# The Supreme Court of South Carolina

In the Matter of George Thomas Samaha, Respondent.

Appellate Case No. 2012-206426

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ORDER

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By opinion dated August 1, 2012, respondent was suspended from the practice of law in this state for one (1) year. *In the Matter of Samaha,* Op. No. 27149 (S.C. Sup. Ct. filed August 1, 2012) (Shearouse Adv. Sh. No. 26 at 90). The Office of Disciplinary Counsel has requested the appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that Danny Villacarlos Butler, 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. Butler shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Butler 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 Danny Villacarlos Butler, 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 Danny Villacarlos Butler, Esquire, has been duly

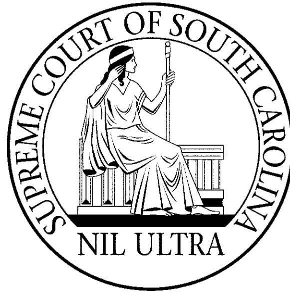
appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Butler's office.

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

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

Columbia, South Carolina

August 3, 2012




# OPINIONS

**OF**

# THE SUPREME COURT

**AND**

# COURT OF APPEALS

**OF**

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 27**
**August 8, 2012**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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

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Monica Weston, Petitioner,

v.

Kim's Dollar Store and CIBA Vision, a Division of Novartis Company, Respondents.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 27155
Heard January 26, 2012 – Filed August 8, 2012

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**AFFIRMED AND REMANDED**

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Robert L. Widener, Celeste T. Jones, A. Victor Rawl, Jr., and Andrew G. Melling, of McNair Law Firm, of Columbia; and Stevens Bultman Elliott, of Columbia, for Petitioner.

Daniel Thomas Sullivan, of Columbia, for Respondent Kim's Dollar Store.

Curtis L. Ott, of Gallivan White & Boyd, of Columbia; and Keith D. Munson and Sandi R. Wilson, of Womble Carlyle Sandridge & Rice, of

Greenville, for Respondent CIBA Vision, a Division of Novartis Company.

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**JUSTICE KITTREDGE:** We granted a writ of certiorari to review the court of appeals' decision in this matter. *Weston v. Kim's Dollar Store*, 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009). Petitioner Monica Weston purchased a pair of prescription decorative, colored contact lenses without a prescription from Respondent Kim's Dollar Store, an unauthorized seller. The lenses were manufactured by Respondent CIBA Vision (CIBA). Petitioner developed an eye infection which led to the loss of vision in her left eye. Thereafter, Petitioner brought an action against Kim's Dollar Store and CIBA alleging six causes of action. The trial court granted partial summary judgment in favor of CIBA as to three of the six causes of action based on federal preemption, and the court of appeals affirmed.

On certiorari, Petitioner concedes the lenses she purchased are Class III medical devices but argues her claims are not preempted because CIBA failed to show the lenses were approved by the Food and Drug Administration (FDA) through the pre-market approval (PMA) process. Having carefully canvassed the voluminous record, we find these lenses were FDA approved through the PMA process. Accordingly, we affirm the court of appeals to the extent partial summary judgment was granted on claims that would impose common-law requirements "different from, or in addition to" applicable FDA requirements. As to the remaining causes of action, we remand for further proceedings consistent with this opinion.

## I.

## PROCEDURAL HISTORY

The underlying facts are set forth in the court of appeals' well-reasoned opinion. For ease of reference, we reiterate only that the contact lenses Petitioner purchased were FreshLook Colors brand lenses with ultraviolet (UV) protection, to be sold by prescription only, and approved for extended wear. The lenses were non-corrective, or "plano" lenses.

Petitioner filed suit against Kim's Dollar Store and CIBA alleging six causes of action and seeking damages for her injuries.[1] Essentially, Petitioner claimed CIBA knew its plano lenses were frequently sold without a prescription and by unauthorized sellers, yet CIBA failed to take steps to ensure customers received lenses by prescription only and with appropriate warnings and instructions. CIBA moved for summary judgment on the basis that Petitioner's claims were preempted by federal law. Following a hearing, the trial court granted partial summary judgment in favor of CIBA as to Petitioner's claims based on "warning, labeling, design, marketing, misbranding, or similar claims."

The court of appeals affirmed the partial grant of summary judgment, finding CIBA demonstrated that no genuine issue of material fact existed as to whether FreshLook Colors plano lenses underwent the PMA process and were subject to device-specific FDA requirements. As to Petitioner's state common-law claims, the court of appeals found "[a]ny state requirements imposed by a jury verdict in favor of the causes of action at issue would be in addition to or in contradiction of federal requirements, and therefore . . . were properly dismissed by the circuit court." *Weston*, 385 S.C. at 537, 684 S.E.2d at 778.

Before now, Petitioner has vigorously claimed that the contact lenses she purchased should be considered a cosmetic, not a medical device, and substantial portions of the trial court's order and the court of appeals' opinion were devoted to that issue. However, Petitioner now concedes the plano lenses she purchased are Class III medical devices. Thus, the sole issue before this Court is Petitioner's claim that a genuine issue of material fact exists as to whether FreshLook Colors UV plano lenses were subject to FDA approval through the PMA process.

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[1] The six causes of action in Petitioner's amended complaint are as follows: (1) negligence per se for violating state and federal statutory requirements regarding the manufacture, promotion, and sale of FreshLook Colors lenses; (2) negligence in the manufacture, sale, promotion, and distribution of FreshLook Colors lenses; (3) breach of implied warranty of merchantability and fitness because the lenses were not safely labeled; (4) strict liability for placing defectively labeled products into the stream of commerce; (5) sale of a defective product for inadequate warnings; and (6) a claim under the South Carolina Unfair Trade Practices Act, based on CIBA's willful and knowing failure to comply with state and federal statutes regarding the sale and distribution of FreshLook Colors lenses.

## II.

## STANDARD OF REVIEW

A trial court may grant 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." Rule 56(c), SCRCP. "Summary judgment should be granted only where it is perfectly clear that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law." *Wortman v. Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992).

## III.

## ANALYSIS

The applicable law regarding federal regulation of contact lenses is set forth in the court of appeal's well-researched and reasoned opinion. Here, we reiterate only that Congress included an **express preemption** provision in the Medical Device Amendments of 1976 (MDA),[2] which provides:

> [N]o State or political subdivision of a State may establish or continue with respect to a device intended for human use any requirement—
> (1) **which is different from, or in addition to, any requirement applicable under this chapter to the device**, and
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

[2] *See generally* Federal Food, Drug, & Cosmetic Act, 21 U.S.C. §§ 301-399d.

21 U.S.C. § 360k(a) (emphasis added). The United States Supreme Court made clear in its recent decision in *National Meat Ass'n v. Harris*, that express preemption provisions should be construed broadly, with an eye towards a federal agency's extensive authority and responsibility of ensuring the safety and effectiveness of consumer products.[3] 132 S.Ct. 965 (2012). Although *Harris* examined a different federal regulatory scheme, we believe that opinion is instructive as to the broad manner in which express preemption provisions should be construed, particularly where, as here, the federal regulatory scheme at issue does not contain a saving clause.

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[3] *Harris* involved the Federal Meat Inspection Act (FMIA), which imposes requirements upon slaughterhouses' handling of certain animals. At issue was the efficacy of a California statute governing the treatment of certain animals in slaughterhouses, including those regulated under FMIA. The FMIA includes an express preemption provision stating:

> Requirements within the scope of [FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided under [FMIA] which are *in addition to, or different than* those made under [FMIA] may not be imposed by any State.

21 U.S.C. § 678 (emphasis added).

The FMIA also includes a saving clause, which states that the Act "shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this [Act], with respect to any other matters regulated under this [Act]." *Harris*, 132 S.Ct. at 969, n.3 (quoting 21 U.S.C. § 678).

Notwithstanding the saving clause, the United States Supreme Court construed the FMIA's express preemption provision to find that it "sweeps widely—and in so doing, blocks the applications of [the California statute] challenged here. The clause prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the [FMIA] and concern a slaughterhouse's facilities or operations." *Id.* at 970. The Supreme Court stated, "California's [statute] endeavors to regulate the same thing, at the same time, in the same place—except by imposing different requirements [than the FMIA]." *Id.* at 975. Accordingly, the Supreme Court concluded the California statute was preempted. *Id.*

As to federal requirements, pre-market approval imposes device-specific requirements as contemplated by the MDA. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 322 (2008). "Absent other indication, reference to a State's 'requirements' includes its common-law duties." *Id*. at 324. However, "State requirements are pre-empted under the MDA only to the extent that they are 'different from, or in addition to' the requirements imposed by federal law." *Id.* at 330. "Thus, § 360k does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements." *Id.*

Thus, the first step in the preemption inquiry is to determine whether the federal government has established requirements applicable to the device through the PMA process. *Id*. at 321. If so, the next step is to determine whether the state common-law claims parallel the federal requirements (then, the state claim is not preempted) or whether the state common-law claims are "different from, or in addition to" the federal requirements (then, state claim is preempted). Petitioner now argues the contact lenses at issue here—plano lenses with UV protection—were never subject to PMA or supplemental PMA.

The key question in the present case is whether the lenses Petitioner purchased were subject to device-specific federal requirements imposed by virtue of the PMA process.[4] Like the court of appeals, we find there is no genuine issue or dispute that the lenses Petitioner purchased are subject to device-specific federal requirements by virtue of the PMA process.

There is no dispute that the lenses Petitioner purchased were UV lenses. In 1996, CIBA received a letter from the FDA approving PMA supplement number 39, which "requested approval for incorporating an ultra-violet absorber" into

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[4] CIBA asserts there exists a mechanism whereby the FDA's position on whether a device is covered by a PMA may be sought. At the trial court level and on appeal, CIBA has requested that each court seek the FDA's position on whether it granted PMA with respect to the lenses in question. However, Petitioner has consistently objected to such an inquiry being made. We have not researched the availability of this option because we find further steps to ascertain the FDA's position are unnecessary. We find the record is manifestly clear that the lenses Petitioner purchased received PMA.

FreshLook Colors UV lenses. Additionally, the FDA approved a supplemental PMA in 1999 that provided in part that FreshLook lenses "with UV-absorbing monomer help protect against the transmission of harmful UV radiation to the cornea and into the eye." Thus, because of the presence of the UV-absorbing component, we find that these lenses were subject to device-specific FDA requirements. The record establishes as a matter of law that these lenses are covered by PMAs. The first prong of the *Riegel* standard has been met and, therefore, express preemption is triggered.

This leads to the section 360k inquiry—whether Petitioner's state claims are different from or in addition to the device's specific federal requirements. As noted above, only state requirements that are "different from, or in addition to" the requirements imposed by the PMA process are preempted. State common law claims premised on a violation of FDA requirements that "parallel," rather than add to, federal requirements are not preempted. *Riegel*, 552 U.S. at 330. Here, Petitioner claims CIBA knew or should have known that its lenses were being marketed and sold unlawfully.[5]

The trial court granted summary judgment as to Petitioner's "claims that are dependent on warning, labeling, design, marketing, misbranding, or similar claims. Specifically, Count II, Count V, and Count VI of the Complaint are hereby dismissed." At oral argument, CIBA's counsel conceded that Petitioner's claim regarding negligence in the manufacture of FreshLook Colors lenses survives summary judgment. Accordingly, to the extent partial summary judgment was granted in that regard, we vacate the trial court's order.

Further, we hold that, to the extent Petitioner seeks to challenge the sufficiency of the FDA-approved requirements imposed in the PMA process, the partial grant of summary judgment was entirely proper. Any claim that imposes requirements different from or additional to those set forth in the PMA is expressly preempted. However, any claim that parallels applicable federal requirements may proceed.

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[5] Essentially, Petitioner claims CIBA knew its plano lenses were frequently sold without a prescription and by unauthorized sellers, yet CIBA failed to take steps to ensure customers received the lenses through prescriptions only and with appropriate warnings and instructions.

## IV.

## CONCLUSION

Due to the lack of specificity in Petitioner's complaint and the trial court's order granting summary judgment, we regret we cannot be more specific in delineating which claims survive the partial grant of summary judgment. Therefore, for the foregoing reasons and in accordance with section 360k, we affirm the partial grant of summary judgment to the extent it was granted on claims that would impose common-law requirements "different from, or in addition to" applicable FDA requirements. As to the remaining causes of action, we remand for further proceedings consistent with this opinion.

**AFFIRMED AND REMANDED.**

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

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

Case No.: 2007-AL-17-0299 Alltel Communications, Inc., Petitioner,
v.
South Carolina Department of Revenue, Respondent.

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Case No.: 2007-AL-17-0300 Alltel Mobile Communications of the Carolinas, Inc., Petitioner,
v.
South Carolina Department of Revenue, Respondent.

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Case No.: 2007-AL-17-0301 New York Newco Subsidiary, Petitioner,
v.
South Carolina Department of Revenue, Respondent.

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Case No.: 2007-AL-17-0302 Telespectrum, Inc., Petitioner,
v.
South Carolina Department of Revenue, Respondent.

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Case No.: 2007-AL-17-0303 360 Communications Co. of SC No. 1, Petitioner,
v.
South Carolina Department of Revenue, Respondent.

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Case No.:2007-AL-17-0304 360 Communications Co. of SC No. 2, Petitioner,
v.
South Carolina Department of Revenue, Respondent.

Appellate Case No. 2010-165386

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Marvin F. Kittrell, Chief Administrative Law Judge

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Opinion No. 27156
Heard June 7, 2012 – Filed August 8, 2012

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**REVERSED**

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John Marion S. Hoefer and Tracey Colton Green, both of Willoughby & Hoefer, of Columbia, for Petitioners.

Harry A. Hancock of Columbia, for Respondent South Carolina Department of Revenue.

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**JUSTICE KITTREDGE:** We granted a writ of certiorari to review the court of appeals' unpublished opinion in this matter. *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, Op. No. 2010-UP-232 (S.C. Ct. App. filed April 7, 2010). This case presents the legal question of whether the Alltel Entities (collectively Petitioners), which are cellular service providers, are included in the definition of "telephone company" for the purpose of increased license fees in S.C. Code Ann. section 12-20-100 (2000). Pursuant to cross motions for summary judgment, the Administrative Law Court (ALC) granted summary judgment in favor of Petitioners, finding that they were not telephone companies for purposes of section 12-20-100. Alternatively, the ALC found that if the statute were ambiguous,

Petitioners would prevail under the rule that an ambiguity in a taxing statute must be construed in favor of the taxpayer.

Although the court of appeals recognized that the application of section 12-20-100 to Petitioners is not "absolutely clear," it reversed the grant of summary judgment and remanded the matter to the ALC for additional fact finding. We reverse the court of appeals and reinstate the ALC's grant of summary judgment in favor of Petitioners. The term "telephone company" is not a defined term and its application to Petitioners is doubtful, as the court of appeals conceded. The presence of an ambiguity in a tax assessment statute requires that a court resolve that doubt in favor of the taxpayer. Accordingly, we resolve the case in line with the ALC's alternative holding.

**I.**

Summary judgment is proper where "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; *see also* ALC Rule 68 (stating the South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules). The question of statutory interpretation is one of law for the court to decide. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 73, 716 S.E.2d 877, 881 (2011). A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. *See* S.C. Code Ann. § 1-23-610(B)(a), (d) (Supp. 2011).

**II.**

Petitioners are engaged in the business of providing wireless communication services, or "cell phone" services, via radio waves within South Carolina. Petitioners timely filed corporate income tax returns with the Department of Revenue (DOR) with the required license fee reports for the years ending December 31, 1999 through December 31, 2003. Petitioners calculated their annual corporate license fee for the years at issue in accordance with the license fee generally applicable to corporations. *See* S.C. Code Ann. § 12-20-50 (requiring every corporation, except those that qualify as utilities and electric cooperatives, to pay a general annual license fee as determined by the records of the corporation).

In 2004, DOR conducted an audit and assessed a total deficiency of $4,709,671 against Petitioners, consisting of underpaid corporate license fees, understatement penalties, and interest. The basis for the deficiency was DOR's determination that Petitioners had erroneously used section 12-20-50 to calculate their license fees. DOR asserted each Petitioner was a "telephone company" and therefore required to pay heightened license fees imposed on utilities and electric cooperatives in accordance with section 12-20-100. Specifically, section 12-20-100(A) provides:

> In the place of the license fee imposed by Section 12-20-50, every express company, street railway company, navigation company, waterworks company, power company, electric cooperative, light company, gas company, telegraph company, and *telephone company* shall file an annual report with the department and pay a [heightened] license fee . . . .[1]

S.C. Code Ann. § 12-20-100(A) (emphasis added).

Each Petitioner filed a protest of the proposed deficiency pursuant to S.C. Code Ann. Section 12-60-450 (2000). DOR subsequently issued its determination denying all protests. Thereafter, Petitioners filed requests for a contested case hearing with the ALC, seeking to challenge DOR's deficiency assessment. Because the challenge presented a single question of statutory construction, the cases were consolidated, and the matter was submitted to the ALC on stipulations and cross motions for summary judgment. In relevant part, the parties stipulated that:

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[1] The heightened license fees are as follows:

> (1) one dollar for each thousand dollars, or fraction of a thousand dollars, of fair market value of property owned and used within this State in the conduct of business as determined by the department for property tax purposes for the preceding taxable year; and
>
> (2)(a) three dollars for each thousand dollars, or fraction of a thousand dollars, of gross receipts derived from services rendered from regulated business within this State during the preceding taxable year . . . .

S.C. Code Ann. § 12-20-100(A).

> (44) Petitioners are each a "radio common carrier" because each is a corporation "owning or operating in this State equipment or facilities for the transmission of intelligence by modulated radio frequency signal, for compensation to the public";
>
> *(50) "Telephones and telephone companies transmit intelligence over a vast network of wires located in public rights of way and in easements over private property"*;
>
> (51) Petitioners "do not have facilities located in public rights of way"; and
>
> (52) Petitioners provide "wireless voice and data communications services [using] radio communication towers or facilities owned or leased by [Petitioners] or licensed to [Petitioners]."

(emphasis added).

The ALC granted Petitioners' motion for summary judgment. The ALC found Petitioners were not required to pay the heightened license fees imposed by section 12-20-100 because they were not "telephone compan[ies]" under the plain language of the statute and the parties agreed upon the definition of "telephone company" found in Stipulation 50. Additionally, the ALC noted that while landline telephone companies have been given the power of eminent domain and the authority to install wires and facilities in public rights-of-way, wireless service providers have not been given these same privileges.

The ALC alternatively ruled that even if the term "telephone company" were ambiguous, Petitioners must prevail. Here, the ALC referenced the settled principle that any substantial doubt in the application of a tax statute must be resolved in favor of the taxpayer. *See Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509-510 (1936) ("[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.").

As noted, in an unpublished opinion, the court of appeals reversed and remanded the ALC's order, holding summary judgment was improper because the application of section 12-20-100 to Petitioners was not "absolutely clear as a matter of law." The court found the ALC erroneously relied on Stipulation 50's definition of the term "telephone company" in its determination that Petitioners were not a telephone company under the plain language of the statute. The court correctly noted that determining the meaning of section 12-20-100 was an issue of law to be decided by the court, rather than the parties, and that courts are not bound by parties' stipulations of law. *See Greenville Cnty. Fair Ass'n v. Christenberry*, 198 S.C. 338, 17 S.E.2d 857 (1941); *cf. Media Gen.Commc'ns , Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 151-52, 694 S.E.2d 525, 531-32 (2010) (accepting and relying on parties *factual* stipulations regarding the taxable income formulas at issue).

The court of appeals, however, did not attempt to define the term "telephone company." Instead, it remanded the case for additional development of the facts, finding more information was needed regarding the nature of Petitioners' services in order to determine whether they were "telephone compan[ies]" for purposes of section 12-20-100.[2]

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[2] In our opinion, a remand to the ALC for further factual development would be futile in light of the 63 joint stipulations filed by the parties, including the stipulations regarding Petitioners' business and the technologies Petitioners use to provide wireless communication services. In this case, the summary judgment inquiry was purely one of law. *See CFRE, LLC*, 395 S.C. at 73, 716 S.E.2d at 881 (noting questions of statutory interpretation are questions of law for the court to decide). Moreover, the parties filed cross motions for summary judgment, thereby indicating the parties' belief that further development of the facts was unnecessary. *See Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir. 1981) ("[C]ross motions for summary judgments do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties.").

## III.

The parties agree that Petitioners use radio waves, not landlines, to transmit communications. According to Petitioners, the plain meaning of the term "telephone company," in conjunction with the stipulations entered into by the parties, demonstrates that "telephone company" means a company that employs landlines and wires to transmit telephonic communications. Thus, Petitioners argue they are not subject to the heightened license fee of section 12-20-100 under the plain meaning rule.[3] "The usual rules of statutory construction apply to the

[3] Petitioners' position, adopted by the ALC, has ostensible merit. The predecessor to section 12-20-100 was enacted in 1904, yet more than a century later the term "telephone company" remains undefined by the legislature. As this Court has explained, "The tax imposed by [section 12-20-100's predecessor], therein called a 'license fee,' is manifestly an excise tax, laid under the benefit theory of taxation upon the public service corporations named for the privilege of exercising their corporate franchises and carrying on their business within the state." *Columbia Ry., Gas, & Elec. Co. v. Carter*, 127 S.C. 473, 121 S.E. 377 (1924). With regard to telephone companies, the earliest laws were "designed to accommodate the original technology, which required the use of land rights-of-way to place telephone poles and run telephone lines." William J. Quirk & Fred A. Walters, *A Constitutional and Statutory History of the Telephone Business in South Carolina*, 51 S.C. L. Rev. 290, 293 (2000). States granted franchises over public and private lands to construct and operate telephone businesses and "local governments could not exclude a telephone company, but they could enforce normal police power regulation over the industry." *Id.* We note that telephone companies have historically been regulated by a state agency, now the Public Service Commission, and have been given the power of eminent domain. *See* S.C. Code Ann. §§ 58-9-2020 to -2030 (2011); *see also* Quirk, *supra*, at 377 ("The special taxes, at times, were justified as a return for the special rights and privileges the state and localities had granted, such as the power of eminent domain and the right to use the public rights-of-way."). Petitioners have none of the trappings of a public utility that further the purpose of the heightened license fee. Petitioners are involved in the cellular services market, which is a highly competitive arena rather than a monopoly. Moreover, Petitioners, unlike a landline telephone company, do not have the power of eminent domain nor do they make use of public property or rights-of-way; rather, Petitioners own or lease private property to transmit their

interpretation of tax statutes." *Multi-Cinema, Ltd. v. S.C. Tax Comm'n*, 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Media Gen.*, 388 S.C. at 147, 694 S.E.2d at 529 (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)) (internal quotations omitted). "Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). "Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* Like the court of appeals, we do not construe section 12-20-100 to have the plain meaning attributed to it by the ALC.

Petitioners next seize on the ALC's alternative finding that the term "telephone company" is ambiguous. Petitioners point to the court of appeals' acknowledgement that application of section 12-20-100 to Petitioners was not "absolutely clear as a matter of law." In this regard, Petitioners contend the court of appeals erred in failing to construe any ambiguity in the tax statute against DOR. It necessarily follows, according to Petitioners, that such ambiguity must be construed in the taxpayers' favor. We agree.

Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature. *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). However, "[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) (citing *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 188 S.E. 508 (1936)). "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in

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wireless intelligence. Thus, while it is arguable that the heightened license fee does not translate to wireless communication service companies that are not granted special privileges by the State, the absence of a statutory definition for "telephone company" leaves the matter in doubt.

his favor." *Cooper River Bridge, Inc*, 182 S.C. at 76, 188 S.E. at 509-510; *see also SCANA Corp. v. S.C. Dep't of Revenue*, 384 S.C. 388, 394 n.3, 683 S.E.2d 468, 471 (2009) (Beatty, J., dissenting) (noting general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government). The existence of an ambiguity in section 12-20-100 raises substantial doubt regarding the section's application to Petitioners. This doubt must be resolved in favor of Petitioners.

Therefore, we reverse the court of appeals and reinstate the grant of summary judgment in favor of Petitioners.

**REVERSED.**

**PLEICONES, BEATTY, HEARN, JJ., and Acting Justice E. C. Burnett, III, concur.**

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

Wells Fargo Bank, NA, Respondent,

v.

Michael Smith; South Carolina Department of Motor Vehicles; M & T Properties, Inc.; State of South Carolina; Arthur State Bank; South Carolina Department of Probation, Pardon and Parole Services, Defendants, of whom Michael Smith is the Appellant.

Appellate Case No. 2009-125666

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Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

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Opinion No. 4988
Submitted March 1, 2011 – Filed June 13, 2012
Withdrawn, Submitted and Refiled August 8, 2012

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**AFFIRMED IN PART, REVERSED IN PART, and REMANDED**

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Susan P. Ingles, of South Carolina Legal Services, of Greenville, for Appellant Michael Smith.

Sean Matthew Foerster, of Rogers Townsend & Thomas, PC, of Columbia, for Respondent Wells Fargo Bank.

**WILLIAMS, J.:** Michael Smith ("Smith") appeals the Master-in-Equity's ("Master") grant of Wells Fargo Home Mortgage, Inc.'s[1] ("Wells Fargo") motion to strike the jury demand. We affirm in part, reverse in part, and remand for further proceedings.

## FACTS/PROCEDURAL HISTORY

The complaint alleges that on April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo in the amount of $83,000. The Complaint further alleges that to secure payment of the Note, Smith gave Wells Fargo a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road in Greenville, South Carolina, as well as a 2003 Fleetwood mobile home.

Wells Fargo filed this action for foreclosure, alleging Smith defaulted on his loan payments under the Note and Mortgage and owed $77,460.63 on the debt. After the Greenville County Clerk of Court filed an order of reference, Smith filed a motion to allow late filing of responsive pleadings, and Wells Fargo consented to an extension of time. Smith filed an answer and counterclaim with a jury trial request and asserted, along with other various defenses, the following counterclaims: 1) accounting; 2) unconscionability; and 3) violation of section 37-10-102 of the South Carolina Code (Supp. 2010).[2] Wells Fargo filed a motion to strike the jury demand ("motion to strike"). The Master heard the motion to strike and asked Smith to submit additional authority to support his position.

On March 12, 2009, the Master issued an order granting Wells Fargo's motion to strike and confirming the order of reference. Smith timely filed a Rule 59(e), SCRCP, motion seeking to alter or amend the final order, and by order entered April 15, 2009, the Master denied Smith's Rule 59(e) motion. This appeal followed.

## STANDARD OF REVIEW

"The matter of striking from a pleading, and the matter of admissibility of evidence is largely within the discretion of the trial judge." *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). "The granting or refusal of a

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[1] Wells Fargo, NA is the successor by merger to Wells Fargo Home Mortgage, Inc.

[2] Section 37-10-102 of the South Carolina Code (Supp. 2010) is also referred to as the Attorney Preference statute.

[m]otion to strike . . . will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by an error of law." *Id.* at 194-95, 213 S.E.2d at 728 (internal citation omitted); *see also Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993) (holding absent an abuse of discretion, the trial court's ruling on a motion to strike will not be reversed).

Additionally, "[w]hether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the trial court." *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

## LAW/ANALYSIS

### A. Subject Matter Jurisdiction

On appeal, Smith asserts the Master exceeded his jurisdiction in ruling on Wells Fargo's motion to strike. As a result, Smith contends the matter should have been transferred to the circuit court when he initially filed the jury demand as part of the answer and counterclaim. We disagree.

Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by an order of reference. *Smith v. Ocean Lakes Family Campground*, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (Ct. App. 1993). When a case is referred to a master under Rule 53, the master is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the master's powers. *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). Specifically, Rule 53(c), SCRCP, states "[o]nce referred, the master or special referee shall exercise all power and authority which a circuit court judge sitting without a jury would have in a similar matter."

As a basis for this claim, Smith cites the Reporter's Note appended to the 2002 Amendment to Rule 53, SCRCP. This note states, "If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court." However, the order of reference in this case authorized the Master "to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to perform all necessary acts incident to this foreclosure action . . . ." Thus, once the case is referred to the Master, he has subject matter jurisdiction to resolve the action to the

extent the order of reference provides, and with the authority a circuit court judge would have in a similar matter. *See* Rule 53(c), SCRCP; *Hayes*, 311 S.C. at 360, 428 S.E.2d at 902. Accordingly, we find the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand as the matter was properly before the Master pursuant to the order of reference and our rules of civil procedure.

**B. Smith's Counterclaims**

Smith contends the Master erred in determining Smith's counterclaims for unconscionability and a violation of the Attorney Preference statute were not entitled to a jury trial. We disagree.

The South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (citation omitted). Additionally, Rule 38(b), SCRCP, provides, in pertinent part:

> Any party may demand a trial by jury of any issue *triable of right by a jury* by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(emphasis added). Smith demanded a jury trial in his answer and counterclaim when he asserted counterclaims of accounting[3], unconscionability, and a violation of the Attorney Preference statute against Wells Fargo.

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[3] Smith conceded at the non-evidentiary hearing he was not entitled to a jury trial on his counterclaim for accounting and subsequently abandoned this argument on appeal. *See* Rule 208(b)(1)(D), SCACR (stating each "particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal).

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). If a complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim. *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986), *modified by Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). "A mortgage foreclosure is an action in equity." *U.S. Bank Trust Nat'l. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). As Wells Fargo's foreclosure allegation is equitable in nature, Smith has the right to a jury trial only if his counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193.

Characterization of an "action as equitable or legal depends on the appellant's 'main purpose' in bringing the action." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citations omitted).[4] "The main purpose of the action should generally be ascertained from the body of the complaint." *Id.* (citation omitted). "However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. *Bell v. Mackey*, 191 S.C. 105, 119-20, 3 S.E.2d 816, 822 (1939) (citations omitted).

For Smith's counterclaims to be entitled to a jury trial, each counterclaim must be both legal and compulsory.

**1. Unconscionability**

Smith argues the Master erred in finding he was not entitled to a jury trial on his unconscionability counterclaim. We disagree.

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[4] "[T]he 'main purpose' rule evolved from a determination that where a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action." *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991) (citations omitted).

## a) Common Law Unconscionability[5]

Although Smith's counterclaim for common law unconscionability is compulsory, he is not entitled to a jury trial because this is an equitable claim that does not create a cause of action for damages.

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); *see also* Rule 13(a), SCRCP. The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our supreme court adopted the "logical relationship" test and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." In essence, the "logical relationship" determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

Here, there is a "logical relationship" between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable. If Smith prevails on his unconscionability claim, it will affect Wells Fargo's right to enforce the Note and foreclose the Mortgage. Therefore, Smith's common law unconscionability counterclaim is compulsory under the "logical relationship" test.

Even though Smith's common law unconscionability counterclaim is compulsory, because common law unconscionability only provides an equitable relief, Smith is not entitled to a jury trial on his counterclaim. Jurisdictions throughout the country

[5] Smith's counterclaim for unconscionability failed to specify whether it was a claim for common law unconscionability or statutory unconscionability under section 37-5-108 of the South Carolina Code (Supp. 2010). We analyze this issue under both and hold the Master was correct in finding Smith was not entitled to a jury trial under either version of the counterclaim.

agree that common law unconscionability is an equitable cause of action with corresponding relief that is only equitable in nature. *See Doe v. SexSearch.com*, 551 F.3d 414, 419 (6th Cir. 2008) ("At common law, unconscionability is a defense against enforcement, not a basis for recovering damages."); *Super Glue Corp. v. Avis Rent a Car Sys., Inc.*, 517 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987) ("The doctrine of unconscionability is used as a shield, not a sword, and may not be used as a basis for affirmative recovery."); *see, e.g.,* Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."). Despite Smith's request for actual and punitive damages for unconscionability in the body of his pleadings, the primary relief sought is to have the mortgage declared void. Accordingly, Smith seeks relief from a jury that cannot be granted. *See Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) ("In determining whether a contract was 'tainted by an absence of meaningful choice,' *courts* should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.") (emphasis added); *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009) ("Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed."); *Loyola Fed. Sav. Bank v. Thomasson Props.*, 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct. App. 1995) ("If the claim is equitable, there is no right to a jury trial."). Because the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim. *See Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001) ("There is no right to a jury trial for equitable remedies such as rescission and restitution."). Accordingly, Smith's common law unconscionability counterclaim is not entitled to a jury trial.

**b) Statutory Unconscionability**

Applying the same "logical relationship" test, we find Smith's counterclaim for statutory unconscionability is also compulsory. In addition to arising out of the same transaction or occurrence as Wells Fargo's foreclosure action, Smith's counterclaim bears a "logical relationship" to the enforceability of the Note and Mortgage. Accordingly, Smith's statutory unconscionability counterclaim is compulsory under the "logical relationship" test.

Although the statutory unconscionability counterclaim is compulsory, section 37-5-108 of the South Carolina Code (Supp. 2010) requires the determination of whether an agreement is unconscionable to be a matter of law for the court. *See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 38, 508 S.E.2d 16, 18 (1998) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). In section 37-5-108, the General Assembly explicitly chose the use of the term "court" to unequivocally demonstrate that the matter is not to be resolved by a jury, but by the court. *See* § 37-5-108(1) ("[I]f the *court* as a matter of law finds . . . the agreement or transaction to have been unconscionable . . . the *court* may refuse to enforce the agreement.") (emphasis added); *see also* § 37-5-108(3) ("If it is claimed or appears to the *court* that the agreement or transaction or any term or part thereof may be unconscionable . . . the parties shall be afforded a reasonable opportunity to present evidence . . . to aid the *court* in making the determination.") (emphasis added). Therefore, section 37-5-108 does not provide a right to a jury trial for a statutory unconscionability cause of action. Accordingly, we affirm the Master's decision to strike Smith's request for a jury trial on his unconscionability counterclaim.

**2. Violation of the Attorney Preference Statute**

To determine whether Smith is entitled to a jury trial on his allegation that Wells Fargo violated the Attorney Preference statute, we again must determine if this counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193. We conclude Smith's counterclaim is permissive because a violation of the Attorney Preference statute would not affect the enforceability of the Note and Mortgage.

Section 37-10-102(a) of the South Carolina Code (Supp. 2010) provides, in pertinent part:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose . . . [t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction . . . .

The complaint alleges that to secure payment of this Note, Smith gave Wells Fargo a real estate Mortgage covering his real estate property as well as a mobile home. As a result, Smith was entitled to choose an attorney of his preference for the closing of the transaction pursuant to section 37-10-102(a). A violation of the Attorney Preference statute is enforced by section 37-10-105(A) of the South Carolina Code (Supp. 2010). The enforcement provision of the Attorney Preference statute provides, in pertinent part:

> If a creditor violates a provision of this chapter, the debtor has a cause of action . . . to recover actual damages and also a right in an action . . . to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.

S.C. Code Ann. § 37-10-105(A) (Supp. 2010). A review of this statute demonstrates Smith's counterclaim has no "logical relationship" to the enforceability of the Note and Mortgage. Moreover, even if a violation of the statute occurred, Smith would only be entitled to actual damages and a possible penalty between $1,500 to $7,500. The statute, however, does not permit rescission of the Note and Mortgage for its violation. *See* § 37-10-105(A). As Smith's counterclaim bears no "logical relationship" to the enforceability of the Note and Mortgage, we conclude Smith's counterclaim is permissive. Therefore, Smith waived his right to a jury trial by asserting it in the foreclosure action. *See N.C. Fed. Sav. & Loan Ass'n*, 294 S.C. at 30, 362 S.E.2d at 310 ("[W]here a defendant in an action begun in equity asserts a permissive counterclaim that is legal in nature, the defendant is deemed to have waived the right to a jury trial on the issues raised by the counterclaim."). Accordingly, we affirm the Master's decision to strike Smith's request for a jury trial on his counterclaim for a violation of the Attorney Preference statute.

### C. Scope of Motion to Strike Jury Demand

Smith contends the Master exceeded the scope of Wells Fargo's motion to strike by making findings of fact and conclusions of law based on documents and information not in evidence. We agree.

A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549-50, 186 S.E.2d 523, 526 (1972).

After a brief non-evidentiary motion hearing, the Master requested Smith submit authority to support his assertion he was entitled to a jury trial. A review of the Master's order demonstrates his ruling went beyond the permissible scope of Wells Fargo's motion. The order granting Wells Fargo's motion to strike had the effect of granting judgment and making findings of fact based on information not admitted or decided by the pleadings. In short, the Master's order on the motion to strike the jury demand makes findings of fact and rules that a cause of action is meritless without evidentiary support, constituting an abuse of discretion.[6] *See Edwards v. Edwards*, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009) ("The [trial] court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law."). We conclude these impermissible findings of fact and conclusions of law are prejudicial to Smith, thus warranting reversal. *See Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976) (holding a trial court will only be reversed when the record shows not only error but also prejudice).

## CONCLUSION

In summary, the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand. Additionally, the Master's ruling on Smith's unconscionability and attorney preference statute counterclaims is affirmed. The Master's order, to the extent that it details specific findings of fact and conclusions of law, is reversed and the case remanded to the Master for a bench trial on the merits of all causes of action alleged.

**AFFIRMED IN PART, REVERSED IN PART, and REMANDED.**

**GEATHERS and LOCKEMY, JJ., concur.**

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[6] The Master made certain findings of fact that go to the substance and merits of Smith's claims and well beyond the scope of the motion to strike, including: "Smith's counterclaim has no merit," and "[b]ecause Smith would not be entitled to relief as against Wells Fargo on his counterclaim, it can hardly be said he would be entitled to a jury trial on it."

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

Ricky Rhame, Appellant,

v.

Charleston County School District, Respondent.

Appellate Case No. 2010-175566

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Appeal from South Carolina Workers' Compensation Commission

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Published Opinion No. 5020
Heard April 11, 2012 – Filed August 8, 2012

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**DISMISSED**

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Blake A. Hewitt and John S. Nichols, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Kenneth W. Harrell and Patrick L. Jennings, both of Joye Law Firm, LLP, of N. Charleston, for Appellant.

Catherine H. Chase, Leslie M. Whitten, and Stephen L. Brown, all of Young Clement Rivers, LLP, of Charleston, for Respondent.

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**LOCKEMY, J.:** In this appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel), Ricky Rhame contends the Appellate Panel erred when it held that his claim for a repetitive trauma injury

to his back was barred by the statute of limitations. We dismiss this appeal as untimely, and thus, we do not reach the merits of Rhame's arguments.

**FACTS**

Rhame was employed by the Charleston County School District (District) as a heating and air conditioning technician from 1987 to 2009. His job frequently required him to lift heating and air conditioning equipment. According to Rhame, some of this equipment weighed as much as fifty to one-hundred pounds.

Rhame admitted he began experiencing off-and-on back pain in 1994 or 1995. Additionally, in 2006, Rhame developed a problem with his neck due to his employment, which was diagnosed as a cervical fusion. After speaking with the District about the neck problem, he was told they would not take care of it. A follow-up letter was sent to Rhame from the District confirming their denial of workers' compensation benefits for his neck injury. Rhame did not contact anyone else concerning the incident.

Rhame initiated this case by filing a Form 50 with the South Carolina Workers' Compensation Commission (Commission) on September 29, 2009. He alleged that on May 4, 2009, he sustained a back injury from repetitively picking up heavy air conditioning units. Shortly after filing the Form 50, Rhame amended it to specifically "reflect repetitive trauma for the nature of the injury."

The District answered by filing a Form 51 on October 7, 2009, in which it denied Rhame had sustained an injury by accident. Additionally, the District asserted Rhame had not complied with the Workers' Compensation Act's (WCA) notice requirement and that the claim was barred by the statute of limitations. The District contended that in 1994 or 1995, as soon as Rhame knew he was having back pain caused by his job, Rhame knew or should have known he had a compensable injury and brought a claim for benefits. Rhame explained his delay in filing a workers' compensation claim, stating: (1) his back pain was off-and-on and was never the result of a single discreet or identifiable injury; (2) he had a fear of losing his job; (3) his ability to complete his work-related duties was not affected until 2009; and (4) he was ignorant of the workers' compensation system and the concept of repetitive trauma injuries until retaining counsel in 2009.

The commissioner heard the case on December 3, 2009, and issued an order dated February 24, 2010, and filed February 26, 2010, finding Rhame's claim was not barred by the statute of limitations.

On March 1, 2010, District filed a Form 30 requesting the Appellate Panel to review the commissioner's decision. Both parties submitted briefs to the Appellate Panel. The Appellate Panel conducted a hearing on May 17, 2010, and in an order dated and filed August 6, 2010, it reversed the commissioner's decision. The Appellate Panel found Rhame was aware of his "back injury" in 1994 or 1995, yet he did not file a claim within two years of when he knew or should have known that his claim was compensable. It also found Rhame "showed awareness of the workers' compensation system" by trying to file a claim for his 2006 neck injury, and that he delayed bringing the present claim out of fear of losing his job.

Rhame filed a petition for rehearing on September 8, 2010. The District opposed the petition, and in an order dated September 20, 2010, and filed September 21, 2010, the Appellate Panel dismissed the petition. On October 21, 2010, Rhame served and filed notice of this appeal.

## STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the [Appellate Panel]." *Murphy v. Owens Corning*, 393 S.C. 77, 81, 710 S.E.2d 454, 456 (Ct. App. 2011) (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2011)). "Under the substantial evidence standard of review, this court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Id.* at 81-82, 710 S.E.2d at 456 (citing *Stone v. Traylor Bros., Inc.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004)).

"'Statutory interpretation is a question of law.'" *Id.* at 82, 710 S.E.2d at 456 (quoting *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007)). "This court is free to decide matters of law with no particular deference to the fact finder." *Id.* (citing *Pressley v. REA Constr. Co.*, 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct. App. 2007)).

## LAW/ANALYSIS

### Tolling the Time for Appeal by Filing a Petition for Reconsideration

As a threshold matter, District argues there is no statute allowing for a petition for rehearing to be filed, and an appeal pursuant to section 42-17-60 of the South Carolina Code (Supp. 2011) is the only route to review a decision by the Appellate Panel; thus, District argues the time period for filing this appeal was not tolled by Rhame filing a petition for rehearing, and this appeal is untimely. We agree.

Rhame argues his right to file a petition for rehearing with the Appellate Panel is derived from section 1-23-380 of the South Carolina Code (Supp. 2011). Section 1-23-380 provides that a party initiates judicial review of an agency's decision by serving and filing a notice of appeal "within thirty days after the final decision of the agency or, ***if a rehearing is requested***, within thirty days after the decision is rendered." S.C. Code Ann. § 1-23-380(1) (Supp. 2011) (emphasis added). He admitted the Commission has no regulation regarding the applicability of petitions for rehearing, but relied upon *McCummings v. South Carolina Department of Corrections*, 319 S.C. 440, 462 S.E.2d 271 (1995), to support his position that statutory silence on an issue does not mean it is disallowed.[1]

Section 42-17-50 of the South Carolina Code (Supp. 2011) provides the procedure for appealing the commissioner's decision. It states:

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[1] *McCummings* determined whether statutory silence regarding the time limit for filing a petition for rehearing meant a party had infinite time to file it. *Id.* at 442-43, 462 S.E.2d at 272-73. Because it involved an employment grievance, we find *McCummings* inapplicable to the case at bar. Workers' compensation appeals are specifically governed by the WCA's appellate procedure statute. S.C. Code Ann. § 42-17-50 (Supp. 2011); *see SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) ("An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose." (citing *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995))).

> If an application for review is made to the [Appellate Panel] within fourteen days from the date when notice of the award shall have been given, the [Appellate Panel] shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award.

S.C. Code Ann. § 42-17-50 (Supp. 2011).

"The [Appellate Panel] is the ultimate fact finder in Workers' Compensation cases and is not bound by the [] [c]ommissioner's findings of fact." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 281, 519 S.E.2d 583, 591 (Ct. App. 1999) (citing *Ross v. American Red Cross*, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989)). "Although it is logical for the [Appellate Panel], which did not have the benefit of observing the witnesses, to give weight to the . . . [c]ommissioner's opinion, the [Appellate Panel] is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the . . . [c]ommissioner." *Id.* at 281-82, 519 S.E.2d at 591 (citing *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 185-86, 414 S.E.2d 162, 163 (1992)). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. *Id.* at 282, 519 S.E.2d at 591 (citing *Ross*, 298 S.C. at 492, 381 S.E.2d at 730).

Section 42-17-60 of the South Carolina Code (Supp. 2011) provides the procedure for appealing the Appellate Panel's decision. It states:

> The award of the [Appellate Panel], as provided in Section 42-17-40, if not reviewed in due time, or an award of the [Appellate Panel] upon the review, as provided in Section 42-17-50, is conclusive and binding as to all questions of fact. However, either party to the dispute, within thirty days from the date of the award or within thirty days after receipt of notice to be sent by registered mail of the award, but not after, whichever is the longest, may appeal from the decision of the [Appellate Panel] to the court of appeals. Notice of

> appeal must state the grounds of the appeal or the alleged errors of law.

S.C. Code Ann. § 42-17-60 (Supp. 2011).

Further, case law specifically states Rule 59(e), SCRCP motions are not applicable in matters before the Commission itself; such motions are applicable when the circuit court sits in an appellate capacity, and they are required to preserve an issue for review by the appellate courts. *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 324, 713 S.E.2d 267, 274 (2011) (citing *Stone v. Roadway Express*, 367 S.C. 575, 582, 627 S.E.2d 695, 699 (2006) ("Rule 59(e) is not applicable in proceedings before the commission."); *Nettles v. Spartanburg Sch. Dist. # 7*, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000) (stating that workers' compensation law does not contain a motion to reconsider the commission's ruling; rather, a party must appeal)).

As with motions to reconsider, we find petitions for rehearing are not applicable in matters before the Appellate Panel. Thus, the petition for rehearing at issue did not toll the time to appeal the Appellate Panel's order to this court. On August 6, 2010, the Appellate Panel issued their order reversing the commissioner's award. On October 21, 2010, Rhame served and filed his notice to appeal. Rhame served and filed his notice of appeal well after the thirty day time period pursuant to section 42-16-70. Accordingly, we dismiss this appeal as untimely.

**CONCLUSION**

For the foregoing reasons, we dismiss this appeal as untimely.

**DISMISSED.**

**WILLIAMS AND THOMAS, JJ., concur.**