section 7.23.6 states: "The disposal site shall be designed to minimize to the extent practicable the contact of water with waste during storage, the contact of standing water with waste during disposal, and the contact of percolating or standing water with wastes after disposal." The Sierra Club argues Chem-Nuclear is in violation of section 7.23.6 because its landfill is not designed to minimize the contact of water with waste during storage, the contact of standing water with waste during disposal, and the contact of percolating or standing water with wastes after disposal. The Sierra Club expressed serious concern regarding several of Chem-Nuclear's vaults and trenches that have no cover or roof such that rain can fall directly into the vault. The ALC also noted the rainfall problem and stated: "The problems caused by rainfall are compounded . . . and [r]ainfall that accumulates in the trenches eventually percolates into the soil, and drives the groundwater movement that is carrying tritium and other radioactive materials into Mary's Branch Creek."

We also remand this issue to the ALC with specific instructions to apply its factual findings to the technical requirements of section 7.23.6. We find section 7.23.6 imposes additional compliance requirements for Chem-Nuclear. Without a specific ruling, we cannot determine whether the ALC erred. Accordingly, we remand the issue to the ALC to give it opportunity to rule on whether Chem-Nuclear was in compliance with section 7.23.6.

c. Section 7.10 and "ALARA"

The Sierra Club also argues section 7.10 of regulations 61-63 requires Chem-Nuclear to comply with ten directives. The Sierra Club argues at length that Chem-Nuclear is required to comply with all subsections of section 7.10 based on the conjunction "and" at the end of subsection 7.10.8. Specifically, section 7.10 states:

7.10.1 The issuance of the license will not constitute an unreasonable risk to the health and safety of the public;
7.10.2 The applicant is qualified by reason of training and experience to carry out the disposal operations requested in a manner that protects health and minimizes danger to life or property;
7.10.3 The applicant's proposed disposal site, disposal design, land disposal facility operations, including equipment, facilities, and procedures, disposal site closure, and postclosure institutional control are adequate to protect the public health and safety in that they provide reasonable assurance that the general population will be protected from releases of radioactivity as specified in the performance objective in 7.18;
7.10.4 The applicant's proposed disposal site, disposal site design, land disposal facility operations, including equipment, facilities, and procedures, disposal site closure, and postclosure institutional control are adequate to protect the public health and safety in that they will provide reasonable assurance that individual inadvertent intruders are protected in accordance with the performance objective in 7.19;
7.10.5 The applicant's proposed land disposal facility operations, including equipment, facilities, and procedures, are adequate to protect the public health and safety in that they will provide reasonable assurance that the standards for radiation protection set out in Part III of these regulations will be met;
7.10.6 The applicant's proposed disposal site, disposal site design, land disposal facility operations, disposal site closure, and postclosure institutional control are adequate to protect the public health and safety in that they will provide reasonable assurance that long-term stability of the disposed waste and the

disposal site will be achieved and will eliminate to the extent practicable the need for ongoing active maintenance of the disposal site following closure;

7.10.7 The applicant's demonstration provides reasonable assurance that the applicable technical requirements of this part will be met;

7.10.8 The applicant's proposal for institutional control provides reasonable assurance that such control will be provided for the length of time found necessary to ensure the findings in 7.10.3 through 7.10.6 and that the institutional control meets the requirements of 7.27; and

7.10.9 The financial or surety arrangements meet the requirements of this part.

7.10.10 The applicant's Quality Assurance Plan describing the methods and procedures used to ensure that the disposal units are constructed in accordance with the approved designs and applicable standards and that the waste complies with the requirements of this regulation and the license. (emphasis added).

Section 7.18 states:

> Concentrations of radioactive material which may be released to the general environment in groundwater, surface water, air, soil, plants, or animals shall not result in an annual dose exceeding an equivalent of 25 millirems (0.25 mSv) to the whole body, 75 millirems (0.75 mSv) to the thyroid, and 25 millirems (0.25 mSv) to any other organ of any member of the public. Reasonable effort should be made to maintain releases of radioactivity in effluents to the general environment <u>as low as is reasonably achievable</u>. (emphasis added).

Section 3.2.6 defines "as low as is reasonably achievable" as:

> [M]aking every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken, taking into account the state of technology, the economics of improvements in relation to state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and licensed materials in the public interest.

In considering the above mentioned sections of regulation 61-63, the ALC found the Sierra Club failed to present sufficient evidence that established Chem-Nuclear was not in compliance with sections 7.10.1, 7.10.2, 7.10.3, and 7.10.4. Additionally, the ALC found the Sierra Club failed to present evidence demonstrating Chem-Nuclear violated section 7.18 and the ALARA test. On the issues the ALC addressed, specifically the first four subsections of section 7.10, we affirm and give deference to the ALC's findings. For the subsections the ALC failed to address, specifically the remaining subsections of 7.10, we remand these questions to the ALC for a final determination as to whether Chem-Nuclear was in compliance with the entirety of 7.10.

CONCLUSION

In considering this appeal, we first find that sections 7.11 and 7.23.6 of regulation 61-63 apply to the present action and require Chem-Nuclear to comply with additional directives. Secondly, we hold these compliance issues are preserved for our review and believe the Sierra Club overcame the "raised to" and "ruled upon" preservation requirements. Having reasoned that sections 7.11 and 7.23.6 apply to the issues at hand and further having decided that the Sierra Club's issues are preserved for our review, we remand this case to the ALC. At this point, we cannot address whether the ALC erred without giving it an opportunity to issue a specific ruling on whether Chem-Nuclear's disposal practices were in compliance with sections 7.11, 7.23.6 and subsections of 7.10 that the ALC did not address. On remand, we

instruct the ALC that sections 7.11 and 7.23.6 impose additional compliance requirements for Chem-Nuclear and further instruct the ALC to apply its factual findings to these sections of regulation 61-63. We affirm the ALC's decision that the Sierra Club failed to present sufficient evidence that established Chem-Nuclear was not in compliance with sections 7.10.1, 7.10.2, 7.10.3, and 7.10.4 as well as its finding that the Sierra Club failed to present evidence demonstrating Chem-Nuclear violated section 7.18 and the ALARA test. Accordingly, the decision of the ALC is

AFFIRMED IN PART AND REMANDED IN PART.

HEARN, C.J., and CURETON A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Titus Abraham Bantan, Appellant.

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4655
Submitted December 1, 2009 – Filed March 10, 2010

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; Solicitor David Michael Pascoe, Jr., of Summerville, for Respondent.

KONDUROS, J.: Titus Abraham Bantan was convicted of armed robbery, kidnapping, and possession of a weapon. Bantan argues the trial court erred in denying his motions for mistrial when (1) a witness referenced drugs and a gun unrelated to the crime during his testimony; (2) a witness alluded to a videotape showing Bantan when the tape was later held to be inadmissible; and (3) a juror overhead a conversation about Bantan and his co-defendant being involved in another robbery and mentioned the conversation to fellow jurors. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On November 6, 2006, two men entered Bells' Wagon Wheel, a small bait and tackle shop near Elloree, South Carolina. The men held the shop's owner and several employees on the floor at gunpoint. They demanded money from the safe and cash register, the shop's video surveillance tape, and the owner's gun. After ransacking the store and hitting the owner in the head with the gun, the robbers absconded with over $200 in bills, approximately $580 in rolled coins, and several packs of Newport cigarettes.

After the robbery, police obtained descriptions of the robbers from witnesses and developed Phillip Spears as a suspect. Police went to the house of Spears' ex-girlfriend, Tanesha Adams, who said Spears lived in North Carolina. She said she had spoken with him around 5 a.m. and again around 7 a.m. the morning of the robbery. She testified he asked whether the Wagon Wheel had a surveillance camera. Adams further testified Spears contacted her again after the robbery and told her he had robbed the shop. He arranged to meet her in Orangeburg. Police followed Adams to the meeting, but Spears did not show. Spears called Adams and said he was returning to Charlotte.

Police had information Spears might be at Bantan's trailer in Orangeburg and went there with a warrant for Spears' arrest. Bantan's sister answered the door and said Bantan was not home. Because they heard something "rumbling around," police conducted a security sweep and found Bantan in the bedroom. Bantan initially consented to a search of the trailer

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

but then withdrew his consent. Officers returned with a search warrant and concluded the search. They found a pair of Timberland boots and army fatigue style pants similar to those worn by the robbers, packs of Newport cigarettes, three boxes of .40 caliber bullets, a roll of pennies, $260 in twenty dollar bills, and a "Coinstar" receipt showing $300 in coins exchanged for cash at a nearby Bi-Lo a few hours after the robbery.

During the robbery, one witness saw Spears drop a cell phone. The witness hid the phone and then turned it over to police. Using the phone, police traced Spears to a house in Charlotte where they found him in a bedroom with a semi-automatic pistol under the mattress and a disassembled cell phone on the dresser.

Bantan and Spears were tried together for the robbery. One witness claimed the gun seized from Spears was similar to the one used in the robbery. Another witness claimed he thought it was like the one used but could not be certain. Additional testimony showed the only weapon that used the type of bullets seized from Bantan was either the full automatic or semi-automatic version of the gun in question. Two witnesses positively identified Bantan from the robbery. Natasha Rivers said she saw Bantan's face when he removed his ski mask in the shop. James Bourgeois likewise identified Bantan.[2]

Evidence showed numerous numbers in common between the dropped cell phone and the disassembled phone seized from Spears. The dropped phone had the disassembled phone's number as a contact number as well as Adams' number. Seven calls were made from the dropped phone to Adams with the last call being November 2. The last call on the dropped phone was to the seized phone on November 3. The seized phone showed three calls to Adams on the afternoon of the robbery. There were also calls from the seized phone to Bantan on November 7 and 8.

[2] Two victims of the robbery claimed they could not identify Bantam because they were held on the floor.

The jury convicted Bantan on all counts. The trial court sentenced him to thirty years' imprisonment for the robbery and kidnapping charges and five years' imprisonment for the weapons charge. This appeal followed.

STANDARD OF REVIEW

The decision to grant or deny a mistrial is within the sound discretion of the trial 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). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.'" State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (quoting Gilliam v. Foster, 75 F.3d 881, 895 (4th Cir. 1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

LAW/ANALYSIS

I. Evidence of Unrelated Weapon and Drugs

Bantan argues a witness's mention of drugs and a shotgun unrelated to the robbery was prejudicial to his case, requiring a mistrial. We disagree.

At trial, the State asked Investigator Chris Golden what was recovered from Bantan's trailer. He responded:

> Coin receipt, Timberland boots was recovered, the dark clothing pants, a ball cap I believe was recovered, Newport cigarettes was recovered, penny wrapper was recovered, and I believed some case or currency was seized at that time, some bullets, 40 caliber, a shotgun. Plus, there was some drugs found.

Bantan objected, requesting a mistrial and the matter was discussed outside the jury's presence. The court denied the motion for mistrial and offered a curative instruction either specifically telling the jury to disavow any testimony regarding drugs or the shotgun, or telling the jury to disregard the ten to fifteen seconds of testimony given just prior to the break. Bantan declined both proposed curative instructions, arguing the prejudicial impact of the testimony could not be cured.

This issue is not preserved for our review. By rejecting the trial court's offer to give a curative instruction, Bantan waived any challenge to the offending testimony on appeal. See State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996) (finding issue unpreserved when defendant refused trial court's curative instruction); see also Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 11, 466 S.E.2d 727, 732 (1996) (finding party waived right to complain of error when trial court's offer of curative instruction refused); State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1995) ("In rejecting the trial court's offer to strike the testimony or give a curative instruction, [the defendant] waived any complaint he had to the challenged testimony."); State v. Hartley, 307 S.C. 239, 245-46, 414 S.E.2d 182, 186 (Ct. App. 1992) (finding error waived when defendant failed to prepare a requested curative instruction).

II. Statement Regarding Video Surveillance

Bantan next argues the trial court erred in denying his motion for mistrial after Officer Stanley Graham testified Bantan could be seen on surveillance footage at an area Bi-Lo during the time $300 in coins were exchanged for cash through a Coinstar machine at the store. We disagree.

The relevant testimony was as follows:

> A. I needed [the Bi-Lo store manager] to review the surveillance tapes to see if we had either of the two subjects that were identified in the photo lineup at that store.
> Q. Okay. And were you able to obtain a video tape?
> A. We were able to -- to obtain -- a CD --
> Q. Uh-huh.
> A. -- of Mr. Titus Bantan.

Bantan objected to the testimony and moved for a mistrial because the CD of the surveillance footage had yet to be introduced into evidence and the quality of the CD was so poor he anticipated it would not be admitted. The trial court expressed concern about Officer Graham's comment and decided to send the jury to lunch to have an opportunity to review the surveillance footage. After viewing the CD, the trial court found it to be inadmissible because the quality was so poor it merely invited speculation as to who could be seen on it. The trial court informed the parties of its decision and proposed a curative instruction. Bantan again argued for a mistrial and the motion was again rejected. The trial court issued the following curative instruction to the jury:

> Before the lunch break, Officer Graham made reference to a -- a tape or CD. And ladies and gentlemen, I'm going to instruct that with regards to this comment regarding any CD or tape that you disregard that testimony and you disavow it from your minds. I have, ladies and gentlemen, reviewed that CD -- that tape as a piece of offered evidence. And ladies and gentlemen, I -- I would instruct you that there is no one that can be identified on that tape. The quality of it is such that there's nobody that -- there's no one -- any person on that tape that can be identified. And for that reason it is excluded because no one could be -- the quality of it, nobody could be identified. So ladies and gentlemen, with that in

> mind, I instruct you to disregard that testimony and disavow it from your mind.

The State argues this issue is not preserved for our review because "[a]n issue is not preserved for appellate review if the objecting party accepts the court's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial." State v. Simmons, 384 S.C. 145, ___ n.8, 682 S.E.2d 19, 33 n.8 (Ct. App. 2009). In this case, Bantan made a motion for mistrial. The trial court then considered the motion and advised the parties as to its ruling and proposed jury instruction. Bantan did not, as the State argues, accept that ruling. Instead, he again argued for a mistrial. Bantan did not need to make another objection in the jury's presence to the sufficiency of the charge in order to preserve this issue for appellate review. See State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) ("[O]ur courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial [court], failure to raise the objection will be excused.").

Turning to the merits of this issue, a curative instruction is generally deemed to have cured any alleged error. State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). In this case, the trial court offered an extremely thorough curative instruction and explained the underlying reason Officer Graham's testimony should be disregarded. The trial court's own viewing of the CD and finding of unreliability underscored the need for the jury to simply ignore Officer Graham's statement because it had no factual basis.

Furthermore, the statement itself does not appear to have been overly prejudicial as a Coinstar receipt stamped closely after the time of the robbery had been discovered in Bantan's bedroom. The CD would simply supply a piece of information the jury could already reasonably infer: that Bantan had been to the Bi-Lo and used the Coinstar machine. "A defendant seeking reversal based on error in the admission of evidence has the burden of showing that the evidence was prejudicial." State v. Jolly, 304 S.C. 34, 37, 402 S.E.2d 895, 897 (Ct. App. 1991). Consequently, we find the trial court did not abuse its discretion by denying Bantan's motion for mistrial.

III. Juror Misconduct

Bantan argues the trial court erred in denying his motion for mistrial after learning the jury had been exposed to a comment that police "targeted" Bantan and Spears because of their involvement in an unrelated robbery. We disagree.

After the jury began deliberations, the trial court received a note from the jury's foreperson with the following information:

> It has been brought to the jury's attention that one of the jurors has heard, quote unquote, something about these two guys being targeted by the police for an alleged bank robbery in Cameron, South Carolina. It is my concern that by hearing this comment, this juror may not be capable of providing an unbiased opinion based solely on the evidence.

The trial court requested the jury stop its deliberations and conducted an on-the-record interview in chambers with the jury foreperson, Rosella Jones, and the juror involved, Mr. Gladden. Gladden apparently overheard a conversation at a gas station between two men he did not know. The men referenced generally a case going on at the courthouse. Gladden stated:

> Well, the only thing I said was I was pumping gas this morning. . . . And it was two fellows standing to the gas tank. . . . Talking and I didn't feel like it make that different. You know, I just said that I heard this morning that, that there was, there was robbery in Cameron some time back, and they was trying to trap these two fellows with it, and that's all I said, you know.

Jones confirmed the entire jury heard Gladden's comment. Clearly, as Gladden understood the information, and as he relayed it to the jury, the police may have been engaged in some sort of improper conduct trying to

"trap" or "target" Bantan and Spears. As the State argued at trial, this reference placed the State in a negative light. However, embedded in Gladden's statement is that Bantan was somehow linked to another crime: a fact prejudicial to him.

After concluding the interviews in chambers, the trial court proceeded to question each juror and asked if he or she would be able to disavow Gladden's remark and render a verdict based solely on the evidence presented. Each juror indicated he or she could do so. Within the individual interviews, the trial court instructed each juror the comment had nothing to do with the trial whatsoever and suggested the juror write a note or tell the jury foreperson of any concerns with respect to his or her ability to disregard Gladden's remark. Bantan moved for a mistrial, and the trial court denied the motion based on the interviews and its belief the jurors had credibly testified to their impartiality. The trial court then reminded the jury of its obligation to deliberate based solely on the evidence presented and deliberations resumed.[3]

While Bantan presents this issue as the erroneous admission of prior bad acts, it is really an issue of juror misconduct wherein a juror overheard and shared inappropriate information with his fellow jurors.

"In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). However, "[u]nless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." Id. "The general test for evaluating alleged juror misconduct is whether or not there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence." State v. Ziegler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005).

[3] The State argues Bantan waived the right to appellate review of this issue because he did not make an additional objection to the "supplemental" curative instruction given by the trial court. We disagree. Bantan had argued his mistrial motion and been denied following the conclusion of the juror interviews. The trial court's reminder of the jury's obligation to consider only the evidence presented did nothing more than echo the curative instruction already given and objected to by Bantan.

> A defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury, as such misconduct . . . does not ipso facto justify the grant of a new trial; but in order that a new trial may be granted on such ground the misconduct of the jury must relate to a material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors.

Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, ___, 682 S.E.2d 489, 493 (2009) (quoting C.J.S. New Trial § 54 (1998)).

"Initially, the trial [court] must make a factual determination as to whether juror misconduct has occurred." Ziegler, 364 S.C. at 109, 610 S.E.2d at 867. If it has, the trial court must then determine whether the misconduct has improperly influenced the jury. Id. In such cases, the trial court is in the best position to determine the credibility of the jurors; therefore, this court should grant it broad deference on this issue. State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998).

In State v. Wasson, 299 S.C. 508, 509-10, 386 S.E.2d 255, 256 (1989), two jurors read a newspaper article about the case that referenced other similar criminal charges pending against the defendant. The two jurors mentioned the article to the other jurors after the jury had voted to convict. Id. at 510, 386 S.E.2d at 256. When this misconduct came to the trial court's attention, the court questioned the two jurors, who stated reading the article had not influenced their deliberations. Id. The trial court polled the remainder of the jury who affirmed the verdict. Id. On appeal, the South Carolina Supreme Court concluded "[t]he trial [court] clearly satisfied any duty [it] had to insure the impartiality of the jury . . . . Only after the trial [court] was satisfied that the jury's verdict had been reached free from any outside influences, did it deny Wasson's motion for a mistrial." Id. at 511, 386 S.E.2d at 257.

Likewise, the trial court in this case interviewed the jurors and was satisfied each one could reach a fair and impartial verdict. Although Gladden's comment was heard by more jurors and prior to the verdict, the comment itself was less prejudicial than the newspaper article because the comment was from a less reliable source and generally had negative overtones as to law enforcement's role in this case. In any event, the trial court did not deny Bantan's motion for mistrial until after determining the jury's ability to proceed solely on the evidence presented at trial. We find no abuse of discretion.

CONCLUSION

We conclude the trial court did not err in denying Bantan's motions for mistrial. With regard to the mention of an unrelated gun and drugs, these issues were not preserved for our review. Any prejudice from Officer Graham's reference to Bantan's being on the video surveillance footage was cured by the trial court's thorough and detailed curative instruction. Finally, the trial court investigated and concluded Gladden's comment, although an improper external influence, did not affect the jury's impartiality. Therefore, the ruling of the trial court is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tracy A. Burnett, as Personal Representative of the Estate of Douglas W. Burnett, Deceased, and Tracy A. Burnett, individually, Appellants,

v.

Family Kingdom, Inc., d/b/a Family Kingdom Amusement Park, Respondent.

Appeal From Horry County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 4656
Heard November 11, 2009 – Filed March 11, 2010

REVERSED

James Stevens, Jr., of Loris, for Appellants.

William Edward Lawson, of Myrtle Beach, for Respondent.

SHORT, J.: Tracy Burnett (Wife) appeals the trial court's decision granting Family Kingdom, Inc.'s (the Amusement Park) motion for a directed verdict in her negligence action. We reverse.

FACTS

Wife; her husband, Douglas Burnett (Husband); Wife's brother, Clyde Adams; and Adams' friend, Patricia Smith, were vacationing in Myrtle Beach, South Carolina. While there, the party visited the Amusement Park, which operates a go-cart attraction. After purchasing two tickets, Husband and Adams proceeded to get in line to ride the go-carts. Wife testified that while Husband and Adams were waiting in line, three young men came behind them and began acting boisterously. According to Wife, the three young men stated they were going to bump or collide with the go-carts during the upcoming ride. Upon hearing this, Husband warned the young men not to collide with him.

The ride operators put Husband, Adams, and the three young men in the go-carts after they took the tickets from the riders. The operators belted in and gave instructions to the drivers. They were warned not to bump or collide with the other go-carts and not to drive recklessly.

The go-cart ride had a controller box that contained a device with which the ride operators could deactivate the ride. When pressed, the "All Stop" button would stop all of the go-carts. The Amusement Park's manager, Donald Sipes, testified that after the second warning not to bump, the ride operators were required to push the "All Stop" button and stop the ride. Sipes also stated a collision that resulted in a go-cart being turned around required the ride operators to stop the ride.

Before Adams' go-cart reached the first turn of the first lap, one of the three young men hit his go-cart and caused Adams' go-cart to spin around

180 degrees. Subsequent to this collision, for the next few laps the three young men continued to repeatedly bump or collide with Husband and Adams. Wife, Husband, Adams, and Smith repeatedly asked the ride operators for assistance because the three young men were driving in a reckless and dangerous manner. Wife testified that rather than providing help to Adams and Husband, the ride operators encouraged the three young men and cheered them on.

After the second lap, Husband drove his cart off of the track and into the pit area, where his cart was hit from behind by one of the young men's cart. The collision caused the go-cart, with Husband inside, to be lifted off the ground. Shortly thereafter, another young man collided with Husband's go-cart. Only after these collisions did the ride operators press the "All Stop" button to deactivate all the go-carts.

Husband brought a negligence action against the Amusement Park. At the close of Wife's case,[1] the Amusement Park moved for a directed verdict, arguing Wife had failed to prove the Amusement Park acted negligently. The trial court granted the motion. This appeal followed.

STANDARD OF REVIEW

When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law. Enos v. Doe, 380 S.C. 295, 300, 669 S.E.2d 619, 621 (Ct. App. 2008). When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418-19 (Ct. App. 2000). The trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt. Id. When considering a directed

[1] Husband died during the action, and Wife was appointed as Husband's personal representative to represent his estate. Wife does not allege Husband died as a result of the injuries he sustained during the go-cart ride.

verdict motion, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Id.

LAW/ANALYSIS

Wife argues the trial court improperly granted the Amusement Park's motion for a directed verdict in her negligence action. Specifically, Wife contends the trial court erred by holding she failed to show the Amusement Park owed a duty of due care. We agree.

In order to succeed in a negligence cause of action, the plaintiff must establish (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. Moore v. Weinberg, 373 S.C. 209, 220-21, 644 S.E.2d 740, 746 (Ct. App. 2007). A crucial element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Absent a duty, there is no actionable negligence. Id.

The question of negligence is a mixed question of law and fact. Id. First, the court must resolve, as a matter of law, whether the law recognizes a particular duty. Id. If the court determines there is no duty, the defendant is entitled to a judgment as a matter of law. Id. However, if a duty does exist, the jury then determines whether a breach of the duty that resulted in damages occurred. Id. Thus, we must first determine if the Amusement Park owed a duty to Husband.

At common law, a person ordinarily has no duty to protect another from a harm inflicted by a third party. Burns v. S.C. Comm'n for the Blind, 323 S.C. 77, 79, 448 S.E.2d 589, 590-91 (Ct. App. 1994). Usually, a person incurs no liability for failure to take steps to benefit others or protect them

from harm not created by his or her own wrongful conduct. Id. However, an affirmative legal duty can be created by a statute, among other things, and thus, the statute can be a source of a duty owed in a negligence case. Id.

The existence of such a statutorily imposed duty is determined by applying a two-prong test. Id. Both of the following elements must be satisfied to find a statute imposes a duty sufficient to support a cause of action in negligence. Id. First, it must be established that the essential purpose of the statute is to protect the plaintiff from the kind of harm suffered. Id. Second, the plaintiff must be a constituent of the class of persons the statute seeks to protect. Id.

As to the first element, the South Carolina Amusement Rides Safety Code (the Act) was passed to prevent injuries to visitors and employees at amusement parks and fairs. S.C. Code Ann. §§ 41-18-20 et seq. (Supp. 2008); see Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 391, 520 S.E.2d 142, 151 (1999) ("The Act's purpose is to prevent injuries to visitors and employees at amusement parks and fairs."). Section 41-18-20(A) of the South Carolina Code (Supp. 2008), entitled "Legislative intent," states, "The purpose of this chapter is to guard against personal injuries in the . . . use of amusement devices at . . . amusement parks to persons employed at or attending . . . amusement parks. . . ."[2] Subsection (B) of this section states, "It is the intent of this chapter that amusement devices must be . . . maintained, and operated so as to prevent injuries." § 41-18-20(B).

[2] An "amusement device" is defined as "any mechanical device . . . which carries or conveys passengers on, along, around, over, or through a fixed or restricted course or within a defined area for the purpose of giving its passengers amusement, pleasure, or excitement." S.C. Code Ann. § 41-18-40(1) (Supp. 2008). A go-cart qualifies as an amusement device. An "amusement park" is defined as "a tract or area used principally as a permanent location for amusement devices or structures." § 41-18-40(2).

The first element is satisfied because the purpose of the Act is to prevent personal injuries that result from the use of amusement devices. In the present case, Husband was visiting the Amusement Park and suffered the type of personal injury the Act seeks to avoid as a result of the use of the go-cart ride.

As to the second element, that the plaintiff must be a constituent of the class of persons the statute seeks to protect, section 41-18-20 states the purpose of the Act is to guard against personal injuries to persons attending amusement parks. This section also states, "[t]he purpose of this chapter is to . . . ensure to the injured party the possibility of financial recovery as against the owner of the carnival, fair, or amusement park where the injury occurred." Id. Husband qualifies because he was attending the Amusement Park at the time of the injury. Additionally, the statue allows Husband as an injured party to seek financial retribution against the owner of the Amusement Park.

Wife meets both elements for establishing a statutorily imposed duty. Thus, the Act creates an affirmative legal duty on part of the Amusement Park, and the trial court erred in concluding Wife failed to show a duty existed.

The Amusement Park argues there are three additional grounds on which to affirm the trial court. The Amusement Park contends (1) the trial court found that even if there was a duty, it did not breach this duty; (2) there was no proximate cause; and (3) Husband's negligence outweighed any negligence on its part. We disagree.

As to the first contention, as explained above, the question of negligence is a mixed question of law and fact. Moore, 373 S.C. at 221, 644 S.E.2d at 746. If a duty does exist, the jury then determines whether a breach of the duty that resulted in damages occurred. Id. Thus, the Amusement Park's argument that it did not breach a duty fails because that determination rests with the jury.

Amusement Park's argument that it did not proximately cause Husband's injuries also fails. Only on the rarest occasion should the trial court determine the issue of proximate cause as a matter of law. Bailey v. Segars, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001) ("Ordinarily, the question of proximate cause is one of fact for the jury. The trial court's sole function regarding the issue is to determine whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law.").

Proximate cause requires proof of causation in fact and legal cause. Hurd v. Williamsburg County, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005). Causation in fact is demonstrated by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is shown by establishing foreseeability. Id. An injury is considered foreseeable if it is the natural and probable consequence of a breach of duty. Id.

In the present case, viewing the evidence and all reasonable inferences in the light most favorable to Wife, we conclude the trial court erred in not submitting the proximate cause issue to the jury. A jury could reasonably conclude Husband's injuries would not have occurred but for the ride operators' failure to stop the go-carts after Wife, Husband, Adams, and Smith repeatedly asked the ride operators for assistance because the three young men were driving in a reckless and dangerous manner. If the ride operators had stopped the ride by pushing the "All Stop" button, Husband would not have been injured when Husband drove his cart off of the track and into the pit area. While Husband was in the pit area, he was rear ended by one of the young men with such force that the collision caused the go-cart with the Husband inside to be lifted off the ground. Thereafter, another young man collided into Husband's go-cart.

With respect to foreseeability, a jury could conclude Husband's injuries were the natural and probable consequence of the breach of the duty by the Amusement Park. The evidence presented showed: (1) the ride operators ignored repeated requests for assistance by Wife, Husband, Adams, and

Smith when the three young men were hitting and colliding with Husband and Adams; (2) as a natural and probable consequence of the ride operators' failure to stop the ride, the three young men continued to drive their go-carts in a reckless and dangerous manner by repeatedly hitting and colliding with Husband; and (3) Husband suffered injuries. Accordingly, Wife did present sufficient evidence of proximate cause to survive the directed verdict motion.

As to the comparative negligence argument, the Amusement Park argues Husband's two prior back surgeries and a knee surgery constituted comparative negligence because he went on the go-cart ride knowing the three young men would collide with his go-cart.[3]

In South Carolina, a plaintiff may only recover damages if his or her own negligence is not greater than that of the defendant. Id. at 429, 611 S.E.2d at 492. The determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least when conflicting inferences may be drawn from the evidence. Id. In a comparative negligence case, the trial court should grant a motion for directed verdict if the only reasonable inference from the evidence is that the non-moving party's negligence exceeded fifty percent. Id.

In regards to Husband's prior surgeries, a defendant takes the plaintiff as he or she is found, and the plaintiff is entitled to recover damages resulting from the aggravation of a pre-existing condition. Waring v. Johnson, 341 S.C. 248, 260, 533 S.E.2d 906, 913 (Ct. App. 2000). As to Husband's knowledge that the three young men would collide with his go-cart, neither the trial court nor this court is in a position to determine whether Husband's knowledge outweighed the fact that the ride operators failed to stop the ride after repeated requests for assistance by Wife, Husband, Adams, and Smith.

The Amusement Park also argues Husband's negligence is outweighed by its negligence because Husband disregarded a safety sign. The sign reads,

[3] Wife testified that when the three young men stated they were going to bump or collide with other go-carts, Husband responded "don't be hitting me, I've had back surgery."

in pertinent part, "PARTICIPATE AT YOUR OWN RISK. THIS RIDE IS NOT RECOMMENDED FOR INDIVIDUALS WHO ARE PREGNANT OR HAVE HEART, NECK, OR BACK PROBLEMS." The Amusement Park presented no evidence Husband saw this sign. Adams testified he did not see the sign prior to entering the go-cart ride. Additionally, the sign states the go-cart ride is not recommended for individuals with back problems and does not state the ride is prohibited to persons with back issues. Even assuming Husband saw the sign, neither this court nor the trial court is in a position to determine whether this outweighed the ride operators' failure to stop the ride after repeated requests for assistance.[4]

CONCLUSION

Accordingly, the trial court's decision is

REVERSED.

THOMAS and KONDUROS, JJ., concur.

[4] The comparative negligence and proximate cause portions of this opinion are not to be construed to conclude that Wife has conclusively proved proximate cause or disproved comparative negligence. These are issues to be determined by the trier of fact. Our review of the trial court's decision on these issues is limited to whether the trial court erred in granting a directed verdict.