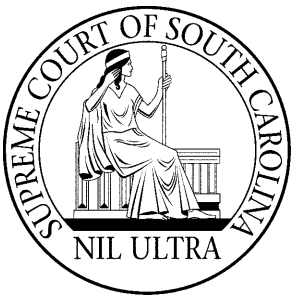

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
June 12, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Health Promotion Specialists, LLC, and Palmetto Dental Care, LLC, Plaintiffs,

Of Which Health Promotion Specialists, LLC, is Appellant,

v.

South Carolina Board of Dentistry, Respondent.

Appellate Case No. 2011-200626

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 27263
Heard May 1, 2013 – Filed June 12, 2013

AFFIRMED

Desa Allen Ballard and Stephanie Nichole Weissenstein of Ballard Watson Weissenstein, of West Columbia, for Appellant.

Andrew F. Lindemann, Kenneth P. Woodington, and William H. Davidson, II, of Davidson & Lindemann, PA, of Columbia, for Respondent.

JUSTICE BEATTY: Health Promotion Specialists, L.L.C. (Health Promotion), a corporation employing dental hygienists that contract with supervising dentists, brought suit against the South Carolina Board of Dentistry

(the Board)[1] based on the Board's enactment and enforcement of an emergency regulation addressing the authorization required for certain procedures performed by dental hygienists in school settings. Health Promotion appeals the circuit court's order granting summary judgment in favor of the Board. Health Promotion contends the circuit court erred in: (1) concluding the Board is immune from suit pursuant to the South Carolina Tort Claims Act (TCA)[2]; (2) finding Health Promotion could not sustain a cause of action for violation of the South Carolina Unfair Trade Practices Act (SCUTPA)[3] as the Board is not a "person" and its actions were not within "trade or commerce" for the purposes of the SCUTPA; and (3) denying Health Promotion's motion to amend its Complaint. This Court certified this appeal from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm as we find the Board proved as a matter of law that it is entitled to immunity from suit.

I. Factual/Procedural History

In 1988, the General Assembly amended the Dental Practice Act (DPA)[4] to authorize, subject to certain restrictions, dental hygienists to provide various oral health services in public settings, including schools. Act No. 439, 1988 S.C. Acts 2921. Section 40-15-80 of this legislation authorized dental hygienists to apply topical fluoride and perform oral screenings in a school setting "without the presence of a dentist on the premises." S.C. Code Ann. § 40-15-80(B) (2001). The 1988 law permitted dental hygienists to apply sealants and oral prophylaxis in a school setting, but only if the following conditions were met: (1) the student had written permission from a parent or guardian; (2) a licensed dentist authorized the treatments; (3) the student was not an active patient of another dentist; and (4) the authorizing dentist had examined the student's teeth and given written

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[1] The Board is South Carolina's regulatory authority for dentists and dental hygienists and is composed of seven dentists, one dental hygienist, and one lay member. S.C. Code Ann. § 40-15-20 (2011). An amendment, with an effective date of June 7, 2012, revised the composition of the Board and the procedures for appointment of its members. S.C. Code Ann. § 40-15-20 (Supp. 2012).

[2] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2012).

[3] S.C. Code Ann. §§ 39-5-10 to -560 (1985 & Supp. 2012).

[4] S.C. Code Ann. §§ 40-15-10 to -380 (2011 & Supp. 2012).

authorization within 45 days before application of the sealant or oral prophylaxis. *Id.* § 40-15-80(C).

In 2000, the General Assembly amended the DPA to impose fewer restrictions on dental hygienists to perform preventive dental services in schools. Act No. 298, 2000 S.C. Acts 2088. As amended, the DPA authorized dental hygienists to perform oral prophylaxis and to apply sealants and topical fluoride in schools under a dentist's "general supervision," which was defined to mean that a licensed dentist or a state public health dentist "authorized the procedures to be performed but does not require that a dentist be present when the procedures are performed." S.C. Code Ann. §§ 40-15-80(B), -85(B) (2001 & Supp. 2002).[5] Thus, other than the parental-consent requirement, the 2000 amendments did not preserve the requirements set forth in the prior version of section 40-15-80(C)(3), specifically the 45-day dentist pre-examination requirement.

In signing the 2000 amendments, Governor Jim Hodges issued a statement that the "new law removes a regulation that hindered access to dental care" and noted that it would "allow[ ] dental hygienists to offer preventative dental care in places such as schools . . . [where] [d]entists rarely practice full-time."

In January 2001, Health Promotion began providing cleanings, sealants, topical fluoride treatments, and other preventive dental hygiene services onsite to children in South Carolina schools. As a result, Health Promotion established working relationships with twenty-one school districts in South Carolina. According to its records, Health Promotion had screened over 19,000 children and had provided services to over 4,000, of whom almost 3,000 were Medicaid-eligible.

On July 13, 2001, the Board promulgated Emergency Regulation 39-18, to "clarify" the authorization required for dental hygienists to administer care in school settings. The Emergency Regulation stated in relevant part:

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[5] Based on the 2000 amendments, section 40-15-80 provided in pertinent part:

> (B) In school settings, licensed dental hygienists may apply topical fluoride and may perform the application of sealants and oral prophylaxis under general supervision, with written permission of the student's parent or guardian.

S.C. Code Ann. § 40-15-80(B) (Supp. 2002).

> (A) A clinical examination must be conducted by the supervising dentist for each patient not more than forty-five (45) days prior to the date the dental hygienist is to perform the procedure for the patient.

Emergency Regulation 39-18, State Register, Vol. 25, Issue No. 7 (July 27, 2001). Upon approval of the Board, the Emergency Regulation was put into effect and was to expire in January 2002, 180 days after it was promulgated.[6]

Immediately thereafter, Health Promotion sought a temporary restraining order to prohibit the Board from enforcing the Emergency Regulation.[7] Additionally, Health Promotion sought damages as it contended the enactment of the Emergency Regulation would effectively force it out of business.

By order dated August 21, 2001, Special Circuit Court Judge Joseph M. Strickland denied the motion on the grounds that: (1) Health Promotion failed to exhaust its administrative remedies; and (2) the Board acted within "its power and authority as conferred by statute" to promulgate the Emergency Regulation, which reasonably clarified the term "general supervision" in the 2000 amendment to include a pre-examination by a licensed dentist. Judge Strickland further determined that Health Promotion failed to establish any irreparable harm for which there was not an adequate remedy at law as it had alleged "lost business from eleven school districts that would have resulted in revenue of five million ($5,000,000.00) dollars." On appeal, the Court of Appeals affirmed the decision solely on the ground that Health Promotion failed to exhaust its administrative remedies. *Health Promotion Specialists, L.L.C. v. S.C. Bd. of Dentistry*, Op. No. 2003-UP-232 (S.C. Ct. App. filed Mar. 26, 2003).

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[6] Because the General Assembly was out of session when the regulation was filed and when the normal 90-day period expired, the regulation was extended for an additional 90 days. *See* S.C. Code Ann. § 1-23-130(C) (2005) ("If emergency regulations are either filed or expire while the General Assembly is in session, the emergency regulations remain in effect for ninety days only and may not be refiled; but if emergency regulations are both filed and expire during a time when the General Assembly is not in session they may be refiled for an additional ninety days.").

[7] In its Complaint, Health Promotion named the following as defendants: the Board, the South Carolina Dental Association, Dr. Charles Maxwell, Dr. Charles E. Millwood, and James H. Zorn, Jr.

On August 24, 2001, the Board published a proposed permanent regulation that was essentially identical to the Emergency Regulation. As required by statute,[8] an Administrative Law Judge held a public hearing to determine the "need and reasonableness" of the proposed regulation.

On February 11, 2002, Administrative Law Judge Marvin Kittrell issued a report wherein he concluded that "the proposed regulation, as written, is unreasonable to the extent that it reinstates a requirement the legislature purposely eliminated when enacting 2000 S.C. Acts 298." In so ruling, Judge Kittrell effectively found the proposed regulation contravened the legislature's intent, in amending section 40-15-80 in 2000, "to provide for quicker and more accessible dental care to be given to these low-income children and adults." Ultimately, the Board elected not to submit the proposed permanent regulation to the General Assembly.

In June 2003, the General Assembly again amended the DPA to clarify the permissibility of certain acts by dental hygienists in public health school settings. Act No. 45, 2003 S.C. Acts 210-15. As amended, dental hygienists were authorized to provide preventive dental care in certain public health settings without a requirement for pre-examination by a dentist. S.C. Code Ann. § 40-15-102(D), -110(A)(10) (2011).

On September 12, 2003, the Federal Trade Commission (FTC) instituted an administrative complaint against the Board alleging the Board violated Section 5 of the Federal Trade Commission Act by "restrain[ing] competition in the provision of preventive dental care services by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists."

After protracted adjudicative and appellate proceedings, the FTC issued a Consent Agreement on September 6, 2007. The Consent Agreement mandated that the Board submit written notice to the FTC thirty days prior to any action of the Board "relating to the provision by dental hygienists of preventive dental services

[8] S.C. Code Ann. §§ 1-23-110, -111 (2005 & Supp. 2012) (outlining administrative procedures for publication of proposed promulgations).

in a public setting." The Consent Agreement was for "settlement purposes only" and did not constitute an admission by the Board as to the law or facts alleged in the FTC Complaint.

During the pendency of the adjudication of the FTC complaint, Health Promotion filed a case in federal court essentially based on the same facts as the state court action.[9] By agreement of the parties, the state court action was stayed pending the outcome of the federal court case. Ultimately, the Board was dismissed from the federal case and the remaining parties reached a settlement. On November 1, 2007, the state court case was restored to the Richland County circuit court docket with Health Promotion and the Board as the remaining parties.

Subsequently, Health Promotion moved to amend its Complaint to include a claim alleging the Board conspired to violate the SCUTPA. The Board renewed its previously filed motion to dismiss and filed a motion for summary judgment. In its motion, the Board maintained it was entitled to summary judgment primarily based on the following grounds: (1) it was immune from suit pursuant to the TCA as well as common law legislative and quasi-legislative immunity; (2) Health Promotion could not maintain a cause of action under the SCUTPA; and (3) Health Promotion's claim for injunctive relief was moot.

After a hearing, Circuit Court Judge William P. Keesley issued an order granting summary judgment in favor of the Board. In so ruling, Judge Keesley found: (1) Health Promotion could not maintain a cause of action for violation of the SCUTPA because the Board is not a "person" and did not engage "in the conduct of any trade or commerce" for the purposes of the SCUTPA; (2) the Board was immune from suit under the TCA and common law legislative immunity; (3) the claim for injunctive relief was moot; and (4) Health Promotion was not entitled to amend its Complaint. Additionally, Judge Keesley found it unnecessary to address the Board's remaining defenses, which included other claims of statutory and common law immunity.

Following the denial of its motion for reconsideration, Health Promotion appealed to the Court of Appeals. This Court certified this appeal from the Court of Appeals pursuant to Rule 204(b), SCACR.

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[9] *Health Promotion Specialists, Inc., a S.C. Corporation v. S.C. Dental Association, et al.*, Civil Action No. 3:03-3230-24 (D.S.C. 2003).

II. Discussion

A. Procedural Issues

1. Amendment of the Complaint

With limited discussion, Health Promotion contends the circuit court judge erred in denying its motion to amend the Complaint. In support of this contention, Health Promotion maintains "it could establish facts that would prove the Board could be a co-conspirator in a conspiracy to violate the SCUTPA and that the Board may also be found to have aided and abetted others in violations of SCUTPA." Because the parties have yet to engage in discovery, Health Promotion asserts the amendment was permissible under Rule 15 of South Carolina Rules of Civil Procedure.

Rule 15, SCRCP, provides that: "A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993).

In denying the motion, Judge Keesley noted the case was filed in 2001 and that the Complaint was initially amended in 2004. Recognizing that extensive discovery had been conducted in the federal case involving the same parties, Judge Keesley deemed the motion untimely and declined to permit Health Promotion to supplement its case with additional theories. Additionally, he found the amendment would unduly prejudice the Board as it would be forced to defend against "arguably new theories of the case when so much time ha[d] elapsed." Even if the motion had been timely, Judge Keesley found the amendments involving civil conspiracy would be "futile" as the Board would be immune from suit for claims involving the commission of intentional torts under the TCA.

We find Judge Keesley did not abuse his discretion as Health Promotion's delay in moving to amend the Complaint was inexplicable given the seven-year

lapse between the filing of the initial complaint and the oral motion. Moreover, despite the extensive federal court proceedings, there were no significant factual developments that warranted the untimely amendment. Furthermore, even if the amendment had been permitted, it would not have affected the grant of summary judgment to the Board. As will be discussed, we find the Board was immune from any tort claim asserted by Health Promotion.[10]

2. Summary Judgment Posture

Although not designated as a separate issue, Health Promotion appears to challenge Judge Keesley's ruling as an improper dismissal pursuant to Rule 12(b)(6).[11] Alternatively, Health Promotion generally claims summary judgment was improperly granted as there are questions of material fact that should have been decided by a jury.

We find this challenge to be without merit as the Board designated its motion as one for summary judgment, Health Promotion responded in full to the motion, and Judge Keesley's decision was based on and encompassed more than the parties' pleadings. *See* Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not

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[10] We also note that in order for Health Promotion to maintain a cause of action for conspiracy it would have needed to include the defendants named in the original lawsuit or establish that members of the Board acted with "actual malice." *See Pye v. Estate of Fox*, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006) ("The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se."); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988) ("A civil conspiracy is a combination of two or more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff."); *see also* S.C. Code Ann. § 40-15-60 (2011) ("No member of the board, or its director, its committees, special examiners, agents, and employees shall be held liable for acts performed in the course of official duties except where actual malice is shown."). The Board, however, is now the sole defendant.

[11] *See Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) (recognizing that in deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the trial judge should consider only the allegations set forth on the face of the plaintiff's complaint).

excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); *Charleston County Sch. Dist. v. Harrell*, 393 S.C. 552, 559 n.4, 713 S.E.2d 604, 608 n.4 (2011) (recognizing that a motion to dismiss may be converted into a motion for summary judgment when the court considers matters outside of the pleadings). Furthermore, other than characterizing Judge Keesley's ruling as premature, we discern no objection by Health Promotion regarding the posture of the case.

Thus, we have analyzed this case utilizing our summary judgment standard of review. As will be discussed, we find Judge Keesley correctly granted summary judgment because the facts are undisputed and the Board established its entitlement to immunity as a matter of law.

Because this case was presented to the circuit court in the posture of a motion for summary judgment, it is governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

B. Substantive Issues

1. Immunity from Suit

Health Promotion asserts the circuit court judge erred in finding as a matter of law that the Board's actions are "protected by the shields of legislative and common law immunities." Because immunity under the TCA is an affirmative defense, Health Promotion contends the Board failed to prove as a matter of law that it was entitled to this immunity. Specifically, Health Promotion asserts the Board did not prove it was entitled to discretionary immunity as there is no evidence that it "weighed competing considerations and then made a conscious choice to act."

Health Promotion's reliance on an alleged failure to prove entitlement to discretionary immunity is misplaced. Rather, at issue is the propriety of the Board's legislative action. As will be discussed, we find that subsections (1), (2) and (4) of section 15-78-60 grant a per se immunity to legislative actions. Thus, there is an irrefutable presumption of the exercise of discretion.

The TCA "is the exclusive civil remedy available for any tort committed by a government entity, its employees, or its agents except as provided in § 15-78-70(b)." *Wells v. City of Lynchburg*, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998); *see* S.C. Code Ann. § 15-78-200 (2005) ("Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty.").

The TCA provides that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein." S.C. Code Ann. § 15-78-40 (2005). "Governmental entity" is defined by the TCA as "the State and its political subdivisions." *Id.* § 15-78-30(d).

"The Tort Claims Act expressly preserves all existing common law immunities." *O'Laughlin v. Windham*, 330 S.C. 379, 383, 498 S.E.2d 689, 691 (Ct. App. 1998) (quoting section 15-78-20(b), which provides: "The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved.").

"The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999). "Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability." *Id.*

We conclude the Board constitutes a governmental entity that may invoke the protections of the TCA. In reaching this conclusion, we have considered the following factors: "whether the entity functions statewide, whether the entity

performs the work of the state, whether the entity was created by the legislature, and whether the entity is subject to local control." 81A C.J.S. *States* § 552 (Supp. 2013) (footnote omitted). Additionally, we have examined "the character of the power delegated to the entity, and the nature of the function performed by the entity." *Id.*

Significantly, the Board was created by the General Assembly as the statewide regulatory authority for dentists and dental hygienists. S.C. Code Ann. § 40-15-10 (2011); *see id.* § 40-1-20(3) (defining "Board" to mean "the group of individuals charged by law with the responsibility of licensing or otherwise regulating an occupation or profession within the State"). Several members of the Board are appointed by the Governor and its funds are controlled by the State Treasurer. S.C. Code Ann. § 40-15-20 (providing for Governor's appointment of Board members); *id.* § 40-15-50 ("All fees received by the board become the property of the state general fund and must be deposited to the account of the State Treasurer. The expenditures of the board must be from state appropriations. All fines must be deposited into a special account to be held by the State Treasurer for the purpose of the payment of administrative costs upon the approval of the Budget and Control Board.").

Notably, the individual members of the Board are entitled to immunity for actions performed in the course of their official duties. *See* S.C. Code Ann. § 40-15-60 (2011) ("No member of the board, or its director, its committees, special examiners, agents, and employees shall be held liable for acts performed in the course of official duties except where actual malice is shown."). Thus, by creating this governmental entity, the General Assembly intended for the Board as a whole to come within the purview of the TCA. Accordingly, as a governmental entity, the Board is entitled to assert the affirmative defense of immunity under the provisions of the TCA.

Having found the Board qualifies for the protections of the TCA, the question becomes whether the Board satisfied its burden of establishing a limitation on liability or an exception to the waiver of immunity. We conclude the Board established as a matter of law that it was entitled to immunity for any tort claims arising out of the promulgation of the Emergency Regulation.

Judge Keesley properly found the Board's promulgation of the Emergency Regulation constituted a legislative or quasi-legislative act that was protected from liability under the following provisions of the TCA, which provide that the governmental entity is not liable for a loss resulting from:

> (1) legislative, judicial, or quasi-judicial action or inaction;
>
> (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
>
> . . . .
>
> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies.

S.C. Code Ann. § 15-78-60(1), (2), (4) (2005).

Furthermore, the Board's entitlement to immunity is supported by common law that interprets and applies principles of legislative immunity, a doctrine that has not been supplanted by the TCA. *See Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) ("A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties."); *see also Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001) (discussing principles of legislative immunity as established by the United States Supreme Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951)).

Based on the foregoing, we hold the Board was immune from the tort claims asserted by Health Promotion. Although this decision is dispositive, we briefly address Health Promotion's remaining issues regarding its claim under the SCUTPA.

2. SCUTPA Claim

Health Promotion argues the circuit court judge erred in finding that Health Promotion could not sustain a cause of action for violation of the SCUTPA as the Board is not a "person" and its actions were not within "trade or commerce" for the purposes of the SCUTPA.

The SCUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices *in the conduct of any trade or commerce* are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985) (emphasis added).

Although the SCUTPA provides for enforcement by the Attorney General,[12] it also provides for an action by a private party "who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by *another person* of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." *Id.* § 39-5-140(a) (emphasis added); F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 415-16 (4th ed. 2011) (discussing provisions of the SCUTPA and quoting section 39-5-140 of the South Carolina Code).

"To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Gentry v. Yonce*, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). "An act is 'deceptive' when it has a tendency to deceive." *Id.*

Even assuming arguendo that the Board constitutes a "person" susceptible to suit under the SCUPTA, we find Health Promotion's claim fails as the Board's action of promulgating the Emergency Regulation cannot satisfy the requirement that the alleged unfair act occurred "in the conduct of any trade or commerce."

As defined by the SCUTPA, "trade or commerce" includes "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (1985). By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions.

Furthermore, by its very definition, "trade or commerce" involves "[e]very business occupation carried on for subsistence or profit and involving the elements

[12] S.C. Code Ann. § 39-5-50 to -130 (1985) (authorizing and identifying specific powers of the Attorney General in carrying out the duties prescribed in the SCUTPA).

of bargain and sale, barter, exchange, or traffic." *Black's Law Dictionary* (9th ed. 2009); *see Bretton v. State Lottery Comm'n*, 673 N.E.2d 76, 78-79 (Mass App. Ct. 1996) (recognizing that "the proscription in § 2 of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a business context" (citations omitted)).

In the instant case, the Board's sole action was the promulgation of a regulation. We find this act, which is alleged to have been unfair, does not fall within the definition of "trade or commerce" as it did not involve advertisement, sale, or distribution of services or property within a business context.[13]

III. Conclusion

Based on the foregoing, we find Judge Keesley properly denied Health Promotion's motion to amend its Complaint. Furthermore, we conclude that he correctly granted summary judgment in favor of the Board as the facts of this case are undisputed and the Board established its entitlement to immunity as a matter of law. Specifically, the Board's action in promulgating the Emergency Regulation was exempt under the provisions of the TCA involving legislative or quasi-legislative decisions. Alternatively, even if the Board was not immune, Health Promotion could not sustain a cause of action for a violation of the SCUTPA as the

[13] Although the SCUTPA has been interpreted to include claims regarding professional services, these cases are inapplicable as the instant appeal involves a regulation of professional services and not the "sale" of those services. *See Taylor v. Medenica*, 324 S.C. 200, 217, 479 S.E.2d 35, 44 (1996) (citing the statutory definitions of section 39-5-10(b) and holding "[t]he provision of *any* service constitutes commerce within the meaning of the UTPA"; the Court observed that "[t]he statute does not exclude professional services from its definition"). Furthermore, although not dispositive, the Board's actions arguably fell within the regulatory exemption of the SCUTPA, which provides that the SCUTPA does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." S.C. Code Ann. § 39-5-40(a) (1985).

Board's promulgation of the Emergency Regulation was not an action "in the conduct of any trade or commerce." Accordingly, we affirm the order of the circuit court.

AFFIRMED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shannon Hutchinson, Personal Representative of the Estate of Stephen F. Ney, a/k/a Steve K. Ney, Petitioner,

v.

Liberty Life Insurance Company, Respondent.

Appellate Case No. 2011-194466

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27264
Heard April 2, 2013 – Filed June 12, 2013

REVERSED

Kenneth C. Anthony, Jr., of The Anthony Law Firm, PA of Spartanburg, for Petitioner.

Kevin Kendrick Bell and Rebecca Ann Roser, both of Robinson McFadden & Moore, PC, of Columbia, for Respondent.

JUSTICE PLEICONES: Petitioner is the beneficiary of a mortgage life insurance policy. She brought this suit against respondent, the insurer, after it

denied her benefits under an exclusion for injury resulting from the insured's being "under the influence of any narcotic." It is undisputed that petitioner's decedent was under the influence of methamphetamine at the time of his accidental death. The circuit court granted petitioner summary judgment holding that methamphetamine is not a narcotic. The Court of Appeals reversed, holding the plain and ordinary meaning of narcotic in an insurance policy to a layperson is understood to include methamphetamine "based on its widespread illegal use." *Hutchinson v. Liberty Life Ins. Co.*, 393 S.C. 19, 709 S.E.2d 130 (Ct. App. 2011). We granted petitioner's request for a writ of certiorari and now reverse.

FACTS

Decedent was a long-distance truck driver who died at the scene of a one-truck accident in Illinois. The death certificate gives the immediate cause of death as "blunt chest trauma" with "motor vehicle crash" as the underlying cause. It also lists "methamphetamine use" as an "other significant condition[s] contributing to death but not resulting in the underlying cause given." The Illinois autopsy lab report is negative for narcotics but positive for both amphetamine and methamphetamine.

Respondent denied petitioner benefits under exclusion (h) of the decedent's policy. Exclusion (h) provides:

> A Benefit will not be payable under this Certificate if your Accidental Death results directly or indirectly from:
>
> . . .
>
> (h) injury as a result of the insured being under the influence of any narcotic unless administered on the advice of a physician and taken in the dosage prescribed
>
> . . . .

This exclusion is derived from S.C. Code Ann. § 38-71-370(9) (2002), which permits an exclusion "for any loss resulting from the insured being drunk or under the influence of any narcotic unless taken on the advice of a physician." A similar provision has been a part of our statutory law since the adoption of the Insurance

Code in 1947. *See* 1947 Act No. 232, § 5 VIII p. 429, permitting an insurer to exclude coverage "for death, injury incurred or disease contracted while the insured is intoxicated or under the influence of narcotics unless administered on the advice of a physician." Over time the narcotics clause has been slightly altered, while the broad intoxication clause has been narrowed to a "drunk" standard.[1]

Petitioner contends the Court of Appeals erred in holding as a matter of law that methamphetamine is commonly understood to be a narcotic based upon its "widespread illegal use." We agree. The Court of Appeals read the exclusion to deny coverage for any injury resulting from unlawful use of popular intoxicating substances. In our opinion, this reading rewrites rather than interprets the insurance policy's exclusionary clause.

Words in insurance contracts are to be given their "plain, ordinary and popular meaning." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012) (internal citations omitted). Whether language is ambiguous is a question of law for the Court, and any ambiguous terms are to be construed liberally in favor of the insured. *Id*. Further, exclusionary terms in a policy are narrowly construed to the benefit of the insured. *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 426 S.E.2d 770 (1993).

The Court of Appeals appears to have read the term "narcotic" in exclusion (h) to mean any drug widely known to be used illegally. In our view, the use of the term "narcotic" in the exclusion rather than "unlawful drug" or "unlawful use of drug" creates, at minimum, an ambiguity as 'narcotic' is a defined type of controlled substance rather than a generic term for illegally used substances. If there is any ambiguity, *McPherson, supra*, it must be construed in favor of the petitioner. *Whitlock, supra*.

On certiorari, respondent relies, as did the Court of Appeals, on *Doe v. Gen. Am. Life Ins. Co.*, 815 F. Supp. 1281 (E.D. Mo. 1993). In *Doe*, the question was whether cocaine was within an insurance exclusion that excluded treatment for

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[1] While the parties argued to the Court of Appeals that exclusion (h) should be interpreted using rules of statutory construction, the court did not reach that issue nor do we. We simply note that it is doubtful that in 1947 'narcotic' was understood to embrace methamphetamine, just as today it is defined as a controlled substance but not a narcotic. S.C. Code Ann. § 44-53-110 (2002).

conditions "arising out of the use of : a) narcotics; b) hallucinogens; c) barbiturates; d) marijuana; e) amphetamines; or other similar drugs or substances." The *Doe* court held the drug exclusion clause was ambiguous, and that "the Missouri rule of construction that requires ambiguities to be construed in favor of the insured cannot be used in interpreting the terms of the instant health plan." *Doe* at 1285. Although the court resolved the ambiguity by concluding cocaine was commonly understood to be a narcotic, we do not find *Doe* aids respondent. First, our state rules of insurance policy construction favoring the insured do apply. Second, the exclusionary language in *Doe* was much broader than exclusion (h), and the *Doe* court could easily have found cocaine to be within the exclusion's catchall phrase "or similar drugs or substances." Finally, at least in South Carolina, cocaine is unambiguously defined as a narcotic. § 44-53-110. The other cases relied upon by the Court of Appeals are all criminal decisions, and appear to involve loose language in an opinion[2] or sloppy drafting in search warrants,[3] or to be relying upon testimony about drug use in a Hell's Angels clubhouse[4] or reciting the opinion of an expert witness.[5] Whatever the individual merits of these criminal decisions, none were subject to the rules of construction applicable to this insurance policy exclusion.

CONCLUSION

The Court of Appeals erred in reversing the trial court's order because, applying our rules of insurance policy construction, methamphetamine is not a narcotic within the meaning of Exclusion (h).

REVERSED.

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

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[2] *United States v. Campos*, 306 F.3d 577, 580 (8th Cir. 2002).
[3] *United States v. Robinson*, 2008 WL 4790324 (E.D. Mo. October 29, 2008) (warrant stated narcotics but incorporated document specified meth).
[4] *United States v. Real Property Known as 77 East 3rd St.*, 869 F. Supp. 1042 (S.D.N.Y 1994).
[5] *State v. Carmichael*, 53 P.3d 214 (Haw. 2002).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dana Allison Medlock as Personal Representative of the Estate of Heather C. Medlock, Petitioner,

v.

University Health Services, Inc. d/b/a University Hospital, Respondent.

Appellate Case No. 2012-213462

ORIGINAL JURISDICTION

Opinion No. 27265
Submitted June 4, 2013 - Filed June 12, 2013

Michael Strom Medlock of Columbia, South Carolina, and Christopher Lance Sheek of Greenwood, South Carolina, for Petitioner.

Robin A. Braithwaite, of Aiken, for Respondent.

PER CURIAM: This Court granted the petition of Dana Allison Medlock (Petitioner) in its Original Jurisdiction to determine whether a non-attorney who files a claim and petition for allowance of a claim in probate court on behalf of a business entity is engaging in the unauthorized practice of law. We dispense with further briefing and hold that a non-attorney may present claims against an estate

and petition for allowance of claims in the probate court on behalf of a business entity without engaging in the unauthorized practice of law.

Petitioner is the personal representative of the Medlock Estate. On August 9, 2012, Respondent filed and served a Statement of Creditor's Claim (the claim) against the Medlock Estate in probate court. Albert J. Sullivan signed the claim as Respondent's "Director of Collections." The claim did not indicate Sullivan was an attorney or that Respondent was represented by an attorney.

Petitioner filed and served a disallowance of the claim. Respondent then petitioned for allowance of the claim. Sullivan signed the petition for allowance of the claim, which was captioned, "Albert J. Sullivan, Petitioner v. [Petitioner]." The petition further indicated that Edward Burr was Respondent's attorney. Burr is not licensed to practice law in South Carolina.

At the hearing on Respondent's petition for allowance of the claim, Petitioner argued Sullivan could not appear on Respondent's behalf because he was not a licensed attorney. The probate judge continued the hearing without ruling on whether Sullivan could properly appear.

Petitioner then filed a petition for original jurisdiction with this Court, requesting the Court declare Sullivan engaged in the unauthorized practice of law by filing the claim and subsequently petitioning for allowance of the claim without the assistance of an attorney licensed in South Carolina. On January 25, 2013, this Court granted the petition and referred the case to the Honorable James O. Spence as special referee to make findings of fact and recommendations to this Court. Judge Spence has since provided the Court with a stipulation of facts from the parties and notice that Respondent permanently withdrew its claim against the Medlock Estate on April 1, 2013.

South Carolina limits the practice of law to licensed attorneys. *Brown v. Coe*, 365 S.C. 137, 139, 616 S.E.2d 705, 706 (2005). The generally understood definition of the practice of law embraces the preparation of pleadings and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts. *Id.* at 139, 616 S.E.2d at 706–07. However, this Court has consistently refrained from adopting a definition of "the practice of law." *Doe v. McMaster*, 355 S.C. 306, 312, 585 S.E.2d 773, 776 (2002). It is the character of the services rendered, and not the denomination of the tribunal where the services are rendered, that determines whether such services

constitute the practice of law. *State ex rel. Daniel v. Wells*, 191 S.C. 468, 477, 5 S.E.2d 181, 185 (1939). A business entity may be represented by a non-attorney in civil magistrate court proceedings, but it must be represented by an attorney in the circuit and appellate courts. Rule 21, SCMCR; *Renaissance Enters., Inc. v. Summit Teleservices., Inc.*, 334 S.C. 649, 651–53, 515 S.E.2d 257, 258–59 (1999); *In re Unauthorized Practice of Law Rules proposed by the S.C. Bar*, 309 S.C. 304, 305–06, 422 S.E.2d 123, 124 (1992).

We have encouraged any interested individual to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of any questionable conduct. *See In re Unauthorized Practice of Law Rules*, 309 S.C. at 307, 422 S.E.2d at 125. Pursuant to that invitation, we now hold a non-attorney may represent a business entity in the probate court to make an estate claim and subsequently petition for allowance of the claim without engaging in the unauthorized practice of law. To file a claim in the probate court, a claimant must merely deliver to the personal representative and the probate court a written statement of the claim indicating its basis, the claimant's name and address, the amount claimed, and the date upon which the claim is due. S.C. Code Ann. § 62-3-804(1) (2009). Similarly, a petition for allowance of a claim in the probate court merely requires a creditor to complete a one-page standard form, located on the South Carolina Judicial Department website, requesting the probate court allow the claim and attesting that such claim is valid, timely presented, and has not been paid. None of these activities require the professional judgment of an attorney or entail specialized legal knowledge and ability.

Accordingly, we hold a non-attorney may present claims against an estate and petition for allowance of claims in the probate court on behalf of a business entity without engaging in the unauthorized practice of law.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, Petitioners,

v.

South Carolina Transportation Infrastructure Bank, Robert W. Harrell, Jr., in his official capacity as Speaker of the S.C. House of Representatives, John E. Courson in his official capacity as President Pro Tempore of the S.C. Senate, and the State of South Carolina, Respondents.

Appellate Case No. 2012-207128

ORIGINAL JURISDICTION

Opinion No. 27266
Heard June 19, 2012 – Filed June 12, 2013

JUDGMENT FOR RESPONDENTS

L. Warren Clayton, III and James G. Carpenter, both of Carpenter Law Firm, PC, of Greenville, for Petitioners.

Robert E. Stepp, Robert E. Tyson, Jr., Alexis K. Lindsay, all of Sowell, Gray, Stepp, & Laffitte, LLC, of Columbia, Attorney General Alan M. Wilson, Deputy Attorney General Robert D. Cook, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, Kenneth

M. Moffitt, John P. Hazzard, V, and Michael R. Hitchcock, all of Columbia, Charles Fennell Reid and Bradley Scott Wright, both of Columbia, for Respondents.

JUSTICE HEARN: Edward D. Sloan and the South Carolina Public Interest Foundation[1] (collectively, Sloan) instituted this suit in our original jurisdiction to determine whether the South Carolina Transportation Infrastructure Bank is constitutional. In particular, Sloan alleges Section 11-43-140 of the South Carolina Code (2011), which governs the composition of the Bank's Board of Directors, violates both the dual office holding and the separation of powers prohibitions of the South Carolina Constitution. We find both challenges fail and that section 11-43-140 is constitutional.

FACTUAL/PROCEDURAL BACKGROUND

The Bank, a corporate and political instrumentality established by legislative enactment, is responsible for selecting and assisting "in financing major qualified projects by providing loans and other financial assistance to government units and private entities for constructing and improving highway and transportation facilities." S.C. Code Ann. § 11-43-120 (2011). In doing so, the Bank may, among other things, "make loans to qualified borrowers to finance the eligible costs of qualified projects and to acquire, hold, and sell loan obligations at prices and in a manner as the [B]oard determines advisable" and "borrow money through the issuance of bonds and other forms of indebtedness as provided in this chapter." *Id.* § 11-43-150(5) & (14) (2011). Since 1998, the Bank has expended nearly three billion dollars for major transportation projects.

Section 11-43-140 establishes the composition of the Board as follows:

> [T]he Chairman of the Department of Transportation Commission, ex officio; one director appointed by the

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[1] The South Carolina Public Interest Foundation is a not-for-profit corporation "dedicated to the public interest, including the upholding and proper application of the South Carolina Constitution."

> Governor who shall serve as chairman; one director appointed by the Governor; one director appointed by the Speaker of the House of Representatives; one member of the House of Representatives appointed by the Speaker, ex officio; one director appointed by the President Pro Tempore of the Senate; and one member of the Senate appointed by the President Pro Tempore of the Senate, ex officio.

Since the Bank's creation, no more than two legislators have served as directors at any one time. The legislators currently serving on the Board are the Honorable Hugh K. Leatherman, Chairman of the Senate Finance Committee, and the Honorable Harry B. "Chip" Limehouse, Vice-Chairman of the House Ways and Means Committee. We granted Sloan's petition to bring a declaratory judgment action in our original jurisdiction challenging the constitutionality of section 11-43-140.

ISSUES PRESENTED

I. Does Sloan have standing to bring this action?

II. Does section 11-43-140 violate the South Carolina Constitution's dual office holding prohibitions in Article III, Section 24; Article VI, Section 3; and Article XVII, Section 1A by allowing legislators to serve as directors on the Board?

III. Does section 11-43-140 violate the South Carolina Constitution's separation of powers provisions in Article I, Section 8 by allowing legislators to serve as directors on the Board?

STANDARD OF REVIEW

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). "A statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the constitution." *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010). A "legislative act will

not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.*

LAW/ANALYSIS

I. STANDING

As a threshold matter, Respondents argue Sloan does not have standing to assert his claims because he does not allege a particularized injury and has not shown that this matter falls within the public importance exception. We disagree.

A party seeking to establish standing bears the burden of proving it. *See Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). As a general rule, a private individual may not use the judicial process to scrutinize the validity of a legislative act without showing that the act in question caused or threatens to cause a direct injury to the individual. *Sloan v. Dep't of Transp.*, 379 S.C. 160, 169, 666 S.E.2d 236, 241 (2008). However, the rule of standing is not inflexible and standing may be conferred where the issue is one of public importance. *Sloan v. Wilkins*, 362 S.C. 430, 436, 608 S.E.2d 579, 583 (2005). The public importance exception grants standing to a party who has not suffered a particularized injury where the issue involved is of such public importance that its resolution is required for future guidance. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). "It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *Id.* at 199, 669 S.E.2d at 341.

Sloan has not asserted he has suffered a particularized harm or injury as a result of section 11-43-140, but we find this case fits within the public importance exception. While we are mindful that we must be cautious with this exception, lest it swallow the rule, this is the precise instance where the public importance exception should apply. Sloan presents a colorable claim that the Board is unconstitutionally comprised, casting a cloud of illegitimacy which could marginalize the important decisions of the Board. We find resolution of this question is certainly of importance and concern to the public and therefore hold Sloan has standing to bring this challenge.

II. DUAL OFFICE HOLDING

Sloan first argues that section 11-43-140 violates the constitution because concurrent service on the Board and in the General Assembly constitutes dual office holding.[2] Because we believe the ex officio exception to dual office holding applies, we disagree.

The South Carolina Constitution prohibits members of the General Assembly from holding another office during their service in the legislature, both expressly and by virtue of the repeated general prohibitions against dual office holding. *See* S.C. Const. art. III, §24 ("No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State . . . ."); S.C. Const. art. VI, § 3 ("No person may hold two offices of honor or profit at the same time."); S.C. Const. art. XVII, § 1A ("No person may hold two offices of honor or profit at the same time . . . ."). This Court, however, has recognized an "ex officio" or "incidental duties" exception where "there is a constitutional nexus in terms of power and responsibilities between the first office and the 'ex officio' office." *Segars-Andrews*, 387 S.C. at 126, 691 S.E.2d at 462. Ex officio is defined as "[b]y virtue or because of an office; by virtue of the authority implied by office." *Black's Law Dictionary* 267 (3d pocket ed. 2006).

Sloan argues that the ex officio exception is inapplicable here because service on the Board does not relate to the duties of a legislator. In support of his position, Sloan relies heavily on *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E.2d 88 (1947), in which we considered a constitutional challenge to the statute creating a board of trustees for an auditorium in Greenville. *Id*. at 85, 44 S.E.2d at 91. There, we found a statutory requirement that the senator and representative from Greenville County serve as members on the board of trustees ran afoul of the dual office holding provisions of the constitution. *Id.* at 90, 44 S.E.2d at 94. However, we clarified that our ruling was not applicable to "those officers upon whom other duties relating to their respective offices are placed by law" and would "not affect the state of the law with respect to ex officio officeholding." *Id.* at 92, 44 S.E.2d at 95.

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[2] None of the Respondents challenges the assertion that membership on the Board qualifies as serving in an office for the purposes of the constitutional analysis.

More recently, in *Segars-Andrews*, we elucidated the framework for determining whether a second office is being held ex officio. There, we considered, *inter alia*, a dual office holding challenge against legislators serving as members of the Judicial Merit Selection Commission (JMSC). 387 S.C. at 123–28, 691 S.E.2d at 461–64. The JMSC possesses the power, both statutorily and constitutionally, to evaluate the qualifications and fitness of all judicial candidates for election or re-election. *Id.* at 114, 691 S.E.2d at 456. A candidate must first be found qualified by the JMSC to be considered by the legislature. *Id.* After the JMSC determined Judge Segars-Andrews was not qualified for re-election, she brought multiple constitutional challenges against the JMSC. *Id.* at 116, 691 S.E.2d at 457. In addressing the dual office holding allegation, we found that although a position on the JMSC qualified as a constitutional office, the ex officio exception applied because service on the JMSC by the legislators was "properly characterized as incidental to their legislative duties." *Id.* at 125, 691 S.E.2d at 462. We further concluded there must be a "constitutional nexus in terms of power and responsibilities" between the two offices. *Id.* at 126, 691 S.E.2d at 462. Moreover, we distinguished the case from *Ashmore* by noting that when members of the General Assembly also serve on the JMSC, "such service is reasonably incidental to the full and effective exercise of their legislative powers." *Id.* at 127, 691 S.E.2d at 463. We held that because the constitution specifically charged the General Assembly with the task of electing members of the judiciary, legislative members of the JMSC exercised the powers and responsibilities which they were already constitutionally granted. *Id*. at 125–26, 691 S.E.2d at 462.

Here, we likewise find the necessary constitutional nexus between service on the Board and service in the legislature. The Bank's purpose "is to select and assist in financing major qualified projects by providing loans and other financial assistance to government units and private entities for constructing and improving highway and transportation facilities necessary for public purposes including economic development." S.C. Code Ann. § 11-43-120(C) (2011). To this end, the Board has the power to "borrow money through issuance of bonds and other forms of indebtedness." S.C. Code Ann. § 11-43-150(14) (2011). Similarly, the constitution vests the General Assembly with the power to set the terms and conditions of general obligation debt of the State. S.C. Const. art. X, § 13(6). Because it is within the province of the legislature to incur debt on behalf of the State, we find a sufficient constitutional nexus between the powers and responsibilities of the directors on the Board and members of the General

Assembly.[3] Moreover, this case is also distinguishable from *Ashmore* because like service on the JMSC in *Segars-Andrews*, service by legislators on the Board is "reasonably incidental to the full and effective exercise of their legislative powers." *Segars-Andrews*, 387 at 127, 691 S.E.2d at 463.

Accordingly, we hold the ex officio exception applies and the statute does not violate the provisions barring dual office holding.

III. SEPARATION OF POWERS

Sloan also argues that section 11-43-140 violates the constitutional provisions regarding separation of powers because service on the Board by legislators results in members of the legislative branch performing executive functions. Because we believe the overlap of the two branches falls within constitutional bounds, we disagree.

The preservation of a separation of powers has been a basic tenet of democratic societies at least since Baron de Montesquieu warned that "[t]here would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." *See* Montesquieu, *The Spirit of Laws* 152 (Thomas Nugent trans. 1949). Consistent with this notion, the South Carolina Constitution requires the branches of government be "forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8. "One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government." *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1979). "The legislative department makes the laws[,] the executive department carries the laws into effect, and the judicial department interprets and declares the laws." *Id.* at 84, 261 S.E.2d at 305. This delineation of

[3] We realize the Board may not be performing purely legislative acts, but the discussion of whether members of the General Assembly can serve on a Board which performs some executive functions relates to the separation of powers challenge, which is discussed *infra*, Part III. Whether the ex officio exception applies merely requires an inquiry into whether there is a constitutional nexus between the powers and responsibilities of the two offices.

powers amongst the branches "prevents the concentration of power in the hands of too few, and provides a system of checks and balances." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

Nevertheless, "[s]eparation of powers does not require that the branches of government be hermetically sealed." 16A Am. Jur. 2d *Constitutional Law* § 244. Accordingly, allowing some degree of overlap between the branches has been a feature of our government since the founding of the Republic. Our founding fathers embraced the celebrated writings of Montesquieu, yet concluded that a certain amount of encroachment was permissible, even under his ideology:

> [I]t may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," [Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

The Federalist No. 47, at 250–51 (James Madison) (The Gideon ed., 2001). Thus, we have acknowledged that "there is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree." *McInnis*, 278 S.C. at 313, 295 S.E.2d at 636 (citing *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 83, 236 S.E.2d 406, 409 (1977)).

In South Carolina, this allowance of overlap between the branches is somewhat singular in the extensive involvement of the legislature in the powers of the executive and judiciary. Historically, this State has been considered a "legislative state" with a practice of "[j]oining legislators with executive branch decision makers" for a "commission approach to government." Cole Blease Graham, Jr., *The South Carolina Constitution: A Reference Guide* 46 (2007).

The path leading to this collaborative governance where the General Assembly wields extensive power is discussed at length by Professor Underwood

in his excellent treatise on our State constitution. While recognizing that no one force can be identified as being responsible for "South Carolina's unique form of government in which the legislative takes a permanent position among the three theoretically equal branches of government," Underwood does discuss several causative factors. James L. Underwood, *The Constitution of South Carolina, Volume I: The Relationship of the Legislative, Executive, and Judicial Branches* 13 (1986).

> Among the historical forces that created the impetus for the acquisition of such powers by the colonial Commons House were abuses by the royal executive that created an inbred suspicion of concentrated executive power in the South Carolina political leadership. In the view of Commons these royal executive excesses threatened the economy of the province, frustrated their own ambitions by reserving choice judicial and other positions for British placemen and threatened the prerogatives of Commons to judge the proper composition of its own membership. The climate favorable to the legislative style of government was enhanced by a small, homogeneous elite who found it convenient to rule as a group through the legislature as a form of committee of peers. Admiration and emulation of the constitutional precedents of British government with its example of growing parliamentary power proved to be a seductive model for the South Carolinians, many of whom were lawyers trained at English Inns of Court.

Id. at 21–22. Although our system has retrenched somewhat from the colonial levels of legislative control,[4] the influence of the legislature in the activities of the other branches remains firmly girded in the operation of our government.

Consequently, our rich and unique constitutional history has resulted in a system of government which does not lend itself to a neat, compartmentalized, or "cookie-cutter" approach. Rather, to counteract the destructive forces which can emanate from strictly defined and jealously guarded power bastions, certain

[4] Professor Underwood offers several "countervailing forces" which have worked over time to moderate the vast power of the General Assembly including the tradition of judicial review and the strengthening of the office of the Governor. *Id.* at 27–85.

"power fusion devices" have developed to enable the branches to work together in a cooperative fashion. *Id.* at 3. A prime example of one of these collaborative devices is the State Budget and Control Board. *See Edwards*, 279 S.C. at 83, 236 S.E.2d at 409.

With this historical framework in mind, we now turn to Sloan's claim that Section 11-43-140 violates the constitutional separation of powers provision.

In answering this question, our prior decision in *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1988), is particularly instructive. There, we identified two major criteria to determine whether a "creature of legislative enactment" which draws membership from different branches of government, like the Board, is constitutional under a separation of powers challenge: "(1) the legislators should be a numerical minority, and (2) the body should represent a cooperative effort to make available to the executive department the special knowledge and expertise of designated legislators in matters related to their function as legislators." *Id.* at 230, 363 S.E.2d at 685–86

In arguing that the Board does not have a legislative minority, Sloan first reasons that although only two members of the legislature currently sit on the Board, there is a possibility that as many as four legislators could sit on the seven-member Board, which would constitute a majority. Initially, we note that since its inception, the Board has never had more than two legislators serve as directors at one time. Additionally, Sloan's contention rests on an illogical reading of the statute.

The Board is appointed as follows:

> [T]he Chairman of the Department of Transportation Commission, ex officio; one director appointed by the Governor who shall serve as chairman; one director appointed by the Governor; one director appointed by the Speaker of the House of Representatives; one *member* of the House of Representatives appointed by the Speaker, *ex officio*; one director appointed by the President Pro Tempore of the Senate; and one *member* of the Senate appointed by the President Pro Tempore of the Senate, *ex officio*.

S.C. Code Ann. § 11-43-140 (emphasis added). The statute expressly provides that the Speaker and President Pro Tempore may appoint a member of the House and Senate, respectively, to serve ex officio, but the other two appointments are neither specifically delineated as members nor constrained to be held ex officio. While it is true there is no express prohibition against the other appointees being members, the same is true for any of the positions except for the Chairman of the Department of Transportation Commission. For example, it could be alleged just as easily that the Governor could choose to appoint a director who was also a legislator. Were we to hold that the absence of language specifically restricting the number of legislators who can serve on such a board rendered the statute constitutionally defective, we would upend countless boards across the State. Furthermore, the fact that neither leaders of the General Assembly nor the Governor have appointed legislators to these other positions demonstrates that the statute is capable of constitutional application.

Sloan further argues that even if only two of the directors are members of the legislature, the fact that the Speaker and President Pro Tempore appoint a majority of the directors constitutes de facto control. He relies mainly on language from *Tall Tower* which, in approving the constitutionality of a statute, noted that in the nine-member panel in question, the maximum number of legislators possible was four so "[t]he five executive appointees will always constitute a majority." *Tall Tower*, 294 S.C. at 230, 363 S.E.2d at 686. Sloan therefore reasons that the important distinction in that case was that the executive appointees were in the majority, not that the legislators were in the minority. Thus, in this case, because the Board does not have a majority of executive appointees, it fails the test used in *Tall Tower*. However, this conclusion ignores the actual language of the *Tall Tower* test which specifically required that "*legislators* should be a numerical minority." *Id.* at 230, 363 S.E.2d at 685 (emphasis added). Here, as discussed above, the statute allows for two directors to be simultaneously members of the General Assembly, which leaves them in the minority. Therefore, we do not agree that because the President Pro Tempore and the Speaker can appoint two other directors, the legislature necessarily dominates the board.[5]

[5] We therefore also disagree with Justice Pleicones's conclusion that *Tall Tower* requires us to hold that the Board violates the separation of powers. As discussed previously, the statute indicates that only two legislators can be appointed to the Board in an ex officio capacity. This is consistent with the language and the test of *Tall Tower*. The executive appointees, of whom there are three, will always be in a

The second prong of *Tall Tower* requires that "the body should represent a cooperative effort to make available to the executive department the special knowledge and expertise of designated legislators in matters related to their function as legislators." *Id.* at 230, 363 S.E.2d at 685–86. Sloan argues the statute fails this element because it does not expressly state that the legislator appointees must have the requisite special knowledge and expertise to increase cooperation between the executive and the legislative branches. However, this contention imposes an unnecessary requirement upon legislative enactments and ignores our deference to the legislature in these appointments. Tellingly, *Tall Tower* did not expressly mandate inclusion of language about the legislator's special knowledge and expertise. Instead, it noted that "[the Court] necessarily give[s] great weight to legislative discretion in the designation of which members of which committees possess the requisite 'special knowledge and expertise' to increase cooperation between the executive and legislative branches." *Id.* at 231–32, 363 S.E.2d at 686. We believe the composition of the Board at issue here enables it to benefit from the legislator members' wisdom without being dominated by them. Therefore, ever mindful of the presumption of constitutional validity, we conclude the Board's composition satisfies both prongs of *Tall Tower* and thus survives the separation of powers challenge.

CONCLUSION

For the foregoing reasons, we find Sloan has standing to bring this challenge but nevertheless find section 11-43-140 is constitutional under both a dual office holding and separation of powers challenge.

TOAL, C.J. BEATTY, and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result in a separate opinion. KITTREDGE, J., concurring in a separate opinion in which TOAL, C.J., concurs.

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majority over the two legislators. While Justice Pleicones asserts it "defies logic" to hold that power of appointment is not tantamount to control, we cannot agree that because the legislature has selected a person for a position, that individual has been stripped of his independence. Indeed, to do so would undermine the integrity of many boards and institutions in this State, including the judiciary.

JUSTICE PLEICONES: I have, in previous decisions, stated my opposition to the "public importance" exception to standing. In my view, standing should not be conferred on a party who cannot allege a particular harm when another potential plaintiff has interests greater than the plaintiff's. *See Energy Research Foundation v. Waddell*, 295 S.C. 100, 102, 367 S.E.2d 419, 420 (1988); *Sloan v. Department of Transportation*, 379 S.C. 160, 175, 666 S.E.2d 236, 244 (2008) (Pleicones, J., dissenting). I completely agree that the constitutionality of the structure and composition of the board of the South Carolina Public Infrastructure Bank (the board) is of great public importance. Nonetheless, I would conclude that, despite the manifest public importance of the issues raised by Petitioner, the executive branch has a greater interest than Petitioner in seeing that the General Assembly does not intrude on executive powers. Thus, I would hold that Petitioner lacks standing to bring this challenge. I therefore concur in result.

Although the analysis should end with the determination that Petitioner lacks standing to bring this challenge, I address the merits because I disagree with the majority's analysis.

On the question whether the composition of the board is unconstitutional, we must initially determine whether the board is legislative or executive. In *Bramlette v. Stringer*, the Court considered the constitutionality of an act, challenged as a violation of the separation of powers, that authorized the Greenville County legislative delegation to determine the amount and method of selling bonds for highway construction and to select the particular roads to be constructed and improved. 186 S.C. 134, 195 S.E. 257 (1938). These functions, the Court found, "are fully discretionary acts, relating exclusively to the executive functions . . . ." *Id*. at 149-50, 195 S.E. at 264. The board of the Infrastructure Bank here is charged with the power to issue bonds and other debt, determine which projects to fund, and make loans. Thus, the board and its functions are undoubtedly executive.

The *Bramlette* Court, having identified the functions at issue as executive, unanimously struck down the act, finding that the provisions permitting performance of such acts by a legislative delegation "are clear violations of [the separation of powers mandate], and are therefore null and void." 186

S.C. at 149-50, 195 S.E. at 264. In the course of its decision, the Court examined those cases in which some "executive" functions had been found permissible as incidental to the legislative function, but it did not discover a fluid boundary between the legislative and executive branches.[6] Rather, it identified as permissible to the legislative branch "executive" functions so unremarkable as hiring and firing its own accountants engaged in audits of executive bodies. *Id*. at 146-47, 195 S.E. at 262.

The General Assembly in subsequent years, having been denied the option of creating executive boards composed exclusively of legislators, has created executive boards on which it has designated some, though not all, seats to legislators or to legislative appointees. In *Ashmore v. Greater Greenville Sewer District*, we rejected this overlap of government branches as well, striking down as unconstitutional an executive board where two of its thirteen members were designated to be legislators. 211 S.C. 77, 44 S.E.2d 88 (1947). The board's composition is unconstitutional under *Ashmore*.

Subsequently, however, the Court reversed course and approved some limited seating of legislative members on executive bodies. In *State ex rel. McLeod v. Edwards*, the Court approved such minority membership, explaining that it was intended to "mak[e] available to the executive department the special knowledge and expertise" of the legislative members. 269 S.C. 75, 83, 236 S.E.2d 406, 409 (1977). While thus seeking to characterize the legislators' function on the board as incidental to the legislative function, the *Edwards*

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[6] The majority cites to secondary sources as authority for the proposition that South Carolina has traditionally used a commission approach to government rather than to this Court's precedents, the only real authorities on the interpretation of our constitution's separation of powers mandate. As the discussion herein demonstrates, in my view these authorities do not interpret that mandate as permissively as does the majority. Moreover, this Court's recent decision in *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012), gave no weight to our state's longstanding tradition of solicitor control of the docket. Notwithstanding that executive and judicial functions necessarily interact when court proceedings are initiated in criminal prosecutions, the Court held that solicitor control of the docket "is not a grey area where some encroachment can be tolerated, but rather a complete invasion into the court's domain." *Id.* at 435, 735 S.E.2d at 478.

Court also found it "[i]mportant" that "the General Assembly ha[d] been careful to put the legislative members in a minority position on [the executive body]." *Id*. at 82-83, 236 S.E.2d at 408-09.

In my view, *Edwards* was wrongly decided because it departed from the Court's prior adherence to the traditional doctrine of separation of powers requiring clear boundaries between the two branches and disapproving any legislative membership on executive boards. As the *Ashmore* Court implicitly recognized, any legislative presence on an executive body constitutes legislative exercise of executive powers, since even a single voting member of an executive body may have opportunities to alter the outcome of a number of its decisions. If the true purpose of seating legislators on such bodies were to make their special knowledge and expertise available to the executive department, the power to vote would be unnecessary.

Notwithstanding my disagreement with *Edwards* and its progeny, even under our current jurisprudence the composition of the board of the Infrastructure Bank is impermissible. In *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, while it again approved mixed membership on an executive body, the Court articulated the test for a mixed-membership board. 294 S.C. 225, 363 S.E.2d 683 (1987). The Court explained that legislative membership on an executive body is permissible under two conditions: "(1) the legislators should be a numerical minority; and (2) the body should represent a cooperative effort to make available to the executive department the special knowledge and expertise of designated legislators in matters related to their function as legislators." *Id*. at 230, 363 S.E.2d at 685-86. The *Tall Tower* Court considered all possible compositions permitted by the statute for the nine-member body: "Two legislative positions are statutorily guaranteed, with a possibility of four legislators maximum. The five executive appointees will always constitute a majority." *Id*. at 230, 363 S.E.2d at 686. Here, two legislative positions are statutorily guaranteed, with a possibility of four legislators maximum, but only three seats are designated for executive officers or appointees.

The majority explains that *Tall Tower* was concerned only with the number of seats guaranteed to legislators and not with the branch by which members are appointed. I disagree. As is clear from the foregoing quotation, the *Tall Tower* Court assumed that the General Assembly might appoint legislators to all four seats for which it held appointment power and approved the composition only because a majority of *executive appointees* was guaranteed. In contrast, the board of the Infrastructure Bank is guaranteed always to be dominated by legislative appointees. Moreover, as a practical matter, it defies logic to assert that the board is not controlled by the legislative branch when that branch appoints the majority of its members, regardless whether those members are themselves legislators.

I also respectfully disagree with the suggestion that a constitutional nexus exists for the exercise by legislators of the board's function in article X, section 13, of our constitution. *See Segars-Andrews v. Judicial Merit Selection Commission*, 387 S.C. 109, 126, 691 S.E.2d 453, 462 (2010) (approving legislative membership on Judicial Merit Selection Commission as incidental to the constitutionally mandated legislative function of electing judges). Article X, section 13, concerns the creation of state debt and seeks to protect taxpayers by limiting the amount of debt that may be incurred. *Robinson v. White*, 256 S.C. 410, 416, 182 S.E.2d 744, 747 (1971). In my view, nothing in the wording of this section suggests any constitutional nexus for legislative appointees to participate in the issuance of bonds and indebtedness or select recipients or projects to be financed. The language used in Article X, section 13, in no way suggests deviation from ordinary constitutional procedures designed to separate the legislative and executive functions. *See* S.C. Const. art. III, § 18 (bicameralism); art. IV, § 21 (presentment). It speaks only in terms of the General Assembly enacting legislation to authorize the incurring of debt.[7] As the *Bramlette* Court

[7] *See* art. X, § 13(4) ("In each act authorizing the incurring of general obligation debt the General Assembly shall . . . ."); (5) ("If general obligation debt be authorized by (a) two-thirds of the General Assembly; or (b) [referendum] . . . there shall be no conditions or restrictions . . . except . . . those . . . imposed in the authorization . . . ."); (6) ("on such terms and conditions as the General Assembly may **by law** prescribe"); (7) ("under such terms and conditions as the General

explained, when the General Assembly sought to permit a delegation of its members to participate in the issuance of bonds,

> It is conceded that the Legislature itself, in the act, could have specified the amount, and method of selling bonds, and designated the roads to be constructed and improved with the funds. It is well settled that the Legislature may pass any act which is not prohibited by the State or Federal Constitutions. But the act must be complete when it comes from the hands of the Legislature; nothing can be added to, or taken away from, the act [by members of the legislative branch] after it leaves the lawmaking body. . . . Article 3 of the State Constitution prescribes the procedure for enacting laws. Among other requirements, the act must be passed during a session of the Legislature, by a majority vote of both branches of that body, after having been read three times, and approved by the Governor. All such requirements are mandatory. So any action now on the part of the Greenville County Legislative Delegation, pursuant to said act, cannot amount to the enactment of legislation, and if said act was incomplete when it came from the hands of the Legislature, it cannot be finished by the Greenville County Legislative Delegation in the manner provided for in said act.

186 S.C. 134, 136-37, 195 S.E. 257, 258 (internal citations omitted).

Thus, I would hold that § 11-43-140 violates article I, section 8, of the South Carolina Constitution, and that it is unnecessary to reach the question whether § 11-43-140 violates the dual office holding prohibition of our constitution. Nevertheless, because Petitioner lacks standing to bring this challenge, I concur in result.

Assembly may prescribe **by law**"); (8) ("under terms and conditions which the General Assembly may prescribe **by law**"); (9) ("The General Assembly may **authorize** the State or any of its agencies, authorities or institutions **to incur** indebtedness . . . ."; "upon such terms and conditions as the General Assembly may prescribe **by law**") (all emphases added).

JUSTICE KITTREDGE: I join Justice Hearn's excellent and scholarly majority opinion. I write separately to set forth my understanding of the constitutional issues involved, as I, unlike Justice Pleicones, would recognize differences in the analytical frameworks of the two constitutional challenges. In short, I would not conflate the dual-office and separation of powers challenges.

Concerning the dual-office holding challenge, the South Carolina Constitution contains several provisions prohibiting dual-office holding. *See* S.C. Const. art. III, § 24 ("No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State . . . ."); S.C. Const. art. XVII, § 1A ("No person may hold two offices of honor or profit at the same time . . . ."); S.C. Const. art. VI, § 3 ("No person may hold two offices of honor or profit at the same time."). Respondents concede, as they must, that service on the South Carolina Transportation Infrastructure Bank's (Bank) Board of Directors is an office. The Bank's Board of Directors has extensive power to "select and assist in financing major qualified projects by providing loans and other financial assistance to government units and private entities for constructing and improving highway and transportation facilities necessary for public purposes including economic development." S.C. Code Ann. § 11-43-120(C) (Supp. 2011).

I concur with the majority's recognition that the "ex officio" or "incidental duties" exception "may be properly invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the 'ex officio' office." *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 126, 691 S.E.2d 453, 462 (2010). I agree that article X, section 13 of our constitution provides the necessary nexus between the General Assembly and membership on the Bank's Board of Directors. It is this constitutional nexus between the legislative office and service on the Bank's Board of Directors that, in my judgment, provides an objective framework and requires this Court to reject Petitioners' constitutional dual-office holding challenge.

Because the constitution is controlling, I would not adopt a framework that would have the effect of upholding a legislative enactment that purports to shield a member of the General Assembly from the dual-office holding prohibitions. Similarly, I agree with the majority that a dual-office holding claim is not resolved by considerations of degrees of board or commission membership, such as minority representation. Rather, the issue posed is straightforward—it is either a constitutionally prohibited dual office or it is not. That is precisely why we explained in *Segars-Andrews* that "because the Legislature is impressed by our

constitution with sole responsibility for the election and re-election of judges[,] . . . service on the [Judicial Merit Selection Commission] by one who holds an office in the executive or judicial branch would violate the constitutional ban on dual-office holding." 387 S.C. at 126, 691 S.E.2d at 462. It is the presence or absence of the *constitutional* nexus, and nothing more, that should answer the dual-office holding question.

In light of the South Carolina Constitution of 1895, I also join the majority in rejecting Petitioners' separation of powers claim. I commend Justice Hearn for her excellent recitation of the importance of the separation of powers doctrine in our country's founding. This Court's jurisprudence often recognizes, in glowing terms, the sanctity of the separation of powers doctrine in our democratic republic. *See State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982) (observing that the separation of the branches of government "prevents the concentration of power in the hands of too few, and provides a system of checks and balances"); *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979) (holding that under separation of powers the "legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws").

Yet, as the majority articulates, "South Carolina . . . is somewhat singular in the extensive involvement of the legislature in the powers of the executive and judiciary." The majority further refers to South Carolina's "collaborative governance where the General Assembly wields extensive power." The majority is entirely correct to acknowledge the legislative dominance that prevails under the South Carolina Constitution of 1895. While article I, section 8 of our constitution contains the familiar separation of powers provision, the balance of the constitution is replete with provisions expressly granting broad powers to the legislative branch. It is for this reason that I believe, under our unique constitutional structure, a separation of powers challenge under article I, section 8 cannot be resolved by merely ascertaining whether the legislative branch is exercising an executive function. Here, the South Carolina Constitution expressly grants power to the legislature, such that legislative service on Bank's Board of Directors does not offend separation of powers.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Margaret P. Ware, Respondent,

v.

Ralph D. Ware, Petitioner.

Appellate Case No. 2011-183286

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Berkeley County
Jocelyn B. Cate, Family Court Judge

Opinion No. 27267
Heard February 5, 2013 – Filed June 12, 2013

REVERSED AND REMANDED

Gregory Samuel Forman, of Charleston, for Petitioner.

William J. Clifford, of North Charleston, for Respondent.

JUSTICE BEATTY: This case involves dual domestic actions instituted in Alabama and South Carolina by Ralph D. Ware (Husband) and Margaret P. Ware (Wife). The family court denied Husband's motion to vacate the orders in the South Carolina case, and the Court of Appeals affirmed. *Ware v. Ware*, 390 S.C. 493, 702 S.E.2d 390 (Ct. App. 2010). This Court has granted Husband's petition

for a writ of certiorari. Husband contends the Court of Appeals erred in upholding the South Carolina orders, which declared the parties to be living separate and apart and included a property division and an award of alimony and attorney's fees to Wife. Husband asserts full faith and credit should have been given to the Alabama decree, which granted the parties a divorce and set forth a different property division and contained no ruling on alimony. It is undisputed that Husband instituted his action first, but Wife has raised questions as to the Alabama court's jurisdiction over her and the marital property that she contends precludes affording full faith and credit to the Alabama order. Husband argues Wife has waived any objection in this regard. We reverse and remand.

I. FACTS

The parties married in Berkeley County in September 1986. At the time of the marriage, Husband was in the United States Navy, and he retired in May 1998. Following Husband's retirement, he was employed locally for two years, and then obtained a job as a federal civil servant with the United States Navy's Military Sealift Command, which required him to be away for long periods. Wife worked at one time, but medical issues resulted in her being declared totally disabled. During their marriage, the parties resided in a marital home they purchased in Berkeley County. No children were born of the marriage.

On January 10, 2007, Husband filed a summons and complaint for divorce and a property division in the circuit court of Randolph County, Alabama. Husband alleged he was a resident of Alabama, Wife was a resident of South Carolina, and that they had separated on February 27, 2001 due to irreconcilable differences. In addition to a divorce, Husband sought an award of his retirement benefits, his vehicle, and his clothing and personal belongings. Husband requested that Wife be awarded her retirement and disability benefits, a vehicle, and the marital home and its furnishings in South Carolina. Wife signed a certified mail receipt on January 13, 2007 acknowledging service of the pleading.

About one month later, on February 16, 2007, Wife filed the instant action in South Carolina seeking, among other things, an equitable division of marital property, including Husband's retirement; alimony; and attorney's fees. Wife stated the parties had separated on or about February 27, 2001 when Husband abandoned the marital home, and averred that "she is entitled to live separate and apart from" Husband. She did not request a divorce. Wife stated in her complaint that she was a resident of Berkeley County, South Carolina, and Husband was a

resident of Randolph County, Alabama, and that the family court had jurisdiction over the parties and the subject matter of the action.

After Wife's attempts to serve Husband at his last known address failed, Wife was permitted to serve Husband with the South Carolina action by publication in Alabama. Husband did not answer Wife's pleading.

On February 20, 2007, some four days after Wife filed her complaint in South Carolina, an Alabama attorney filed a Limited Notice of Appearance on behalf of Wife in Alabama. The same day, Wife's counsel also filed a motion to dismiss Husband's action. Wife argued, in relevant part, that the "complaint does not meet the requirements of Alabama Code Section 30-2-5."[1] In addition, Wife asserted the Alabama court does not have personal jurisdiction over her and does not have jurisdiction "over the marital res at issue," as Wife is a resident of South Carolina with no contact with Alabama as evidenced in a supporting affidavit.

In the alternative, Wife asked that, if the court decided to proceed with the case, that it rule that it has jurisdiction only to divorce the parties and not over any of the marital assets and liabilities, which are located in South Carolina or other states, and Wife noted ancillary proceedings in such states were pending. Lastly, Wife requested that she "be awarded attorney's fees and costs for litigating this jurisdictional issue."

After a hearing, the Alabama court denied Wife's motion to dismiss by order dated May 13, 2007. In its order, the Alabama court stated the hearing was held on Wife's motion to dismiss "for [Husband's] failure to plead and prove residence as required by Alabama statute." The court noted that Husband had testified at the hearing that he had been domiciled in Alabama since 2001; additionally, Husband had filed amended pleadings denoting the same.[2] The court stated while Husband "spends most of his time at sea due to his profession, residency is based on more

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[1] *See* Ala. Code § 30-2-5 (2011) ("When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for six months next before the filing of the complaint, which must be alleged in the complaint and proved."). Husband's complaint stated he separated from Wife in 2001 and he was a resident of Alabama, but he did not specifically state he had been a resident of Alabama for six months prior to filing the complaint.

[2] The order does not indicate whether the amended pleading was served on Wife.

than [where] he lays his head each night." On May 17, 2007 the court set the trial date for August 23, 2007.

On or about June 1, 2007, Wife filed a "Motion to Reconsider," pointing out that, while the court found it had personal jurisdiction as to *Husband*, it had failed to address her argument that the Alabama court lacked personal jurisdiction over *her* and the parties' marital property based on her insufficient contacts with Alabama. The court issued no ruling at that time.

On June 18, 2007, Wife's Alabama attorney filed a motion to continue the August 23rd trial date previously set for the Alabama action citing, among other things, the fact that Wife's motion for reconsideration was still pending. There is no indication in the record that a formal ruling was issued on this motion prior to the August trial.

A final hearing was held on Wife's domestic action in South Carolina on June 22, 2007. Wife was present with her attorney; however, Husband was absent and was not otherwise represented by counsel.

By order filed July 31, 2007, the South Carolina family court declared Wife shall be permitted to continue living separate and apart from Husband, it awarded Wife alimony of $750 per month, it equitably distributed the marital assets, including Husband's military retirement, and it awarded Wife $2,867.91 in attorney's fees. The family court noted Wife had testified that she desired to continue her marriage in spite of Husband's desertion because she is afforded military medical coverage, which supplements her Medicare. However, upon her divorce, which Husband was pursing in Alabama, she will no longer have that medical coverage.

As to the property, the family court awarded Wife the marital home in South Carolina, a 27% share of Husband's military retirement, and a Chrysler Jeep. Husband was awarded property located in Georgia after Wife relinquished all interest therein, all of his Civil Service retirement, the balance of his military retirement that was not awarded to Wife, and three vehicles. He was ordered not to change benefits documents or insurance policies that have named Wife as a beneficiary.

The family court found it had jurisdiction over the parties and subject matter jurisdiction of this action except as to the disposition of the Georgia property, to

which Wife had relinquished any interest. The family court stated it had been made aware of ongoing litigation in Alabama by a letter from Husband's counsel notifying the court of the Alabama action and seeking to have the South Carolina action dismissed. As to this request, the family court stated, "The Alabama attorney, neither being a member of the South Carolina Bar or being authorized to proceed pro hac vice, was not authorized to practice law in this state and the Court took no actions based on the Defendant's attorney's letter."

A hearing was held by the Alabama court as scheduled on August 23, 2007. By that time, Wife's Alabama counsel had withdrawn from representation on the basis Wife had retained her for the limited purpose of handling the motion to dismiss and had not contacted her thereafter to retain her for further representation.[3] The Alabama court filed a final judgment on September 5, 2007 declaring the orders issued in South Carolina to be "null and void and of no effect." The court stated the South Carolina judge "was sent notice of this Court's Order May 13, 2007 [denying Wife's motion to dismiss], and yet refused to abstain from further proceedings and even refers to the notice in her Final Order . . . ."

The court granted Husband a divorce and divided the marital estate, including real property located in South Carolina and personal property, along the lines requested by Husband in his complaint. Both Husband's complaint and the court's order are silent on the issue of alimony. The order did not address Wife's previous motion for a continuance.

On October 12, 2007, Wife filed an "Appeal/Amendment" of the Alabama court's final order with the trial court. Wife stated she was "not contesting the divorce in any manner," but that she believed she had a right to appeal and/or amend the final order because she is "entitled to a fair share of the personal assets that were acquired during [the] marriage and alimony." Wife requested the Alabama court to "reconsider the decision based on the lack of jurisdiction and fair play over the issue of alimony and the distribution of marital assets."

On January 17, 2008, the Alabama court summarily denied Wife's "Motion to Reconsider." The order does not otherwise identify which of Wife's motions that it was ruling on, or the date of the order it reviewed.[4] The Alabama court

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[3] Wife's Alabama attorney filed a Motion to Withdraw on July 20, 2007, which was granted by the Alabama court on July 26, 2007.

stated it "specifically finds that jurisdiction was proper here and that [Wife] was properly served in this matter and failed to appear. Furthermore, the court notes that this case was filed and [Wife was] served prior to [Wife's] commencement of the divorce action in South Carolina."

On April 13, 2008, Husband filed a Rule 60(b), SCRCP motion with the family court in South Carolina seeking to vacate the family court's final order of July 31, 2007, as well as an August 28, 2007 Supplemental Qualified Domestic Relations Order (QDRO) and a January 10, 2008 Amended Supplemental QDRO regarding the equitable distribution of Husband's military retirement, and a February 26, 2008 Order for Alimony Support Payments to be Made Through the Court.

The family court dismissed Husband's motion to vacate pursuant to Rule 60(b)(3) and (5), and it denied the motion as to Rule 60(b)(4). The family court found there was no evidence of fraud or misrepresentation, nor was there any evidence that a judgment had been satisfied, thus negating any relief under either (b)(3) or (5). The family court concluded Husband's Rule 60(b)(4) argument was without merit because, while it might have been shown that Husband's domicile gave Alabama jurisdiction over the marital res, or marital status, of the parties, it was not shown that Alabama had in personam jurisdiction over Wife or in rem jurisdiction over the marital assets to preclude South Carolina from proceeding with its action. The family court found Husband had been properly served with the South Carolina action by publication and that he had sufficient contacts with South Carolina for the family court to acquire in personam jurisdiction over Husband.

Husband appealed the denial of his motion under Rule 60(b)(4), SCRCP, and the Court of Appeals affirmed.[5] *Ware v. Ware*, 390 S.C. 493, 702 S.E.2d 390 (Ct. App. 2010).

II. STANDARD OF REVIEW

The decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP is within the sound discretion of the trial judge. *BB & T v. Taylor*, 369 S.C. 548,

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[4] Husband characterizes the Alabama court's order as a ruling on Wife's June 2007 motion to reconsider following the denial of her motion to dismiss, not a ruling on Wife's October 2007 motion to reconsider filed after the court's final order.

[5] Husband is no longer pursuing relief under the other provisions of Rule 60.

633 S.E.2d 501 (2006). An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support. *Id.* at 551, 633 S.E.2d a 502-03. In appeals from the family court, the appellate court has the authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. *Anthony H. v. Matthew G.*, 397 S.C. 447, 725 S.E.2d 132 (Ct. App. 2012).

III. LAW/ANALYSIS

Rule 60(b)(4) of the South Carolina Rules of Civil Procedure provides, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding" if "the judgment is void[.]" Rule 60(b)(4), SCRCP.

"A void judgment is one that, from its inception, is a complete nullity and is without legal effect[.]" *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (quoting *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996)); *see also BB & T*, 369 S.C. at 551, 633 S.E.2d at 503 ("A judgment is void if a court acts without personal jurisdiction."). "A judgment is not rendered void by irregularities which do not involve jurisdiction." *Universal Benefits, Inc.*, 349 S.C. at 183, 561 S.E.2d at 661.

In this case, although Wife contends the Alabama property division should be given no effect since the Alabama court had no personal jurisdiction over her, Husband argues the South Carolina orders regarding alimony, the property division, and attorney's fees, should have been vacated as void because Wife had the opportunity to litigate the issue of personal jurisdiction in Alabama when she made a limited appearance for the purpose of contesting jurisdiction, but she thereafter abandoned her argument by not completing the process for an appeal. Thus, the Alabama court's ruling that it had personal jurisdiction, right or wrong, is res judicata and is entitled to full faith and credit in this state. Husband contends the South Carolina courts may not go behind the ruling of the Alabama court and reexamine the issue of personal jurisdiction itself, as that would undermine the basis for the Full Faith and Credit Clause. Consequently, Husband maintains the South Carolina orders should have been vacated since the Alabama court had

already assumed jurisdiction of this matter, and the family court and Court of Appeals erred to the extent they ruled to the contrary.

Under the United States Constitution, "[f]ull Faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." U.S. Const. art. 4, § 1. "Full faith and credit 'generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded **in the State which rendered it.**" *Hospitality Mgmt. Assocs. v. Shell Oil Co.*, 356 S.C. 644, 653, 591 S.E.2d 611, 616 (2004) (quoting *Durfee v. Duke*, 375 U.S. 106, 109 (1963)).

"[I]t is also well settled that a judgment issued without proper personal jurisdiction over an *absent* party is not entitled to full faith and credit, and therefore has no res judicata effect as to that party." *Id.* (emphasis added).

"The validity and effect of a foreign judgment must be determined by the laws of the state which rendered the judgment." *Minorplanet Sys. USA Ltd. v. Am. Aire, Inc.*, 368 S.C. 146, 149, 628 S.E.2d 43, 45 (2006). "When determining the validity and effect of a foreign judgment based on a lack of personal jurisdiction, courts look to the law of the state that rendered the judgment." *Pitts v. Fink*, 389 S.C. 156, 163, 698 S.E.2d 626, 629 (Ct. App. 2010).

A two-part test is required to establish due process to authorize in personam jurisdiction: (1) the nonresident defendant must have minimum contacts with the forum state, and (2) service of process must have been properly accomplished pursuant to Alabama law. *Burke v. Burke*, 816 So. 2d 498, 500-01 (Ala. Civ. App. 2001).

"[U]nder the Full Faith and Credit Clause, personal jurisdiction is presumed when a foreign judgment appears on its face to be a record of a court of general jurisdiction." *Law Firm of Paul L. Erickson, P.A. v. Boykin*, 383 S.C. 497, 501, 681 S.E.2d 575, 577 (2009) (footnote omitted).

"[I]f the issue of personal jurisdiction has been litigated in and determined by the foreign court rendering judgment, the judgment is entitled to full faith and credit and cannot be collaterally attacked." *Ft. Recovery Indus., Inc. v. Perry*, 291 S.E.2d 329, 330 (N.C. Ct. App. 1982). "If the foreign court made an erroneous determination of jurisdiction, such decision is grounds for reversal in the appellate court of that state." *Id.*; *see also Gregoire v. Byrd*, 338 S.C. 489, 527 S.E.2d 361

(Ct. App. 2000) (holding a debtor could not collaterally attack the judgment of a foreign court on the ground the court failed to fully and fairly litigate the issue of personal jurisdiction where the debtor agreed to litigate the issue of personal jurisdiction in the foreign court, but failed to timely file a response to the creditor's motion for summary judgment and failed to move to amend the judgment based on the lack of personal jurisdiction and to pursue an appeal in the foreign court).

Husband's position is that, since Wife, through her Alabama attorney, made a special appearance to challenge personal jurisdiction but did not further contest the Alabama court's determination that it had personal jurisdiction by an appeal, the trial court's ruling would be res judicata in Alabama and should be accorded full faith and credit in South Carolina. The validity of the Alabama order must be examined under Alabama law, and its effect in other jurisdictions should be examined in light of the principles governing the application of the Full Faith and Credit Clause.

As an initial matter, we find the Alabama court had the authority to issue a decree of *divorce* based on Alabama law, and that the divorce is entitled to full faith and credit in South Carolina. "If one party is a resident of Alabama, then an Alabama court has jurisdiction over the marital res." *Orban v. Orban*, No. 2110530, 2012 WL 5696786, at *2 (Ala. Civ. App. Nov. 16, 2012) (quoting *Butler v. Butler*, 641 So. 2d 272, 273 (Ala. Civ. App. 1993)). "For purposes of subject-matter jurisdiction in a divorce action, residency means domicile." *Id.*

For an Alabama trial court to have jurisdiction over a divorce, the complaining party must have been a resident of Alabama for six months before filing a complaint seeking a divorce. *See Chafin v. Chafin*, 101 So. 3d 234 (Ala. Civ. App. 2012) (holding the trial court had jurisdiction to divorce the parties where the husband alleged that he had been a resident of Alabama for more than six months when he filed his complaint for divorce and the wife did not challenge the fact that husband was an Alabama resident); *see also* Ala. Code § 30-2-5 (2011) ("When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for six months next before the filing of the complaint, which must be alleged in the complaint and proved.").

In this case, Husband alleged that he separated from Wife in 2001 and that he was a domiciliary of Alabama. The Alabama court noted Husband had testified that he had been a resident of Alabama for more than six months prior to filing his complaint and the court found it had jurisdiction over Husband's complaint.

Moreover, Wife has previously acknowledged that she is not challenging the Alabama court's grant of the *divorce* itself, as distinguished from the property division, so we find the divorce is entitled to full faith and credit. *Cf. Chafin*, 101 So. 3d at 236-37 (stating the complaining party must have been a resident of Alabama for six months before filing a complaint for divorce; the Alabama statutes do not require that a court have in personam jurisdiction over both parties to grant a divorce); *Fuller v. Fuller*, 51 So. 3d 1053 (Ala. Civ. App. 2010) (holding husband's allegation that he had been a bona fide resident of Alabama for more than six months before filing his complaint conferred jurisdiction over the divorce with the Alabama court even though the wife was a resident of Mississippi).

The next consideration is whether the Alabama court had personal jurisdiction over Wife to issue its ruling regarding the equitable division of the marital property. The Alabama court ultimately concluded that it had personal jurisdiction over Wife because she was properly served with process and she defaulted by not filing a responsive pleading. Although the Alabama court did not specifically use the phrase "personal jurisdiction," it did say that "jurisdiction" was proper in response to Wife's specific challenge to the court's exercise of personal jurisdiction over her. After reviewing the record, we believe the Alabama court did not, in fact, have in personam jurisdiction over Wife under Alabama law. Although she was properly given service of process, it was not shown that Wife had sufficient contacts with Alabama to warrant the exercise of in personam jurisdiction over her, and both (1) proper service of process and (2) sufficient contacts are required to obtain in personam jurisdiction. *See, e.g., Coleman v. Coleman*, 864 So. 2d 371 (Ala. Civ. App. 2003) (finding wife's residence in Alabama was sufficient to allow Alabama court to have jurisdiction over the marital res and the divorce, but the nonresident husband did not have the requisite contacts with Alabama for the Alabama court to exercise in personam jurisdiction over him with respect to other issues raised in wife's divorce action; Alabama law, however, does not require a court to have in personam jurisdiction over both parties to grant a divorce).

In light of the foregoing, it appears the Alabama court did not have in personam jurisdiction over Wife because, although she was properly served, there was no evidence or finding that she had sufficient contacts with that state in order to effect a division of the marital property. However, a question arises as to whether Wife, by her conduct, has waived any objection to the alleged lack of

jurisdiction. We are mindful of the restraint imposed by the Full Faith and Credit Clause on our review of another state's determination regarding jurisdiction.

Husband argues that Wife, by agreeing to make a limited appearance *to litigate* the issue of personal jurisdiction in the Alabama court, was thereafter bound by that court's ruling, right or wrong, and she should have appealed any erroneous ruling.[6] Since Wife had the opportunity to fully and fairly litigate the issue, she was not denied due process and the Alabama court's ruling is given res judicata effect in that state. Thus, the Alabama order should be afforded full faith and credit. Husband contends Wife could not challenge personal jurisdiction in Alabama, walk away after the trial court's ruling, and then, in effect, reassert the issue in the South Carolina court. *Cf.* 27C C.J.S. *Divorce* § 1220 (2005) ("Where the foreign court has once acquired jurisdiction over the parties, whether it retained that jurisdiction is a question depending on the law of that state, which cannot be attacked collaterally.").

We are constrained to agree with Husband. If Wife had made no appearance in Alabama, it is clear that court would have been without jurisdiction over any issue other than the parties' divorce. *See* 27C C.J.S. *Divorce* § 1221 (2005) (stating where a divorce is obtained by a spouse domiciled in the forum state without acquiring personal jurisdiction over a nonresident spouse, the courts of other states are required to give full faith and credit only insofar as it purports to operate on the parties' marital status, but they are not required to give it recognition for issues other than marital status).

Here, however, Wife did present the jurisdictional issue to the Alabama court by virtue of her special appearance and representation by counsel. However, Wife failed to proceed on the merits. The Supreme Court of Alabama has specifically held: "It is clear under Alabama's Rules of Civil Procedure that when a defendant challenges the court's personal jurisdiction and the trial court overrules the challenge, the issue of personal jurisdiction is preserved for appeal. However, the defendant must proceed with the case on the merits." *Leventhal v. Harrelson*, 723 So. 2d 566, 570 (Ala. 1998).

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[6] Husband acknowledges that Wife's entry of a limited appearance to contest personal jurisdiction did not, *in itself*, confer personal jurisdiction on the Alabama court.

In a case analogous to the current appeal, *Hennessee v. State ex rel. State of Texas*, 650 So. 2d 903 (Ala. Civ. App. 1994), an Alabama appellate court considered whether to give full faith and credit to another state's decision under similar circumstances. The Court of Civil Appeals of Alabama found a Texas court's judgment was entitled to full faith and credit where Hennessee attempted to object to the jurisdiction of Texas by filing a motion to dismiss, but never followed up with a special appearance in Texas to argue his objection and did nothing to pursue the issue of jurisdiction, although he had notice and an opportunity to do so. *Id.* at 905-06. The Alabama court initially hearing Hennessee's motion to set aside the Texas judgment denied the motion, stating:

> Under the full faith and credit clause of the United States Constitution, sister states generally give effect to foreign judgments. However, Alabama courts may inquire into the jurisdiction of the foreign court and determine whether the issue of jurisdiction was fully and fairly litigated by the foreign court. The respondent/defendant had [the] opportunity to present his evidence and his view of the law in reference to the issue of jurisdiction in the Texas court but, for whatever reason, chose not to do so. Consequently, the proceedings in Texas ultimately concluded with default judgment being entered against the respondent/defendant and said judgment must be given full faith and credit.

Id. at 905. The Civil Court of Appeals of Alabama affirmed. *Id.* at 906.

The Supreme Court of the United States has observed that the requirement of personal jurisdiction is "a legal right protecting the individual" and that a plaintiff may demonstrate certain facts that make it clear to a court that there is personal jurisdiction, or a defendant may take certain actions that amount to a legal submission to the jurisdiction of the court, whether voluntary or not. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982). The Supreme Court stated the expression of legal rights is often subject to certain procedural rules, and that "[t]he failure to follow those rules may well result in the curtailment of the rights." *Id.* at 705. "A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Id.* at 706. However, "[b]y submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue

of jurisdiction: That decision will be res judicata on that issue in any further proceedings." *Id.*

It remains unclear why Wife did not challenge the Alabama court's ruling beyond the trial court level. Since those findings are res judicata, the Alabama court's ruling is entitled to full faith and credit. Thus, the family court in South Carolina should have granted Husband's Rule 60(b) motion. As a result, the rulings on the property division, alimony, and attorney's fees award will be vacated, an unfortunate result in light of the Alabama court's apparently erroneous ruling as to personal jurisdiction, but one that is mandated by the Full Faith and Credit Clause due to Wife's special appearance and subsequent failure to pursue her rights in this regard. *Cf. Thoma v. Thoma*, 934 P.2d 1066 (N.M. Ct. App. 1996) (finding where a husband appeared specially in an Oklahoma divorce proceeding, he was bound by that court's determination that it had personal jurisdiction over him based on the doctrine of issue preclusion; the court stated the Full Faith and Credit Clause required it to recognize the sister state's determination that it had personal jurisdiction over the husband because, although he had asserted an objection on this basis, he took no appeal from an adverse ruling in this regard by the sister state); *Mount Holly Sunoco v. Exec. Commercial Servs., Ltd.*, 396 A.2d 1155, 1157 (N.J. Super. Ct. App. Div. 1978) ("A special appearance does not give a defendant the right to litigate jurisdiction and ignore the outcome with impunity. It merely protects against waiver of the jurisdictional defense which would otherwise flow from a general appearance.").

In *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 525-26 (1931), the Supreme Court explained the import of a special appearance:

> The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. . . .
>
> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled

> as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

In the current matter, Wife should have either made no appearance at all or, having chosen to make a special appearance, she should have retained her Alabama counsel to pursue an appeal as to the issue of personal jurisdiction. By attempting, in essence, to raise the issue piecemeal in both the Alabama and South Carolina courts, she has adversely impacted her rights. *See Elkins v. West*, 554 S.W.2d 821 (Tex. Civ. App. 1977) (stating the full faith and credit inquiry is restricted to whether the defendant had a full and fair opportunity to litigate the issue of jurisdiction; the court found the defendant could have appealed the default judgment or could have gone to trial on the merits and then appealed both the merits and the jurisdictional question); *see also United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 250 (9th Cir. 1992) ("Even if a foreign court lacked jurisdiction to pronounce a judgment, a party will be barred from collaterally attacking a judgment entered by that court if the party appeared there, contested jurisdiction, and lost."); *id.* ("If the foreign court decided that it had jurisdiction to hear a claim, that determination itself is res judicata." (citing *Durfee v. Duke*, 375 U.S. 106, 11-12 (1963)).

IV. CONCLUSION

The Alabama court had jurisdiction to enter an order granting Husband a divorce based on the provisions of Ala. Code § 30-2-5. The South Carolina orders did not purport to establish a divorce, and Wife has previously acknowledged that she is not contesting the Alabama court's entry of a divorce. Thus, the Alabama court's grant of a divorce should be afforded full faith and credit.

As to the issue of personal jurisdiction and its effect on the financial issues of equitable division and alimony, we believe the Alabama court was incorrect in its initial determination that in personam jurisdiction was established over Wife based solely on completion of service of process. Under Alabama law, two components are required: (1) the nonresident defendant must have had sufficient minimum contacts with the state to comport with notions of fairness and due process, and (2) effective service of process must have been established to confer in personam jurisdiction upon the Alabama court.

However, we reluctantly conclude Wife was not entitled to bring the South Carolina action for an equitable division, alimony, and attorney's fees. Wife entered a notice of limited appearance in Alabama through counsel solely to litigate the issue of personal jurisdiction in Alabama and having done that, she is bound by the Alabama forum's decision in that regard and its determination is res judicata. Wife did not pursue her challenge to personal jurisdiction past the trial court level, but under Alabama law a nonresident may appeal the court's erroneous finding of personal jurisdiction. Thus, she had the opportunity to contest personal jurisdiction and abandoned that challenge in the Alabama courts. The inquiry in assessing whether an order is entitled to full faith and credit is whether the defendant had a full and fair opportunity to litigate the issue of jurisdiction. By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, a defendant agrees to abide by that court's determination on that issue and it will be given res judicata effect in further proceedings.

Since Alabama would have given its order res judicata effect, it was entitled to full faith and credit. Thus, we conclude Husband's Rule 60(b) motion to vacate the South Carolina orders should have been granted, contrary to the determination of the family court and the Court of Appeals. Consequently, we reverse and remand this case to the family court for entry of an order in accordance with this decision. Husband's request for attorney's fees may be considered at that time.

REVERSED AND REMANDED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Action Concrete Contractors, Inc., Respondent,

v.

Elvira Chappelear, Craig Chappelear, Premier Southern Homes, LLC, Henry G. Beal, Jr. and First Citizens Bank and Trust Co., Inc. Defendants,

Of whom Elvira Chappelear and Craig Chappelear are Appellants.

Appellate Case No. 2012-207526

Appeal from Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 27268
Heard April 30, 2013 – Filed June 12, 2013

AFFIRMED

Joshua Allan Bennett and Franklin H. Turner, III, both of Rogers Townsend & Thomas, PC, of Columbia, for Appellants.

John T. Crawford, Jr. and F. Lee Prickett, III, both of Kenison Dudley & Crawford, LLC of Greenville, for Respondent.

JUSTICE PLEICONES: This is an appeal from an order granting respondent (Subcontractor) summary judgment in this mechanic's lien foreclosure action brought against Owners. Owners contend we should reverse and remand because there are material issues of fact such that summary judgment is inappropriate. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002) (summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law). We disagree, and affirm.

FACTS

Appellants Chappelear (Owners) hired defendant Premier Southern Homes LLC (Premier) to construct a model home. The contract price was $300,000 although an Owner testified that the value of the construction services was in the four hundreds, and that Premier had agreed to the lower price as it intended to showcase its work in Owners' residence. Premier contracted with Subcontractor to do certain work on the property, including building a retaining wall and the home's foundation and walls. Premier failed to pay Subcontractor's final bill of $66,862.63.

On September 25, 2007, within 90 days of its last work on the home, Subcontractor filed and served a notice of mechanics lien and statement of account on Owners. *See* S.C. Code Ann. § 29-5-40 (2007). On September 27, 2007, Subcontractor recorded its mechanics lien. *See* S.C. Code Ann. § 29-5-20 (2007). Subcontractor filed its *lis pendens* and its lien foreclosure complaint on December 27, 2007.

As of September 27, 2007, when Subcontractor's lien was recorded, Owners had paid Premier $135,740 on the $300,000 contract, leaving a balance of $164,260. While Owners made no payments to Premier after notice of Subcontractor's lien, Owners paid $118,931.83 directly to other subcontractors on Premier's behalf during the period between receiving notice of the lien and their firing of Premier on May 2, 2008. Up until that day, Premier remained as the general contractor supervising the subcontractors and the project. One Owner testified that she told Premier she would pay the subcontractors directly while Premier caught up with the money due Subcontractor.

As of May 2, 2008, Owners had paid $254,671.83 for a home that was approximately 68% complete. Owners subsequently bonded off Subcontractor's

lien in August 2008 pursuant to S.C. Code Ann. § 29-5-110 (2007). At some point, Owners sold the unfinished house for an undisclosed amount.

Subcontractor moved for summary judgment, and Owners interposed a payment defense. Owners also contended they were entitled to set-off damages they incurred when Premier breached the contract by failing to pay Subcontractor against the moneys due Subcontractor on its lien. The trial judge found the payment defense was a question of law, interpreted four mechanic's lien statutes,[1] concluded Owners owed Subcontractor the full amount of its lien along with interest, costs, and attorneys fees, and referred the matter to the master to foreclose the lien and determine the exact amounts due. Owners appealed.

ISSUE

Did the trial court err in granting Subcontractor summary judgment?

ANALYSIS

An owner has several defenses available to it when a subcontractor asserts a mechanic's lien. First, the lien may be invalid because the subcontractor did not comply with the statutory requirements for perfecting the lien. There is no allegation here that Subcontractor did not properly perfect its lien. Second, the owner may assert he has paid the general contractor the full amount due under the contract before receiving notice of the subcontractor's lien. *E.g.*, *A.V.A. Constr. Co. v. Palmetto Land Clearing*, 308 S.C. 377, 418 S.E.2d 317 (Ct. App. 1992). This payment defense is predicated on the last sentence of the subcontractor's lien statute, which provides that "[I]n no event shall the aggregate amount of [subcontractor] liens set up hereby exceed the amount due by the owner on the contract price of the improvement made." S.C. Code Ann. § 29-5-40 (2007).

Owners contend there is an unresolved question of fact as to the value of the work done by Premier as of September 27, 2007, when they received notice of Subcontractor's lien. While there may be such a question, under the facts of this case, the relevant date for determining the value of the "improvement made" under § 29-5-40 is May 2, 2008, Premier's last day on the job. Second, Owners contend

[1] S.C. Code Ann. §§ 29-5-20, -40, -50, and -110.

the trial court erred in failing to credit them for payments they made to Premier's other subcontractors between receiving notice of Subcontractor's lien and the firing of Premier on May 2, 2008. We find no error.

We first address Owners' contention that the relevant date for determining "the amount due by the owner on the contract price of the improvement made" under § 29-5-40 is the date they received notice of Subcontractor's lien. We agree that where, as here, the general contractor leaves before the job is finished, the amount due under § 29-5-40 is determined by the percentage of the contracted-for work completed. *E.g.*, *Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. P'ship*, 308 S.C. 298, 417 S.E.2d 634 (1992); *Wood v. Hardy*, 235 S.C. 131, 110 S.E.2d 157 (1959). That percentage is determined as of the last day the general contractor worked on the job. *Id*. Here, the last day of work was May 2, 2008. While ordinarily the notice of a subcontractor lien follows shortly after the general contractor's abandonment or results in its firing, Premier was allowed to continue to act as the general contractor for 220 days after Subcontractor's lien was noticed. There is no issue of fact that May 2, 2008, is the relevant date for purposes of § 29-5-40. Further, there is no issue that as of that date, the house was 68% complete, nor that the contract price was $300,000.[2] Sixty-eight percent of $300,000 is $204,000.

Owners next contend that the trial court erred when it gave them credit only for the $135,740 they paid to Premier before receiving notice of Subcontractor's lien. Owners contend they are entitled to offset that amount plus the $118,931.83 Owners paid directly to Premier's other subcontractors between notice in September 2007 and Premier's last day on the job. Under Owners' theory, since they paid Premier and its subcontractors a total of $254,671.83, and since they were only liable for $204,000 under § 29-5-40, Subcontractor cannot collect on its lien. The circuit court rejected this argument, citing S.C. Code Ann. § 29-5-50. We agree with the circuit court.

[2] We need not decide in this case whether the fact that the builder had agreed to accept less than the value of his work affects the amount of money available for Subcontractor.

Section 29-5-50 provides:

> Any person claiming a lien under the provisions of this chapter who shall have given the notice provided for herein shall be entitled to be paid in preference to the contractor at whose instance the labor was performed or material furnished and no payment by the owner to the contractor thereafter shall operate to lessen the amount recoverable by the person so giving the notice.

In other words, "payment by the owner to the general contractor after the owner has received notice of the lien is made at the owner's peril, as it will not effect [sic] the amount recoverable by the party with the mechanics' lien." *Maddux Supply Co. v. Safhi, Inc.*, 316 S.C. 404, 412, 450 S.E.2d 101, 106 (Ct. App. 1994).

Owners argue that the circuit court should not have found them "in violation" of § 29-5-50 for paying Premier's other subcontractors directly between September 2007, when they received notice of Subcontractor's lien, and May 2008, when Owners fired Premier. They contend that, by virtue of Subcontractor's lien, it was obvious that Premier was having financial difficulties. Thus, Owners contend that under *Stoudenmire*, they were entitled to begin paying other subcontractors directly. We find nothing in *Stoudenmire* that supports Owners' argument.

In *Stoudenmire* the evidence showed that after the general contractor became insolvent, "[Owner] took over the construction job and simply hired [general contractor's] employee's to complete the job." 308 S.C. at 301, 417 S.E.2d at 636-7. Here, however, Premier remained on the job, supervising the project and the subcontractors who continued to work on the project. Owners did not "take over the job" but instead continued to rely on Premier to act as the general contractor. The circuit court correctly held that Owners cannot reduce the money available to Subcontractor on its lien by amounts they chose to pay for Premier while Premier remained the general contractor. *A.V.A. Construction* teaches that for purposes of the mechanics lien statutes, owners can pay general contractors other than by conveying money directly to them. In *A.V.A. Construction*, the payment took the form of the owner's forgiveness of the general contractor's prior debts; here, Owners paid Premier's debts. Owners' payments to Premier's subcontractors after notice of Subcontractor's lien were "payment by the owner to the contractor" under § 29-5-50. The circuit court properly refused to allow Owners' post-lien direct

payments to Premier's other subcontractors to reduce their obligation to Subcontractor because to do so would violate § 29-5-50 and the policies underlying the entire mechanics lien procedure. [3]

Finally, Owners contend summary judgment was inappropriate because there remains a material issue of fact as to the moneys they paid to finish Premier's work or repair work done by Premier's subcontractors. They contend they would be entitled to offset funds expended as a result of Premier's abandonment of the job against their debt to Subcontractor. We find summary judgment appropriate here.

Where a general contractor abandons the job before work is complete and the lienholder does not give the owner notice until after that juncture, the owner is entitled to credit for damages, if any, incurred by the owner to finish the general contractor's work. *Stoudenmire*, *supra*. Further, where the general contractor has abandoned the job before completion, the subcontractor gives notice after the project is complete, and the original general contractor's work was shoddily performed, the owner may be entitled to offset moneys spent to repair that work against the lienholder's recovery. *Wood*, *supra*. Assuming without deciding that these principles apply where notice is given and the general contractor remains on the job, summary judgment was appropriate because Owners failed to present any evidence that they incurred expenses to repair work performed while Premier was the general contractor or to finish the house. Instead, the only evidence is that while they obtained an estimate for the cost of completion, they instead sold the unfinished house to third parties for an undisclosed sum. There is no evidence Owners incurred any "abandonment" damages.

CONCLUSION

Owners owed Premier $204,000. Owners, however, (over)paid Premier a total $254,671.83: $135,740 before Subcontractor's lien was perfected and $118,931.83 after. Pursuant to § 29-5-50, Owners are only entitled to credit the $135,740 against the $204,000 due Premier. The total due to Premier ($204,000) less the Owners' proper payments ($135,740) leaves $68,260 available for liens.

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[3] Again, it is important to recall that Premier remained the general contractor until May 2008. As Subcontractor concedes, the result might well be different had Owners actually fired Premier around the time they learned of its failure to pay Subcontractor.

Subcontractor's lien is $66,862.16, less than the $68,260 available, and therefore Subcontractor is entitled to its entire lien.

The summary judgment order is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John S. Rainey, Appellant,

v.

Nimrata Nikki R. Haley, Respondent.

Appellate Case No. 2012-211048

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 27269
Heard March 20, 2013 – Filed June 12, 2013

AFFIRMED

Richard A. Harpootlian, Graham L. Newman, M. David Scott, and Christopher P. Kenney, all of Richard A. Harpootlian, PA, of Columbia, for Appellant.

Kevin A. Hall, Karl S. Bowers, Jr., and M. Todd Carroll, all of Womble Carlyle Sandridge & Rice, LLP, of Columbia, for Respondent.

JUSTICE KITTREDGE: Appellant John S. Rainey brought this action in circuit court against the Honorable Nikki R. Haley, Governor of South Carolina, seeking declarations that Governor Haley, during her service as a member of the House of

Representatives, committed violations of the State Ethics Act.[1] The circuit court dismissed the action for lack of jurisdiction, finding the House Ethics Committee has exclusive jurisdiction to hear complaints of ethics violations against its own members. We agree and affirm.

I.

Appellant filed a Complaint in circuit court seeking a declaration that Governor Haley violated the State Ethics Act while serving as a member of the House of Representatives.[2] Specifically, the Complaint sought declarations that Governor Haley failed to disclose a reason for recusing herself from a vote, failed to abstain from a vote, solicited money from registered lobbyists for the benefit of her employer, and concealed all of the aforementioned activity by making false and incomplete disclosures required by law.[3]

Governor Haley filed a motion to dismiss in the circuit court based on lack of subject matter jurisdiction and standing. After a hearing, the circuit court dismissed the action, finding it lacked subject matter jurisdiction because the Legislature had granted exclusive authority to the House Ethics Committee to hear such matters. The court denied Appellant's Rule 59(e), SCRCP, motion to reconsider. This appeal followed.

Subsequent to the dismissal of his circuit court action, Appellant filed a complaint asserting the identical charges against Governor Haley with the House Ethics Committee. After a full merits hearing, the House Ethics Committee dismissed all of the claims, finding Governor Haley had not violated the law.

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[1] S.C. Code Ann. §§ 8-13-100 to -1520 (Supp. 2012).

[2] Appellant contended the court had jurisdiction pursuant the Declaratory Judgments Act, S.C. Code Ann. §§ 15-52-10 to -140 (Supp. 2012).

[3] The Complaint also asserted Governor Haley's actions violated section 2-17-80 of the South Carolina Code (Supp. 2012), dealing with prohibited acts of members of the legislature in connection with lobbyists, and section 16-9-10 of the South Carolina Code (Supp. 2012), which concerns perjury.

II.

Appellant contends the circuit court erred in dismissing the Complaint. We disagree.

A.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law. S.C. Const. art. V, § 11. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009).

The Legislature has established a comprehensive statutory scheme for regulating the behavior of elected officials, public employees, lobbyists, and other individuals who present for public service. *See generally* S.C. Code Ann. §§ 2-17-5 to -150 (Supp. 2011); S.C. Code Ann. §§ 8-13-100 to -1520. To enforce the State Ethics Act, the Legislature statutorily created the State Ethics Commission and the Senate and House Legislative Ethics Committees, respectively. *See* S.C. Code Ann. §§ 8-13-310 and -510.

Although the State Ethics Commission is generally responsible for the handling of ethical violations by most public officials and employees, the House and Senate Legislative Ethics Committees are charged with the exclusive responsibility for the handling of ethics complaints involving members of the General Assembly and their staff. *See* S.C. Code Ann. § 8-13-530 (noting the Ethics Committees are authorized to receive and hear complaints regarding ethical violations of members or staff of the appropriate house); S.C. Code Ann. § 8-13-320(9) (noting the Ethics Commission is authorized to initiate or receive complaints and make investigations concerning public officials or public employees, except those concerning members

or staff of the General Assembly). The respective Committees are authorized to receive, investigate, and hear all complaints alleging a violation of the State Ethics Act by its own members or staff. *See* S.C. Code Ann. § 8-13-540[4] (outlining the procedures to be followed when a complaint is filed with the Legislative Ethics Committee); *see also* S.C. House of Representatives Rule 4.16 (delineating procedure for investigation and hearings).

The extensive and unambiguous statutory scheme contemplates the receipt, processing and resolution of ethics complaints against members of the General Assembly in the respective chambers of the Legislature. Therefore, it is clear the Legislature intended the respective Ethics Committees to have exclusive authority to hear alleged ethics violations of its own members and staff.

B.

The statutory scheme, however, does provide one limited situation where the circuit court may receive and act on an ethics complaint, to the exclusion of the Ethics Committees:

> No complaint may be accepted by the ethics committee concerning a member of or candidate for the appropriate house during the fifty-day

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[4] Section 8-13-540 provides extensive procedures to the Legislative Ethics Committees for receiving, investigating, sanctioning, and dispensing with a complaint. The Committee shall conduct a confidential, preliminary investigation. If it finds that probable cause exists to support an alleged violation, the Committee shall render an advisory opinion. If the member fails to comply with the opinion, the Committee shall convene a formal hearing. After the hearing, the Committee determines its findings of fact. If it finds, based on competent and substantial evidence, the member has committed a violation, the Committee shall administer a public or private reprimand, determine that a technical violation has occurred, recommend expulsion of the member, and / or refer the matter to the Attorney General in the case of an alleged criminal violation. If the Committee finds the member has not violated a code or statutory provision, it shall dismiss the charges.

At all times, the Committee must afford appropriate due process protections, including the right to counsel, the right to call and examine witnesses, the right to cross-examine, and the right to introduce exhibits. An appeal from the Committee's action is to the full legislative body.

> period before an election in which the member or candidate is a candidate. During this fifty-day period, any person may petition the court of common pleas alleging the violations complained of and praying for appropriate relief by way of mandamus or injunction, or both. Within ten days, a rule to show cause hearing must be held, and the court must either dismiss the petition or direct that a mandamus order or an injunction, or both, be issued. A violation of this chapter by a candidate during this fifty-day period must be considered to be an irreparable injury for which no adequate remedy at law exists.

S.C. Code Ann. § 8-13-530(4).

Absent this one narrow situation within the fifty-day period before an election, the Legislature has granted exclusive authority over ethical complaints to the appropriate Ethics Committee. "The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges*, 341 S.C. at 86, 533 S.E.2d at 582 (quoting Black's Law Dictionary 602 (7th ed. 1999)). Moreover, the necessity of the circuit court's fifty-day window is self-evident during the final days of an election, where time is of the essence and an immediate remedy may be warranted.[5] It is therefore clear the Legislature intended the respective Ethics Committee to otherwise have exclusive authority to hear alleged ethics violations of its own members and staff.

Appellant asserts the case of *Ford v. State Ethics Commission* supports the circuit court's exercise of jurisdiction in this matter. 344 S.C. 642, 545 S.E.2d 821 (2001). Appellant's reliance on *Ford* is misplaced. *Ford* in no manner lends support to the

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[5] Even in such an instance, the Legislature has limited the remedy that the circuit court can impose. *See* S.C. Code Ann. § 8-13-530 ("Within ten days, a rule to show cause hearing must be held, and the court must either dismiss the petition or direct that a mandamus order or an injunction, or both, be issued."). Thus, the circuit court is not authorized to issue the enumerated sanctions the Committees are authorized to issue. *Cf. id.* § 8-13-540(3) (stating that if the Ethics Committee finds a violation, it shall administer a public or private reprimand, determine that a technical violation has occurred, recommend expulsion of the member, or refer the matter to the Attorney General for investigation in the case of an alleged criminal violation).

argument that the circuit court has jurisdiction to hear this action. Ford, a state senator, was the subject of a matter filed in the State Ethics Commission. Ford sought dismissal of the complaint on the ground that the State Ethics Commission lacked jurisdiction over a state senator's conduct, as jurisdiction rested *exclusively* with the *Senate* Ethics Committee. *Id.* at 644, 545 S.E.2d at 822. The State Ethics Commission complaint was dismissed and we affirmed. *Ford* is in accord with our construction of the State Ethics Act.

C.

Finally, the South Carolina Constitution and this Court have expressly recognized and respected the Legislature's authority over the conduct of its own members. *See, e.g.*, Const. Art. 3, § 11 (stating each house has the authority to judge the election returns and qualifications of its own members); Const. Art. 3, § 12 (providing that each chamber shall determine its own rules of procedure, punish its members for disorderly behavior, and expel a member); *see also Stone v. Leatherman*, 343 S.C. 484, 541 S.E.2d 241 (2001) (finding court did not have jurisdiction over election result in light of Article 3, § 11 of the Constitution that provides the Senate has the authority to judge the election returns and qualifications of its own members); *Scott v. Thorton*, 234 S.C. 19, 106 S.E.2d 446 (1959) (finding the court had no jurisdiction in light of the constitutional provisions that require each house to judge the election returns and qualifications of its own members). Consequently, a court's exercise of jurisdiction over Appellant's ethical complaint against Governor Haley would not only contravene the clear language of the State Ethics Act, it would also violate separation of powers.[6] *See* S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.").

In sum, ethics investigations concerning members and staff of the Legislature are intended to be solely within the Legislature's purview, to the exclusion of the

[6] In light of our conclusion, we need not reach the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

courts, except in the singular circumstance expressly provided for in section 8-13-530(4).

AFFIRMED.

TOAL, C.J., and PLEICONES, J., concur. BEATTY, J., concurring in result in a separate opinion in which HEARN, J., concurs.

JUSTICE BEATTY: I concur in result. In my view, the circuit court correctly dismissed Appellant's declaratory judgment action. I disagree, however, with the majority's reasoning as I believe the circuit court had subject matter jurisdiction, but the matter was not procedurally proper for its consideration. Because Appellant's primary purpose for filing the action was to seek a declaration that Respondent's conduct violated the criminal laws of this state, I would find declaratory judgment proceedings were inappropriate as it would deprive Respondent of her constitutional right to a jury trial. Furthermore, Appellant, as a private citizen, was precluded from seeking this relief. Finally, any determination as to whether Respondent's conduct violated provisions of the South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991 ("the Ethics Act")[7] was not ripe for judicial review as Appellant failed to exhaust the Act's administrative remedies.[8]

I. Declaratory Judgment Actions

In analyzing this appeal, it is important to initially recognize that Appellant filed his case pursuant to the Uniform Declaratory Judgments Act. Section 15-53-20 of the South Carolina Code identifies the purpose of the Uniform Declaratory Judgments Act ("the Act") and provides that courts "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20 (2005); *see* Rule 57, SCRCP ("The procedure for obtaining a declaratory judgment pursuant to Code §§ 15-53-10 through 15-53-140, shall be in accordance with these rules, and . . . [t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."). The Act is to be liberally construed and administered to achieve its intended purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15-53-130 (2005).

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[7] S.C. Code Ann. §§ 8-13-100 to -1520 (Supp. 2011).

[8] I base my conclusion on the statutory provisions in effect at the time Appellant filed his declaratory judgment action on November 17, 2011. Notably, several bills have been introduced in the House and Senate that specifically confer jurisdiction with the State Ethics Commission and amend the process and procedures governing the disposition of ethics complaints. S.B. 133, S.B. 338, S.B. 347, H.B. 3407, H.B. 3945, 120th Gen. Assem., Reg. Sess. (S.C. 2013).

Despite this liberal construction, "[d]eclaratory judgment statutes do not create jurisdiction, and the court must have the authority to grant the relief as well as jurisdiction over the subject matter and over the parties." 26 C.J.S. *Declaratory Judgments* § 123 (Supp. 2013). Stated another way, "[t]he authority of a state's courts to render declaratory judgments must operate within the limits of the constitutional powers and duties of those courts." *Id.* Thus, "[a] declaratory judgment action may be maintained only if the jurisdictional conditions that are required in ordinary actions are present." *Id.*

Applying these principles to the instant case, it is necessary to determine: (1) whether the circuit court had jurisdiction over the subject matter of the action and, if so, (2) whether the action constituted a justiciable controversy appropriate for judicial determination.

II. Subject Matter Jurisdiction

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008) (citations omitted)). As provided in our state constitution, "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." S.C. Const. art. V, § 11. Thus, pursuant to this broad constitutional provision, a circuit court has subject matter jurisdiction to hear any justiciable matter unless the General Assembly has conferred exclusive jurisdiction of the matter to an inferior court. *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 120-21, 678 S.E.2d 430, 433 (2009). In determining whether the General Assembly "has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Id.* at 121, 678 S.E.2d at 433.

In my view, a circuit court has subject matter jurisdiction over violations of the Ethics Act as I discern no statutory provision, and Respondent has not identified one, which confers exclusive jurisdiction to the State Ethics Commission or the Legislative Ethics Committees.[9] Although these legislative entities are

[9] As a member of the House of Representatives at the time of the alleged misconduct, Respondent would only have been subject to the jurisdiction of the House of Representatives Legislative Ethics Committee as members of the General

statutorily authorized to receive complaints, the fact that jurisdiction has been conferred does not operate to divest the circuit court of subject matter jurisdiction. *See Muldrow v. Jeffords*, 144 S.C. 509, 520, 142 S.E. 602, 605 (1928) ("[A]ccording to a well-established rule of law, those who undertake to deprive [a court] of jurisdiction in any given case and give it to [another] must be able to point out some particular provision of the Constitution which either expressly or by necessary implication gives jurisdiction of such case to the limited and inferior tribunal to the exclusion of the superior tribunal.").

Instead, several provisions of the Ethics Act reveal the General Assembly has implicitly conferred the circuit court with concurrent jurisdiction over matters arising from the Ethics Act. For example, the circuit court is designated as the exclusive forum for resolving Ethics Act complaints involving a legislative member or candidate during the fifty-day period before an election in which the member or candidate is a candidate.[10] Thus, by implication, the circuit court is an

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Assembly are not subject to the jurisdiction of the State Ethics Commission. *See* S.C. Code Ann. § 8-13-320(9) (Supp. 2011) (outlining duties and powers of the State Ethics Commission and noting that it may initiate or receive complaints and make investigations involving a "public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided for under House or Senate Rules"); *id.* § 8-13-530 (identifying powers and duties of legislative ethics committees in receiving and investigating complaints as to a "member or staff of the appropriate house"); *see also Ford v. State Ethics Comm'n*, 344 S.C. 642, 644, 545 S.E.2d 821, 822 (2001) (holding that State Ethics Commission did not have jurisdiction over state senator as it was vested in the Senate Ethics Committee).

[10] S.C. Code Ann. § 8-13-320(9)(b)(1) (Supp. 2011) ("No complaint may be accepted by the commission concerning a candidate for elective office during the fifty-day period before an election in which he is a candidate. During this fifty-day period, any person may petition the court of common pleas alleging the violations complained of and praying for appropriate relief by way of mandamus or injunction, or both."); *id.* § 8-13-530(4) ("No complaint may be accepted by the ethics committee concerning a member of or candidate for the appropriate house during the fifty-day period before an election in which the member or candidate is a candidate. During this fifty-day period, any person may petition the court of

available forum to resolve all Ethics Act violations and is the exclusive forum for allegations that arise fifty days before an election. Additionally, the State Ethics Commission is authorized to file in the court of common pleas a certified copy of an order or decision that results in a judgment that "has the same effect as though it had been rendered in a case duly heard and determined by the court." § 8-13-320(14).

Because there is no statutory or constitutional authority to support the circuit court's holding that it lacked subject matter jurisdiction, I believe the court erred in dismissing Appellant's action on this ground.

III. Justiciable Controversy

Having found the circuit court was vested with the subject matter jurisdiction, the question becomes whether Appellant demonstrated a justiciable controversy that was appropriate for the court's determination.

Although the Uniform Declaratory Judgments Act is to be broadly construed, it is not without limitation. *Sunset Cay, L.L.C. v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). "An adjudication that would not settle legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act." *Id.* "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Id.* A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character. *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970); *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006) (recognizing that an issue that is contingent, hypothetical, or abstract is not ripe for judicial review).

In the instant case, Appellant did not demonstrate the requisite justiciable controversy to maintain a cause of action under the Uniform Declaratory Judgments Act as: (1) these proceedings were inappropriate to determine guilt or innocence in a criminal matter; (2) he was not the proper party to pursue the

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common pleas alleging the violations complained of and praying for appropriate relief by way of mandamus or injunction, or both.").

criminal allegations, and (3) he failed to exhaust the administrative remedies provided for in the Ethics Act.

A.

As his Complaint states, Appellant sought a determination by the circuit court that Respondent's alleged ethical misconduct "violate[d] the law(s) of South Carolina." This statement, in conjunction with counsel's arguments before this Court, can only lead to the conclusion that Appellant sought to criminally prosecute Respondent.

Initially, I note that a declaratory judgment action is not the appropriate proceeding for determining guilt or innocence in criminal matters. *See* W.E. Shipley, Annotation, *Validity, Construction, and Application of Criminal Statutes or Ordinances as Proper Subject for Declaratory Judgment*, 10 A.L.R.3d 727, § 2 (1966 & Supp. 2013) (discussing state and federal cases that have considered the availability of declaratory judgment procedures to determine matters of criminal law and stating, "This is not to say that a declaratory proceeding may be resorted to to try ordinary matters of guilt or innocence, or even whether particular contemplated action will or will not amount to a violation of a criminal provision, unless there are presented peculiar circumstances making the resort to declaratory relief particularly appropriate"). If we were to permit this type of relief, Respondent would be denied her constitutional right to a jury trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14.

Furthermore, Appellant, as a private citizen, lacked the authority to seek this relief because "[t]he South Carolina Constitution, South Carolina statutes and case law place the unfettered discretion to prosecute *solely* in the prosecutor's hands." *In re Richland County Magistrate's Court*, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010) (emphasis added). By precluding a private citizen from prosecuting a criminal action, the interests of the public are best served as the "powers of the State are employed only for the interest of the community at large" as opposed to the potential self-interest of a private party. *Id.* at 412, 699 S.E.2d at 163.

Although Appellant was not the proper party to pursue the criminal action, his concern for the public was not without recourse as the Attorney General's office, either on its own initiative or via a referral from the House of Representatives Legislative Ethics Committee, could have sought a criminal determination of the alleged misconduct.

Our state constitution provides, "[t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." S.C. Const. art. V, § 24. Thus, "the prosecution has wide latitude in selecting what cases to prosecute," which necessarily would include violations of the Ethics Act. *State v. Thrift*, 312 S.C. 282, 307, 440 S.E.2d 341, 355 (1994) (holding that prosecution under the Ethics Act does not require referral by the Ethics Commission as the Attorney General's power to prosecute "arises from our State Constitution and cannot be impaired by legislation"); *see Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000) (discussing prosecution of state trooper for using his official position for financial gain under 1991 Ethics Act).[11]

B.

Alternatively, to the extent Appellant's Complaint can be construed as purely a civil action involving a violation of the Ethics Act,[12] I would find it was not ripe for judicial review as Appellant failed to exhaust the administrative remedies provided for in the Ethics Act.

Initially, I note that Appellant's failure to exhaust the administrative remedies did not affect the circuit court's subject matter jurisdiction. As this Court has explained, "[t]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Ward v. State*, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000) (citations omitted). "Thus, the failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." *Id.* "The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994).

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[11] Regardless of whether a matter goes to the State Ethics Commission or to the House/Senate Ethics Committee, under either statutory scheme the Commission or the appropriate Ethics Committee can refer a matter to the Attorney General if criminal conduct has been committed.

[12] *See Thrift*, 312 S.C. at 307, 440 S.E.2d at 355 ("recognizing the civil nature of the Ethics Act complaint" and providing for criminal referral by the Ethics Commission to the Attorney General).

Although the circuit court had subject matter jurisdiction over the action, the Ethics Act provided administrative remedies specifically tailored to efficiently resolve Appellant's complaint against Respondent.

Pursuant to the Ethics Act, the State Ethics Commission is designated as the administrative agency[13] that is imbued with the power to initiate complaints, receive complaints from individuals, and to investigate the complaints regarding "a public official, public member, or public employee *except* members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided under House or Senate Rules." S.C. Code Ann. § 8-13-310 (Supp. 2011) (providing for State Ethics Commission and composition of its members); *id.* § 8-13-320 (outlining the duties and powers of the State Ethics Commission) (emphasis added)).[14]

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[13] *See Sanford v. South Carolina State Ethics Comm'n*, 385 S.C. 483, 685 S.E.2d 600 (2009) (deferring to State Ethics Commission, as an administrative agency, for matters regarding investigation of ethics complaint against Governor), *clarified by*, 386 S.C. 274, 688 S.E.2d 120 (2009).

[14] Any person charged with an ethical violation before the State Ethics Commission is entitled to the administrative process outlined in section 8-13-320 and an administrative hearing conducted in accordance with the Administrative Procedures Act. *Id.* § 8-13-320(9), (10). If, upon investigation, the commission staff determines there is probable cause to believe that a violation has been committed, a hearing may be held before a panel of three commissioners. *Id.* § 8-13-320(10)(i). Within sixty days after the conclusion of a hearing, the commission panel must issue a written decision with findings of fact and conclusions of law. *Id.* § 8-13-320(10)(k). "The commission panel, where appropriate, shall recommend disciplinary or administrative action, or in the case of an alleged criminal violation, refer the matter to the Attorney General for appropriate action." *Id.* "Within ten days after service of an order, report, or recommendation, a respondent may apply to the commission for a full commission review of the decision made by the commission panel." *Id.* § 8-13-320(m). Although this review is the final disposition of the complaint before the commission, a respondent may appeal to the Court of Appeals, pursuant to section 1-23-380 and the South Carolina Appellate Court Rules. *Id.*

Because Respondent was serving as a member of the House of Representatives at the time of the alleged misconduct, any complaint against her would have been filed with the House of Representatives Legislative Ethics Committee as this committee and a Senate Legislative Ethics Committee have been established in addition to the State Ethics Commission. S.C. Code Ann. § 8-13-510 (Supp. 2011). These legislative ethics committees were created to receive complaints filed by individuals and investigate possible ethical violations committed by a member or staff of the appropriate house. *Id.* § 8-13-530 (outlining powers and duties of legislative ethics committees). Specifically, an ethics committee is designated to "administer or recommend sanctions appropriate to a particular member or staff of or candidate for the appropriate house pursuant to Section 8-13-540 or dismiss the charges." *Id.* § 8-13-530(6).

After a complaint is filed with the ethics committee, a copy must be promptly sent to the person alleged to have committed the violations. *Id.* § 8-13-540(1). "If the ethics committee determines the complaint does not allege facts sufficient to constitute a violation, the complaint must be dismissed and the complainant and respondent notified." *Id.* However, if the ethics committee determines the complaint alleges facts sufficient to constitute a violation, it must promptly investigate the alleged violation. *Id.* If, after such preliminary investigation, the ethics committee finds that probable cause exists to support an alleged violation, it shall either: (a) render an advisory opinion to the respondent and require respondent's compliance within a reasonable time; or (b) convene a formal hearing on the matter within thirty days of respondent's failure to comply with the advisory opinion. *Id.*

If a hearing is held, the ethics committee shall determine its findings of fact as to whether the respondent committed an ethical violation. *Id.* § 8-13-540(3). If the committee finds a violation, it shall:

(a) administer a public or private reprimand;

(b) determine that a technical violation as provided for in Section 8-13-1170 has occurred;

(c) recommend expulsion of the member; and/or,

(d) in the case of an alleged criminal violation, refer the matter to the Attorney General for investigation. The ethics committee shall report its findings in writing to the Speaker of the House or President Pro Tempore of the Senate, as appropriate. The report must be accompanied by an order of punishment and supported and signed by a majority of the ethics committee members. If the ethics committee finds the respondent has not violated a code or statutory provision, it shall dismiss the charges.

Id. § 8-13-540 (3). The individual has ten days from the date of notification of the ethics committee's action to appeal the action to the full legislative body. *Id.* § 8-13-540(4).

Had Appellant pursued the above-outlined administrative remedies, he could have received the relief he requested in his declaratory judgment action. Specifically, he could have procured a determination as to whether Respondent's actions constituted an ethical violation. If a violation was found, the ethics committee may have issued a public reprimand, recommended expulsion, or referred the matter to the Attorney General for a criminal investigation. Thus, as a matter of policy and efficiency, it would have been procedurally more appropriate for Appellant to file his Complaint with the House of Representatives Legislative Ethics Committee rather than the circuit court.

Because Appellant failed to exhaust his administrative remedies, I would find the matter was premature and, thus, not proper for the circuit court's consideration.

IV. Conclusion

Based on the foregoing, I would affirm as modified the circuit court's order dismissing Appellant's declaratory judgment action. Because the General Assembly has not conferred the State Ethics Commission or the Legislative Ethics Committees with exclusive jurisdiction over ethics complaints, the circuit court had subject matter jurisdiction over Appellant's action. Despite subject matter jurisdiction being vested in the circuit court, Appellant failed to demonstrate a

justiciable controversy to maintain a cause of action under the Uniform Declaratory Judgments Act. Thus, the action was not proper for the circuit court's consideration.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Elisa Narruhn, Respondent,

v.

Alea London Limited and Anderson General Insurance, Defendants,

Of whom Alea London Limited is the, Appellant.

Appellate Case No. 2011-191646

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27270
Heard January 24, 2013 – Filed June 12, 2013

AFFIRMED AS MODIFIED

Mark Steven Barrow, William Roberts Calhoun, Jr., and Mark V. Gende, all of Sweeny Wingate & Barrow, of Columbia, for Appellant.

Gene McCain Connell, Jr., of Kelaher Connell & Connor, of Surfside Beach, for Respondent.

JUSTICE BEATTY: Alea London Limited ("Insurer") appeals the circuit court's denial of its Rule 60(b), SCRCP motion to set aside the order of a special referee that granted Elisa Narruhn ("Narruhn") an assignment of rights in supplemental proceedings held in conjunction with another lawsuit. We affirm as modified.

I. FACTS

Narruhn brought a lawsuit seeking damages against RKC Entertainment, L.L.C., d/b/a The Red Room ("RKC"), and Ardon Percevial Cato, II ("Cato") after she was shot and injured by Cato while she was a customer at The Red Room, a nightclub in Myrtle Beach. Thereafter, by order of reference, a special referee was directed to conduct supplemental proceedings to determine if there were any assets available to satisfy the judgment. After a hearing, the special referee issued an order granting Narruhn an assignment of any and all rights, including any claims, that RKC might have against Insurer, who had previously issued a liability insurance policy to RKC for The Red Room.

Narruhn then brought the current lawsuit against Insurer and Anderson General Insurance, the producing agency, seeking actual and punitive damages and alleging, *inter alia*, the failure to pay or defend a claim. Insurer filed a Rule 60(b) motion to set aside the order of the special referee granting Narruhn an assignment of rights.[1] The circuit court denied Insurer's Rule 60(b) motion after finding (1) the motion was untimely and not properly before the circuit court because the motion was not made within one year of the date of the order of reference; (2) it was without authority to rule on Insurer's Rule 60(b) motion because it should have been directed to the special referee, not the circuit court; and (3) Insurer had no standing to challenge the special referee's order granting an assignment as it was not a party to the challenged order from which it sought relief. Insurer appealed the circuit court's order to the Court of Appeals, and the matter was certified for this Court's review under Rule 204(b), SCACR.

[1] Although Insurer's motion and the circuit court's order are captioned with Narruhn's current action number, both the contents of Insurer's motion and the circuit court's order state the Rule 60(b) motion was directed to the special referee's ruling.

II. LAW/ANALYSIS

A. Timeliness

As to the issue of timeliness, we agree with Insurer that the circuit court erroneously considered the date of the order of reference in calculating the timeliness of Insurer's Rule 60(b) motion, rather than the date of the challenged order, which is the special referee's order granting Narruhn an assignment of rights. The special referee's order granting Narruhn an assignment of RKC's rights was filed on March 8, 2010. Insurer's motion challenging that order was made pursuant to the provisions of Rule 60(b)(1) (surprise), (b)(4) (void), and (b)(5) (inequitable) on or about December 10, 2010.

Motions under Rule 60(b)(1), (2), or (3) must be made within a reasonable time, but not later than one year of the order taken, and those under (4) and (5) are subject only to the reasonable time limitation. Insurer's motion was clearly timely under these parameters as it was made well within one year of the date of the special referee's order granting the assignment and within a reasonable time. *See* Rule 60(b), SCRCP ("The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken."); *BB & T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006) (stating the decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP is within the sound discretion of the trial judge, which will not be disturbed unless the order of the court is controlled by an error of law or is based on factual findings that are without evidentiary support).

B. Authority

As to the issue of authority, we find the circuit court did have the authority to rule on Insurer's motion. Since the special referee had already entered a final order regarding the supplemental proceedings as directed under the order of reference, the special referee had no remaining duties to perform, and the matter was properly before the circuit court. Because the Rule 60(b) motion presents a separate matter, it does not run afoul of the general rule prohibiting one circuit court judge from overruling another. *Cf. Wachovia Bank of S.C. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000) (holding where a matter had been referred to the master with finality, but the master had not concluded all of his duties under the order of reference because he had directed a foreclosure yet still needed to conduct

the sale and dispose of the surplus fund, the master had the authority to decide a party's Rule 60(b)(4), SCRCP motion).

C. Standing

As to the issue of standing, the circuit court found the Rule 60(b) motion was not properly before it and should, therefore, be denied because Insurer was not a party to the order from which it sought relief. *See* Rule 60(b), SCRCP ("On motion and upon such terms as are just, the court may relieve *a party or his legal representative* from a final judgment, order, or proceeding . . . ." (emphasis added)).

As an initial matter, we question whether Insurer has preserved an objection to the circuit court's ruling on standing. Insurer did not specifically set forth any challenge to this independent basis for the circuit court's denial of the Rule 60(b) motion in its Statement of Issues on Appeal and, although it made an implied reference to standing in the conclusion of its brief, it cited none of the authorities that it belatedly advanced during the oral argument of this matter. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *id.* Rule 208(b)(1)(D) ("The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority.").

In any event, we find the cases and argument advanced by Insurer do not support Insurer's position that the circuit court erred in finding it did not have standing to make a Rule 60(b) motion because it was not a party to the challenged judgment. In *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd* 395 S.C. 85, 716 S.E.2d 887 (2011), the employer of a party filed a motion to intervene in the case, which was granted, so at the time the employer made a Rule 60(b) motion, it was a party and, as a party, the employer could seek relief from the judgment. Insurer also cited *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970), a case decided prior to the adoption of the SCRCP, for the proposition that a nonparty insurer may petition for relief under Rule 60(b). In *Edwards*, the defendant (Ferguson) *and* his insurance company moved to set aside a default judgment entered against Ferguson on the basis of mistake, inadvertence, surprise, or excusable neglect. Thus, there is no question that the motion was properly before the court as it was being advanced by a party to the judgment, Ferguson, and no issue was raised regarding the insurance company's status. Accordingly,

this case does not support Insurer's argument in this regard. Since Insurer has not established that it was a party or the legal representative of a party, it was not entitled to seek relief under the provisions of Rule 60(b). *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 107-08, 727 S.E.2d 407, 416 (2012) (stating in interpreting the South Carolina Rules of Civil Procedure, this Court applies the same rules of construction used to interpret statutes, and if a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the court is obligated to follow and to enforce the stated meaning).

The concurring/dissenting opinion concludes Insurer did have standing to bring a challenge by means of a Rule 60(b) motion. The opinion contends the assignment was in error because notice and an opportunity to be heard must be afforded to Insurer before its rights may be affected, citing, *inter alia*, S.C. Code Ann. § 15-39-350 (2005) (governing the examination of debtors of a judgment debtor) and *Johnson v. Service Management, Inc.*, 319 S.C. 165, 168, 459 S.E.2d 900, 902 (Ct. App. 1995) (stating where funds are held by a third party, "the funds on deposit could be reached only after the supplementary proceedings were held to examine [the third party] with regard to the account").[2]

While we agree in general with the law cited, we find these provisions are not controlling here because they pertain to the merits of the Rule 60(b) motion, such as whether the assignment was valid in the face of an anti-assignment clause and other enumerated defenses (see Section D below), and they do not involve the threshold issue before this Court, namely, the propriety of Insurer's challenge to the assignment by means of a Rule 60(b) motion. Because Insurer does not fall within the plain terms of Rule 60(b), in that Insurer was not a party or the legal representative of a party, Rule 60(b) is not the proper vehicle for any challenge in this regard. That is not to say, however, that Insurer is without recourse. The

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[2] *Johnson* involved an attempt to satisfy a judgment by obtaining funds held in a judgment debtor's bank account. 319 S.C. at 167, 459 S.E.2d at 902. The Court of Appeals explained that funds on deposit, unless put into a special account, "becomes the property of the bank and goes into its general account." *Id.* at 167-68, 459 S.E.2d at 902. "The funds on deposit thus are no longer the personal property of the depositor; instead, the depositor has a chose in action against the bank for recovery of the deposit." *Id.* at 168, 459 S.E.2d at 902. The court stated the funds could not be reached through execution and levy, but only through supplemental proceedings. *Id.*

referee, in making the assignment, referred to it as a "chose in action,"[3] and expressly stated Narruhn assumed the rights that RKC might have against Insurer, "*if any*." Moreover, Narruhn stipulated, as she must, at oral argument before this Court that Insurer still retains all of its defenses and rights under the insurance contract. *See, e.g., Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct. App. 1999) (stating that an assignee generally "stands in the shoes of its assignor" and has the same rights as the assignor (citation omitted)); *Chet Adams Co. v. James F. Pederson Co.*, 308 S.C. 410, 413, 418 S.E.2d 337, 338 (Ct. App. 1992) ("Generally, the assignee of a non-negotiable chose in action takes it subject to all equities and defenses which could have been set up against the assignor at the time of the assignment."); 29 *Williston on Contracts* § 74:47 (4th ed. 2003) ("[T]he assignee of a nonnegotiable chose in action . . . takes it subject to all defenses that the obligor may have had against the assignor . . . .").

We note *Johnson* refers to the need for supplemental proceedings, which were held in the current matter with all necessary parties present, and section 15-39-350 speaks in terms of the "discretionary authority" of the court to question a third party when it deems it necessary, as indicated by the statute's use of "may" rather than "shall."[4] Although we need not reach the issue here, it appears the

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[3] A "chose in action" has been variously defined as (1) "A proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort"; (2) "The right to bring an action to recover a debt, money, or thing"; and (3) "Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit." *Black's Law Dictionary* 275 (9th ed. 2009). "South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity." *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007). "In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable." *Id.* (citation omitted).

[4] "[U]pon an affidavit that any person or corporation has property of such judgment debtor or is indebted to him in any amount exceeding ten dollars, the judge *may* by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place and answer concerning such property or indebtedness. The judge *may also, in his discretion*, require

referee did not believe Insurer's approval of the assignment of RKC's rights was required, and we note it is generally held that an assignment *after* a loss has already occurred does not require an insurer's consent. *See* 3 *Couch on Insurance* 3d § 35:8 (2011 Rev. Ed.) ("[T]he great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim. The purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity." (footnotes omitted)); 44 Am. Jur. 2d *Insurance* § 786 (2003) ("After a loss has been incurred, the claim to recover insurance proceeds may be effectively assigned by the insured."); 17 *Williston on Contracts* § 49:126 (4th ed. 2000) ("As a general principle, a clause restricting assignment [in an insurance policy] does not in any way limit the policyholder's power to make an assignment of the rights under the policy . . . after a loss has occurred. . . . It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property."); *see also Young v. Chicago Fed. Sav. & Loan Ass'n*, 535 N.E.2d 977, 980-81 (Ill. App. Ct. 1989) ("An insurance policy that is assigned after a claim arises is an assignment of the policy proceeds; such a transaction results in an assignment of a chose in action which does not require the insurer's consent." (citing *Couch on Insurance*)); *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. Ct. 2011) (same, citing *Young*, 535 N.E.2d at 980-81); *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804-05 (Iowa 1973) (rejecting an insurer's contention that an insurance policy was not assignable without its consent, and stating, "[a]fter the loss was incurred, the issue became *not an assignment of the policy*, but the assignment of a chose in action…." (emphasis added)).

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notice of such proceeding to be given to any party to the action in such manner as may seem to him proper." S.C. Code Ann. § 15-39-350 (2005) (emphasis added).

D. Merits

Lastly, to the extent Insurer argues the merits of its Rule 60(b) motion in its brief, i.e., that the special referee erred in granting an assignment of rights to Narruhn,[5] we hold that argument is not properly before this Court since the circuit court denied the motion for reasons related to timeliness, authority, and standing, and we ultimately find no error in the circuit court's decision to deny the motion based on standing. *See Weeks v. McMillan*, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous."). Moreover, the issue of standing was not appealed.

As noted above, however, Insurer has retained all of its defenses and rights under the insurance contract, and said defenses and rights will be considered in Narruhn's pending action against Insurer.

III. CONCLUSION

Based on the foregoing, the circuit court's order denying Insurer's Rule 60(b) motion to set aside the order of the special referee is affirmed as modified.

AFFIRMED AS MODIFIED.

HEARN, J., and Acting Justice James E. Moore, concur. ACTING CHIEF JUSTICE PLEICONES, concurring in a separate opinion. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion.

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[5] Insurer asserts it was not given notice of the supplemental proceedings, the contract of insurance prohibits an assignment of rights without its consent, the policy was not in effect at the time of the incident as the policy had already been cancelled for nonpayment of premiums, and the policy was void for RKC's violation of the cooperation clause.

ACTING CHIEF JUSTICE PLEICONES: I concur in the result here which allows appellant to assert all its rights, including any defenses, in respondent's pending action against appellant. I write separately because while I agree with Justice Beatty that appellant lacked standing to bring this Rule 60(b) motion, I also agree with Justice Kittredge that we should not reach the merits of appellant's anti-assignment argument both because without standing the merits are not before the Court, and because respondent has stipulated that appellant retains all of its defenses and rights under the insurance contract. I therefore concur in the decision to affirm the circuit court's denial of appellant's Rule 60(b) motion.

JUSTICE KITTREDGE: I concur in part and dissent in part. I respectfully dissent from this Court's advisory opinion concerning the efficacy of the anti-assignment provision in the insurance policy. I otherwise concur in result only because of the stipulation that Appellant Alea London Limited's rights remain fully preserved, notwithstanding the clearly erroneous order of the circuit court denying Rule 60(b), SCRCP, relief. As noted by the majority, "Narruhn conceded at oral argument that [Appellant] Insurer has retained all of its defenses and rights under the insurance contract."

I write separately because I fundamentally disagree with the suggestion that Appellant lacked standing to challenge the order of the special referee assigning the insured's rights under the policy. I find it breathtaking and a Due Process violation for a court to unilaterally and without notice affect and potentially impair a third party's contract rights and then deny that third party the ability and standing to challenge the court order.[6]

The facts are not in dispute. Elisa Narruhn was injured in a shooting at The Red Room, a Myrtle Beach nightclub. The Red Room is owned by RKC Entertainment, LLC (RKC). Narruhn obtained a default judgment against RKC and sought to enforce the judgment through supplemental proceedings. The matter was referred to a special referee who, at the request of Narruhn, referred to the insurance policy as a "chose in action." With the insurance policy characterized as a chose in action, the special referee believed he had the authority to assign RKC's contract rights under the insurance policy to Narruhn. As stated, this was accomplished without notice to Appellant. This was error.

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[6] I do not understand the majority's suggestion that the issue of Appellant's standing is not preserved, and I do not agree with the majority's finding that "the issue of standing was not appealed." The entire essence of its Rule 60(b), SCRCP, motion was that the special referee's order affected its rights. As asserted in its supporting memorandum, Appellant argued that "Alea London, whose interests were to be affected, should have been provided Notice of Hearing before the Special Referee." In Appellant's final brief to this Court, Appellant referenced the circuit court's order "that [Appellant] may not file a Rule 60 motion because it was not a party[,]" and stated that the "Trial Court's Order errs in construing South Carolina law." A fair reading of this record reeks of Appellant's contention that it has standing to pursue Rule 60(b) relief.

It is not necessary to decide the correctness of the chose in action designation. Even assuming the insurance policy was properly characterized as a chose in action by the special referee, it was improper to effect an assignment of the insurance policy without notice to Appellant. The law is clear—if an account or asset of a judgment debtor is held by a third party, that account or asset may be reached in supplemental proceedings only after notice and opportunity to be heard is given to the third party. *See Johnson v. Serv. Mgmt., Inc*., 319 S.C. 165, 167-69, 459 S.E.2d 900, 902-03 (Ct. App. 1995) (holding that where funds are held by a third party that are allegedly owed a judgment debtor, "the funds on deposit could be reached only after supplementary proceedings were held to examine [the third party] with regard to the account").

South Carolina Code section 15-39-350 provides:

> After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment and *upon an affidavit* that any person or corporation has property of such judgment debtor or is indebted to him in any amount exceeding ten dollars, *the judge may by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place and answer concerning such property* or indebtedness. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action in such manner as may seem to him proper.

(emphasis added). Here, no affidavit was presented to the special referee, and Appellant was given no notice and opportunity to appear.

Armed with the assignment, Narruhn filed the underlying action seeking actual and punitive damages for failure to pay or defend a claim. Appellant was served and then learned, for the first time, of the special referee's assignment of RKC's rights under the insurance policy to Narruhn. Appellant filed the Rule 60(b) motion understandably claiming "surprise."[7] I am confident the able circuit judge would have rectified the error of the special referee had he not mistakenly believed that

[7] As Appellant observed in its Rule 60(b) motion, "[t]here was nothing regarding the [special referee's order] which was *not* a surprise." (emphasis in original).

his exercise of jurisdiction would run afoul of the rule prohibiting one circuit judge from overruling another.

This case may well illustrate the reasons why section 15-39-350, as well as basic notions of due process, require the providing of notice and opportunity to be heard to a third party before its rights may be affected. This is so because Appellant attempted to demonstrate in its Rule 60(b) motion to the circuit court the following: (1) the policy excluded coverage for "all causes of action arising out of an assault and/or battery"; (2) RKC failed to comply with the policy by failing to, among other things, notify Appellant of the Complaint, damages hearing and order of reference to the special referee; and (3) the policy included an anti-assignment provision, "[RKC's] rights and duties under this policy may not be transferred without [Appellant's] written consent except in the cause of death of an individual Named Insured."

With great respect for the majority, I believe it ventures inappropriately into the merits of Appellant's anti-assignment challenge. We are to believe that Appellant, which the majority assumes has no standing because its rights were not affected by the special referee's order, may assert all of its defenses in the underlying action. Yet today, this Court sends an unmistakable message to the trial court that Appellant's reliance on the policy's anti-assignment provision is meritless. The Court speculates that "it appears the referee did not believe [Appellant's] approval of the assignment of RKC's rights was required." I speculate that the referee had no clue that the policy had an anti-assignment provision, for it would not have served the mutual interests of Narruhn and RKC to inform the referee of the terms of the policy. After an extensive discussion indicating that an assignment after a loss has already occurred does not require an insurer's consent, the majority correctly observes that the issue "is not properly before this Court." Does one really expect the trial court to view this issue without regard to the Court's advisory view of the anti-assignment provision? We are doing the same thing the special referee did—prematurely and adversely affecting Appellant's rights. I dissent from the Court's advisory opinion.

Perhaps in recognition of the erroneous rulings of the special referee and the circuit court, Narruhn made her concession at oral argument, acknowledging that Appellant retains all of its rights in the pending action. It is solely because of the stipulation fully preserving Appellant's rights that I otherwise concur in result.

The Supreme Court of South Carolina

In the Matter of Amy Marie Parker, Respondent.

Appellate Case No. 2013-001193

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) and (c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Timothy E. Madden, 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 accounts respondent may maintain. Mr. Madden shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Madden may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts 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 account(s) 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 Timothy E. Madden, 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 Timothy E. Madden, 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. Madden's office.

Mr. Madden's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.

Columbia, South Carolina

June 4, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Appellants,

v.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2010-159446

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

Opinion No. 5095
Heard May 8, 2012 – Filed March 6, 2013
Withdrawn, Substituted, and Refiled June 12, 2013

AFFIRMED

Amy E. Armstrong, of South Carolina Environmental Law Project, of Georgetown, for Appellants.

W. Thomas Lavender, Jr. of Nexsen Pruet, LLC, of Columbia, and J. Michael Harley, of Barrington, IL, for Respondent Roper Pond, LLC; Roger Page Hall and

Stephen Philip Hightower, both of Columbia, for Respondent SCDHEC.

THOMAS, J.: The Town of Arcadia Lakes (Town) and various individuals appeal a decision by the Administrative Law Court (ALC) upholding the authorization by the South Carolina Department of Health and Environmental Control (DHEC) of coverage for certain land-disturbing activities under a State General Permit. We affirm.

FACTS AND PROCEDURAL HISTORY

Respondent Roper Pond, LLC (Roper) is the owner and developer of 12.75 acres of real property on Trenholm Road in an unincorporated area of Richland County. The property includes 1.8 acres consisting of wetlands and waters that were identified by the United States Army Corps of Engineers (Corps) in 2005 as falling under the jurisdiction of the Federal Clean Water Act (CWA).[1] These jurisdictional wetlands include Roper Pond, a man-made pond that is visible from Trenholm Road but wholly within the boundaries of Roper's property. Before implementation of the project at issue in this appeal, water lilies covered the surface of Roper Pond.

Roper Pond drains through a pipe that runs beneath Trenholm Road and into Cary Lake. Cary Lake is privately owned by the Cary Lake Homeowners Association, which is not a party to this litigation. Although Cary Lake lies partly within the boundaries of the Town, the Town has no ownership interest in it and is not responsible for its maintenance or remediation.

In August 2007, Roper submitted to the Corps its initial plans for a multifamily apartment development to be built on its property. As part of this undertaking, Roper needed a permit for stormwater discharges from land-disturbing activities associated with the project. *See* S.C. Code Ann. § 48-14-30(A) (2008) (prohibiting land-disturbing activities without the submission of a stormwater management and sediment control plan to the appropriate agency and a permit to proceed with these activities); 9 S.C. Code Ann. Regs. 72-305 (Supp. 2012) (stating similar

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[1] 33 U.S.C. §§ 1251 *et seq.* (2006).

prohibitions to section 48-14-30(A) and setting out the permit application and approval process).

To expedite matters, Roper could "seek coverage under a promulgated storm water general permit" instead of obtaining an individual permit. *See* 3 S.C. Code Ann. Regs. 61-9.122.26(c)(1) (2012) ("Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit."). Under 3 S.C. Code Ann. Regs. 61-9.122.28 (2012), DHEC is authorized to issue general permits for stormwater discharges from projects that meet certain criteria. Pursuant to this authority, DHEC issued Permit Number SCR100000 (State General Permit) on August 1, 2006. The State General Permit, which DHEC described as an "NPDES General Permit for Storm Water Discharges from Large and Small Construction"[2] covered discharges from the commencement of an authorized project until final stabilization of the construction site.

In 2006, DHEC published a Guidance Document for the State General Permit advising prospective permittees about the need to obtain necessary permits from the Corps. In this particular case, Roper was required under section 404 of the CWA to obtain a wetlands permit from the Corps because it intended to fill some of the jurisdictional wetlands on the project site. *See* 33 U.S.C. § 1344(a) (2006) (authorizing the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites").

Under section 404(e) of the CWA, the Secretary of the Army is authorized to issue Nationwide Permits (NWPs) for any category of similar activities involving discharges of dredged or fill material determined to "cause only minimal adverse environmental effects when performed separately" and to "have only minimal cumulative adverse effect [sic] on the environment." 33 U.S.C. § 1344(e)(1) (2006). If a proposed activity meets the applicable regional and general conditions for an NWP, application for its authorization can proceed more quickly than it would if the applicant sought an individual permit. On March 12, 2007, the Corps issued NWP 29 and NWP 39, the two NWPs at issue in the present litigation.

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[2] As authorized by the Clean Water Act, the National Pollutant Discharge Elimination System (NPDES) Permit Program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. The program is administered by authorized states, including South Carolina.

NWP 29 applied to residential developments, and NWP 39 applied to commercial and institutional developments.

The requirement for a 404 permit from the Corps in turn triggers a requirement under section 401 of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards (401 certification). 401 certification is required "from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1) (2006).[3] On May 11, 2007, pursuant to its regulatory authority, DHEC issued 401 certifications for projects covered under NWP 29 and NWP 39.[4] DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.

On April 30, 2008, George Whatley, a wetland scientist for BP Barber, submitted a joint federal and state application for the proposed construction project on Roper's property. On the application, Whatley noted the project would involve the filling of 0.075 acres of jurisdictional wetlands.[5] On May 5, 2008, Whatley submitted a

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[3] DHEC regulations reference this requirement as well. *See* 8 S.C. Ann. Regs. 61-101.A.2 (2012) (stating federal law requires an applicant for a federal permit to conduct an activity that "during construction or operation may result in any discharge to navigable waters" "to first obtain a certification from [DHEC]" and stating that "Federal law provides that no Federal license or permit is to be granted until such certification is obtained").

[4] *See* 8 S.C. Code Ann. Regs. 61-101.A.3 (2012) ("[DHEC] may issue, deny, or revoke general certifications for categories of activities or for activities specific in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations."); 33 C.F.R. § 330.4(c)(1) (2013) ("State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.").

[5] As noted earlier, the CWA requires a 404 permit for certain discharges of dredged or fill material into navigable waters. The term "navigable waters" is

pre-construction notification (PCN) to the Corps. In the PCN, Whatley noted: (1) although Roper initially advised the Corps in 2007 that the project would impact 0.099 acres of jurisdictional wetlands, the project was redesigned to reduce impacts to 0.075 acres and (2) "best management practices" (BMPs) would be implemented to ensure that construction activities would not impact jurisdictional areas lying outside the permitted impact areas. Whatley further requested that the Corps review the project for possible coverage under an NWP; however, he did not specify any particular NWP under which the activity would be conducted.

No other impacts to water quality were disclosed on the application; however, according to subsequent e-mails between BP Barber and the Corps, Whatley notified the Corps that the project included lowering the elevation of Roper Pond and the discharge of the soil and sediment from the bottom of the pond into an upland area. According to the e-mails, Whatley inquired whether either of these was an impact to be considered in obtaining approval for the construction, and the Corps advised: (1) lowering the pond was not an impact and (2) excavation of the pond would be exempt from permitting requirements provided the excavated material was "placed in a truck or deposited onto uplands" and there was "[n]o double handling or stockpiling in jurisdictional areas."

Pursuant to the requirements for coverage under the State General Permit, a Stormwater Pollution Prevention Plan (SWPPP) was prepared for the project on June 26, 2008. DHEC reviewed the SWPPP and requested certain revisions.

By letter dated September 9, 2008, the Corps advised Whatley: (1) it reviewed the PCN and determined the proposed activity would "result in minimal individual and cumulative adverse environmental effects and [was] not contrary to public interest"; (2) the activity met the terms and conditions of NWP 39; and (3) for authorization to remain valid, the project had to comply with general conditions of

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defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The United States Supreme Court has imposed limitations on the inclusion of wetlands, holding that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]." *Rapanos v. U.S.*, 547 U.S. 715, 742 (2006) (emphasis in original). In the present case, the parties do not dispute that the 0.075 acres of wetlands to be filled in conjunction with Roper's proposed project were "jurisdictional wetlands" subject to the CWA.

the NWP, regional conditions, and certain special conditions, namely, that Roper obtain and provide the Corps with "all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit)." Consistent with its usual practice, the Corps sent a copy of the September 9, 2008 letter to DHEC as well as to Whatley.

On September 24, 2008, Roper submitted to DHEC a notice of intent (NOI) to discharge storm water associated with its proposed project, now designated as Roper Pond Apartments, seeking approval from DHEC to have the stormwater discharges covered under the State General Permit.[6] According to the NOI, the project site was 12.8 acres, of which 9.9 acres would be disturbed by land-clearing activities.

DHEC responded to Whatley by letter dated October 2, 2008, advising it determined that the impacts of the project on water quality would be minimal and that the proposed work would be consistent with the 401 certification issued in 2007 for NWP 39, subject to various conditions not at issue in this appeal.

On November 17, 2008, DHEC staff engineer Jill Stewart e-mailed BP Barber to express various concerns. Among these concerns was information she received that the proposed plans for Roper Pond Apartments included lowering of the water surface elevation of Roper Pond to allow for detention of post-development runoff of stormwater. Stewart inquired whether the dropping of the water surface elevation should be taken into account in determining if a site is eligible for coverage under NWP 39. BP Barber responded the following day, informing Stewart that its wetlands consultant advised "the lowering of the water surface elevation is included and covered under [NWP 39]."

In December 2008, DHEC issued a letter acknowledging it was satisfied that the revised SWPPP met the requirements of the State General Permit and the applicable regulations. On December 15, 2008, DHEC staff granted Roper coverage under the State General Permit for its stormwater discharges associated with construction of Roper Pond Apartments.

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[6] The NOI was on a DHEC form entitled "Notice of Intent (NOI) for Stormwater Discharges from Large and Small Construction Activities, NPDES General Permit SCR100000."

By letter dated December 30, 2008, Appellants and other individuals requested that the DHEC Board review and overturn the decision.[7] Among the technical issues raised in the letter were Roper's failure to disclose its intent to lower the elevation of Roper Pond and an allegation that it sought coverage under the wrong NWP. On January 14, 2009, DHEC responded to the letter, informing Appellants that the Board declined to conduct a final review conference and that anyone aggrieved by the decision could request a contested case hearing in the ALC. On February 16, 2009, Appellants filed a request for a contested case hearing in the ALC.

Meanwhile, on January 6, 2009, Whatley e-mailed the Corps requesting a corrected letter indicating the impacts of the project would be covered under NWP 29 instead of NWP 39. As noted earlier, Whatley also recounted Roper's plans to lower the elevation of Roper Pond and its intent to remove the excavated material to an upland area and his understanding that Roper did not need approval from the Corps for these activities. By letter to Whatley dated February 25, 2009, the Corps advised that it determined the proposed activity would result in minimal individual and cumulative adverse environmental effects, would not be contrary to the public interest, and met the terms and conditions of NWP 29. Except for the particular NWP referenced, the language in the February 25, 2009 letter was identical to the corresponding language in its September 9, 2008 letter.

As it did with the September 9, 2008 letter, the Corps sent a copy of its February 25, 2009 verification letter to DHEC. DHEC, however, did not issue another authorization letter advising Roper that the project would be consistent with the 401 certification issued in 2007 for NWP 29. According to Charles Hightower, DHEC's Section Manager of the 401 Wetlands Section, the purpose of such notification from DHEC is to provide an applicant assurance that the applicant's proposed project falls within the conditions of DHEC's 401 certification. Hightower further testified that Roper's proposed fill of the 0.075 acres of jurisdictional wetlands satisfied the necessary conditions to receive 401 water quality certifications for both NWP 29 and NWP 39 and that because the requisite conditions had been met, Roper did not need to notify DHEC before proceeding with the project under NWP 29.

On June 17, 2009, in response to a motion by Roper to dismiss Appellants' request for a contested case hearing, the ALC issued a consent order in which the parties

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[7] Additional facts about Appellants will be presented in the LAW/ANALYSIS section of this opinion.

agreed to the dismissal of all claims raised by Appellants challenging the 401 certification and authorization to conduct activities under NWP 39 for the proposed development. The partial dismissal did not affect Appellants' claims and Roper's defenses in connection with the 401 certification and authorization under NWP 29 .

The contested case hearing before the ALC took place on September 3 and 4, 2009. Stewart, Hightower, Whatley, and several individual Appellants testified. The record on appeal also includes depositions from various individuals, including Stewart and Hightower. In addition, Appellants called Seth Reice, Ph.D., a professor of ecology and biology at the University of North Carolina at Chapel Hill, as an expert on aquatic ecology. Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

On January 21, 2010, the ALC issued a final order upholding DHEC's approval of coverage under the State General Permit on the merits and further finding that Appellants lacked standing to challenge DHEC's decision. On March 23, 2010, following a hearing on a motion for stay by Appellants, the ALC temporarily stayed its final order pending a decision on Appellants' motion for reconsideration.

By order dated April 1, 2010, the ALC denied Appellants' motion to reconsider and lifted the temporary stay. Appellants then filed their notice of appeal to this court.

ISSUES[8]

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[8] The Home Builders Association of South Carolina has filed an *amicus curiae* brief asserting that Appellants seek to add an unnecessary step in stormwater regulation and nationwide permitting that would have adverse consequences for

I. Did the ALC err in finding Appellants lacked standing to challenge DHEC's decision to authorize coverage for Roper Pond Apartments under the State General Permit?

II. Did the ALC err in holding the 401 certification issued by DHEC was sufficient for a valid 404 permit and coverage under the State General Permit?

III. Did the ALC err in holding that Roper's proposed stormwater control activities could be covered under the State General Permit?

STANDARD OF REVIEW

The standard of review that an appellate court is to apply to appeals from the ALC is set forth in the South Carolina Administrative Procedures Act (APA), specifically in section 1-23-610 of the South Carolina Code (Supp. 2012). *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191 191, 194 (2012). Under section 1-23-610(B), a reviewing court may reverse or modify a decision by the ALC if the substantive rights of the appellant have been prejudiced because of a finding, conclusion, or decision that: (1) violates constitutional or statutory provisions; (2) exceeds the agency's statutory authority; (3) is made upon unlawful procedure; (4) is affected by other error of law; (5) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) is arbitrary, capricious, or characterized by either abuse of discretion or clearly unwarranted exercise of discretion. Section 1-23-610 has been applied not only to findings by the ALC on the merits of a controversy but also to findings by the ALC concerning a party's standing to maintain an action. *See Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 4-8, 693 S.E.2d 426, 428-30 (Ct. App. 2010) (referencing only the APA in stating the standard of review, but ultimately affirming the ALC on the ground that appellant lacked

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the construction industry, the housing market, and the public at large and that existing programs and regulations sufficiently protect the public interest in the permitting process. Because our rulings on the issues Appellants have presented are dispositive of this appeal, we decline to address these policy concerns. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its disposition of a prior issue is dispositive of the appeal).

standing and declining to address appellant's remaining arguments), *cert. denied* (July 7, 2011).

LAW/ANALYSIS

I. Standing

Appellants in this case are: (1) the Town; (2) various residents of Kaminer Station, a subdivision adjacent to and uphill from Roper Pond (Kaminer Station Appellants);[9] and (3) various individuals whose properties border Cary Lake (Cary Lake Appellants).[10] The ALC found none of these groups had standing to maintain this action. We agree.

"'Standing to sue is a fundamental requirement in instituting an action.'" *Bodman v. State of S.C.*, Op. No. 27248 (S.C. Sup. Ct. filed May 8, 2013) (Shearouse Adv. Sh. No. 21 at 27, 31) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)). "When no statute confers standing, the elements of constitutional standing must be met." *Youngblood v. S.C. Dep't of Soc. Servs.*, ___ S.C. ___, ___, 741 S.E.2d 515, 518 (2013).[11]

In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001), the Supreme Court of South Carolina, quoting *Lujan v. Defenders of Wildlife*, 504

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[9] The Kaminer Station Appellants are Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Toney Sinclair, Aaron Small, and Bette Small.

[10] The Cary Lake Appellants are Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown.

[11] The ALC did not consider whether the "public importance" exception could confer standing on any of the Appellants, and Appellants have not raised this exception in their brief. *See Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) ("[S]tanding may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.").

U.S. 555, 560-61 (1992), set forth three requirements that must be met to satisfy "the irreducible constitutional minimum of standing":

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

(Citations omitted).

"The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pine*s, 345 S.C. at 601, 550 S.E.2d at 291. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to withstand a motion to dismiss. *Lujan*, 504 U.S. at 561. Elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation." *Id.* (*quoted in Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

A. The Town

The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. Quoting *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include: (1) the Town's interest in protecting the environmental quality of Cary

Lake, which lies partly within the Town borders; (2) the Town's ability to comply with federal law, such as NPDES regulations; (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal: and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether "proprietary" or not, are sufficient to confer standing on the Town in this case.

As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion.[12] Moreover, he acknowledged the Town is not responsible for the maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the "bottom lake," that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are "fairly traceable" to the challenged action in this case. Similarly, Appellants have not shown any causal connection between the authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC's determination that the Town lacks standing.

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[12] In their reply brief, Appellants cite title 33, section 1342(p) of the United States Code (2006), which the United States Congress added to the CWA in 1987. This section covers municipal and industrial stormwater discharges. Under paragraph (4) of this section, the Administrator of the Environmental Protection Agency is required to establish regulations setting forth permit application requirements for discharges from municipal separate stormwater systems and either the Administrator or appropriate State agency would eventually acquire the authority to issue and deny such permits. We have found nothing in this section either requiring a municipality to obtain a permit for stormwater discharges from a stormwater system that is already covered by a permit or holding a municipality responsible for such discharges.

B. Kaminer Station Appellants

The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.

Linda Jackson, one of the Kaminer Station Appellants, conceded that "water flows down" and there was no serious concern that stormwater from Roper Pond would flow uphill to Kaminer Station. However, Jackson also described the visual appeal of Roper Pond and her appreciation of the nature sounds in the area. She also testified that she had fished on Cary Lake and had seen changes for the worse in that area as it developed. Such observations, even if shared by many others, arguably can still form the basis for a concrete and particularized injury that would confer standing. *See Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) ("[M]erely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Moreover, even those concerns reflecting aesthetic or recreational interests have been recognized as "judicially cognizable injur[ies] in fact." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. Nonetheless, when such interests involve property that is privately owned by a party other than the plaintiff, the presence of an injury in fact cannot be assumed. *Cf. Conservation Council of N.C. v. Costanzo*, 505 F.2d 498, 501-02 (4th Cir. 1974) (stating the plaintiffs' recreational use of privately owned property as either licensees or trespassers did not confer standing to challenge development on that property because there was no evidence that the owner of the property would allow such use to continue in the future). Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants.

Furthermore, we hold substantial evidence supports the ALC's determination that the Kaminer Station Appellants have not established a causal connection between their alleged injuries and the conduct giving rise to their complaint. When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits

rather than the permits themselves. Furthermore, Reice's inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

C. Cary Lake Appellants

Finally, we agree with the ALC that the Cary Lake Appellants failed to show that granting coverage for Roper Pond Apartments under the State General Permit would cause an actual or imminent injury and therefore lacked standing to challenge DHEC's decision to grant coverage under the State General Permit.

Testifying for the Cary Lake Appellants, Elaine Starr stated her home, where she has lived since 1971, borders Cary Lake, which is on the opposite side of Trenholm Road from Roper Pond. She further testified that she had a bachelor's degree in biology and had done graduate work in wetlands and coastal resources. She had participated in several organizations that were concerned with water quality, and she and her family have made extensive use of Cary Lake for recreational purposes. Starr testified about her empirical observations of the decline in the water quality of Cary Lake and how these observations were supported by her use of a Secchi disk, a technique to measure water clarity. She also expressed concerns about the possible demise of the water lilies due to the dredging of Roper Pond, noting "if their [rhizomes] or root systems get damaged or taken way, . . . they may not be there."

According to Starr, the increased sedimentation in Cary Lake that she described resulted from prior occurrences involving possible mismanagement. However, there was no evidence that the project at issue here would lead to similar results. Starr admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments. Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact. We therefore agree with the ALC that the Cary Lake Appellants presented at best only speculative evidence that they would suffer an injury in fact from DHEC's decision to allow Roper Pond Apartments to be covered under the State General Permit.

II. Validity of the 401 Certification

Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

First, although Roper did not initially inform the Corps that it intended to dredge and excavate the pond as part of the project, as of January 6, 2009, when Whatley requested a corrected letter from the Corps indicating that the impacts of the project would be covered under NWP 29 instead of NWP 39, the Corps had been informed that such an activity was to be part of the project. Having received this information, the Corps nevertheless determined that the project would result in "minimal individual and cumulative environmental effects" and met the conditions of NWP 29.

As to Appellants' second argument, we agree with their position that the general conditions for water quality certification require DHEC to review the "overall project proposed by a single owner/developer," "includes all land within the project bound under single ownership," and is not confined to "the land area directly impacted by each NWP request" and their assertion that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site or determined if feasible alternatives were available. Here, however, 401 certification was necessary only as a prerequisite to obtaining a 404 permit from the Corps for filling the jurisdictional wetlands. This requirement was pursuant to 33 U.S.C. section 1341(a)(1) (2006), which states in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction

> or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions . . . .

(emphasis added). Appellants have emphasized they never argued that a 404 permit was necessary to dredge and excavate the pond, and there was no contention here that this activity would result in a discharge into a navigable water.

Furthermore, according to their brief, the specific "impacts" that Appellants maintain were overlooked by DHEC pertained only to the pond. As Appellants point out, under DHEC's general conditions, Roper was required to: (1) demonstrate that impacts to wetlands have been avoided and that unavoidable impacts to wetland areas have been minimized; and (2) provide suitable compensation for any unavoidable impacts. Roper, as the owner of the property on which the pond is located, would be the proper party to object to impacts that have not been avoided or minimized and to enforce compensation for any unavoidable impacts. In other words, Roper would be placed in the illogical position of having to complain about its own project or to demand compensation from itself.

Based on our interpretation of the events in this case, we disagree with Appellants' third argument, their assertion that the project never received a proper water quality certification for coverage under NWP 29. We acknowledge Hightower admitted that after DHEC received notice from the Corps that the project would be covered under NWP 29, it did not issue a letter advising Roper that the project would be consistent with the 401 certification it issued for this NWP and agreed that sending such a letter would have been advisable; however, he also testified that an authorization letter was only a formality for the applicant's benefit and was not required by the State General Permit. The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

Finally, Appellants have challenged the water quality certification on the ground that DHEC failed to review the project to determine: (1) whether it complied with

6 S.C. Code Ann. Regs. 61-68 (2012) and 8 S.C. Code Ann. Regs. 61-101 (2012), both of which were promulgated pursuant to the South Carolina Pollution Control Act; and (2) the impact of the draining and excavation of Roper Pond. They further argue the ALC erroneously relied on *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 552-53, 641 S.E.2d 425, 428 (2007), for the proposition that "a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act." We need not determine whether the ALC correctly applied this holding. We have already determined that the Corps was aware that Roper intended to excavate the pond when it authorized coverage under NWP 29 and that the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit.

III. Coverage Under the State General Permit

Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.

First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.

Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

CONCLUSION

We agree with the ALC that none of the Appellants had standing to maintain their challenge to the authorization of coverage for Roper Pond Apartments under the State General Permit. As to the merits of Appellants' arguments, we affirm the ALC's ruling that Roper is entitled to this coverage.

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David M. Graham, Jr., Appellant,

v.

Welch, Roberts and Amburn, LLP and Russell Patrick Welch, Respondents.

Appellate Case No. 2012-209026

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

Opinion No. 5141
Heard February 13, 2013 – Filed June 12, 2013

AFFIRMED

Bryan D. Caskey and Cantzon Foster, II, both of Foster Law Offices, LLC, of Columbia, for Appellant.

Ronald L. Richter, Jr. and Eric Steven Bland, both of Bland Richter, LLP, of Charleston, for Respondents.

WILLIAMS, J.: David M. Graham, Jr. ("Graham") appeals the circuit court's grant of summary judgment to Welch, Roberts and Amburn, LLP, and Russell Patrick Welch (collectively, "WRA") based on its finding that Graham's claims were barred by the applicable statute of limitations. Graham contends the circuit court erred in granting summary judgment when conflicting evidence existed as to

when Graham knew or should have known he had a cause of action against WRA. We affirm.

FACTS/PROCEDURAL HISTORY

Russell Patrick Welch ("Welch") is a partner at the Charleston accounting firm of Welch, Roberts and Amburn, LLP. In 2005, Graham hired WRA to perform certain accounting and tax services.

On July 5, 2005, Graham received a notice of tax liability stating that he owed $4,296.49 in unpaid taxes to the State of New York. On October 13, 2005, Graham issued a check to WRA for $4,296.49 believing the funds would be used to satisfy his outstanding tax liability. Graham included instructions on the face of the check to "Post to Account: DM Graham."

On November 28, 2005, WRA issued an invoice to Graham "For Services Rendered Through October 31, 2005" in the amount of $6,656.00. This invoice included four line item descriptions of the services performed by WRA; none of these descriptions indicate a payment was made for the tax liability to the State of New York. Instead, this invoice reflected a credit towards the service charges for $4,296.49, leaving a balance owed in the amount of $2,359.51. On December 30, 2005, Graham issued a check made payable to WRA for $2,359.51. This check Graham included the same instruction on the face of the check to "Post to Account: DM Graham."

On November 28, 2008, Graham received notice from his bank that the New York State Department of Taxation and Finance had levied his account to collect unpaid taxes.

On March 9, 2011, Graham commenced this action, alleging the following causes of action against WRA: professional negligence, breach of fiduciary duty, fraud, negligent misrepresentation, conversion, and unjust enrichment. With his complaint, Graham attached an affidavit from Michael Goldson, Graham's new accountant, detailing the alleged actions of WRA, which he believed amounted to professional negligence. On May 24, 2011, WRA answered this complaint, denying any allegations of misconduct and asserting several defenses, including the statute of limitations.

On June 24, 2011, WRA moved for summary judgment on the ground that Graham knew, or should have known, of his claims as early as November 2005 and the action was therefore barred by the applicable statute of limitations.

On October 26, 2011, Graham filed an affidavit detailing his version of the events that led to this lawsuit. In this affidavit, Graham states that he "agreed to send $4,296.49 to [WRA] and for [WRA] to pay the Tax Penalty on [his] behalf." Graham explained, "At the time[,] it was not uncommon for [WRA] to pay expenses on [his] behalf with funds [Graham] provided . . . ." Graham also stated that "[o]n or about April 20, 2010," his bank confirmed that WRA deposited the funds he believed were used to pay his taxes into WRA's account, and "[t]his was the first time [he] knew that a cause of action related to the failure to pay the tax liability might exist against [WRA]."

On October 28, 2011, the circuit court heard WRA's motion for summary judgment. In addition to the pleadings, the court considered Graham's affidavit, Goldson's affidavit that accompanied the complaint, and an affidavit submitted by Welch at the hearing that detailed his account of the story.

On January 17, 2012, the circuit court issued an order granting WRA's motion for summary judgment. In this order, the circuit court found that because Graham had received the November 28 invoice reflecting that Graham's payment of $4,296.49 had been applied towards services rendered and not towards his tax liability, Graham knew or should have known his causes of action against WRA existed at that time. Accordingly, the circuit court concluded that "more than three years had passed since [Graham] first knew or should have known" about his claims, and, as a result, his claims were now "barred by the expiration of the statute of limitations." This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c) provides a circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Rule 56(c),

SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

LAW/ANALYSIS

Graham contends his October 26 affidavit creates conflicting evidence regarding when he knew or should have known of the existence of his cause of action; therefore, he argues the circuit court erred in granting summary judgment. We disagree.

The applicable statute of limitations for Graham's causes of action is three years. *See* S.C. Code Ann. § 15-3-530(5) (Supp. 2012) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years). The "discovery rule" applies to actions brought under section 15-5-530(5). *See* S.C. Code Ann. § 15-3-535 (Supp. 2012); *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 272, 384 S.E.2d 693, 695 (1989), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) ("Section 15-3-535 extended the 'discovery rule' to actions governed by § 15-3-530(5).").

According to "the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997). "We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). In *Bayle v. South Carolina Department of Transportation*, this court stated:

> The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. In other words, whether the particular plaintiff actually knew he had a claim is not the

> test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001) (internal citations omitted).

However, when conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for a jury to decide. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338, 534 S.E.2d 672, 681 (2000) ("[T]he determination of the date the statute [of limitations] began to run in a particular case [is a question] of fact for the jury when the parties present conflicting evidence."); *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) ("The jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action.").

The resolution of this case hinges on when the three-year statute of limitations began to run. Graham contends the first time he knew or could have known about the existence of claims against WRA was in 2008 when the state of New York levied his account. Graham further argues his October 28 affidavit demonstrates a course of dealing between the parties that creates conflicting testimony regarding whether he knew or should have known that his tax liability with New York was unpaid. According to Graham, "this course of dealing would lead a reasonable person to believe that the tax liability had been paid by [WRA], and it would not be until April 29, 2008, that a person of reasonable knowledge would conclude that the tax liability had not been satisfied . . . ."

However, we find that the invoice provided to Graham on November 28, 2005, would put "a reasonable person of common knowledge and experience" on notice that the funds had not been applied towards the outstanding tax liability and had instead been applied towards WRA's service charge. The invoice clearly indicates in its heading that it is billing "[f]or [s]ervices [r]endered [t]hrough October 31, 2005." Additionally, the bill shows a beginning balance of "-$4,296.49," which is the exact amount of the check issued by Graham to pay his New York tax liability. The descriptions of the services provided do not mention the New York tax

liability. The only mention of New York in the brief descriptions shows that WRA conducted "[r]esearch [on] penalty notices from South Carolina and New York regarding prior year balances due."

We agree that Graham's affidavit creates a course of dealing that would lead a reasonable person to expect that Graham's check in the amount of his tax liability would be used to satisfy that liability. Viewing this evidence in the light most favorable to Graham, we find a reasonable person in his position would be justified in believing the funds were used in this way immediately following his delivery of a check for $4,296.49. However, upon receipt of the invoice showing that exact amount being applied towards "services rendered," a reasonable person would then be on notice that their previous assumption was no longer valid. Viewing all inferences that can be reasonably drawn from the evidence in the light most favorable to Graham, we find that the invoice provides notice to "a reasonable person of common knowledge and experience" that the money provided by Graham was not used to satisfy his tax liability with the state of New York. Therefore, the statute of limitations would have begun to run, at the latest, on December 30, 2005, the date when Graham paid the remaining balance from the invoice.

Accordingly, we find the applicable statute of limitations on all of Graham's causes of action had run, and the circuit court properly granted WRA's motion for summary judgment.

CONCLUSION

Based on the foregoing, the order of the circuit court is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Gregory Hembree, Solicitor, Fifteenth Judicial Circuit, on behalf of the Horry County Police Department, Respondent,

v.

One Thousand Eight Hundred Forty-Seven Dollars (1,847.00), U.S. Currency; 1994 Monaco RV, SN: VIN: 1RF120611R1010972; and a Taurus 38 Special Pistol, SN: SF53109, Defendant Property, and Michael James Albin, Defendant,

Of whom, Michael James Albin is the Appellant.

Appellate Case No. 2012-211943

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5142
Heard April 11, 2013 – Filed June 12, 2013

AFFIRMED IN PART AND REVERSED IN PART

David James Canty, of Myrtle Beach, for Appellant.

David Pierce Caraker, Jr., of the Hyman Law Firm, of Florence, for Respondent.

WILLIAMS, J.: Michaela Albin, as personal representative for the estate of Michael J. Albin[1], appeals the circuit court's order (1) ordering the forfeiture of his motor home pursuant to section 44-53-520(a)(3) and (4) of the South Carolina Code (2002), (2) finding that his failure to appeal the denial of his summary judgment motion rendered it the "law of the case," and (3) dismissing his counterclaim for conversion. We affirm in part and reverse in part.

FACTS

After receiving complaints of illegal gambling activities at Putters Lounge (Putters), a Horry County restaurant owned by Albin, agents for the South Carolina State Law Enforcement Division (SLED) initiated an investigation. Pursuant to the investigation, Agents Christina Gainey and Kathy Bass visited Putters several times. During each of their visits, Agents Gainey and Bass engaged in illegal gambling while wearing a hidden recording device. In addition, during their final visit, Agent Gainey asked Albin if she could purchase some marijuana from him. Albin indicated that she and Agent Bass could smoke marijuana with him in his motor home, which was parked directly behind Putters.

The following day, SLED agents executed a search warrant of Putters and the motor home. Upon SLED's request, officers from the Horry County Police Department (HCPD) assisted with the search. During the search and a subsequent inventory of the contents of the motor home, officers from the HCPD discovered five bags containing a total of 137 grams or approximately four ounces of marijuana in the motor home, a pistol, and $1,847 in currency. In addition, SLED agents recovered approximately $15,000 in currency and a laptop computer from the motor home and Putters.[2] HCPD agents also seized the motor home during the execution of the warrant.

The HCPD brought the instant action against Albin for forfeiture of the marijuana, pistol, motor home, and $1,847 in currency the HCPD seized during the execution of the search warrant. Prior to trial, Albin moved for summary judgment on the ground that forfeiture pursuant to section 44-53-520(a)(6) of the South Carolina

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[1] This action was originally brought against Michael Albin. Mr. Albin died after trial, and his estate is represented on appeal by Michaela Albin. For purposes of this opinion and because it is not necessary to our analysis, we will not differentiate between Michael Albin and Michaela Albin.

[2] In general, SLED seized items associated with illegal gambling, while the HCPD seized items associated with illegal drug use.

Code (Supp. 2012), which applies to conveyances, would not be proper because officers seized less than a pound of marijuana required by the section for the forfeiture of a motor vehicle. In response, the HCPD agreed to strike the portion of its complaint proceeding pursuant to subsection (6) of section 44-53-520(a). However, the HCPD argued that it could properly proceed pursuant to subsections (3), which addresses containers, and (4), which addresses property used to facilitate certain drug activities. In a pre-trial order, the Honorable Steven John agreed and denied Albin's motion for summary judgment, finding that the HCPD could proceed pursuant to subsections (3) and (4).

The Honorable Larry B. Hyman tried the case in a bench trial on July 28, 2011. Just before trial, Albin again argued that the portion of the case seeking forfeiture of the motor home should be dismissed. Specifically, Albin argued that the officers found less than a pound of marijuana in the motor home, which falls below the threshold for allowing the forfeiture of a motor vehicle pursuant to subsection (6) of section 44-53-520(a). Judge Hyman denied the motion, finding Judge John's prior order denying Albin's motion for summary judgment on the same grounds was the law of the case because Albin did not appeal that order.

In addition, the HCPD moved to dismiss Albin's counterclaims for the misappropriation of $15,000 seized by SLED during the raid, arguing that they were not properly before the court because SLED was not a party to the instant action. The circuit court agreed, dismissing the counterclaims without prejudice and noting that Albin was free to bring a separate action against SLED to recover currency seized by SLED.

At trial, Albin admitted giving marijuana to Agents Gainey and Bass in his motor home but denied ever selling marijuana to anyone. Albin also admitted purchasing and smoking marijuana in his motor home and claimed he smoked marijuana because his doctor recommended he do so to alleviate the effects of radiation treatments for cancer. Following the bench trial, the circuit court issued a final order (1) ordering the HCPD to return the pistol and $1,847 in currency to Albin and (2) finding Albin presented evidence reflecting legitimate sources of income and evidence that he purchased the pistol for protection after several burglaries and larcenies of his business. However, the court ordered forfeiture of the motor home. This appeal followed.

LAW/ANALYSIS

A. Forfeiture of the Motor Home

Albin argues the circuit court erred in ordering forfeiture of the motor home pursuant to subsections (3) and (4) of section 44-53-520(a). Specifically, Albin contends the court erred in allowing forfeiture of the motor home pursuant to these subsections despite the fact that the amount of marijuana found in the motor home was less than that required for the forfeiture of a motor vehicle pursuant to subsection (6) of section 44-53-520(a). Albin also argues the circuit court erred in finding Judge John's order denying his motion for summary judgment to be the law of the case. We agree.

Initially, we find the circuit court erred in finding Judge John's order denying his motion for summary judgment to be the law of the case. Albin could not have appealed this order because the denial of a motion for summary judgment is not appealable, even after final judgment. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443-44 (2003). We also agree with Albin on the merits.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Accordingly, we "read the statute as a whole" and "should not concentrate on isolated phrases within the statute." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "In that vein, we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *Id.* (alterations, citation, and internal quotation marks omitted).

Section 42-53-520(a) provides in pertinent part that the following are subject to forfeiture:

(1) all controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this article;

(2) all raw materials, products, and equipment of any kind which are used, or which have been positioned for use, in manufacturing, producing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this article;

(3) all property which is used, or which has been positioned for use, as a container for property described in items (1) or (2);

(4) All property, both real and personal, which in any manner is knowingly used to facilitate production, manufacturing, distribution, sale, importation, exportation, or trafficking in various controlled substances as defined in this article;

. . .

(6) all conveyances including, but not limited to, trailers, aircraft, motor vehicles, and watergoing vessels which are used or intended for use unlawfully to conceal, contain, or transport or facilitate the unlawful concealment, possession, containment, manufacture, or transportation of controlled substances and their compounds, except as otherwise provided, must be forfeited to the State. *No motor vehicle may be forfeited to the State under this item unless it is used, intended for use, or in any manner facilitates a violation of Section 44-53-370(a)*[3]*, involving at least one pound or more of marijuana . . . .*

[3] Section 44-53-370(a) (Supp. 2012) of the South Carolina Code makes it illegal "to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with

S.C. Code Ann. § 42-53-520(a) (Supp. 2012) (emphasis and footnote added). Based on the principles of statutory interpretation, we find the circuit court erred in ordering forfeiture of the motor home pursuant to subsections (3) and (4). A statute must be read as a whole and so that no phrase is rendered superfluous. *See CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881. Allowing a seizing agency to proceed pursuant to subsections (3) and (4) would render the one-pound weight limitation found in subsection (6) regarding marijuana meaningless and, therefore, superfluous, because motor vehicles could in every situation be forfeited pursuant to another subsection. For example, as in the instant case, it is likely that in many, if not all, circumstances, a motor vehicle will serve as a container for controlled substances, in which case the motor vehicle could be forfeited pursuant to subsection (3) as well as (6). This concern is further heightened by the fact that subsection (6) purports to apply to "all conveyances including . . . motor vehicles . . . which are used or intended for use unlawfully to . . . contain . . . controlled substances and their compounds . . . ." This language indicates the legislature did not intend for the State to pursue the forfeiture of a motor vehicle pursuant to subsection (3), which applies to containers generally, as well as subsection (6), which specifically applies to motor vehicles. Otherwise, the above language in subsection (6) is rendered redundant and unnecessary because the use of a motor vehicle as a container would already fall within subsection (3).

Further, it is difficult to ascertain why the legislature would preclude the forfeiture of a motor vehicle pursuant to subsection (6) but allow the forfeiture of the same motor vehicle pursuant to subsections (3) or (4). The fact that the legislature specifically addresses conveyances, including motor vehicles, in subsection (6) would appear to reflect the intent that all conveyances be forfeited pursuant to that subsection only. *See Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010) ("[G]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment[.]" (alterations and internal quotation marks omitted)); *cf. Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 432-33, 716 S.E.2d 443, 445 (2011) (holding that a specific statute governing a certain issue controls over the more general language of another statute addressing the issue); *Avant v. Willowglen Academy*, 367 S.C. 315, 319, 626 S.E.2d 797, 799 (2006) (noting "the principle that more specific rules prevail over general ones"). Based on the above considerations and because it is undisputed that less than a pound of marijuana was

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the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or controlled substance analogue."

found in the motor home, we find the circuit court erred in ordering forfeiture of the motor home pursuant to subsections (3) and (4). Accordingly, we reverse the circuit court's order of forfeiture of the motor home.

B. Dismissal of Counterclaims

Albin argues the circuit court erred in dismissing his counterclaims against SLED. We disagree.

Albin filed counterclaims for the misappropriation of $15,000 allegedly seized by SLED during the raid. However, as noted by the circuit court, SLED was not a party to the instant action, and, accordingly, the circuit court dismissed Albin's counterclaims involving the seizure of the funds.

Despite this, Albin points to two statutes in support of his argument that the circuit court improperly dismissed his counterclaims. First, Albin cites section 44-53-520(h) of the South Carolina Code (2002), which states that "whenever the seizure of any property subject to seizure is accomplished as a result of a joint effort by more than one law enforcement agency, the law enforcement agency initiating the investigation is considered to be the agency making the seizure." We fail to see how this section supports Albin's argument that the circuit court erred in dismissing his counterclaims against SLED, which was not a party to the instant action. Further, SLED and the HCPD were investigating and searching for evidence of completely different criminal activity, i.e., the HCPD was investigating and searching for evidence of drug activity, and SLED was investigating and searching for evidence of illegal gambling activity. Accordingly, this argument is without merit.

In addition, Albin contends that pursuant to section 44-53-530 of the South Carolina Code (Supp. 2012), a forfeiture action involving the funds seized by SLED would be brought by the same plaintiff, i.e., the circuit solicitor, as in the instant case. Accordingly, Albin states this supports a finding that he could properly bring counterclaims against SLED in the instant action. This argument is without merit because the circuit solicitor in the instant action was representing the HCPD, not SLED. The fact that the circuit solicitor would also be responsible for bringing a forfeiture action on behalf of SLED does not lead to the result that Albin could properly file counterclaims in the instant case involving any property seized in the circuit, regardless of the agency that seized the property. Accordingly, the circuit court did not err in dismissing Albin's counterclaims involving $15,000

seized by SLED, and we affirm the circuit court's dismissal of Albin's counterclaims.

CONCLUSION

Based on the foregoing, we reverse the circuit court's order allowing forfeiture of the motor home and affirm the ruling dismissing Albin's counterclaims against SLED.

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roger F. Carlson and Mary Jo Carlson, Respondents,

v.

South Carolina State Plastering, LLC, Peter Conley, Individually, Del Webb Communities, Inc., and Pulte Homes, Inc., Defendants,

Of whom Del Webb Communities, Inc. and Pulte Homes, Inc. are the Appellants.

Appellate Case No. 2011-202907

Appeal From Beaufort County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5143
Heard April 3, 2013 – Filed June 12, 2013

REVERSED

Robert L. Widener, of Columbia, and A. Victor Rawl, Jr., of Charleston, both of McNair Law Firm, PA, for Appellants.

W. Jefferson Leath, Jr. and Michael S. Seekings, both of Leath, Bouch & Seekings, LLP, of Charleston; John T. Chakeris, of The Chakeris Law Firm, of Charleston; and Phillip W. Segui, Jr., of Segui Law Firm, LLC, of Mount Pleasant, for Respondents.

WILLIAMS, J.: Del Webb Communities, Inc. (Del Webb) and Pulte Homes, Inc.[1] (Pulte) appeal the circuit court's order denying their motion to compel arbitration based on its finding that they waived any right to arbitration. We reverse.

FACTS

On March 8, 2002, Roger F. Carlson and Mary Jo Carlson entered into a purchase agreement with Del Webb whereby they agreed to purchase a home in the Sun City development in Hilton Head, South Carolina. The purchase agreement contained the following arbitration clause:

> Any controversy or claim arising out of or relating to this Agreement or Your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
>
> . . .
>
> After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act.

The deed to the home, which a representative for Del Webb executed on March 15, 2002, did not include an arbitration clause.

In September 2008, the Carlsons commenced the instant action against Del Webb and Pulte, alleging construction defects in their home's stucco siding. The Carlsons' case is one of about 140 cases currently pending against Del Webb and Pulte involving stucco-clad homes in the Sun City development. Del Webb and Pulte answered in December 2008 and asserted various defenses, including: (1) the alleged failure of the Carlsons to comply with sections 40-59-810 to -860 of the

[1] Del Webb is a subsidiary of Pulte.

South Carolina Code (2011) (Right to Cure Act[2] or the Act), and (2) that the Carlsons' claim was subject to mandatory arbitration.

In February 2009, the Carlsons sent Del Webb and Pulte a letter purportedly providing notice as required by the Right to Cure Act along with a proposed consent order staying the action to allow for compliance with the Act. Del Webb and Pulte responded with a letter requesting clarification of the defects as allowed by the Act. Del Webb and Pulte allege the Carlsons did not respond to the request.

In May 2009, the circuit court entered a consent order finding that the Carlsons filed the instant action without first complying with the requirements of the Right to Cure Act and staying the case until the Carlsons complied with the Act. The stay expired ninety days after it was entered. Del Webb and Pulte allege that, at a status conference in April 2010 addressing all 140 cases, they advised the circuit court that the two threshold issues to decide in the cases were the Right to Cure Act and arbitration. Also in April 2010, the Carlsons moved to amend their complaint to add class action allegations pursuant to Rule 23(a), SCRCP. Del Webb and Pulte opposed the motion, and the circuit court granted the motion on December 10, 2010. The Carlsons filed their amended complaint on December 29, 2010.

On May 24, 2010, Del Webb and Pulte filed a motion to dismiss based on noncompliance with the Right to Cure Act in a related case, *Amadeo v. South Carolina State Plastering, LLC, Peter Conley, Individually, Del Webb, & Pulte*, No. 09-CP-2904 (hereinafter, *Amadeo* case). The case was one of the 140 cases brought against Del Webb and Pulte alleging defective stucco on homes in the Sun City development. In the alternative, Del Webb and Pulte moved to stay the case and compel compliance with the Act.

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[2] The Right to Cure Act requires claimants to give notice to a contractor ninety days before filing an action against the contractor arising out of the construction of a dwelling. S.C. Code Ann. § 40-59-840 (2011). After receiving such notice, the contractor has fifteen days to request clarification of the alleged defects if the defect is not sufficiently stated. *Id.* Otherwise, the contractor has thirty days after receipt of such notice to "inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." S.C. Code Ann. § 40-59-850 (2011). If a claimant files an action in court before complying with the Right to Cure Act, upon motion of a party, the court shall stay the action until the claimant has complied with the Act. S.C. Code Ann. § 40-59-830 (2011).

In a status conference on July 13, 2010, the circuit court imposed a seventy-day briefing schedule to brief the Right to Cure Act issue. Del Webb and Pulte assert they again informed the court during this status conference that the two threshold issues to address were the Right to Cure Act and arbitration, and the circuit court indicated its intent to address the Right to Cure Act issue first.

In an order filed January 11, 2011, the circuit court denied Del Webb and Pulte's motion to dismiss in the *Amadeo* case. The circuit court noted that because it had not yet certified the class, the order technically only applied to the *Amadeo* case, but that "all parties are aware that there are multiple pending similarly situated civil claims."

Del Webb and Pulte moved to compel arbitration in the current action on February 14, 2011. In an order filed October 20, 2011, the circuit court denied the motion, finding that Del Webb and Pulte had waived the right to compel arbitration based on their delay in bringing the motion. This appeal followed.

LAW/ANALYSIS

I. Standard of Review

"In reviewing a circuit court's decision regarding a motion to stay an action pending arbitration, the determination of whether a party waived its right to arbitrate is a legal conclusion subject to *de novo* review . . . ." *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) (internal quotation marks omitted).

II. Waiver

Del Webb and Pulte argue the circuit court erred in finding they waived their right to enforce the arbitration clause in the purchase contract by engaging in litigation for over two years before filing a motion to compel arbitration. Specifically, Del Webb and Pulte argue (1) the Carlsons did not suffer any prejudice as the result of the delay; (2) Del Webb and Pulte did not engage in any discovery before filing the motion; and (3) Del Webb and Pulte did not file the motion sooner because they were waiting on the resolution of the Right to Cure Act issue. We agree.

"The right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011). "In order to establish waiver, a party must show prejudice through an undue burden caused by

delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* (internal quotation marks omitted).

This court has previously recognized three factors to consider when determining whether a party has waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Davis, 394 S.C. at 131, 713 S.E.2d at 807 (internal quotation marks omitted). "To establish prejudice, the non-moving party must show something more than mere inconvenience." *Id.* (internal quotation marks omitted). In addition to the above factors, this court has also considered the extent to which the parties have availed themselves of the circuit court's assistance. *See id.* at 133, 713 S.E.2d at 808.

Based on the above factors, we find the circuit court erred in denying Del Webb and Pulte's motion to compel arbitration. First, we acknowledge that a relatively substantial length of time transpired in the instant case between the commencement of the action and the commencement of the motion to compel arbitration. Specifically, the Carlsons commenced the instant action in September 2008, and Del Webb and Pulte did not file their motion to compel until February 2011, over two years after the filing of the complaint. Nevertheless, Del Webb and Pulte had raised the issue of arbitration since the inception of the action. The history of activity in the instant case indicates that the delay in filing the motion to compel was the result of the circuit court's decision to address the Right to Cure Act issue first and not because of any dilatory actions or tactics by Del Webb and Pulte.

Second, no discovery has occurred in the instant case. In its order, the circuit court relied in part on a list of more than forty actions undertaken by Del Webb and Pulte in support of its ruling denying the motion to compel arbitration. However, the majority of the actions on the list were taken in other cases against Del Webb and Pulte. Although we recognize that similar cases are currently pending against

Del Webb and Pulte, we find it would be inappropriate to consider actions undertaken in other cases for purposes of determining the extent of discovery that has been undertaken in the instant case. Accordingly, we find the lack of discovery conducted by Del Webb and Pulte weighs in favor of granting the motion to compel arbitration. *See Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding an eight-month period in which the "litigation consisted of routine administrative matters and limited discovery [that] did not involve the taking of depositions or extensive interrogatories" did not establish waiver).

Finally, due to the relatively limited amount of activity occurring in the instant case, the Carlsons will not be prejudiced by Del Webb and Pulte's delay in filing their motion to compel arbitration. Further, the record reveals the Carlsons were on notice from the inception of Del Webb and Pulte's involvement in the case that they would be seeking to compel arbitration. Aside from the mere passage of time, the Carlsons can point to no prejudice they will suffer as the result of Del Webb and Pulte's delay in moving to compel arbitration. Accordingly, we find this factor weighs in favor of granting the motion to compel arbitration. Based on the foregoing, we find the circuit court erred in denying Del Webb and Pulte's motion to compel arbitration.

III. Unconscionability

The Carlsons argue as an additional sustaining ground that the purchase agreement, including the arbitration clause, is unconscionable and, thus, unenforceable.[3] We disagree.

"General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 24-25, 644 S.E.2d at 668. In making this determination, courts must consider that "[t]he policies of the United States and this State favor arbitration of

[3] The Carlsons raised this argument and the following two arguments to the circuit court, but the court declined to rule on the issues because it denied the motion to compel arbitration based on waiver.

disputes." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008). Accordingly, "[t]here is a strong presumption in favor of the validity of arbitration agreements." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

The Carlsons point to the *Simpson* case cited above in support of their argument that the arbitration clause in the purchase agreement was unconscionable. However, we find the facts of the instant case distinguishable. In *Simpson*, the supreme court found an arbitration clause in a contract involving the sale of an automobile to be unconscionable. *Id.* The court first determined that the purchaser had no meaningful choice in agreeing to arbitrate because (1) the contract she signed was an adhesion contract; (2) the arbitration clause was inconspicuous in the contract; and (3) the purchase was for a necessity. *Id.* at 26-28, 644 S.E.2d at 669-670. The court then determined that the arbitration clause was substantively oppressive and one-sided because it prohibited the recovery of punitive, exemplary, double, or treble damages. *Id.* at 28, 644 S.E.2d at 670. The court found this limitation on damages violated statutory law because it precluded the plaintiff from receiving mandatory statutory remedies under the South Carolina Unfair Trade Practices Act and the Dealers Act and undermined the statutes' purposes of punishing acts that adversely affect the public interest. *Id.* at 30, 644 S.E.2d at 671. In addition, the court found the arbitration clause's stipulation that the dealer could bring a judicial proceeding irrespective of any pending consumer claims requiring arbitration to be oppressive. *Id.* at 31-32, 644 S.E.2d at 672. Specifically, the court noted that this created the possibility of a scenario "in which a dealer's claim and delivery action is initiated in court, completed, and the vehicle sold prior to an arbitrator's determination of the consumer's rights in the same vehicle." *Id.* at 32, 644 S.E.2d at 672.

In contrast to the facts in *Simpson*, no evidence in the record indicates whether the purchase agreement was an adhesion contract, and the clause is clearly identified in the purchase agreement. In addition, the arbitration clause in the purchase agreement does not waive any rights or remedies otherwise available by law. Although the Carlsons point to other limitations in the purchase agreement, such as a provision limiting the statute of limitations for bringing claims to two years, these provisions are not part of the arbitration clause and are irrelevant to a determination of whether the arbitration clause is unconscionable. *See Davis*, 394 S.C. at 125, 713 S.E.2d at 804 (noting that arbitration clauses are severable from the contracts in which they are contained and, therefore, that the issue of the

arbitration clause's validity is distinct from the substantive validity of the contract as a whole). Finally, the arbitration clause does not lack mutuality and applies to Del Webb and Pulte as well as the Carlsons. Based on the foregoing, we find the Carlsons' argument that the arbitration clause was unconscionable is without merit.

IV. Merger

The Carlsons also argue as an additional sustaining ground that the doctrine of merger precludes arbitration of their claims. Specifically, the Carlsons argue that because the deed, which contained no arbitration clause, superseded the purchase agreement, their claims are not subject to arbitration. We disagree.

The merger by deed doctrine provides that "a deed made in in full execution of a contract of sale of land merges the provisions of the contract therein." *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957); *see also Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 133 (Ct. App. 1984) ("A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract . . . ." (quoting *Charleston & W. Carolina Ry. Co.*, 231 S.C. at 505, 99 S.E.2d at 193)). However, agreements that are not intended to be merged in a deed are not merged into the deed. *See Hughes v. Greenville Country Club*, 283 S.C. 448, 450-51, 322 S.E.2d 827, 828 (Ct. App. 1984). "[T]he party denying merger has the burden of proving by clear and convincing evidence that merger was not intended." *Id.*

In the instant case, we find the parties did not intend for the arbitration clause to be superseded by the subsequently-executed deed. The purchase agreement in the instant case expressly provides, "The covenants, disclaimers and agreements contained in this Agreement shall not be deemed to be merged into or waived by the instruments executed at Closing, but shall expressly survive the Closing and continue to be binding upon both parties." In addition, the arbitration clause in the purchase agreement specifically states that "[a]fter closing, every controversy or claim arising out of or relating to this Agreement . . . shall be settled by binding arbitration." Pursuant to the clear and unambiguous terms of the purchase agreement, clear and convincing evidence supports a finding that the parties did not intend for the arbitration clause to be merged into the deed at closing. Accordingly, this argument has no merit, and we decline to affirm the circuit court's order on this ground.

V. Scope of Arbitration Clause

As a third additional sustaining ground, the Carlsons argue that because their claims arise in tort, they are not subject to the purchase agreement's arbitration clause because the clause only applies to claims arising in contract. We disagree.

"Arbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *New Hope Missionary Baptist Church*, 379 S.C. at 627, 667 S.E.2d at 4. "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Landers v. FDIC*, 402 S.C. 100, __, 739 S.E.2d 209, 213-14 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Courts have held that such broad clauses "appl[y] to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* at __, 739 S.E.2d at 214. "Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract, but embraces every dispute between the parties having a significant relationship to the contract." *Id.* (alterations and internal quotation marks omitted). Accordingly, the "court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

Based on the above standard, we find the Carlsons' tort claims fall within the scope of the arbitration clause in the instant case. The arbitration clause in the purchase agreement executed by the Carlsons applies to "every controversy or claim arising out of or relating to this Agreement, or the breach thereof . . . ." We hold the factual allegations underlying the Carlsons' claims have a significant relationship between the purchase agreement, such that the arbitration clause should be read to encompass the Carlsons' tort claims. The Carlsons' claims all arise from Del Webb and Pulte's allegedly defective construction of their home. The purchase agreement encompassed the parties' agreements regarding the construction of the Carlsons' home and includes Del Webb and Pulte's agreement to construct a home free from defective materials. Therefore, we find the arbitration clause in the purchase agreement was not intended to apply to claims arising in contract only and encompasses the Carlsons' tort claims as well. This conclusion is supported by recent case law in this state. *See, e.g.*, *Landers*, 402 S.C. at __, 739 S.E.2d at 214-15 (finding plaintiff's tort claims for slander and intentional infliction of emotional stress arising from his employment with the defendant were encompassed by an

arbitration clause in his employment contract that requires arbitration for "any controversy or claim arising out of or relating to this contract, or the breach thereof"). Accordingly, we find this argument is without merit and decline to affirm the circuit court's decision on this ground.

CONCLUSION

Based on the foregoing, we reverse the order of the circuit court denying Del Webb and Pulte's motion to compel arbitration.

REVERSED.

HUFF and KONDUROS, JJ., concur.