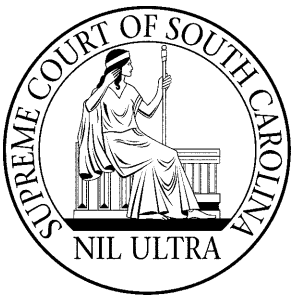

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 12, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

27559 - In the Matter of Robert Andrew Hedesh 13

27560 - The State v. Henry Haygood 18

27561 - Gladys Sims v. Amisub of SC 22

27562 - The State v. Francis Larmand 31

27563 - Columbia Venture v. Richland County 39

Order - Amendment to Rule 31(h) of Rule 413, SCACR 65

Order - Amendment to Rule 402, SCACR 67

Order - Amendments to the Rules of the Resolution of Fee Disputes Board 68

Order - In the Matter of Robert W. Herlong 71

UNPUBLISHED OPINIONS

2015-MO-047 - Pavilion Development v. Nexsen Pruet
(Charleston County, Judge J. C. Nicholson, Jr.)

PETITIONS - UNITED STATES SUPREME COURT

2014-002739 - The City of Columbia v. Haiyan Lin Pending

2015-000038 - The State v. Anthony Jackson Pending

PETITIONS FOR REHEARING

27528 - The State v. Curtis J. Simms Denied 8/6/2015

27538 - The State v. Steven Louis Barnes Denied 8/6/2015

27541 - The State v. Gregg Henkel Denied 8/5/2015

27543 - In the Matter of the Care & Treatment of Christopher Taft Denied 8/5/2015

27545 - The State v. Christopher Broadnax	Pending
27546 - The State v. Rushan Counts	Pending
2015-MO-005 - The State v. Henry Haygood (original opinion withdrawn and substituted with published opinion #27560)	Denied 8/12/2015
2015-MO-027 - Kamell D. Evans v. State	Denied 8/6/2015
2015-MO-028 - Jonathan Kyle Binney v. State	Denied 8/6/2015
2015-MO-029 - John Kennedy Hughey v. State	Denied 8/6/2015
2015-MO-033 - The State v. Christopher Ryan Whitehead	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

5253-Sierra Club v. S.C. Department of Health and Environmental Control and Chem-Nuclear Systems, LLC
(Withdrawn, Substituted, and Refiled August 12, 2015) 73

5340-George Wigington v. The State 107

5341-State v. Alphonso Thompson 116

5342-John Goodwin v. Landquest 136

UNPUBLISHED OPINIONS

2015-UP-394-State v. Christopher Roberts

2015-UP-395-Brandon W. Hodge v. Sumter County

2015-UP-396-Estate of Essie B. Bryan, through her personal representative Marcus Kinloch v. Charleston County and C.A. Roberds

2015-UP-397-EverBank v. Lenora Scurry

2015-UP-398-Tidelands Bank v. J. R. Gregory Ventures, LLC

2015-UP-399-Howard Nankin and Nancy Nankin v. Donald M. Danford d/b/a Don Danford Interiors

2015-UP-400-State v. Greg Jackson Floyd

2015-UP-401-Oscaar Sorcia v. Brady K. Mathis and Palmetto Surety Corporation

2015-UP-402-Fritz Timmons v. S.C. Employment Security Commission

2015-UP-403-Angela Parsons v. Jane Smith, QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System

2015-UP-404-Deutsche Bank National Trust Company v. Geary Thomas Dooly

2015-UP-405-Teri N. Jacobs, Jr. v. Jerry W. Page

2015-UP-406-Eileen Critcher v. Susan Critcher Rhodes

2015-UP-407-William R. Ferrara v. Michael E. Hunt, Sheriff of Aiken County, and Charles Cain in his individual capacity as Deputy Sheriff

2015-UP-408-William R. Ferrara v. Michael E. Hunt, Sheriff of Aiken County, Aiken County Sheriff's Department, Charles Cain in his individual capacity as Deputy Sheriff, and the Aiken County Sheriff's Department

2015-UP-409-Jammie Anderson v. Jerry W. Page

2015-UP-410-Chang Hua Zeng v. Coosaw Partners, LLC and Terry Kinder

2015-UP-411-State v. Gary Wayne Presley

2015-UP-412-State v. Keenan Coakley

2015-UP-413-State v. Shedrix Steward

2015-UP-414-Christopher A. Wellborn v. City of Rock Hill

2015-UP-415-Charles R. Mikals and Donna Mikals v. Debra House

2015-UP-416-Joe Carrington, Jr. v. Amanda Piegari

2015-UP-417-State v. Raheem Jamar Bonham

2015-UP-418-State v. Alvin Dwayne Arnold

2015-UP-419-State v. Bill Derese Breland (aka Bill Breeland)

2015-UP-420-Tiffany Boyce v. Lauren Nelson

2015-UP-421-Willie Preston, individually and as the personal representative of the Estate of Martha Preston v. Surgical Care Affiliates, et al.

2015-UP-422-Eric Nelson v. Tonya Kennon Brooks f/k/a Tonya Kennon

2015-UP-423-North Pleasant, LLC and Vanguard Development, LLC v. South Carolina Coastal Conservation League and Edward D. Beach

2015-UP-424-Meredity Hastings v. Earl Carrara

PETITIONS FOR REHEARING

5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc.	Pending
5254-State v. Leslie Parvin	Pending
5295-Edward Freiburger v. State	Pending
5322-State v. Daniel D. Griffin	Pending
5324-State v. Charles A. Cain	Pending
5326-Denise Wright v. PRG	Pending
5328-Matthew S. McAlhaney v. Richard K. McElveen	Pending
5331-State v. Thomas Stewart	Pending
2015-UP-031-Blue Ridge Electric Cooperative, Inc. v. Gresham	Denied 07/29/15
2015-UP-169-Hollander v. The Irrevocable Trust Est. by James Brown	Pending
2015-UP-245-Melissa Jean Marks v. Old South Mortgage	Pending
2015-UP-266-State v. Gary Eugene Lott	Pending
2015-UP-273-State v. Bryan M. Holder	Pending
2015-UP-275-State v. David Eugene Rosier, Jr.	Pending
2015-UP-279-Mary Ruff v. Samuel Nunez	Pending
2015-UP-280-State v. Calvin J. Pompey	Pending
2015-UP-300-Peter T. Phillips v. Omega Flex, Inc.	Pending
2015-UP-301-State v. William J. Thomas, Jr.	Pending
2015-UP-303-Charleston Cty. Assessor v. LMP	Pending
2015-UP-304-Robert K. Marshall v. City of Rock Hill	Pending

2015-UP-305-Tanya Bennet v. Lexington Medical Center	Pending
2015-UP-306-Ned Gregory v. Howell Jackson Gregory	Pending
2015-UP-307-Allcare Medical v. Ahava Hospice	Pending
2015-UP-310-State v. Christopher Miller	Pending
2015-UP-311-State v. Marty Baggett	Pending
2015-UP-313-John T. Lucas v. The Bristol Condominium	Pending
2015-UP-314-Student No. 1 John Doe v. Board of Trustees	Pending
2015-UP-316-S.C. Second Injury Fund v. Sompo Japan Ins.	Pending
2015-UP-320-American Community Bank v. Michael R. Brown	Pending
2015-UP-325-Tilbros, Inc. v. Cherokee County	Pending
2015-UP-327-State v. Shawn Justin Burris	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-331-Johnny Eades v. Palmetto Cardiovascular	Pending
2015-UP-333-Jennifer Bowzard v. Sheriff Wayne Dewitt	Pending
2015-UP-339-LeAndra Lewis v. L.B. Dynasty d/b/a Boom Boom Room	Pending
2015-UP-344-Robert Duncan McCall v. State	Pending
2015-UP-345-State v. Steve Young	Pending
2015-UP-350-Ebony Bethea v. Derrick Jones	Pending
2015-UP-351-Elite Construction v. Doris Tummillo	Pending
2015-UP-353-Selene RMOF v. Melissa Furmanchik	Pending
2015-UP-354-In re: Estate of Sylvia J. Reagan (Shelly v. Becker)	Pending

2015-UP-355-Samuel L. McPherson v. Henry Banks	Denied 08/07/15
2015-UP-357-Linda Rodarte v. USC	Pending
2015-UP-358-Thomas Osborne v. State	Pending
2015-UP-359-In the matter of the Estate of Alice Shaw-Baker	Pending
2015-UP-361-JP Morgan Chase Bank v. Leah Sample	Pending
2015-UP-362-State v. Martin D. Floyd	Pending
2015-UP-364-Andrew Ballard v. Tim Roberson	Pending
2015-UP-365-State v. Ahmad Jamal Wilkins	Pending
2015-UP-367-Angela Patton v. Dr. Gregory A. Miller	Pending
2015-UP-384-Robert C. Schivera v. C. Russell Keep, III	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5209-State v. Tyrone Whatley	Pending
5231-Centennial Casualty v. Western Surety	Pending
5247-State v. Henry Haygood	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5263-Milton P. Demetre Family Ltd. Partnership v. Beckmann	Denied 08/06/15
5270-56 Leinbach Investors v. Magnolia Paradigm	Denied 08/06/15
5278-State v. Daniel D'Angelo Jackson	Pending
5279-Stephen Brock v. Town of Mt. Pleasant	Pending
5286-State v. Graham F. Douglas	Pending
5288-State v. Damon T. Brown	Denied 08/06/15
5291-Samuel Rose v. JJS Trucking	Pending

5297-Trident Medical Center v. SCDHEC	Pending
5298-George Thomas v. 5 Star	Pending
5299-SC Public Interest Foundation v. SCDOT	Pending
5300-Joseph E. Mason, Jr. v. Catherine L. Mason	Dismissed 07/31/15
5301-State v. Andrew T. Looper	Pending
5302-State v. Marvin B. Green	Pending
5303-State v. Conrad Lamont Slocumb	Pending
5307-George Ferguson v. Amerco/U-Haul	Pending
5309-Bluffton Towne Center v. Beth Ann Gilleland-Prince	Pending
5312-R. C. Frederick Hanold, III v. Watson's Orchard POA	Pending
5313-State v. Raheem D. King	Pending
5314-State v. Walter M. Bash	Pending
5315-Paige Johnson v. Sam English Grading	Pending
5317-Michael Gonzales v. State	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-366-State v. Darrell L. Birch	Denied 08/06/15
2014-UP-430-Cashman Properties v. WNL Properties	Pending
2014-UP-436-Jekeithlyn Ross v. Jimmy Ross	Pending
2014-UP-446-State v. Ubaldo Garcia, Jr.	Pending
2014-UP-470-State v. Jon Wynn Jarrard, Sr.	Pending
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending

2015-UP-041-Nathalie Davaut v. USC	Pending
2015-UP-042-Yancey Env. v. Richardson Plowden	Pending
2015-UP-050-Puniyani v. Avni Grocers	Pending
2015-UP-051-Chaudhari v. S.C. Uninsured Employer's Fund	Pending
2015-UP-059-In the matter of the estate of Willie Rogers Deas	Pending
2015-UP-065-Glenda Couram v. Lula Davis	Pending
2015-UP-066-State v. James Scofield	Pending
2015-UP-067-Ex parte: Tony Megna	Pending
2015-UP-068-Joseph Mickle v. Boyd Brothers	Pending
2015-UP-071-Michael A. Hough v. State	Pending
2015-UP-072-Silvester v. Spring Valley Country Club	Pending
2015-UP-074-State v. Akeem Smith	Pending
2015-UP-091-U.S. Bank v. Kelley Burr	Pending
2015-UP-102-SCDCA v. Entera Holdings	Pending
2015-UP-107-Roger R. Riemann v. Palmetto Gems	Pending
2015-UP-110-Deutsche Bank v. Cora B. Wilks	Pending
2015-UP-111-Ronald Jarmuth v. International Club	Pending
2015-UP-115-State v. William Pou	Pending
2015-UP-119-Denica Powell v. Petsmart	Pending
2015-UP-126-First National Bank v. James T. Callihan	Pending
2015-UP-127-T.B. Patterson v. Justo Ortega	Pending

2015-UP-138-Kennedy Funding, Inc. v. Pawleys Island North	Pending
2015-UP-139-Jane Doe v. Boy Scout Troop 292	Pending
2015-UP-141-Gregory Ulbrich v. Richard Ulbrich	Pending
2015-UP-146-Joseph Sun v. Olesya Matyushevsky	Pending
2015-UP-152-Capital Bank v. Charles Moore	Pending
2015-UP-155-Ashlie Outing v. Velmetria Weeks	Pending
2015-UP-164-Lend Lease v. Allsouth Electrical	Pending
2015-UP-167-Cynthia Griffis v. Cherry Hill Estates	Pending
2015-UP-174-Tommy S. Adams v. State	Pending
2015-UP-176-Charles Ray Dean v. State	Pending
2015-UP-178-State v. Antwon M. Baker, Jr.	Pending
2015-UP-191-Carmen Latrice Rice v. State	Pending
2015-UP-201-James W. Trexler v. The Associated Press	Pending
2015-UP-203-The Callawassie Island v. Arthur Applegate	Pending
2015-UP-204-Robert Spigner v. SCDPPPS	Pending
2015-UP-205-Tri-County Dev. v. Chris Pierce (2)	Pending
2015-UP-208-Bank of New York Mellon v. Rachel R. Lindsay	Pending
2015-UP-209-Elizabeth Hope Rainey v. Charlotte-Mecklenburg	Pending
2015-UP-212-State v. Jabari Linnen	Pending
2015-UP-228-State v. John Edward Haynes	Pending
2015-UP-248-South Carolina Electric & Gas v. Anson	Pending

2015-UP-249-Elizabeth Crotty v. Windjammer Village	Pending
2015-UP-256-State v. John F. Kennedy	Pending
2015-UP-259-Danny Abrams v. City of Newberry	Pending
2015-UP-262-State v. Erick Arroyo	Pending
2015-UP-281-SCDSS v. Trilicia White	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert Andrew Hedesh, Respondent.

Appellate Case No. 2015-001430

Opinion No. 27559
Submitted July 28, 2015 – Filed August 12, 2015

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Robert Andrew Hedesh, *Pro Se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and suspend respondent from the practice of law in this state for ninety days. The facts, as set forth in the Agreement, are as follows.

Facts

The allegations set forth in the Agreement relate to respondent's actions as a closing attorney. As further background information, respondent served as a closing attorney for Belle Terre Title Company, which was located in a separate suite in the same building as respondent's law office. Respondent's trust account checks were housed in a locked cabinet in Belle Terre's suite. In October 2008,

there was a theft at Belle Terre's office and forty blank checks were stolen from the checkbook for respondent's trust account. The theft was not discovered initially because there was no forced entry to the office and the stolen checks were removed from the back of the checkbook. Near the end of November 2008, respondent was attempting to conduct a manual reconciliation of his trust account when he discovered inconsistencies in the check numbers. An investigation led to the arrest of the title agent's brother and two accomplices. The persons responsible for the theft negotiated several of the stolen checks before being apprehended. Respondent sought criminal charges against the perpetrators and filed a civil lawsuit against them. Respondent also filed lawsuits against the banks that cashed the stolen checks. Respondent deposited his own funds to cover some of the losses in his trust account. Respondent cooperated at all times with law enforcement.

Matter I

In three closings, respondent failed to ensure the closing documents were recorded in a timely manner. In a fourth closing, the closing documents were not recorded at all. The lender recorded the documents without respondent's assistance, and as a result, had to pay $7,000 in deed stamps for the transaction because respondent did not have the money.

The transaction closed in September 2008, but the lender was not able to record the documents until March 2009. During this period, respondent delegated the task of recording the closing documents to the title agent with Belle Terre. Respondent represents he supervised the process; however, he was not aware the documents were not recorded until it was brought to his attention by the lender. Respondent further represents he did not immediately have the funds for the deed stamps due to the theft of his trust account checks but he fully intended to cover the losses in this matter. However, the lender chose to immediately file the documents to protect its interests. Respondent represents he had exhausted most of his personal funds and his home equity line, and his only access at the time was to start taking cash from his credit cards.

Matter II

On December 29, 2008, the computer system at the bank where respondent's trust account was established indicated a check in the amount of $186,656.02 written on respondent's trust account could not be paid due to insufficient funds. The

following day, respondent deposited a personal check for $10,000 into the account so the trust account check could be negotiated. Respondent informed the bank about the theft of trust account checks, and he signed affidavits of forgery for each of the checks written by the perpetrators, totaling approximately $88,590.

Matter III

ODC received notice of a check written on insufficient funds from respondent's trust account in the amount of $150.97. The check was written on August 11, 2008, but not presented for payment until June 23, 2009. At the time the check was presented, respondent's trust account was not in use and had a zero balance. Respondent ceased use of the account in 2008 following the theft of checks. Respondent represents he made contact with the payee of the check and resolved the matter.

Matter IV

In January 2011, RBC Bank brought suit against respondent in federal court alleging negligence and breach of fiduciary duty. The suit arose from respondent's role as closing attorney in seventeen transactions occurring between January 17, 2008 and August 19, 2008. In each case, RBC loaned funds that were used to purchase residential properties. The transactions were part of an elaborate mortgage fraud scheme where participants in the scheme recruited "straw buyers" to apply for a loan to purchase property. A fraudulent loan application was prepared, supported by fake documentation regarding the straw buyers' income or assets. Participants in the scheme then induced appraisers to produce inflated appraisals. At closing, loan proceeds were paid to participants in the scheme or companies controlled by them. Thereafter, the loans went into default. A few payments were made on some of the loans, but no payments were made on the remaining loans.

It is not alleged respondent participated in the loan scheme or even knew of the scheme; however, at the time of the real estate transactions, all of the books and records for respondent's real estate trust account were under the control and custody of a title agent for Chicago Title Insurance Company. Respondent permitted the title agent to write checks drawn on respondent's trust account for the purpose of disbursing loan proceeds, and allowed the agent to reconcile and audit the trust account. Respondent also permitted the title agent to prepare title abstracts on each property, prepare HUD-1 statements for each transaction and

collect borrower contributions and payoff information. Respondent failed to properly supervise the title agent in these transactions. The title agent was a key participant in the mortgage fraud scheme.

Matter V

Respondent received $5,000 as an earnest money deposit from a potential purchaser of real estate. The Contract of Sale for the property was signed by the seller and purchaser on June 7, 2010, but the sale was not consummated. The seller of the property requested that the earnest money be transferred to him because the buyer had breached the terms of the sales contract. Respondent informed the seller that respondent would need a release signed by the buyer, or a court order, before respondent could release the money to the seller. The seller filed a lawsuit against the buyer for breach of contract and requested the court issue an order for the release of the $5,000 deposit to the seller. The seller was unable to locate the buyer to serve the complaint so the lawsuit did not progress. Respondent represents the $5,000 deposit is still being held in his trust account.

Law

Respondent admits that by his conduct he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.15(a)(a lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property, such funds shall be kept in a separate account, and complete records of such funds shall be kept by the lawyer); Rule 5.3 (a lawyer who has supervisory authority over a nonlawyer shall make reasonable efforts to ensure the person's conduct is compatible with the professional obligations of the lawyer and the lawyer shall be responsible for conduct of the person that would be a violation of the RPC if engaged in by a lawyer); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another). Respondent also admits he has violated Rule 7(a)(1)(it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. Finally, respondent admits he violated Rule 417, SCACR (financial recordkeeping requirements).

Respondent states he has ceased doing any buyer related real estate work. He states he has participated in less than five transactions in the last three years and those involved preparing deeds related to work with other clients such as homeowners' associations.

In addition to consenting to the imposition of any sanction in Rule 7(b), RLDE, respondent also agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct and to complete the Legal Ethics and Practice Program Ethics School and Trust Account School within nine months of the imposition of any sanction.

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for ninety days. He shall also pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct and complete the Legal Ethics and Practice Program Ethics School and Trust Account School within nine months of the date of this opinion, as agreed. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

The State, Petitioner,

v.

Henry Haygood, Respondent.

Appellate Case No. 2014-001985

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, we hereby withdraw our original opinion in this matter and substitute it with Opinion No. 27560.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

August 12, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Henry Haygood, Respondent.

Appellate Case No. 2014-001985

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
The Honorable Edgar W. Dickson, Circuit Court Judge

Opinion No. 27560
Submitted February 3, 2015 – Refiled August 12, 2015

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General John Croom Hunter, both of Columbia, for Petitioner,

Assistant Public Defender Breen Richard Stevens, of Orangeburg, for Respondent.

PER CURIAM: The State seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Haygood*, 409 S.C. 420, 762 S.E.2d 69 (Ct. App. 2014). We grant the petition, dispense with further briefing, affirm the Court of Appeals' opinion in part, vacate in part, and remand for a new trial.

The Court of Appeals found the circuit court erred in finding the testimonial statements made by the victim to the police did not violate the Confrontation Clause of the Sixth Amendment because the statements fell within the excited utterance exception to hearsay. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

The Court of Appeals also found the admission of the victim's statements in this case violated the Confrontation Clause because the victim's statements were testimonial, there was no evidence the victim was unavailable to testify, and there was no evidence respondent had the opportunity to cross-examine the victim. We find the Court of Appeals erred in addressing whether the facts of this case demonstrated respondent's rights under the Confrontation Clause were violated because the record before the court lacked the facts necessary to make such a determination. For unexplained reasons, the recording of the proceeding before the magistrate's court was unavailable, and the only facts available to the Court of Appeals were from the magistrate's summary of the responding officer's testimony during the State's case-in-chief. We find the information contained in the magistrate's summary is insufficient to conduct a Confrontation Clause analysis, especially where the magistrate did not hold a hearing to determine whether the officer's testimony would violate the Confrontation Clause.

Therefore, we vacate the Court of Appeals' opinion to the extent it addresses whether the victim's statements violated the Confrontation Clause. Moreover, because there is no record of the proceedings before the magistrate's court to aid the magistrate in fully analyzing this issue were we to remand for a determination of whether the statements were testimonial, we find it necessary to remand for a new trial in accordance with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (a/k/a Kristy Wood), Petitioner,

v.

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; and, C. Edward Creagh, M.D., Respondents.

Appellate Case No. 2014-001179

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 27561
Heard June 2, 2015 – Filed August 12, 2015

AFFIRMED

Chad A. McGowan, Ashley W. Creech and Jordan C. Calloway, all of Rock Hill, and Whitney B. Harrison, of Columbia, all of McGowan Hood & Felder, LLC, for Petitioner.

Andrew F. Lindemann, of Davidson & Lindemann, P.A., of Columbia, and H. Spencer King, of The Ward Law

Firm, P.A., of Spartanburg, William U. Gunn and Joshua T. Thompson, both of Holcombe Bomar, P.A. of Spartanburg, all for Respondents.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' decision in *Sims v. Amisub of South Carolina, Inc.*, 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014), in which the court of appeals affirmed as modified the dismissal of this action, which is the second medical malpractice case filed by a conservator on behalf of Kristi L. Orlowski relating to medical care she received in the fall of 2003. The first medical malpractice action was filed in August 2006 against a different physician. When the trial of that action resulted in a defense verdict, Petitioner Gladys Sims filed the current action on Orlowski's behalf seeking the same damages against different defendants—this time against Respondents, Dr. Edward Creagh and Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center ("Piedmont").

Respondents moved for summary judgment, asserting Petitioner's claim was barred by the statute of limitations. Petitioner contended her suit was timely filed because the three-year medical malpractice statute of limitations in section 15-3-545 of the South Carolina Code is subject to the tolling provision for insanity in section 15-3-40. The trial court granted summary judgment in favor of Respondents. As noted, the court of appeals affirmed as modified. We find the court of appeals properly construed section 15-3-545 in rejecting Petitioner's reliance on section 15-3-40 in arguing for an eight-year statute of limitations. We affirm.

I.

On September 12, 2003, Kristy L. Orlowski, who was twenty-two years old and thirty-six weeks pregnant, was found unresponsive in her home by a family member. Less than twenty-four hours earlier, Orlowski had been seen by her prenatal care physician, Dr. Norman Taylor, to whom she complained of headaches, dizziness, nausea, and swelling of her hands and feet, all of which are symptoms of pre-eclampsia, a serious, potentially life-threatening complication of pregnancy.[1] Despite Orlowski's reported symptoms, Dr. Taylor failed to diagnose

---

[1] Left untreated, pre-eclampsia can develop into eclampsia, which can result in placental abruption, stroke, and seizures. The only cure for pre-eclampsia is

Orlowski's pre-eclampsia and sent her home from her doctor's visit without any special instructions or warnings.

Upon being discovered in an unresponsive state the following morning, Orlowski was rushed to Piedmont, where she underwent an emergency cesarean section and was later diagnosed as having suffered a seizure caused by eclampsia.[2] Orlowski remained hospitalized continuously from September 12, 2003, through November 24, 2003. During that period, she suffered extreme respiratory distress (including a collapsed lung), was placed on a ventilator, and endured multiple surgeries, including the surgical placement of breathing tubes in her neck. As a result of being intubated for a lengthy period of time, Orlowski also developed aspiration pneumonia and a MRSA infection in her chest cavity.

After two-and-a-half months in the hospital, Orlowski was discharged from Piedmont on November 24, 2003, but was readmitted the following day by Respondent Dr. Edward Creagh. Dr. Creagh, a board-certified pulmonologist, diagnosed and treated Orlowski for a buildup of fluid around her lungs, prescribed an oral antibiotic, and discharged her on November 27, 2003.

Two days later, on November 29, 2003, Orlowski was once again admitted to the hospital with persistent vomiting; her pulmonary condition had worsened and the fluid around her lungs had become infected. Thereafter, Orlowski remained hospitalized through December 8, 2003, when she experienced cardiopulmonary arrest. Orlowski was resuscitated, but she suffered permanent and severe brain damage, which prevents her from caring for herself or managing her own affairs. She requires around-the-clock care.

In March 2004, the probate court appointed a conservator for Orlowski.[3]

---

delivery of the baby.

[2] As a result of the eclamptic seizure, Orlowski's baby Breanna suffered prolonged oxygen deprivation, which caused severe health complications that eventually led to her death on March 21, 2006.

[3] *See* S.C. Code Ann. § 62-5-424(B)(17) (2009) (providing that a conservator "may act without court authorization or confirmation, to . . . prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties").

Orlowski's conservator is the Petitioner in this appeal. In August 2006, Orlowski, through her conservator, filed her first medical malpractice lawsuit, naming Dr. Taylor and his medical practice as defendants. Orlowski alleged her severe and permanent neurological deficits were caused by Dr. Taylor's negligent failure to diagnose and treat her pre-eclampsia prior to her seizure on September 12, 2003. Specifically, Orlowski presented expert testimony that, within a reasonable degree of medical certainty, *all* of her medical problems were caused by the eclamptic seizure that occurred on September 12, 2003. Plaintiff's medical expert witness at trial testified as follows:

> Q: Within a reasonable degree of medical certainty were all of [Orlowski's] problems; medical problems, were they caused by the eclamptic episode on September 12th?
>
> A: Yes they were. . . . [H]er readmission to Piedmont [Medical Center], her subsequent cardiac arrest during that admission and then her transfer to CMC the Carolina's Medical Center [in Charlotte] was all related back to her eclamptic seizure.

Orlowski's first medical malpractice suit was tried in April 2009 and resulted in a defense verdict.[4] Thereafter, on November 24, 2009, Orlowski, again through her conservator, filed the present medical malpractice action against Respondents Dr. Creagh and Piedmont, alleging Respondents committed medical negligence and were responsible for her injuries. Orlowski sought damages against Respondents for the same injuries and damages she asserted in her previous medical malpractice lawsuit.

Respondents denied negligence and filed a motion for summary judgment. Respondents argued that Orlowski's claims were barred by the statute of limitations and that Orlowski should be estopped from seeking to recover damages from Respondents after contending in her first lawsuit that, to a reasonable degree of medical certainty, *all* of her injuries were solely attributable to the eclamptic seizure episode on September 12, 2003, which resulted from Dr. Taylor's negligent failure to diagnose and treat her pre-eclampsia.

[4] As a result of a high-low arrangement, Orlowski received $300,000.

During the summary judgment hearing, Orlowski denied that her claims were barred by the three-year statute of limitations, contending that section 15-3-40, which provides certain exceptions to statutes of limitations, gives an "insane" plaintiff a total of eight years from accrual of the claim to commence a lawsuit despite the six-year statute of repose in section 15-3-545. Orlowski further contended that her claims in the second lawsuit should not be estopped because she alleged Dr. Creagh and Piedmont had committed separate negligent acts from those of Dr. Taylor and that Respondents' alleged negligence contributed to the worsening of her condition.

The trial court denied Respondents' summary judgment motion on the basis of the statute of limitations, but nonetheless granted summary judgment in favor of Respondents on the alternative basis that Orlowski was estopped from asserting the negligence claims in her second lawsuit against Dr. Creagh and Piedmont because "from the record in the prior action, it is clear that [Orlowski] sought to prove Dr. Taylor's negligence [] was entirely responsible for all of [Orlowski's] injuries and damages."

The parties filed cross-appeals, and the court of appeals affirmed as modified, holding that the trial court erred in finding Orlowski was estopped from bringing her second lawsuit but affirming summary judgment on the alternate ground that the three-year medical malpractice statute of limitations barred Orlowski's second lawsuit. In finding the statute of limitations barred Orlowski's second suit, the court of appeals relied upon *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), in which this Court held the six-year statute of repose in section 15-3-545 was not tolled by the defendant's absence from South Carolina under section 15-3-30 of the South Carolina Code. This court subsequently issued a writ of certiorari to review the court of appeals' decision.[5]

II.

"An appellate court reviews the grant of summary judgment using the same standard employed by the circuit court." *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015) (citing *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002)). "Summary

[5] In view of the absence of a challenge to the court of appeals' decision concerning the issue of estoppel, we do not reach that issue.

judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id*. (citing Rule 56(c), SCRCP; *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)). "'Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.'" *Id*. (quoting *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012)).

"A cause of action accrues at the moment when the plaintiff has a legal right to sue on it." *Brown v. Finger*, 240 S.C. 102, 111, 124 S.E.2d 781, 785 (1962) (citing *Livingston v. Sims*, 197 S.C. 458, 15 S.E.2d 770 (1941); *Bugg v. Summer*, 1 McMul. 333 (1841)). The South Carolina Code provides a three-year statute of limitations for medical malpractice causes of action. S.C. Code Ann. § 15-3-545(A) (2005). This three-year limitation period begins to run at the time the cause of action accrues or, in other words, "from the date of the treatment, omission, or operation giving rise to the cause of action" or, under the discovery rule, 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. *Id*.; *see also Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (citing *Dean v. Ruscon Corp*., 321 S.C. 360, 468 S.E.2d 645 (1996)).

We emphasize that the Court is presented only with a question of statutory interpretation. The parties agree that the statute of limitations applicable in a medical malpractice action is the three-year period set forth in section 15-3-545(A). The parties disagree, however, about whether and to what extent certain statutory exceptions for persons under disability operate to toll the running of that three-year limitation period.[6] Specifically, section 15-3-40 provides:

> If a person entitled to bring an action . . . is at the time the cause of action accrued either:

[6] In this regard, we briefly note that Petitioner argues the court of appeals erred in considering the statute of limitations as an additional sustaining ground because Respondents' position on appeal was inconsistent with their position before the trial court. Specifically, Petitioner claims Respondents "conceded" this issue at trial and pointed to a specific statement of counsel during the summary judgment hearing. We do not read this statement to amount to a concession as Petitioner claims. Rather, the issue of the statute of limitations was contested throughout the summary judgment hearing.

(1) within the age of eighteen years; or
(2) insane;

[then] the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended:

(a) more than five years by any such disability, except infancy; nor
(b) in any case longer than one year after the disability ceases.

S.C. Code Ann. § 15-3-40 (2005).

Respondents concede Orlowski's mental incompetency satisfies the insanity standard. Therefore, the statutory construction question before us concerns only the extent to which the Legislature authorized tolling in section 15-3-545, which was enacted after section 15-3-40. *See Williams v. Town of Hilton Head Island, S.C.*, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993) (noting that in reconciling two statutory provisions, the "Last Legislative Expression Rule" requires that the "later legislation supersedes the earlier") (citations omitted). We hold the clear language of section 15-3-545 forecloses Orlowski's reliance on section 15-3-40 to create an effective eight-year statute of limitations due to insanity in a medical malpractice action. Subsection (A) of section 15-3-545 provides for a three-year statute of limitations (and a six-year statute of repose) for medical malpractice actions "or as tolled by *this section*." (emphasis added). Subsection (D) of that section provides for tolling only in one circumstance, that is, for those "under the age of majority." The unambiguous language in section 15-3-545 constrains us to conclude that the Legislature did not intend the insanity tolling provision in section 15-3-40 to apply in a medical malpractice action.

We further find the court of appeals properly relied upon this Court's decision in *Langley* in finding that the disability tolling provisions of section 15-3-40 do not enlarge the three-year limitation period found in section 15-3-545(A). *See Langley*, 313 S.C. at 403, 438 S.E.2d at 243 (stating "[i]nclusion of the phrase '*or as tolled by this section*' in subsection (A) clearly indicates that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)" and "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only

to minors") (emphasis in original). We fully understand Petitioner's equitable argument that fairness dictates that incapacities other than minority should be read into the medical malpractice statute of limitations; however, the "'fairness of such decisions remains within the prerogative of the legislature' and not the [C]ourt," and the only issue before this Court is to discern the intent of the Legislature. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 147, 750 S.E.2d 65, 73 (2013) (quoting *Bell Atl. Nynex Mobile, Inc. v. Comm'r of Revenue Servs.*, 869 A.2d 611, 626 (Conn. 2005)). Moreover, we note that in the more than twenty years since this Court's decision in *Langley*, the Legislature has taken no action to alter section 15-3-545. *See Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (noting the "Legislature is presumed to be aware of this Court's interpretation of its statutes" and finding the fact that the Legislature failed to alter a statute in the four decades following a decision by this Court to be "evidence the Legislature agrees with this Court's interpretation") (citing *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000)).[7]

[7] Respectfully, the Legislature may wish to reexamine the availability and duration of tolling in section 15-3-545(D). We, nevertheless, note that the apparent inequities that could exist where an incompetent person seeks the protections of "insanity" tolling are not present here. This is so because of the appointment of Orlowski's conservator in March 2004. The conservator brought Orlowski's first medical malpractice lawsuit in August 2006, within the statute of limitations. There was no impediment to Orlowski timely pursuing her claim against Respondents. There is authority for the proposition that the appointment of a conservator who is vested with authority to bring an action on the ward's behalf effectively removes the disability. *See Stewart v. Robinson*, 115 F.Supp.2d 188 (D.N.H. 2000) (holding that the medical malpractice statute of limitations is tolled on the basis of insanity only until the appointment of a capable guardian who is authorized to take possession of the disabled ward's estate and bring all related actions necessary). Respondents propose the appointment of a conservator as an alternative sustaining ground. Because of our disposition, we need not reach the issue of the effect, if any, of the appointment of a conservator on the matter of tolling a statute of limitations.

III.

The decision of the court of appeals is affirmed.

AFFIRMED.

TOAL, C.J., PLEICONES, J. and Acting Justices James E. Moore and J. Cordell Maddox, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Francis Larmand, Respondent.

Appellate Case No. 2013-001143

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 27562
Heard February 3, 2015 – Filed August 12, 2015

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, all of Columbia, and Solicitor Kevin S. Bracket, of York, all for Petitioner.

C. Rauch Wise, of Greenwood, for Respondent.

CHIEF JUSTICE TOAL: The State appeals the court of appeals' decision in *State v. Larmand*, 402 S.C. 184, 739 S.E.2d 898 (Ct. App. 2013), reversing the trial court's denial of Frank Larmand's (Respondent) motion for a directed verdict on charges for lynching, conspiracy, and pointing and presenting a firearm. We reverse.

FACTS/PROCEDURAL BACKGROUND[1]

Respondent and his wife (collectively, the Larmands) are residents of Kannapolis, North Carolina. Together, they own a branch of Pop-A-Lock, a national locksmith franchise company providing customers with roadside assistance and locksmith services, and operate their branch in and around the Charlotte metropolitan area. Ryan Lochbaum worked at the Larmands' branch of Pop-A-Lock for several years until his termination in October 2008 for misconduct and providing unauthorized services to customers.

Approximately seven months after Lochbaum's termination, the Larmands became suspicious that he and one of their current employees, Mike Taylor, were conspiring to defraud Pop-A-Lock. Specifically, the Larmands believed that Taylor would occasionally relay a customer's location to Lochbaum, who would then place a removable magnetic sign on his vehicle and masquerade as the Pop-A-Lock locksmith. According to the Larmands, after the customer paid Lochbaum for "Pop-A-Lock's" services, Taylor and Lochbaum would split the money between themselves, and Taylor would inform the Larmands that the customer had left the designated location before he arrived.

To confirm their suspicions, the Larmands set up a "mystery shopper call" for Taylor. During the call, Respondent's brother-in-law, Leo Lemire, posed as a customer needing locksmith services at the Charlotte Knights' former stadium (Knights' Stadium) located in Fort Mill, South Carolina. Respondent and Lemire waited at the stadium in the hope of catching Taylor and Lochbaum.

Ultimately, neither Taylor nor Lochbaum responded to the telephone call. Therefore, around midnight, Respondent and Lemire drove to Lochbaum's house in

[1] Because this appeal involves Respondent's motion for a directed verdict, we view the evidence in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002).

Rock Hill, South Carolina, to investigate further, and potentially confront Lochbaum.[2] The two men parked at least one-quarter mile away from Lochbaum's house, despite the ample street parking available closer to the house. Further, they parked their vehicle facing the neighborhood's sole entrance and exit.

Meanwhile, Lochbaum and three of his neighbors—Mark Whittington, Devin Fivecoat, and Ron Lee—were socializing outside Lochbaum's house. Respondent, dressed in all-black clothing, approached the group and stood and stared silently, looking "edgy" and "agitated." Eventually, Respondent stated he wanted to speak to Lochbaum, and Lochbaum asked his neighbors to give them some privacy.

Respondent and Lochbaum began arguing loudly and pushing one another. Approximately one minute into the exchange, Respondent broke eye contact with Lochbaum and looked toward the vacant, darkened field abutting Lochbaum's house. Lochbaum then saw Lemire (also wearing all-black clothing) approaching quickly and pointing a handgun at Lochbaum. Lemire said, "This is what you get when you fuck with my family," and pulled the hammer of the gun back.

Lochbaum seized the gun and began to struggle with Lemire. Respondent placed Lochbaum in a chokehold and attempted to pull him away from Lemire. Whittington, Fivecoat, and Lee, who had been watching the exchange from several houses away, ran down the street and jumped into the fray in an effort to separate Lemire, Respondent, and Lochbaum. Lochbaum's next-door neighbor, Jesse Harris, also heard the commotion and ran out to stop the fight.[3] Throughout the scuffle, Lemire screamed at everyone, "F-you, he's f'ing with my family, he's f'ing with my family."

---

[2] At trial, a police officer and Lochbaum testified that it takes approximately one-and-a-half hours to drive from Respondent's home in Kannapolis to Lochbaum's home in Rock Hill.

[3] During the struggle, Harris placed his finger between the gun's hammer and the gun to prevent it from being fired. At some point, the hammer of the gun "clicked" on Harris's finger, indicating that the gun would have discharged during the fight had Harris's finger not stopped the hammer.

Lochbaum, Whittington, Fivecoat, Lee, and Harris were able to wrestle the gun away from Lemire and pull Respondent away from Lochbaum. Respondent and Lemire quickly left the scene, driving at approximately sixty miles per hour in a thirty-five mile per hour zone without illuminating the vehicle's headlights.

Ultimately, a grand jury indicted Respondent and Lemire for lynching, conspiracy, and pointing and presenting a firearm. At trial, Respondent moved for a directed verdict at the conclusion of the State's case. He argued that the State had failed to provide any testimony that the attack on Lochbaum was premeditated, or that Respondent and Lemire jointly planned the attack. Rather, Respondent asserted he was merely speaking with Lochbaum when Lemire appeared, and he only reacted to Lochbaum's "affirmative action" of "jump[ing] on [] Lemire" to grab the gun. The trial court denied Respondent's motion, and the jury later convicted Respondent and Lemire of second-degree lynching, criminal conspiracy, and pointing and presenting a firearm.

The court of appeals reversed the trial court's decision to deny Respondent's motion for a directed verdict. *Larmand*, 402 S.C. at 187, 739 S.E.2d at 900. Specifically, with respect to the lynching and conspiracy charges, the court of appeals found a complete lack of evidence of premeditation or a common plan to assault Lochbaum. *Id.* at 190–94, 739 S.E.2d at 901–03. With respect to the firearm charge, the court of appeals found that the State did not present any evidence of a conspiracy between Respondent and Lemire, and it was undisputed that Respondent never had possession of the gun. *Id.* at 194, 739 S.E.2d at 903–04. Therefore, the court of appeals reversed all three of Respondent's convictions. *Id.* at 194, 739 S.E.2d at 904.

We granted the State's petition for a writ of certiorari to review the court of appeals' decision.

ISSUE

Whether the court of appeals applied the correct standard of review in considering the trial court's denial of Respondent's directed verdict motion?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). A court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

ANALYSIS

A defendant is only entitled to a directed verdict if the State fails to produce any evidence of the offense charged. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing a defendant's motion for a directed verdict, the trial judge is only concerned with the existence of evidence, not with its weight. *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) (citation omitted).

On appeal from the denial of a directed verdict, appellate courts must view the evidence and reasonable inferences in the light most favorable to the State. *Id.* If there is either any direct evidence or any substantial circumstantial evidence reasonably tending to prove the defendant's guilt, appellate courts must find that the trial judge properly submitted the case to the jury. *State v. Cherry*, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004); *see also Walker*, 349 S.C. at 53, 562 S.E.2d at 315 ("When a motion for a directed verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, the trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." (citation omitted)).

In pursuing a lynching conviction, the State must produce at least some evidence that two or more persons had a common, premeditated intent to commit a joint act of violence on the person of another. *See* S.C. Code Ann. § 16-3-220 (2003) (defining second-degree lynching as "[a]ny act of violence inflicted by a mob upon the body of another person and from which death does not result") (recodified as amended at S.C. Code Ann. § 16-3-210(C) (Supp. 2014)); S.C. Code Ann. § 16-3-230 (2003) (defining a mob as "the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another") (recodified at S.C. Code Ann. § 16-3-210(A) (Supp. 2014)); *State v. Smith*, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct. App. 2002). The premeditated

intent to do violence may be formed either before or during the assemblage, but by definition cannot be spontaneous. *Smith*, 352 S.C. at 137, 572 S.E.2d at 475.

Moreover, "[t]o establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." *State v. Kelsey*, 331 S.C. 50, 63, 502 S.E.2d 63, 70 (1998).[4] Because the crime of conspiracy is the agreement itself, the State need not show any overt acts in furtherance of the common scheme or plan. *State v. Wilson*, 315 S.C. 289, 292, 294, 433 S.E.2d 864, 867, 868 (1993). Nonetheless, substantive crimes committed in furtherance of the conspiracy may constitute circumstantial evidence from which a jury could infer the existence of the conspiracy, its object, and scope. *Id.*

At issue here is whether the State presented any evidence demonstrating a premeditated intent on the part of Respondent to assault Lochbaum (for the lynching charge), or that Respondent and Lemire entered into an agreement to perpetrate the assault (for the conspiracy charge).[5] The State contends that the court of appeals applied an improper standard of review in conducting its inquiry. Specifically, the State argues that the court of appeals expressly credited the defense evidence and made credibility determinations, thereby erroneously substituting its own judgment for that of the trial court and the jury. We agree.

While the court of appeals should have considered the evidence in the light most favorable to the State, it instead primarily cited to *Respondent's and Lemire's* testimony, including their explanations for their actions. *See, e.g.*, *Larmand*, 402 S.C. at 191–92, 739 S.E.2d at 902; *id.* at 194, 739 S.E.2d at 903. In doing so, the

---

[4] *See also* S.C. Code Ann. § 16-17-410 (2003 & Supp. 2014) (defining a criminal conspiracy as "a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means"); *State v. Gunn*, 313 S.C. 124, 134, 437 S.E.2d 75, 80 (1993) (stating that the "gravamen of the offense of conspiracy is the agreement or combination," not merely a common objective between similarly situated people (citations omitted)).

[5] We need not address the firearm charge separately, as its validity rises and falls on the existence of a conspiracy under the "hand of one is the hand of all" theory.

court of appeals incorrectly minimized the circumstantial evidence the State presented regarding premeditation and an agreement between Respondent and Lemire.

Specifically, the State demonstrated: (1) Respondent and Lemire lived approximately one-and-a-half hours away from Lochbaum's house; (2) Respondent and Lemire arrived at Lochbaum's neighborhood late at night, unannounced; (3) Respondent and Lemire wore all-black clothing; (4) Respondent and Lemire parked their vehicle over one-quarter mile away from Lochbaum's house, facing the sole entrance and exit to the neighborhood, despite ample street parking near Lochbaum's house; (5) Respondent and Lemire approached Lochbaum's house on foot, rather than conducting a "drive by" to look for incriminating evidence of Lochbaum's involvement in the scheme to defraud Pop-A-Lock, such as the magnetic sign on Lochbaum's vehicle; (6) Respondent was "edgy" and "agitated" when he approached Lochbaum's house, and stood and stared silently at Lochbaum and his neighbors; (7) Respondent broke off arguing with and pushing Lochbaum to observe Lemire's approach from the adjoining vacant, darkened lot; (8) Lemire approached Respondent and Lochbaum a mere one minute after Whittington, Fivecoat, and Lee departed, despite parking at least one-quarter mile away; (9) Lemire approached from a vacant, darkened lot rather than from the lit street or sidewalk; (10) upon his approach, Lemire immediately pointed the gun at Lochbaum and drew the hammer of the gun back; (11) Lemire told Lochbaum, "This is what you get when you fuck with my family," and later during the altercation refused to let go of his gun because Lochbaum was "f'ing with [his] family;" (12) Respondent never confronted Lemire or tried to get him to lower the weapon or return to their vehicle; and (13) Respondent and Lemire drove away together at a high rate of speed without illuminating their vehicle's headlights.

Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was *any* evidence from which the jury could infer Respondent's guilt. Given the deferential standard of review, we find the State presented sufficient circumstantial evidence of premeditation and a common plan or scheme such that the trial judge properly denied Respondent's motion for a directed verdict. Accordingly, the court of appeals erred in reversing Respondent's convictions.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Columbia Venture, LLC, Appellant,

v.

Richland County, Respondent.

Appellate Case No. 2013-001067

Appeal from Richland County
John Hamilton Smith, Sr., Special Referee

Opinion No. 27563
Heard November 18, 2014 – Filed August 12, 2015

AFFIRMED

Manton M. Grier, James Y. Becker, and Elizabeth Halligan Black, all of Haynsworth Sinkler Boyd, PA, of Columbia, for Appellant.

M. McMullen Taylor, of Mullen Taylor, LLC, of Columbia, Pope D. Johnson, III, of Johnson & Barnette, LLP, of Columbia, and John D. Echeverria, of South Royalton, Vermont, for Respondent.

John S. Nichols, of Bluestein Nichols Thompson and Delgado, of Columbia, for Amicus Curiae, The Association of State Floodplain Managers, Inc.; Robert E. Lyon, Jr., John K. DeLoache, Alexander White Smith

and James Ferguson Knox, all of Columbia, for Amicus Curiae, South Carolina Association of Counties.

JUSTICE KITTREDGE: Appellant Columbia Venture, LLC, purchased 4,461 acres of land along the eastern bank of the Congaree River in Richland County, intending to develop the property. Columbia Venture knew at the time of the purchase that the Federal Emergency Management Agency (FEMA) was in the process of revising the area flood maps and designating most of the property as lying within a regulatory floodway. *See* 42 U.S.C. § 4101(e)–(f) (requiring FEMA to assess the need to revise flood maps every five years). Pursuant to federal law, development is generally not permitted in a regulatory floodway. When Columbia Venture's efforts to remove the floodway designation were unsuccessful, Columbia Venture sued Richland County, alleging an unconstitutional taking. By consent, the case was referred to a special referee, who after numerous hearings and a multi-week trial dismissed the case and entered judgment for Richland County. We affirm.

I.

To reduce the losses caused by flood damage, to create a unified national program for floodplain management, and to increase the availability of affordable flood insurance, Congress enacted the National Flood Insurance Act of 1968, through which it established the National Flood Insurance Program (NFIP). 42 U.S.C. §§ 4001–4131. Under the NFIP, state and local governments must "make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses," and "guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards." *Id.* § 4001(e). Although local communities are not required to participate in the NFIP, no purchaser or owner of property located within a non-participating community is eligible for federal lending, flood insurance, or federal disaster relief. *See id.* §§ 4022(a), 4106. Richland County has participated in the NFIP since 1981.

FEMA is the federal agency responsible for implementing the NFIP and for making scientific and technical determinations to identify flood hazards for a given area. 42 U.S.C. § 4101(e)–(f). The basis for most of FEMA's mapping and regulation is the "base flood" or "100-year flood," which has a one percent chance

of occurring in any particular year.[1] 44 C.F.R. § 59.1. Based on its scientific studies regarding the elevation of a base flood, FEMA issues a Flood Insurance Rate Map ("FIRM" or "flood map"), which identifies and delineates flood hazards within a community.[2] *Id.* Communities are required to adopt the FIRMs and to restrict development in those flood hazard areas.[3] 42 U.S.C. § 4102(c); 44 C.F.R. § 60.3. A local community's floodplain land-use controls must meet FEMA's minimum requirements, but FEMA encourages communities to impose more restrictive regulations. 44 C.F.R. § 60.1(d). In one important aspect, Richland County's regulations are more restrictive than the FEMA minimum in that Richland County, by ordinance, prohibits construction in a floodway.

---

[1] As a practical matter:

> It is important to note that the 100-year storm is not based on any actual storm. Instead, a theoretical storm is constructed by using mathematical models. A hydraulic computer model is applied to generate the width and location of the floodway at each cross-section at which the stream is measured. The water surface elevation for the design flood is plotted onto a corresponding topographical map showing relative ground elevations. Areas in which the plotting reveals the flood elevation of the theoretical design flood to be higher than the ground elevation are then included within the flood hazard area.

Am. Cyanamid Co. v. State, Dep't of Envtl. Prot., 555 A.2d 684, 688 (N.J. Super. Ct. App. Div. 1989) (internal citation omitted).

[2] Floodplain areas are continuously shaped by the forces of water, and surrounding development also alters the floodplain and the dynamics of flooding. Accordingly, FEMA must assess the need to revise its flood maps every five years and undertake revisions as it sees fit. 42 U.S.C. § 4101(e)–(f). FEMA may also initiate a re-study at any time upon the request of a state or local government if the requesting community supplies sufficient technical data justifying the request. *Id.*

[3] In addition to local land use restrictions, federal law requires flood insurance in special hazard areas. 44 C.F.R. § 59.1.

Flood hazard areas are divided into two parts, called the "regulatory floodway" and the "flood fringe," which are referred to collectively as the "floodplain." In conducting its flood studies, FEMA identifies the area adjacent to a river or stream that is subject to dangerously high flood levels and rushing water during a flood and within which the presence of development would increase the danger posed by flood conditions. This area, which poses the greatest flood risk, is known as the regulatory floodway. 44 C.F.R. § 59.1. The remainder of the floodplain area is the flood fringe, which is expected to be under water during a 100-year flood but within which floodwaters are expected to be comparatively more shallow and slow-moving. Richland County is comprised of 487,600 acres of land, of which 16,516 acres are designated as regulatory floodways.

Within a regulatory floodway, FEMA requires that a community must, at a minimum:

> [P]rohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway *unless it has been demonstrated* through hydrologic and hydraulic analyses performed in accordance with standard engineering practice *that the proposed encroachment would not result in any increase in flood levels* within the community during the occurrence of the base flood discharge.

44 C.F.R. § 60.3(d)(3) (emphasis added). This is commonly referred to as the "no-rise" standard.

As noted, Richland County's restrictions on encroachments within a regulatory floodway are more restrictive than the FEMA minimum.[4] Under the floodway

---

[4] Michael Criss, a former Richland County Planning Director, testified Richland County's more restrictive land-use standards enable County residents to receive discounted flood insurance rates and that these more-restrictive standards are forward-looking and thus further public safety because:

> The federal flood maps do not account for the continued urbanization and development of the corresponding watersheds and the resulting increase in stormwater runoff and potential flooding. . . . The federal flood maps are retrospective. They rely on historical flood records

provision of the County's stormwater management ordinance in place when Columbia Venture purchased the property, "no levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway." Richland County, S.C., Code § 8-62(h) (1994). This prohibition against impeding the free flow of floodwater, or the "no-impede" standard, essentially prohibits construction in a floodway.[5] By contrast, areas outside the regulatory floodway but still within the fringes of the floodplain may be developed, so long as new structures are sufficiently elevated and flood-proofed. *Id*. § 26-73.5(2) (1999). Thus, FEMA's determination of whether an area of land is within a regulatory floodway (versus within the larger floodplain) essentially determines whether development will be permitted.[6]

Once FEMA completes its scientific studies and prepares a revised flood map, the new maps are issued as preliminary documents for review by the affected community and the public. 42 U.S.C. § 4104(a). The revised flood maps do not become final until federal statutory notice and administrative appeal periods have passed.[7] However, under certain circumstances (that apply in this case), communities are directed to use the preliminary revised flood maps for the purposes of floodplain regulation. Specifically, federal guidance provides that if a

---

> and don't project the potential of increased flooding in the future from urbanization or from the possibility of more intense storms due to climate change.

[5] The following uses are permitted within a regulatory floodway: agricultural and horticultural uses, parking areas, accessory and recreational uses (such as lawns, gardens, play areas, swimming areas, fishing areas, beaches, boat ramps, parks, playgrounds, etc.), airport runways and landing strips, and various infrastructure uses (such as streets, bridges, overhead utility lines, storm drainage facilities, sewer lines, and waste treatment plants). Richland County, S.C., Code § 26-73.4(3).

[6] The County's stormwater management ordinance did not contain a variance provision.

[7] A community itself or any private citizen adversely affected by the proposed flood-map revisions may initiate an administrative appeal challenging the scientific or technical basis for FEMA's determinations. 42 U.S.C. §§ 4104–4104-1.

preliminary revised flood map widens a floodway or shows higher base flood elevations than the current final flood map, then the preliminary revised map should be used for regulatory and permitting purposes.

Aside from successfully appealing the scientific or technical basis for FEMA's floodplain designations, a floodplain designation may be removed if a landowner constructs a certified levee, thereby allowing the area protected by a certified levee to no longer be considered part of the floodway or floodplain. 44 C.F.R. § 65.10. For a levee to be certified, it must meet FEMA's design, stability, and orientation standards, and a local NFIP community must agree to assume responsibility for maintaining the levee. 44 C.F.R. § 65.10(c)–(d). Although FEMA regulations require that levees be designed to withstand a 100-year flood, Richland County's ordinances are stricter and require that levees must provide protection from a 500-year flood[8] plus three feet of freeboard. Richland County, S.C., Code § 8-62(g) (1994).

Prior to undertaking any levee upgrades necessary to acquire FEMA certification, property owners may submit proposed design and construction plans, along with supporting scientific data, for FEMA's review and advance comment as to whether such plans are sufficient to obtain levee certification. 44 C.F.R. § 65.5. The scientific data required for FEMA to consider a proposed project involves extensive hydraulic and hydrologic engineering analysis. *Id*. § 65.6. After a levee construction project is approved and completed, FEMA then revises its flood map to reflect the protection provided by the certified levee and removes the floodplain designation through a Letter of Map Revision (LOMR). *Id*. § 65.10

We turn now to the facts of this case.

II.

This case involves 4,461 acres of land along the eastern bank of the Congaree River in Richland County. The property is located just a few miles from the City of Columbia, near Interstate 77, Heathwood Hall Episcopal School, and the City of

[8] A 500-year flood is one that has a 0.2% chance of occurring in any given year.

Columbia's sewer treatment plant. For decades, the property was owned by the late Burwell Manning and was used for farming and recreational purposes.[9]

In order to protect the property from flooding, in the early 1960s, Manning constructed a system of levees extending for over twenty miles along the banks of the Congaree River and Gills Creek, which runs through the property. These agricultural levees were approximately twenty feet tall by forty-five feet wide and were constructed under the supervision of Manning and a registered surveyor using an Army Corps of Engineers' levee construction manual and guidance from the U.S. Department of Agriculture. At the time the levees were constructed, no permitting process or levee design and construction regulations existed. Although the immediate purpose of the levees was to protect his crops, Manning ultimately envisioned large-scale development on the property, and he knew that sufficient levees would be required to protect any future development.

Following completion of the levees, Manning sold approximately 120 acres to the City of Columbia for construction of its sewer treatment plant.[10] Thereafter, Manning subdivided and donated a parcel of land for the construction of Heathwood Hall Episcopal School. In addition to protecting Heathwood Hall, the City's sewer plant, and the remainder of Manning's property, the levees also protect the nearby land of several other property owners and another wastewater treatment plant.

Over the years, Manning used the property to secure various loans and agricultural credit lines, and by June 1997, Manning had defaulted on those loans. To maintain

---

[9] The only structures on the property are barns, a grain facility, an unoccupied house, and an office building.

[10] The City's parcel included a portion of the levees along the Congaree River, and the deed included a covenant by the City to maintain the levees. In 1976, the City's portion of the levee failed due to a lack of proper maintenance and allowed water to flow onto an adjacent 1806-acre parcel still owned by Manning; Manning sued the City and recovered damages resulting from the City's failure to adequately maintain the levees. *See Manning v. City of Columbia*, 297 S.C. 451, 452, 377 S.E.2d 335, 336 (1989) (affirming a jury award of $4,120,000 in favor of Manning).

possession of his property (and to keep it from being subdivided, which would have thwarted his development vision), Manning entered into a complicated series of real estate transactions, through which his outstanding agricultural debts were paid and he retained an option to repurchase the property no later than February 1999. After securing the repurchase option in June 1997, Manning and his son Deas Manning, began looking for investors to help finance the planned repurchase before the option expired.

At that time, only the thin strip of land between the river channel and the riverside toe of the levees was designated as part of the regulatory floodway and subject to the County's extensive development restrictions. Thus, in June 1997, the levees themselves could be improved and had the potential to become FEMA-certified, thereby allowing the land behind the levees to be developed.

By the spring of 1998, Tee-To-Green, LLC, expressed interest in developing the property into a golf course and entered into a joint venture option agreement with Manning. During the contractual due-diligence period, Tee-To-Green ordered site plans, conducted environmental assessments and wetlands investigations, and commissioned an appraisal, which valued the property at $30 million; however, at some point during the due-diligence period, Tee-To-Green discovered FEMA was in the process of revising the flood map of Richland County and that the preliminary revised map was expected to reconfigure the regulatory floodway to include approximately 70% of the property. Ultimately, Tee-To-Green withdrew its option to purchase the property, as it was unable to obtain satisfactory assurances from the County that the levees could be upgraded in light of the imminent floodway designation. Tee-To-Green understood that the floodway designation thwarted its intended development and reduced the value of the property.

On June 5, 1998, FEMA released its preliminary revised flood map, and as anticipated, the revisions enlarged the Congaree River's regulatory floodway to encompass most of the property owned by Manning, the City of Columbia, and Heathwood Hall. Although this revised map was not yet finalized, it was the effective map for permitting purposes, as it widened the regulatory floodway and showed higher base flood elevations than the prior map.

Since the levees were included within the regulatory floodway under the preliminary revised flood map, as of June 5, 1998, whether it was possible to

obtain a land-disturbance permit to upgrade the levees depended on County's interpretation of the "no-impede" standard within its ordinance. Although that ordinance has always expressly prohibited any encroachment that would "impede the free flow of water," there is some evidence that certain County employees, at some point, interpreted that language as being consistent with the less restrictive FEMA "no-rise" standard which permits development within a floodway, so long as it is shown not to cause an increase in flood levels. This uncertainty in the meaning of the County's 1994 stormwater ordinance no-impede standard is central to Columbia Venture's theory of the case.[11]

With one potential sale already falling through over the unresolved flood-map issues and the expiration of the repurchase option quickly approaching, Manning was running out of time to find another investor. In mid-1998, another development company, Burroughs & Chapin, expressed interest in purchasing the property to construct a large-scale, mixed-use development. Burroughs & Chapin is based out of Horry County; it had never taken on a project of this large a scale outside Horry and Georgetown counties or any project involving levee systems or FEMA regulations. Burroughs & Chapin recognized that there was a "small window of opportunity to get this large amount of acreage, strategically located, in one parcel for development purposes [at] the right price." As early as May 1998, internal documents of Burroughs & Chapin reflect it was well-aware that the bulk of the property was designated as a regulatory floodway and that construction is not permitted in a floodway. Nevertheless, Burroughs & Chapin continued to pursue the possibility of purchasing the property, and on November 13, 1998, Burroughs & Chapin entered into a Purchase Agreement with Manning.

Before the sale was finalized, Burroughs & Chapin retained the Lockwood Greene engineering firm to assist it in exploring the FEMA floodway issues. Prior to closing, Lockwood Greene issued a cursory report purporting to summarize "the FEMA and floodway issues" and estimating a cost and completion date range for the potential levee construction. The report acknowledged the 1998 preliminary flood map designating most of the property as a floodway but stated "the acceptance of these maps as final is currently on hold by FEMA," and that the

[11] Columbia Venture did not seek an opinion from counsel concerning the proper interpretation or the impact of the stormwater ordinance on its proposed development prior to purchasing the property.

property's floodplain classification could be removed altogether through upgrading and obtaining FEMA certification of the levees.[12] The report also stated that the "floodway elevation is currently being re-done by FEMA," and that "[t]he results of this are not known as of yet." This preliminary engineering report did not include any of the required scientific flood modeling or analysis and did not address the relevant levee design and construction requirements. Further, this cursory evaluation did not take into account Richland County's more stringent development restrictions or the cost implications of those enhanced requirements. At trial, Columbia Venture's engineer admitted that at the time of this preliminary report, "we didn't quite understand the full [FEMA] certification process."[13]

Seeking assurance that its development plans would come to fruition, Lockwood Greene, on behalf of Burroughs & Chapin, provided a summary of the intentions to upgrade the levees and sought assurance from FEMA that it would agree to certify the levees following construction and from Richland County that it would assume responsibility for levee maintenance following FEMA certification.

FEMA responded with a letter stating the following:

> If the aforementioned levee is upgraded to meet in total the applicable provisions of 44 C.F.R., Part 65.10, and the construction necessary for it to meet said requirement[s] is in compliance with State and local floodplain management requirements, then FEMA would revise the applicable FIRM to remove the Special Flood Hazard Area designation and floodway. As you are aware, should the structural modifications necessary to bring the levee into compliance with 44 C.F.R., Part 65.10 result in any increase in base flood elevations as a result of construction within the existing regulatory floodway of the

---

[12] This statement that the finalization of the 1998 map had been "put on hold" erroneously implied that that preliminary map was not the operative map for permitting purposes.

[13] The engineer also acknowledged that "we all didn't completely understand what the scope of the work was at that time," in order to challenge the scientific and technical basis of FEMA's floodway designations. At the time of purchase, Columbia Venture was not prepared to submit the extensive engineering analysis required to obtain a LOMR from FEMA.

> Congaree River, the requirements of 44 C.F.R., Part 65.12 would also have to be met. In addition, any change in the configuration of the floodway as a result of the levee modifications will have to be done with the approval of the impacted communities.

Meanwhile, Lockwood Greene had also requested that Richland County agree to assume responsibility for the levees if FEMA agreed to certify them following construction. However, because this request was presented to County Council approximately two weeks before the scheduled closing date, the County was concerned that it did not have sufficient time to explore fully the financial and safety aspects of the proposed levee construction. As a result, County Council adopted the following contingent resolution regarding the levees:

> [T]o accept responsibility for local inspection and enforcement of the levee system, and if required by FEMA, to accept operation and maintenance responsibility for the system *contingent upon the following*:
>
> 1) The property owners upgrade the levees to meet FEMA standards;
>
> 2) [T]he property owners prepare all required documentation including operation and maintenance plans;
>
> 3) [C]ertification that the levee system, as upgraded meets FEMA standards;
>
> 4) The parties, including Richland County, the City of Columbia and the developers, resolve the issues of the performance and funding of the operation and maintenance responsibility;
>
> 5) The county's acceptance of responsibility terminates if the developers of the area do not invest at least $30,000,000 within ten years of the date of the adoption of this motion.

(emphasis added).

Additionally, Burroughs & Chapin solicited a "Non-Binding Memorandum of Understanding" from the County Administrator, which stated, "[t]he County is aware of and agrees to work with the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles and a multi-county business park." The bottom of the memo reiterated, "This agreement is intended to be non-binding on the parties." This memorandum of understanding did not provide the outright assurances relating to government assumption of ongoing levee maintenance as required by 44 C.F.R. § 65.10.

Nevertheless, the board of directors of Burroughs & Chapin thereafter resolved to move forward with the purchase of the property based on its belief that "an agreement *can be negotiated* with Richland County to assume the maintenance of the dike system." (emphasis added). Indeed, the board of directors was well aware that the County's Resolution expressly involved multiple contingencies, and at trial, Columbia Venture conceded that the Resolution did not bind Richland County to accept maintenance of the levees.

Notably, in the days and weeks leading up to the sale, Burroughs & Chapin was having difficulty retaining investors in the joint venture to help fund the agreed-upon purchase price of $18 million. As the closing date neared, Burroughs & Chapin had acquired firm cash commitments of only $11 million. To cover the shortfall, Burroughs & Chapin negotiated with Manning to accept the $11 million and take the balance of the purchase price as shares in the joint venture. On February 17, 1999, Appellant Columbia Venture, LLC, was formed with its initial members including Burroughs & Chapin (contributing $9 million and serving as the managing member), Lockwood Greene (contributing $2 million in in-kind engineering services), and Manning's Green Diamond, LLC (receiving $6,650,000 in membership shares in Columbia Venture, which were to be redeemed within fourteen months).

Despite the unresolved status of the various FEMA flood map issues, on February 19, 1999, Columbia Venture proceeded with the transaction and purchased the property for a price of $18 million. Based on a then-recent appraisal, Columbia Venture believed that if its development plan proved unworkable, the property could still be sold for around $30 million.

As of the date of purchase, Columbia Venture knew FEMA's preliminary flood map designated almost all of the property as lying within the regulatory floodway,

that the County's stormwater ordinance could be interpreted to preclude improvement of the levees and subsequent commercial development, and that the possibility of FEMA approving and certifying upgraded levees was contingent upon a host of factors which Columbia Venture had not fully explored and over which Columbia Venture did not exercise ultimate control.

Shortly after closing, Columbia Venture announced its plans for a $1 billion development on the property, which it called Green Diamond. The initial Green Diamond plans included residential uses, golf courses, an outlet mall, restaurants, hotels, offices, retail businesses, a research and development park, a retirement village, a theme park, and a wildlife expo, all to be constructed within the Congaree River floodplain. This development plan was contingent upon Columbia Venture receiving $864 million in multi-county business park public financing incentives and $80 million in infrastructure costs to be financed through special revenue bonds issued by the County. Columbia Venture had not obtained any assurances as to these plans and was aware of the concerns raised by its requests of Richland County and the City of Columbia.[14]

On February 20, 2002, FEMA's revised floodway determinations, placing 3,130 acres of Columbia Venture's property within a regulatory floodway, became final by operation of law.[15] Columbia Venture appealed FEMA's findings in federal court but, ultimately, was unsuccessful.[16] Columbia Venture claims that the date

---

[14] Moreover, in addition to government concerns, public opposition to the project began to mount, and a citizen group called the Congaree Task Force opposed the project.

[15] The remaining 1,135 acres of Columbia Venture's property were outside of the floodway.

[16] In its federal appeal, Columbia Venture disputed the scientific and technical basis for FEMA's September 2000 base flood elevation determinations, which caused most of Columbia Venture's land to be designated as lying within the regulatory floodway. *Columbia Venture LLC v. S.C. Wildlife Fed'n*, 562 F.3d 290, 294 (4th Cir. 2009). The federal district court vacated FEMA's determinations based on FEMA's failure to strictly comply with the timing of required notice publications. *Id.* FEMA appealed, and the Fourth Circuit reversed the district court and reinstated FEMA's base flood determinations, finding FEMA's

of the alleged taking was February 20, 2002. Thus, it was FEMA's floodway determination that Columbia Venture claims constitutes the alleged taking—not any action by Richland County.

In August 2004, Columbia Venture filed suit, claiming the County's actions constituted an unconstitutional taking and a substantive due process violation. Following a lengthy stay pending the resolution of Columbia Venture's appeal of the federal court action, this action resumed in December 2010, and was referred to retired circuit court judge John Hamilton Smith as Special Referee. In various pre-trial rulings, the Special Referee granted summary judgment in favor of the County as to Columbia Venture's per se taking claim and substantive due process claim, but denied summary judgment on Columbia Venture's regulatory taking claim.

Thereafter, Columbia Venture's regulatory taking claim was tried before the Special Referee, sitting without a jury. Following the multi-week trial, the Special Referee found that Richland County's actions did not constitute a taking.[17] Specifically, in terms of the *Penn Central*[18] factors, the Special Referee found the designation of Columbia Venture's property as a regulatory floodway (by FEMA, not Richland County) caused a significant decrease in the property's value; however, the Special Referee concluded that factor was outweighed by the fact that Columbia Venture's investment-backed expectations were not reasonable in light of the inherent risk in floodplain development. Moreover, the Special Referee found the County's pre-existing floodplain regulations and floodplain management regulations served an important purpose of flood protection. The Special Referee concluded that, on balance, the *Penn Central* factors preponderated against a taking and therefore that the County could not be responsible for any diminution in the property's value. This appeal followed.

---

noncompliance was harmless and Columbia Venture was not prejudiced by FEMA's failure to publish notifications, as Columbia Venture was deeply involved in the administrative process from the beginning. *Id*. at 294–95.

[17] We commend the learned Special Referee for his expert handling of this case, including his thorough and excellent order.

[18] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

III.

Having set forth in detail the factual background and procedural history associated with Columbia Venture's purchase of the property and many efforts to remove the floodway designation, we address the merits of this appeal. Like the able Special Referee, we find Richland County's adoption of floodway development restrictions and the County's required utilization of FEMA flood data do not constitute a taking of any sort.

"The question of a taking is one of law." *Ex Parte Brown*, 393 S.C. 214, 224, 711 S.E.2d 899, 904 (2011). However, "[w]hether a taking that is compensable under the Fifth Amendment has occurred is a question of law that is based on factual determinations." *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004) (citations omitted). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The judge's findings are equivalent to a jury's findings in a law action." *Id*. (citing *Chapman v. Allstate Ins. Co*., 263 S.C. 565, 567, 11 S.E.2d 876, 877 (1974)). The evidence compellingly supports the findings of the Special Referee.

A. Flowage Easement

Columbia Venture argues the County's adoption of the revised FEMA flood maps (which designate most of Columbia Venture's property as lying within the regulatory floodway and trigger development restrictions that prevent Columbia Venture from expanding the levees) is tantamount to the County taking a flowage easement upon Columbia Venture's property for which it is entitled to just compensation under the Takings Clause. We disagree, for the Special Referee properly found Richland County's floodway development restrictions are simply limitations on land use and do not constitute a flowage easement upon Columbia Venture's property.

We acknowledge the well-established principle that government-induced flooding may, in some circumstances, constitute a taking that would justify compensation under the Takings Clause. *See Arkansas Game & Fish Comm'n v. United States*,

133 S.Ct. 511, 518 (2012) ("'[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.'") (quoting *Pumpelly v. Green Bay Co*., 80 U.S. 166, 181 (1871)). However, for flooding to amount to a taking, there must be a causal connection between the challenged government act and the increased flooding—a connection which is lacking in this case. *See Sanguinetti v. United States*, 264 U.S. 146, 149–50 (1924) (finding no taking occurred where there was no causal connection between the construction of a nearby government canal and the increased amount or severity of periodic flooding).

In addition to the requirement of a causal connection, a compensable taking occurs only where a claimant shows an actual increase in the frequency or severity of flooding. *See Danforth v. United States*, 308 U.S. 271, 285 (1939) (rejecting the argument that the passage of legislation in and of itself constitutes a taking and noting that although "[a] reduction or increase in the value of property may occur by reason of legislation . . . [s]uch changes in value are incidents of ownership" and "cannot be considered as a 'taking' in the constitutional sense"); *see also Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 753 (Fed. Cir. 2013) ("[U]nder well-settled law, the apprehension of flooding does not constitute a taking of a flowage easement."). Indeed, to successfully show the government has taken a flowage easement, a claimant must demonstrate that the occurrence of flooding is the "natural consequence of government action" and that such flooding, though it may be intermittent, is nevertheless "of a type which will be inevitably recurring." *Barnes v. United States*, 538 F.2d 865, 870–73 (Ct. Cl. 1976) (finding claimant had shown a government taking of a flowage easement by demonstrating significant damages resulting from frequent and inevitably recurring flooding which was the natural consequence of the government's control of the flow of a river through a nearby dam).

In evaluating this claim, we find the United States Supreme Court's decision in *United States v. Sponenbarger*, 308 U.S. 256 (1939), instructive. Following "the most disastrous of all recorded floods" which occurred along the Mississippi River in the spring of 1927, Congress enacted the Mississippi Flood Control Act of 1928 (the "1928 Act") which provided for extensive improvements to a 950-mile system of levees along both banks of the Mississippi River stretching from Missouri to the Gulf of Mexico. *Id*. at 261. The improved levee system was designed to include several designated spillway points, at which the height of the existing levees would

not be raised and behind which diversion channels would be constructed. These lower spillway points were created to divert floodwaters from the main river channel in an effort to prevent floods from cresting over the higher riverside levees during major flood events. Thereafter, Julia Sponenbarger, an owner of land lying in a contemplated diversion channel along the waterway, filed suit against the United States alleging the 1928 Act would result in her property being inundated with water during major floods, for which she was entitled compensation under the Takings Clause. Although the existing levees protecting her land would not be altered or reduced under the 1928 Act, Sponenbarger nevertheless claimed a taking had occurred because the government planned to improve other nearby levees but not those protecting her land.

The Supreme Court held the 1928 Act did not constitute a taking of Sponenbarger's property or a "servitude from excessive floodwaters" because the United States had neither caused her property to flood nor "in any wise nor to any extent increased the flood hazard thereto." *Id*. at 263 (internal marks omitted). Since the existing levees were to remain in place, the Supreme Court found:

> [T]he 1928 Act had not increased the immemorial danger of unpredictable major floods to which [Sponenbarger]'s land had always been subject. Therefore, to hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no [action] of any kind. So to hold would far exceed even the "extremest" conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private party owner for flood damages which it in no way caused.

Id. at 265.

The Supreme Court readily acknowledged that a taking may occur where the government directly subjects private land to intermittent floods; however, as to Sponenbarger's property, the Court held "[t]he Government has not subjected [her] land to any additional flooding, above what would occur if the Government had not acted; and the [Takings Clause of the] Fifth Amendment does not make the

Government an insurer that the evil of floods be stamped out universally." *Id*. at 266.

Here, as in *Sponenbarger*, the existing levees have remained in place, and unlike other cases in which the natural consequence of government action caused an increase in flooding, here, the County's actions in adopting FEMA's revised flood maps do not, in any way, increase the flood hazard to which Columbia Venture's property has historically been exposed. *Compare Jacobs v. United States*, 290 U.S. 13, 16 (1933) (finding a compensable flowage easement was created by reason of the government's construction of a dam along a tributary of the Tennessee River, which caused an increase in the frequency of intermittent overflows upon claimant's farmland, destroyed claimant's crops, and impaired his use of the land for agricultural purposes), *and Cotton Land Co. v. United States*, 75 F. Supp. 232, 233–35 (Ct. Cl. 1948) (finding compensable taking occurred where the construction of a dam and the impounding of water in its reservoir caused over 7,000 acres of claimant's land to be flooded), *and Barnes*, 538 F.2d at 870–73 (finding claimant demonstrated the government had taken a flowage easement where claimant proved significant damages resulting from frequent and inevitably recurring flooding that was the natural consequence of the government's control of the flow of a river through a nearby dam), *with Danforth v. United States*, 308 U.S. 271, 286 (1939) (finding no taking occurred where riverbank levee was not lowered from its previous height and the land at issue was "as well protected from destructive floods as [it was] formerly" and stating "[t]he Government could become liable for a taking, in whole or in part, even without direct appropriation, [only] by such [action] as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior"), *and Sanguinetti* 264 U.S. at 149–50 (finding no taking occurred despite periodic flooding of claimant's property because the land was subject to the same periodic overflows prior to the government's construction of a nearby canal and levee system and claimant produced no evidence that the amount or severity of flooding was increased by construction of the canal). Indeed, the County's ordinances, which allow for maintenance and repair but prohibit expansion of the existing levees, merely maintain the status quo in terms of the flood risk. Thus, in the absence of any increase in flooding attributable to an act of the County, we affirm the Special Referee's finding that the County did not take a flowage easement.[19]

[19] To the extent Appellant argues an exaction has occurred, we would likewise find this theory unavailing. This case in no manner falls within the exactions line of

B. Regulatory Taking

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the United States Supreme Court "identified three factors to be weighed in order to determine whether a regulatory imposition could constitute a taking under the Fifth Amendment, thus requiring compensation on the part of the government for the taking of private property." *Norman v. United States*, 63 Fed. Cl. 231, 261 (2004). "In this analysis, the court must balance (1) the extent to which the regulation has interfered with the property owner's reasonable investment-backed expectations; (2) the economic impact of the regulation on the claimant; and (3) the character of the governmental action at issue." *Id*. (citing *Penn Central*, 438 U.S. at 124). Here, Columbia Venture argues that the Special Referee erred in finding no

---

cases, as Richland County has not required Columbia Venture to grant an easement or dedicate a portion of its property for public use. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (finding conditions on development of property constitute a taking if there is not a nexus between the legitimate state interest and the condition created or if the burden created by the condition is not "roughly proportionate" to the government's justification for regulating) (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

Further, to the extent Columbia Venture argues the County's development restrictions amount to a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (finding a taking occurs where a regulation denies all economically beneficial or productive use of land), we likewise find this theory provides no relief because approximately thirty percent of Columbia Venture's property is not designated as lying within the regulatory floodway and therefore is not subject to the same stringent development restrictions. Moreover, the entire tract retained substantial value for agricultural and other purposes, even under the existing designations. Indeed, since February 2002, Columbia Venture has sold approximately 3,000 acres of the property for almost $10 million. Thus, no regulation has deprived the property of all economically beneficial use, and no *Lucas*-type categorical taking occurred. *See Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 313–14, 737 S.E.2d 601, 619 (2013) (finding that except in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, no taking has occurred) (citing *Lucas*, 505 U.S. at 1015–16).

regulatory taking occurred because the *Penn Central* factors did not preponderate in Columbia Venture's favor. We disagree.

Aside from cases involving a *Lucas*-type categorical taking, "regulatory takings challenges are governed by the standards set forth in *Penn Central*." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005); *see also Byrd v. City of Hartsville*, 365 S.C. 650, 658, 620 S.E.2d 76, 80 (2005) (finding that an inverse condemnation claim involving denial of less than all economically viable use is governed by *Penn Central*). "The 'common touchstone' of each regulatory taking theory is 'to identify *regulatory actions that are functionally equivalent to the classic taking* in which government directly appropriates private property or ousts the owner from his domain.'" *Dunes West*, 401 S.C. at 314, 737 S.E.2d at 619 (quoting *Lingle,* 544 U.S. at 539, 125 S.Ct. 2074 (emphasis added)). "However, the United States Supreme Court repeatedly has declined to identify a specific threshold of interference with property rights below which no taking occurs and above which there is a taking." *Id*. at 314–15 (citing *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 332–35 (2002) (holding that determining whether a regulatory taking has occurred is not best served by categorical rules but rather "requires careful examination and weighing of all the relevant circumstances")).

The Supreme Court has recognized "that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518. "In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the [Supreme] Court has recognized few invariable rules in this area." *Id*. "Noting that these constitutional challenges present 'essentially ad hoc' inquiries which are largely dependent on the particular circumstances of each case, *Penn Central* identifies the appropriate factors to consider in determining whether a taking has occurred: the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations." *Dunes West*, 401 S.C. at 315, 737 S.E.2d at 619–20 (quoting *Penn Central*, 438 U.S. at 124).

In evaluating the *Penn Central* factors vis-à-vis Columbia Venture's property, the Special Referee noted that the property was historically, and still may be, used for agricultural and recreational purposes, even with the regulatory floodway designation. However, the Special Referee nevertheless found the regulatory

floodway designation significantly impaired the fair market value of the property since mixed-use development, the highest and best use of the property, would not be possible. The Special Referee found this was the only *Penn Central* factor that preponderated in Columbia Venture's favor, and that on balance, this factor was far outweighed by the other two—namely, the unreasonableness of Columbia Venture's development expectations and the important, safety-enhancing character of the government action. Columbia Venture contends this was error. We disagree and address each in turn.

1. Investment-Backed Expectations

Columbia Venture urges this Court to reverse the Special Referee's findings, claiming its Green Diamond development plans were reasonable and achievable and that the County "induced" its development expectations by adopting the contingent resolution regarding levee maintenance and executing the non-binding memorandum of understanding regarding the same prior to purchase. We find the Special Referee did not err in concluding Columbia Venture's expectations were unreasonable.

In evaluating a regulatory taking claim, "[t]he purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Cienega Gardens v. United States*, 331 F.3d 1319, 1345–46 (Fed. Cir. 2003) (quotations and citations omitted). "A property owner's reasonable investment-backed expectations are defined at the time the property is purchased." *Norman v. United States*, 63 Fed. Cl. 231, 267 (2004) (citation omitted).

In examining a party's investment-backed expectations, "'the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.'" *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348 (Fed. Cir. 2004) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)). In examining the reasonable expectations prong, the level of industry regulation is a "pertinent but not determinative factor." *Chancellor Manor v. United States*, 331 F.3d 891, 906 (Fed. Cir. 2003). "The subjective expectations of the [claimant] are irrelevant." *Id.* at 904 (citation omitted). "The critical question is what a reasonable owner in the [claimant's] position should have anticipated." *Id.*

As for the regulatory scheme at issue here, the NFIP was enacted in 1968, and the County has been a participant since 1981—well before Columbia Venture purchased the property. Based on the evidence presented at trial, there is no doubt that Burroughs & Chapin, Columbia Venture's managing member, was a sophisticated real estate development company with actual and constructive notice of the County's floodplain development restrictions that essentially prohibited construction within a regulatory floodway. Moreover, at the time of the purchase, Columbia Venture was well aware of the revised FEMA flood map's floodway designation and the fact that such designation carried with it extensive regulatory implications affecting over seventy percent of the property.

Although Columbia Venture may have subjectively believed that, in spite of all this, it would nevertheless be allowed to develop the extensive Green Diamond project, we find any such expectation was not objectively reasonable. As the Special Referee found:

> [P]rior to purchase, Columbia Venture had made very little investment in actual engineering analysis of its levee. Columbia Venture did not know if it could convince FEMA to issue a Flood Map with no floodway. Columbia Venture did not know whether it could upgrade its levee to meet FEMA's levee certification requirements. It did not know whether Richland County would ultimately accept responsibility for maintenance. It did not even have the financial resources in hand to undertake levee construction; in fact, Columbia Venture expected this cost to be paid through public financing.
>
> . . . .
>
> Columbia Venture faced an uncertain path forward with very little technical data and a complex regulatory scheme. Even Burroughs & Chapin's Board of Directors admitted that Green Diamond was "purely speculative in nature." This complex array of moving parts, all of which needed to fall into place in order for Columbia Venture to be able to develop its Property to the extent that it hoped for, made Columbia Venture's investment backed expectations unreasonable.

There is ample evidence in the record to support the Special Referee's factual findings, and we find the Special Referee did not err in determining this factor of the *Penn Central* analysis weighs against a taking. *See Mehaffy v. United States*, 499 F. App'x 18, 22 (Fed. Cir. 2012) (holding that recovery under a takings analysis is limited to property owners who can demonstrate reliance on a regulatory scheme that would allow their development plans to proceed unhindered); *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002) (finding that when a party moves forward with a transaction in light of actual or constructive knowledge of changing regulatory circumstances, "[t]he fact that his risk-taking turned out badly for him does not render it a taking in violation of the Fifth Amendment").[20]

2. Character of the Governmental Action

Columbia Venture argues the Special Referee erred in failing to find this prong preponderates in its favor and contends it alone bears a disproportionate burden of the County's flood map designations and that it receives no reciprocity of advantage by virtue of the regulation. We disagree, and find this factor likewise lends Columbia Venture no support.

The "character of the Government action" prong of the *Penn Central* analysis examines "the *magnitude or character of the burden* a particular regulation imposes upon private property rights" and "how any regulatory burden is

---

[20] To be clear, we do not find the fact that Columbia Venture was on notice of the impending floodway designation prior to its purchase of the property to be dispositive of the takings claim; indeed, such a finding would be inconsistent with the United States Supreme Court's decision in *Palazzolo v. Rhode Island*, in which the Supreme Court reversed the state supreme court's finding that "the acquisition of title after the effective date of the regulations barred the takings claims." 533 U.S. 606, 631 (2001). However, by the same token, *Palazzolo* does not require this Court to ignore the timing or sequence of the claimant's notice of the regulatory imposition relative to the purchase of the property in evaluating the reasonableness of investment-backed expectations. To the contrary, timing and sequence are quite probative and material to our analysis; we note they are simply not dispositive. *See id*. at 633 (noting "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations") (O'Connor, J., concurring).

distributed among property owners." *Lingle*, 544 U.S. at 542. In evaluating the benefits and burdens of a government regulation, "a taking does not take place if the prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'" *Penn Central*, 438 U.S. at 147 (quoting *Mahon*, 260 U.S. at 415) (noting that the concept of "reciprocity of advantage" is the reason zoning does not constitute a taking and stating "[w]hile zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefitted by another"). Indeed, the Fifth Amendment "'prevents the public from loading upon one individual more than his just share of the burdens of government'" and provides that only when an individual "'surrenders to the public something more and different from that which is exacted from other members of the public, [shall] a full and just equivalent [] be returned to him.'" *Id*. at 417–18 (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)).

Considering the character of the County's floodplain development restrictions, we find the important public purposes of mitigating the social and economic costs of flooding that are served by the County's ordinances are substantial and legitimate. *See Dolan*, 512 U.S. at 387 (acknowledging that floodplain development restrictions further legitimate public purposes of mitigating the serious risks posed by flooding). Moreover, the County's regulations further the important federal purposes served by the NFIP, namely to reduce the losses caused by flood damage, to create a unified national program for floodplain management, and to increase the availability of affordable flood insurance for all County residents. *See* 42 U.S.C. § 4001 (setting forth Congressional findings and declaration of purpose for the NFIP).

Columbia Venture's contention that it alone bears the burden of the County's ordinance is without merit. Indeed, the ordinance is applicable to all property located within a floodplain, which encompasses over 16,500 acres throughout the County. Richland County, S.C., Code § 8-18 (2001). This provision does not unjustly burden Columbia Venture. *See Penn Central*, 438 U.S. at 147 ("[A] taking does not take place if the prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'" (quoting *Mahon*, 260 U.S. at 415))).

Moreover, in terms of reciprocity of advantage, the County's restriction of floodway development benefits all owners of floodplain property within the County by reducing general flood hazards and allowing access to flood insurance under the NFIP. *See* 42 U.S.C. § 4022(a) (providing flood insurance coverage is available only in areas where governing bodies have adopted adequate land use and control measures); *Sponenbarger*, 308 U.S. at 267 (noting that where enforcement of a broad flood control program "measured in its entirety greatly reduces the general flood hazards," such a program is "highly beneficial" to individual tracts of land and does not involve a taking). Further, the County's limitations on development in flood-prone areas reduce the inherent risk of flood-related property damage and benefit all County taxpayers and residents by reducing the County's potential liability incurred in emergency response, rescue, evacuation, and other actions taken during a flood. *See, e.g.*, Roger A. Pielke, Jr., et al., *Flood Damage in the United States, 1926–2003: A Reanalysis of National Weather Service Estimates* 55 (National Oceanic & Atmospheric Administration, June 2002) (estimating that between 1929 and 2003, urban floods in the United States caused approximately $171 billion in property damage and noting the need for effective development management to mitigate future flood hazards as "[e]conomic damage results from an interaction between flood waters and human activities in the flooded area").

We find there is considerable evidence in support of the Special Referee's finding that this prong of the *Penn Central* analysis preponderates in favor of the County. Indeed, in light of the potential public costs of extensive development in the regulatory floodway, we reject the argument that the County's floodway development restrictions constitute anything but responsible land-use policy. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) ("Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack." (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926))).

We conclude the Special Referee correctly determined that Columbia Venture's lack of reasonable investment-backed expectations coupled with the legitimate and substantial health and safety-related bases for the County's floodplain development restrictions outweigh Columbia Venture's economic injury, and under *Penn Central*, no regulatory taking occurred. *See Rith Energy, Inc. v. United States*, 270

F.3d 1347, 1352 (Fed. Cir. 2001) (rejecting a regulatory taking claim where the challenged government action aimed at preventing possible contamination into a water supply caused a substantial diminution in the value of certain mining leases and stating "[t]he exercise of the police power to address that kind of general public welfare concern is the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations").

IV.

In sum, we find no taking occurred. Richland County is not the "'involuntary guarantor of the property owner's gamble that he could develop the land as he wished despite the existing regulatory structure.'" *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (2012) (quoting *Forest Props., Inc. v. United States*, 39 Fed.Cl. 56, 76–77 (1997)). "Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause." *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994). Because no taking occurred, the decision of the Special Referee is affirmed.

AFFIRMED.

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

The Supreme Court of South Carolina

Amendment to Rule 31(h) of Rule 413, SCACR

Appellate Case No. 2015-001286

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Footnote 1 to Rule 31(h) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR) is hereby amended as follows:

> For purposes of this rule, the following rates are currently established for reimbursement of fees, expenses, and the cost of copies but are subject to change at the discretion of the Court.
>
> | | |
> |---|---|
> | Receiver and Attorneys to Assist the Receiver Fees | $75.00 per hour |
> | Receiver Staff and Other Support Staff | $15.00 per hour |
> | Copies | $ 0.15 per page |

This amendment shall be effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
August 10, 2015

The Supreme Court of South Carolina

Amendment to Rule 402, SCACR

Appellate Case No. 2013-000017

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Footnote 1 to Rule 402, SCACR, is hereby amended as follows:

> This fee is currently fifty dollars ($50.00) and shall be made by check payable to the National Conference of Bar Examiners.

This amendment shall take effect immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

August 10, 2015

The Supreme Court of South Carolina

Amendments to the Rules of the Resolution of Fee Disputes Board

Appellate Case No. 2015-001258

ORDER

The South Carolina Bar has petitioned this Court to amend Rules 5, 10 and 19 of the rules governing the Resolution of Fee Disputes Board contained in Rule 416 of the South Carolina Appellate Court Rules (SCACR). While it is appropriate to amend the rules, we do so using slightly different language from that proposed by the South Carolina Bar.

Accordingly, pursuant to Article V, § 4 of the South Carolina Constitution, and Rule 22 of Rule 416, Rules 5, 10 and 19 contained in Rule 416, SCACR, are amended to read as shown in the attachment to this order. These amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

August 7, 2015

RULE 5. APPOINTMENT OF EXECUTIVE COUNCIL

From among the appointed Board members, the President shall appoint an Executive Council comprised of the following: One Executive Council member from each of the four Judicial Regions of the state and one at large member. The President shall designate the chair of the Executive Council.

The Executive Council shall have the authority to interpret these Rules. The duties of the Executive Council will be to oversee and assist the functioning of the Board in the respective circuits of the state and to make recommendations to the Board of Governors as to procedures to be followed and rules to be amended.

Executive Council members should be experienced in the practice of law with no fewer than seven (7) years active practice.

The terms of the Executive Council shall be for three (3) years. The expiration of a term will coincide with the date of expiration of the term of the incumbent President in the same year. Should the term of an Executive Council member on the Board expire and the member not be reappointed to the Board, the member's term on the Executive Council shall expire at the same time the member's term on the Board expires. In that event, the President shall appoint a replacement member to the Executive Council for the unexpired term. A member of the Executive Council may be reappointed.

The Executive Council shall meet at such times and places as may be called by the chair or by any four members thereof.

RULE 10. COMMENCEMENT OF PROCEEDINGS

All proceedings hereunder shall be commenced by filing an application in the Office of the Bar, on forms provided by the Bar. The application shall include a written statement of the facts and circumstances surrounding the dispute, furnishing complete names and addresses. If the materials submitted exceed twenty-five (25) pages, the client-applicant shall submit three additional sets of the materials.

If the applicant is a client, but is not the person who paid for the lawyer's services, the third party payer, with the written consent of the client-applicant, may jointly file with the client-applicant, with both signatures affixed to the application.

If the responding party is an attorney, the Bar shall forward the completed application, as filed, to the attorney by electronic mail, with confirmation of delivery. If the responding party is not an attorney, the Bar shall forward the completed application, as filed, to the responding party by certified mail, return receipt requested. A copy shall be sent by regular mail or email to the circuit chair in the circuit where the principal place of practice of the attorney is located. If the application involves attorneys in more than one circuit, a copy of the completed application shall be sent to the chair of the Executive Council, who shall designate which of these circuit chairs shall have jurisdiction and shall proceed with the matter.

If the amount in dispute exceeds $7,500, the circuit chair may appoint a hearing panel without assignment of the matter to an assigned member.

After the initial correspondence, all other correspondence will be sent by regular mail or, with the written consent of the client and lawyer, by email. Such written consent may be withdrawn by written notice served on all other parties or attorneys. If served by regular mail, correspondence will be deemed served upon deposit in the U.S. Mail with proper postage affixed. If served by email, service is complete upon transmission, unless the party making service learns that the attempted service did not reach the person to be served. All parties have the duty to inform the circuit chair of any change of address.

RULE 19. COMPLIANCE

The decision of the Board shall be final and binding upon the parties and shall be enforceable in any court of competent jurisdiction. The parties shall comply with the terms of the final decision within thirty (30) days after mailing. In case of non-compliance by either party, the circuit chair shall issue a Certificate of Non-Compliance which may be entered as a judgment pursuant to Rule 58(a), SCRCP. If the certificate is issued against a lawyer, it shall be forwarded by the circuit chair to the Bar and then forwarded to the Commission on Lawyer Conduct under Rule 8.3 of the Rules of Professional Conduct, Rule 407, SCACR.

The Supreme Court of South Carolina

In the Matter of Robert W. Herlong, Respondent.

Appellate Case Nos. 2015-001664 and 2015-001666

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 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 the Receiver 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 Peyre Thomas Lumpkin, Esquire, Receiver, 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. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin 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 Peyre Thomas Lumpkin, Esquire, Receiver, 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 Peyre Thomas Lumpkin, Esquire, Receiver, 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. Lumpkin's office.

Mr. Lumpkin'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.
FOR THE COURT

Columbia, South Carolina
August 6, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sierra Club, Appellant,

v.

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

Appellate Case No. 2012-212791

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5253
Heard February 5, 2014 – Filed July 30, 2014
Withdrawn, Substituted and Refiled August 12, 2015

AFFFIRMED IN PART, REVERSED IN PART

Amy Elizabeth Armstrong and Michael Gary Corley, S.C. Environmental Law Project, both of Pawleys Island, and Robert Guild, of Columbia, for Appellant.

Mary Duncan Shahid and Stephen Peterson Groves, Sr., both of Charleston, and Sara S. Rogers, of Columbia, all of Nexsen Pruet, LLC, for Respondent Chem-Nuclear Systems; Claire Harley Prince and Jacquelyn Sue Dickman, both of Columbia, for Respondent South Carolina Department of Health & Environmental Control.

FEW, C.J.: This is an appeal from the administrative law court (ALC), which upheld the South Carolina Department of Health and Environmental Control's (DHEC) decision to renew the license under which Chem-Nuclear Systems, LLC operates a disposal facility for low-level radioactive waste. We affirm the ALC as to all issues, except four subsections of the regulation governing DHEC's issuance and renewal of such licenses. *See* 24A S.C. Code Ann. Regs. 61-63, pt. VII (1992 & Supp. 2010).

I. Procedural History

Chem-Nuclear operates a disposal facility for low-level radioactive waste in Barnwell County (the "facility") pursuant to a license DHEC first issued in 1971. Part VII of regulation 61-63—entitled "Licensing Requirements for Land Disposal of Radioactive Wastes"—establishes "specific technical requirements" and "performance objectives" "upon which [DHEC] issues licenses for the land disposal of wastes." 24A S.C. Code Ann. Regs. 61-63 § 7.1.1, 7.1.3 (1992). Before DHEC may renew Chem-Nuclear's license to operate the facility, it must determine Chem-Nuclear designed, constructed, and operates the facility in compliance with the requirements and objectives of part VII of regulation 61-63. *See generally* § 7.1.

In 2000, Chem-Nuclear submitted an application to renew its license. After holding a public hearing and accepting comments, DHEC issued a renewal license to Chem-Nuclear in 2004. DHEC's decision to renew the license was challenged on the basis that the disposal methods at the facility do not meet certain requirements and objectives of part VII of the regulation. The ALC issued an order affirming DHEC's decision to renew the license (the "2005 order"), and found Chem-Nuclear complied with subsections 7.10.1 through 7.10.4 of South Carolina Code Regulation 61-63 (1992 & Supp. 2010) and section 7.18 of South Carolina Code Regulation 61-63 (1992). However, the ALC ordered Chem-Nuclear to conduct further studies to address concerns "related to the potential for groundwater contamination on and near the [facility]." In particular, the 2005 order stated these studies must "concern[] methods to reduce contact between radioactive waste and rainfall and other water at its facility" and ordered Chem-Nuclear to submit the results of the studies to DHEC within 180 days.

This court's opinion reviewing the findings of the 2005 order is reported at 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010) (*Chem-Nuclear I*). We affirmed the findings related to section 7.18 and subsections 7.10.1 through 7.10.4. 387 S.C. at 438, 693 S.E.2d at 20. However, we remanded the case to the ALC to apply its

factual findings from the 2005 order to determine whether Chem-Nuclear complied with the following subsections of regulation 61-63: 7.11.1 through 7.11.12 (1992 & Supp. 2010), 7.23.6 (1992), and 7.10.5 through 7.10.10 (1992 & Supp. 2010). 387 S.C. at 435, 436, 438, 693 S.E.2d at 18-19, 20.

On remand, the ALC issued an order affirming DHEC's conclusion that Chem-Nuclear complied with these subsections (the "remand order"). In this appeal, we review the findings in the remand order. After we filed our first opinion, Op. No. 5253 (S.C. Ct. App. filed July 30, 2014) (Shearouse Adv. Sh. No. 30 at 53), DHEC and Chem-Nuclear petitioned for rehearing. We granted a stay of the relief ordered in the first opinion on August 28, 2014, and we now grant both petitions for rehearing. We withdraw our original opinion and substitute this opinion.

II. Factual Findings in the 2005 Order

Following this court's instructions, the ALC considered on remand only the findings from the 2005 order. In reviewing the remand order, therefore, we likewise consider only the findings from the 2005 order. In this section of the opinion, we recite those findings relevant to our review. Unless otherwise indicated, all quotations in this section are from the 2005 order.

A. Overview of Chem-Nuclear's Disposal Practices

Chem-Nuclear disposes of waste at the facility using "enhanced shallow land burial with engineered barriers." An engineered barrier is "a man-made structure or device that is intended to improve the land disposal facility's ability to meet the performance objectives" set out in part VII of regulation 61-63. 24A S.C. Code Ann. Regs. 61-63 § 7.2.9 (Supp. 2010). The primary engineered barriers used by Chem-Nuclear are disposal trenches, disposal vaults, and enhanced caps.

Initially, waste is shipped to the facility in a disposal container. *See* 24A S.C. Code Ann. Regs. 61-63 § 3.2.30 (Supp. 2010) ("'Disposal container' means a container principally used to confine low-level radioactive waste during disposal operations at a land disposal facility . . . [and] for some shipments, the disposal container may be the transport package."). Depending on the type of waste, disposal containers are also shipped to the facility inside a container called a cask. When a shipment of waste arrives at the facility, it is directed to either the appropriate trench for disposal or the Cask Maintenance Building, where Chem-Nuclear performs quality control inspections to ensure the casks are not damaged. Following this inspection, Chem-Nuclear transports the casks to the appropriate

disposal trench where the disposal containers are loaded into reinforced concrete disposal vaults inside the trench. As disposal containers are loaded into vaults, Chem-Nuclear continues to inspect them.

Some "large components," such as steam generators and pressurizers, are considered disposal vaults themselves and can be placed directly into the trench after DHEC approves them for burial. Otherwise, all waste is contained inside a disposal container that is loaded into a vault, which is located within a trench.

Chem-Nuclear uses the term "active" to describe disposal vaults and trenches that are in the process of being filled. Thus, vaults are active until filled to capacity with disposal containers, and trenches are active until filled to capacity with vaults and large components. Once vaults and trenches become full, Chem-Nuclear refers to them as "inactive." When an individual vault becomes full, Chem-Nuclear covers the inactive vault with "general cover soils and an initial clay cap," which reduces "the infiltration of surface water into the trench." When a trench becomes full, Chem-Nuclear installs an "impermeable" multi-layer enhanced cap over the inactive trench, which consists of an initial clay cap, polyethylene and bentonite, a sand drain layer, and general soil materials.

Waste is divided into three classes—A through C—based on the concentration of "long-lived" and "shorter-lived radionuclides" in the waste. Class A is the least radioactive waste, while C is the most radioactive. *See* 24A S.C. Code Ann. Regs. 61-63 § 3.56.1.1 to .8 (Supp. 2010). Chem-Nuclear currently uses three types of disposal trenches that are designed to hold different types of waste: (1) Class A trenches, which are the largest of the three types, hold vaults containing Class A waste; (2) Class B/C trenches hold vaults containing Class B and C waste; and (3) slit trenches, which are narrow, hold irradiated hardware and large components. Chem-Nuclear uses soil to fill voids between the vaults in each type of trench, which "enhance[s] long-term stability of the entire trench system."

Each trench has a drainage system "to facilitate monitoring of water accumulation entering the trench." Chem-Nuclear also implements a "surface water management plan" to manage rainfall after it collects in trenches, which consists of pumping water into either adjacent trenches or a lined pond.

B. Tritium Contamination of Groundwater

Tritium is a radioactive isotope of hydrogen that is found in "trace amounts in groundwater throughout the world." *NRC Senior Management Review of Overall*

Regulatory Approach to Groundwater Protection (N.R.C., Rockville, M.D.), Feb. 9, 2011, at SECY-11-0019. Although tritium is naturally occurring, it is also a byproduct of the manufacture of nuclear power, and found in radioactive waste generated by nuclear power plants. *Id.*

The waste disposed of at the facility contains tritium. Rainfall "in and on the disposal trenches drives tritium into the groundwater beneath the facility." Chem-Nuclear initially discovered the presence of tritium in its disposal trenches in 1974. Chem-Nuclear determined that early disposal practices utilizing "unreliable containment and waste forms" led to this initial tritium contamination. However, these early containment methods "were acceptable at the time" under the regulations. In fact, they "were identical to practices at . . . other low-level radioactive waste disposal facilities."

Although "it is inadvisable to attempt to uncover or excavate" the old containers that caused the initial tritium release, improvements in disposal technology and changes in the operations at the facility have "enhanced site performance." In 1995, DHEC substantially revised part VII of regulation 61-63 to require engineered barriers for all waste classes disposed of at the facility. Specifically, DHEC required all waste, except large components, to be placed in vaults, and required enhanced caps to be installed on all inactive trenches. Chem-Nuclear began using vaults and enhanced caps to meet these new requirements. In addition, Chem-Nuclear began using high-integrity polyethylene disposal containers to hold certain waste forms and discontinued the disposal of unstable, liquid waste forms. All of these measures served to "reduce[] the amount of tritium migrating to groundwater."

DHEC imposes a regulatory limit on the amount of radioactive material Chem-Nuclear may release to the "general environment." *See* § 7.18. Although certain groundwater samples collected from beneath the facility show high concentrations of tritium, these samples are inappropriate for evaluating Chem-Nuclear's compliance with section 7.18. This is because DHEC regulates the release of radiation into the "general environment," § 7.18, not into the groundwater within the boundaries of the facility where there is no risk of public exposure. To determine whether Chem-Nuclear is in compliance with section 7.18, DHEC established a "compliance point"—defined as the "first point where a hypothetical member of the public might receive a dose of radiation"—at which it measures Chem-Nuclear's release of tritium into the general environment. This compliance point is located at Mary's Branch Creek, where the groundwater from beneath the facility flows into an above-ground stream. Chem-Nuclear regularly samples the

water from Mary's Branch Creek to determine whether there has been a release of tritium above the regulatory limit set by DHEC. Since 2001, tritium concentrations at the compliance point have been declining, and all measurements taken at Mary's Branch Creek have been well below the regulatory limit for exposure under section 7.18. In fact, "[t]here is no evidence of any actual release resulting in an exposure above regulatory limits to any member of the general public."

C. Actions to Prevent Tritium Exposure

Chem-Nuclear has taken steps to protect the public from exposure to radiation at the compliance point. The general public is restricted from accessing the waters of Mary's Branch Creek at the compliance point, and there are no known consumers of the water who are "located in and around the compliance point." Chem-Nuclear also erected a fence around the compliance point to prevent entry of unauthorized persons. Additionally, Chem-Nuclear has a restrictive covenant and easement on three parcels of property surrounding the compliance point. This property serves as a buffer zone by prohibiting the use of groundwater under the property, as well as surface water on the property, without written consent from DHEC. Moreover, changes in design and operations at the facility further reduce the potential for radioactive exposure to the general environment.

D. Long-Term Predictions for Compliance

As required by DHEC, Chem-Nuclear created a predictive model—the Environmental Radiological Performance Verification (ERPV)—to predict the future performance of the site for up to two thousand years. This model relies on data collected through a system of groundwater monitoring wells and thirty years of data derived from over two hundred sampling points. DHEC commissioned and funded a panel of experts—the "Blue Ribbon Panel"—to review the ERPV and determine whether Chem-Nuclear's predictions were accurate. After finding the ERPV predictions to be reliable, the Blue Ribbon Panel concluded the facility "pose[d] minimal risk to either the environment or members of the public, both today and into the long-term future." DHEC relied on the conclusions of both the ERPV and the Blue Ribbon Panel in deciding to renew the facility's license.

III. Standard of Review

In the 2005 order, the ALC conducted a de novo review of DHEC's decision to renew Chem-Nuclear's license. *See Marlboro Park Hosp. v. S.C. Dep't of Health*

& Envtl. Control, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) (stating the ALC acts "as the fact-finder" in a contested case and "must make sufficiently detailed findings supporting the denial [or grant] of a permit application" (alteration in original) (citation omitted)). In *Chem-Nuclear I*, this court reviewed the ALC's findings and conclusions in the 2005 order to determine whether they were "[]supported by substantial evidence or controlled by some error of law." *See* 387 S.C. at 430-31, 693 S.E.2d at 16 (relying on the standard of review set forth in S.C. Code Ann. § 1-23-610(B) (Supp. 2013)). Although we affirmed the ALC's determination that Chem-Nuclear complied with all sections of regulation 61-63 addressed in the 2005 order, we remanded for the ALC to apply the factual findings from the 2005 order to other, applicable sections it did not address. 387 S.C. at 439, 693 S.E.2d at 20-21. *See* 387 S.C. at 439, 693 S.E.2d at 20 (instructing the ALC "to apply its factual findings [from the 2005 order] to these sections of regulation 61-63" on remand). In the remand order, the ALC applied the factual findings from the 2005 order to determine whether Chem-Nuclear complied with these additional sections.

In this appeal from the remand order, we must accept the factual findings in the 2005 order. We review the remand order under the standard of review set forth in subsection 1-23-610(B)(d), and may reverse only if the ALC's decision was affected by an error of law. *See* § 1-23-610(B)(d) (stating an appellate court may reverse the ALC's decision when it is affected by an error of law); *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court. We will correct the decision of the ALC if it is affected by an error of law, and questions of law are reviewed de novo." (internal quotation marks and citations omitted)).

IV. Chem-Nuclear's Compliance with Regulation 61-63

DHEC drafted part VII of regulation 61-63 to include three general categories of regulations. *See* § 7.1.3 ("This Part establishes procedural requirements[,] . . . performance objectives[,] . . . [and] specific technical requirements for near-surface disposal of radioactive waste . . . ."). All three categories are applicable to the enhanced shallow land burial of low-level nuclear waste at the facility.[1] In this appeal, we address the ALC's determination that Chem-Nuclear complied with

[1] Subsection 7.1.3 provides that the "procedural requirements" and "performance objectives" apply "to any method of land disposal," and the "specific technical requirements" apply to "near-surface disposal of radioactive waste."

regulations in two of these categories—regulations imposing technical requirements and performance objectives. Generally, regulations containing technical requirements require Chem-Nuclear to take action to comply with the regulation, while regulations containing performance objectives require Chem-Nuclear to achieve certain results sought under the regulation. There is some overlap, however, between the action-based and result-based requirements of these two categories of regulations.

Some regulations imposing "technical requirements" require Chem-Nuclear to take a specific action to meet the requirement. For example, subsection 7.24.2 of South Carolina Code Regulation 61-63 (1992) requires that Chem-Nuclear place five meters of material above Class C waste when the disposal unit is full and made inactive. *See id.* (requiring Class C waste be disposed of "so that the top of the waste is a minimum of 5 meters below the top surface of the cover").[2] Other regulations imposing technical requirements do not list any specific action, but leave to Chem-Nuclear the choice of action to take to comply with the regulation. For example, subsection 7.11.11.7 of South Carolina Code Regulation 61-63 (Supp. 2010) requires "[t]he disposal units and the incorporated engineered barriers . . . be designed and constructed to . . . prevent[] contact between the waste and the surrounding earth."[3] Chem-Nuclear's compliance with "technical requirements" regulations may be determined only by examining the specific actions taken by Chem-Nuclear. As to subsection 7.24.2 and others, the required action is specifically listed in the regulation. As to subsection 7.11.11.7 and others, Chem-Nuclear may choose what action to take to comply with the regulation. In both instances, Chem-Nuclear must take action to meet the technical requirements of the regulation.

On the other hand, compliance with a regulation imposing "performance objectives" must be determined by examining whether Chem-Nuclear obtained the results required by the regulation. An example of such a regulation is section 7.18, which requires reasonable efforts be made to maintain radioactive releases to the general public "as low as is reasonably achievable"—a concept known by the acronym "ALARA."[4] This and other result-based "performance objective"

---

[2] Chem-Nuclear's compliance with subsection 7.24.2 is not an issue in this appeal.

[3] We discuss Chem-Nuclear's compliance with subsection 7.11.11.7 in section IV.B.5 of this opinion.

[4] Regulation 61-63 defines the "ALARA" standard as:

regulations require consideration of existing environmental conditions, such as the fact that tritium levels are declining in the groundwater below the facility and in the surface water of Mary's Branch Creek.

In *Chem-Nuclear I*, we affirmed the ALC's finding that Chem-Nuclear met the performance objectives of sections 7.18 and 7.10. 387 S.C. at 438, 693 S.E.2d at 20. Section 7.18 and the subsections of 7.10 that we addressed in *Chem-Nuclear I* relate to whether Chem-Nuclear is protecting the public from radioactive releases, and generally do not impose specific requirements as to how Chem-Nuclear must accomplish any particular result.[5] In affirming Chem-Nuclear's compliance with section 7.18, we gave deference to the ALC's finding that "Chem-Nuclear . . . demonstrated adherence to ALARA . . . by taking appropriate measures to address tritium migration from the Barnwell facility and the potential for releases from other radionuclides." 387 S.C. at 429, 438, 693 S.E.2d at 15, 20. Showing similar deference, we affirmed the ALC's findings that Chem-Nuclear complied with four of the performance objectives in section 7.10. 387 S.C. at 438, 693 S.E.2d at 20.

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

24A S.C. Code Ann. Regs. 61-63 § 3.2.6 (Supp. 2010).

[5] *See* § 7.10.1 ("The issuance of the license will not constitute an unreasonable risk to the health and safety of the public."); § 7.10.2 ("The applicant is qualified . . . to carry out the disposal operations . . . in a manner that protects health and minimizes danger to life or property."); § 7.10.3 ("The . . . operations . . . are adequate to protect the public health and safety in that they provide reasonable assurance that the general population will be protected from releases of radioactivity . . . ."); § 7.10.4 ("The . . . operations . . . are adequate to protect the public health and safety in that they will provide reasonable assurance that individual inadvertent intruders are protected . . . .").

We found, however, the ALC did not address the six remaining subsections of 7.10 (7.10.5 through 7.10.10). 387 S.C. at 438-39, 693 S.E.2d at 20-21. We remanded for the ALC to determine whether Chem-Nuclear complied with those subsections. *Id.*

We also required the ALC to consider on remand Chem-Nuclear's compliance with section 7.11 and subsection 7.23.6. 387 S.C. at 435-36, 693 S.E.2d at 18-19. DHEC argued that in determining whether DHEC properly renewed the license, the ALC must consider compliance with the result-based requirements "set forth in section 7.10 . . . rather than apply criteria set forth in sections 7.11 and 7.23.6." 387 S.C. at 431, 693 S.E.2d at 16. We rejected that argument, finding "the technical requirements" of "section 7.11 impose[] additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address[] whether Chem-Nuclear is in compliance." 387 S.C. at 435, 693 S.E.2d at 18-19. Similarly, we found "the technical requirements of [sub]section 7.23.6 . . . impose[] additional compliance requirements for Chem-Nuclear." 387 S.C. at 436, 693 S.E.2d at 19. Under our holding in *Chem-Nuclear I*, therefore, the technical requirements of subsections 7.11.11 and 7.23.6 require Chem-Nuclear to take action to design and construct the disposal site, disposal units, and engineered barriers to meet the specifications in those subsections. *See* 387 S.C. at 432, 435, 436, 693 S.E.2d at 17, 19, 20. DHEC and Chem-Nuclear may not demonstrate compliance with those subsections simply by showing Chem-Nuclear met the performance objectives of other subsections. *See id.*

With these considerations in mind, we discuss the ALC's determination that DHEC properly found Chem-Nuclear complied with the applicable subsections of regulation 61-63.

A. Section 7.10[6]

The subsections of 7.10 that we review in this appeal[7] set forth performance objectives for the issuance and renewal of Chem-Nuclear's license. The

[6] In this section, we discuss compliance with subsections 7.10.6 and 7.10.8, and not 7.10.7, because our analysis of that subsection depends on whether Chem-Nuclear complied with the relevant subsections of 7.11.11. We later discuss subsection 7.10.7 in section IV.D. of this opinion.

[7] Chem-Nuclear's compliance with subsections 7.10.5, 7.10.9, and 7.10.10 is not an issue in this appeal.

correctness of DHEC's and the ALC's determination of compliance with subsections 7.10.6 and 7.10.8 depends, in part, on Chem-Nuclear's progress in reducing the amount of tritium released from the facility. In reviewing the ALC's findings as to these subsections, therefore, we rely upon evidence that shows its operations are "adequate to protect the public health and safety," which includes the following result-based evidence: (1) Chem-Nuclear's disposal operations currently meet the ALARA standard; (2) "improvements in waste disposal procedures" have enhanced site performance; and (3) there is a decline in the "tritium concentration at the compliance point."

1. Subsection 7.10.6

Subsection 7.10.6 provides that before DHEC may issue a license to Chem-Nuclear, it must find:

> [Chem-Nuclear]'s proposed disposal site, disposal site design, land disposal facility operations, disposal site closure, and postclosure institutional control are adequate to protect the public health and safety in that they will provide reasonable assurance that long-term stability of the disposed waste and the disposal site will be achieved and will eliminate to the extent practicable the need for ongoing active maintenance of the disposal site following closure.

This subsection focuses our analysis on Chem-Nuclear's efforts to protect the public, the environment, and inadvertent intruders from radioactive exposure by ensuring "long-term stability of the disposed waste and the disposal site." We begin our discussion with the definitions of the relevant terms used in subsection 7.10.6.

"Site closure" is defined as "those actions that are taken upon completion of operations that prepare the disposal site for custodial care [by the State of South Carolina] and that assure that the disposal site will remain stable and will not need ongoing active maintenance." 24A S.C. Code Ann. Regs. 61-63 § 7.2.19 (1992).

Once site closure is accomplished, the "institutional control" period begins, in which the State of South Carolina "assume[s] responsibility" for maintaining the facility, 24A S.C. Code Ann. Regs. 61-63 §§ 7.8.1, 7.15 (1992), and "control[s]

access to the disposal site." 24A S.C. Code Ann. Regs. 61-63 § 7.27.2 (1992). By regulation, the institutional control period is one hundred years. *Id.*

"Stability" is defined as "structural stability." 24A S.C. Code Ann. Regs. 61-63 § 7.2.20 (1992). According to Part III of regulation 61-63, structural stability results from: (1) "the waste form itself" being stable, or "processing the waste to stable form"; (2) converting waste containing liquid "into a form that contains as little free-standing and non-corrosive liquid as is reasonably achievable"; and (3) filling "[v]oid spaces within the waste and between the waste and its package." 24A S.C. Code Ann. Regs. 61-63 § 3.56.2.2.1 to .3 (Supp. 2010).

"Active maintenance" means "any significant activity needed during the period of institutional control to maintain a reasonable assurance that the performance objectives in 7.18 and 7.19 are met." 24A S.C. Code Ann. Regs. 61-63 § 7.2.1 (1992). As we previously discussed, section 7.18 regulates the concentration of radioactive material that may be released to the general environment and the public. Section 7.19 of South Carolina Code Regulation 61-63 (1992) requires that the "[d]esign, operation, and closure of the land disposal facility . . . ensure protection of any individual inadvertently intruding into the disposal site and occupying the site or contacting the waste at any time after active institutional controls over the disposal site are removed." An "inadvertent intruder" is a "person who might occupy the disposal site after closure and engage in . . . activities . . . in which an individual might be unknowingly exposed to radiation from the waste." 24A S.C. Code Ann. Regs. 61-63 § 7.2.13 (1992).

The following findings from the 2005 order support the ALC's determination that the waste and disposal site are structurally stable:

(1) All waste is placed into reinforced concrete disposal vaults;
(2) Void space between the vaults is filled with soil, which enhances "long-term stability of the entire trench system";
(3) Enhanced caps are installed on all inactive trenches;
(4) "[T]he elimination of liquid waste forms . . . have increased site performance"; and
(5) "Improvements in waste forms . . . have succeeded in reducing the amount of tritium that is migrating to groundwater."

Additionally, the following findings support the determination that *long-term* stability of the disposed waste and disposal site will be achieved and will be

adequate to protect the general public and inadvertent intruders from radioactive exposure:

(1) Predictions of a declining trend in radioactive releases to the general environment;
(2) The Blue Ribbon Panel's conclusion that the facility "poses a minimal risk to either the environment or members of the public, both today and into the long-term future";
(3) The presence of a buffer zone, which provides "long-term protection to the public from exposure to radioactive material in the surface water at the compliance point"; and
(4) The use of concrete disposal vault lids[8] for Class C waste, which serves as an intrusion barrier for inadvertent intruders.[9]

Based on these findings, we find the ALC did not err in concluding Chem-Nuclear is in compliance with subsection 7.10.6.

2. Subsection 7.10.8

Subsection 7.10.8 requires Chem-Nuclear to provide a "proposal for institutional control" that gives "reasonable assurance that such control will be provided for the length of time found necessary to ensure the findings in 7.10.3 through 7.10.6 and that the institutional control meets the requirements of 7.27." On appeal, Chem-Nuclear's compliance with this subsection is challenged on the ground that it violated subsection 7.10.6.[10] As previously discussed, subsection 7.10.6 requires the design and operations of the facility to provide "long-term stability of the

[8] We are uncertain of the nature and purpose of disposal vault lids. Neither the regulations nor the 2005 order defines "disposal vault lid," and the 2005 order references disposal lids only twice and in two limited contexts: (1) "the lids of the vaults are not grouted or otherwise sealed to prevent water from entering the vault"; and (2) "[t]he disposal vault lids serve as an intrusion barrier for Class C waste."

[9] Subsection 3.56.1.2.3 requires Class C waste to be disposed of in a manner that "protect[s] against inadvertent intrusion."

[10] We previously affirmed Chem-Nuclear's compliance with subsections 7.10.3 and 7.10.4. *Chem-Nuclear I*, 387 S.C. at 438, 693 S.E.2d at 20. Chem-Nuclear's compliance with subsection 7.10.5 is not an issue on appeal.

disposed waste." When considered in the context of subsection 7.10.6, subsection 7.10.8 requires Chem-Nuclear to provide reasonable assurances the waste will be stable after the facility is closed. Based on our ruling regarding subsection 7.10.6, we find the ALC correctly determined Chem-Nuclear is in compliance with subsection 7.10.8.

B. Subsection 7.11.11

Subsection 7.11.11 provides, in relevant part,

> The disposal units and the incorporated engineered barriers shall be designed and constructed to meet the following objectives:
>
> 7.11.11.1 to minimize the migration of water onto the disposal units.
>
> 7.11.11.2 to minimize the migration of waste or waste contaminated water out of the disposal units.
>
> 7.11.11.4 temporary collection and retention of water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures without the contamination of groundwater or the surrounding soil.
>
> 7.11.11.6 reasonable assurance that the waste will be isolated for at least the institutional control period.
>
> 7.11.11.7 prevention of contact between the waste and the surrounding earth, except for earthen materials which may be used for backfilling within the disposal units.

DHEC and Chem-Nuclear continue to assert that in reviewing the ALC's findings as to subsection 7.11.11, we may rely on result-based evidence—(1) its operations meet the ALARA standard, (2) "improvements in waste disposal procedures" have enhanced site performance, and (3) there is a decline in the "tritium concentration at the compliance point." As we previously acknowledged, evidence of improvements in disposal practices and a decline in tritium concentrations is certainly relevant to our analysis of compliance with the regulations containing

performance objectives. However, that evidence does not directly relate to, and cannot alone show compliance with, the technical requirements imposed by subsection 7.11.11. *See* 387 S.C. at 435, 693 S.E.2d at 18-19 (holding "the [specific] technical requirements" of "section 7.11 impose[] additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address[] whether Chem-Nuclear is in compliance"). For these subsections of the regulation, compliance may not be measured solely by results. Instead, we must consider whether Chem-Nuclear took any actions to meet the technical requirements imposed by these subsections, and if so, the sufficiency of Chem-Nuclear's actions.

1. Subsection 7.11.11.1

Subsection 7.11.11.1 requires that Chem-Nuclear design and construct its disposal units and engineered barriers "to minimize the migration of water onto the disposal units."

The regulations define "disposal unit" to include "a vault or a trench," 24A S.C. Code Ann. Regs. 61-63 § 7.2.8 (Supp. 2010), and "engineered barrier" to include "vaults or equivalent structures," § 7.2.9. The regulations, however, do not define the phrase "migration of water." DHEC concedes the phrase encompasses not only the flow of surface water, but also rainfall. We need not rely on DHEC's concession, however, because we find the subsection clearly applies to rainfall. Thus, for DHEC to have correctly determined Chem-Nuclear complied with this subsection, DHEC must have found Chem-Nuclear took action that reduced rainfall and the flow of surface water onto the vaults and trenches. Chem-Nuclear's compliance concerning the migration of rainfall onto disposal units is particularly important, given the following findings from the 2005 order: (1) "[t]ritium is driven into the groundwater through rainfall in and on the disposal trenches," and (2) tritium concentrations in the groundwater seem to "vary[] with the amount of rainfall." Referring to these and other findings, the ALC called this "the undeniable 'rainfall problem.'"

We first examine whether the ALC correctly determined Chem-Nuclear complied with subsection 7.11.11.1 in regard to rainfall migrating onto active disposal units—vaults and trenches that are in the process of being filled. The 2005 order provides that while Chem-Nuclear is filling individual vaults with disposal containers, it employs "no cover or roof, so rain can fall directly into the vault during the loading period." The 2005 order also indicates Chem-Nuclear provides no cover for active trenches, which leaves these trenches and the vaults contained

within them exposed to rainfall until the trenches become full. Vaults contained within an active trench remain exposed to rainfall for up to two years while Chem-Nuclear fills the trench. The 2005 order further states rainfall enters vaults because they "are not sealed against water intrusion," and the "lids of the vaults are not . . . sealed to prevent water from entering" them.

DHEC interprets subsection 7.11.11.1 as requiring Chem-Nuclear to "minimize the migration of water onto the disposal units" during the period in which the trenches are active. This interpretation required DHEC to consider what action Chem-Nuclear took to reduce the amount of rain falling onto open vaults while they are being filled, and onto closed vaults in active trenches. However, neither the 2005 order, the remand order, nor any other portion of the record or the briefs contain any evidence that Chem-Nuclear has taken a single action to stop a single raindrop from falling onto active vaults or trenches.

Although the ALC determined Chem-Nuclear complied with this subsection, none of the evidence it relied upon addresses the rainfall issue. Specifically, the ALC listed the following factual findings from the 2005 order to support DHEC's determination of compliance as to active and inactive disposal units:

(1) The Class A trench has a sloped floor and a drainage system that facilitates monitoring of water that enters the trench;
(2) The Class B/C trench contains a French drain and sump system that allows monitoring of water accumulation in the trench;
(3) The slit trench has a sloped floor that is filled with "coarse drain sand" and contains "standpipes" that monitor water accumulation;
(4) Chem-Nuclear implements a surface water management plan to pump water out of trenches.

We find none of these findings support the ALC's determination that Chem-Nuclear complied with this subsection as to rain falling on disposal units—active or inactive. These findings relate to remedial measures to monitor, drain, and manage water that has already migrated onto disposal units. The plain language of this subsection, however, requires Chem-Nuclear to do more than monitor, drain, or otherwise manage water once it enters the vaults and trenches.[11] These

[11] Other subsections of regulation 61-63 deal with accumulation of water within disposal units once it migrates there. *See, e.g.*, § 7.23.6 (requiring the disposal site to be designed in a way that "minimize[s] . . . the contact of *standing water* with

measures listed by the ALC have no effect on the initial migration of rainfall and thus, do not relate to compliance with subsection 7.11.11.1. Furthermore, the record is devoid of any evidence to support the ALC's conclusion that Chem-Nuclear has done *anything* to reduce rainfall onto active disposal units. When pressed at oral argument to list what Chem-Nuclear has done to reduce rainfall onto active disposal units, neither Chem-Nuclear nor DHEC could name one action Chem-Nuclear took, except to construct berms along the edges of trenches.[12]

The ALC also listed the following two factual findings, in addition to the four discussed above, to affirm DHEC's determination of compliance with this subsection as to rainfall on inactive disposal units only:

(5) Backfilling methods that fill voids between vaults are implemented for all trenches; and
(6) Initial clay caps placed on inactive vaults and enhanced caps installed over inactive trenches minimize the infiltration of surface water into the trench.

We find neither of these findings support—and only one actually addresses—the ALC's determination that Chem-Nuclear complied with this subsection as to inactive disposal units. Regarding finding (5), "backfilling methods" involve placing soil in open spaces between the vaults, which has nothing to do with reducing the migration of water onto disposal units. Finding (6), however, is relevant to Chem-Nuclear's compliance with subsection 7.11.11.1 as to inactive disposal units. The installation of the initial clay cap on inactive vaults and the enhanced cap on inactive trenches reduces the migration of water onto these disposal units. Although these measures *reduce* the migration of water, subsection 7.11.11.1 requires Chem-Nuclear to "minimize" this occurrence. Thus, whether finding (6) supports Chem-Nuclear's compliance with this subsection requires us to consider the meaning of "minimize."

---

waste during disposal, and the contact of *percolatin*g or *standing water* with wastes after disposal" (emphasis added)).

[12] While berms may keep surface water from migrating onto the disposal units, they do nothing to minimize direct rainfall onto active trenches and vaults. Additionally, the ALC made no findings as to whether Chem-Nuclear ever constructed a berm, or if so, whether the berms reduce the migration of surface water onto the disposal units.

Regulation 61-63 does not define minimize. Chem-Nuclear and DHEC filed a joint brief with this court in which they set forth the following definition of minimize: "to reduce to the smallest possible amount, extent, size, or degree."[13] Applying this definition to the requirements of subsection 7.11.11.1, we must consider two sub-issues in analyzing compliance: (1) whether there is evidence to support a finding that Chem-Nuclear has reduced the migration of water onto disposal units, and (2) whether the extent of this reduction is adequate to meet DHEC's definition of minimize. Thus, we cannot find the ALC correctly determined Chem-Nuclear complied with this subsection simply because Chem-Nuclear "reduced" the migration of water onto disposal units.

As to the first sub-issue, we agree with the ALC that installation of initial clay caps and enhanced caps reduce the migration of surface water and rainfall onto inactive vaults and trenches. However, the ALC did not address the second sub-issue—whether initial clay caps and enhanced caps "reduce to the smallest possible amount" the migration of water onto inactive disposal units. Both DHEC and Chem-Nuclear represented to this court in their brief that Chem-Nuclear must have taken action to "reduce [the migration of water onto inactive trenches] to the smallest possible amount." Yet, neither DHEC nor the ALC made any finding as to whether Chem-Nuclear did so. The determination of this issue is crucial to the question of whether Chem-Nuclear complied with subsection 7.11.11.1.

In considering whether Chem-Nuclear's disposal units and engineered barriers adequately reduce—"minimize"—the migration of water, we acknowledge it is the duty of DHEC, not this court, to enforce regulation 61-63. Similarly, it is the duty of Chem-Nuclear, not DHEC, to take the necessary action to comply with the

---

[13] While this definition sets a strict standard for compliance, we find this is supported by the way in which this regulation, and others, are written. For example, subsection 7.23.6 requires Chem-Nuclear to "minimize to the extent practicable" the contact of water with waste at different stages of the disposal process. We interpret subsection 7.23.6 as imposing a less stringent standard for compliance than subsection 7.11.11.1 because the term "minimize" is followed by language prompting DHEC to consider the reasonableness of Chem-Nuclear's efforts to comply. The lack of similar language in subsection 7.11.11.1 suggests there is no inherent reasonableness or practicability consideration involved in analyzing Chem-Nuclear's compliance. The definition of "minimize" provided by Chem-Nuclear and DHEC accords with this interpretation. Thus, we rely on their definition of minimize—"to reduce to the smallest possible amount, extent, size, or degree"—in analyzing DHEC's and the ALC's determinations of compliance.

regulations. Nevertheless, we find support in the 2005 order that implementing "relatively simple measures" could further reduce the migration of water onto both active and inactive disposal units. These measures include "shelter[ing] the disposal trenches from rainfall" while they are being filled and "sealing and grouting the concrete disposal vaults to prevent the intrusion of water."

In 2001, DHEC directed Chem-Nuclear to consider implementing such measures. According to the 2005 order, "during the review of the re-issuance of the Chem-Nuclear license, DHEC . . . advis[ed] Chem-Nuclear to review and revise all trench construction details, plans, specifications, and procedures." "In particular, [DHEC] informed Chem-Nuclear that consideration should be given to protection of the open trenches from direct rainfall and runoff such as temporary covers." In response to this directive, Chem-Nuclear considered "several conceptual trench designs," including designs for "temporary roofs to keep water out of the trenches and vaults." Although Chem-Nuclear informed DHEC in 2001 it would take "up to two years to evaluate [these] designs," the ALC found in the 2005 order "Chem-Nuclear ha[d] not completed its evaluation and ha[d] not submitted final designs to DHEC for review and approval."

The ALC found it significant that Chem-Nuclear had not yet completed and submitted these final designs to DHEC, given the "undeniable 'rainfall problem.'" Specifically, the 2005 order stated, "Chem-Nuclear has already considered conceptual designs to keep rainfall out of the trenches, . . . [but] it failed to complete a report on its research and has not submitted such a report to DHEC, despite its request." Additionally, the ALC found further studies "were needed to evaluate the . . . feasibility of employing or implementing designs" that would: (1) "shelter disposal trenches from rainfall and prevent rainfall from entering the trenches," and (2) "provide for sealing and grouting the concrete disposal vaults to prevent the intrusion of water to the maximum extent feasible." The order explained these additional studies were necessary because "no evidence was presented . . . that the Blue Ribbon Panel considered any of these particular issues." The ALC ordered that "Chem-Nuclear shall conduct the[se] studies . . . and submit the results to DHEC within 180 days."

These findings and directives from the 2005 order support the importance of implementing measures to address concerns related to rainfall on the disposal units. Both DHEC and the ALC ordered Chem-Nuclear to consider such measures. However, none are currently in place, a fact directly relevant to Chem-Nuclear's ability to reduce water migration onto the disposal units "to the smallest possible amount."

In conclusion, we find the record in this case conclusively demonstrates Chem-Nuclear has taken no action whatsoever to prevent even one raindrop from migrating onto one active vault or trench.[14] Additionally, while initial clay caps and enhanced caps reduce the migration of water onto inactive disposal units, there is no evidence and no finding by the ALC that DHEC has required, or that Chem-Nuclear has taken, any action that would reduce this migration to the smallest possible amount. In light of these facts, we hold the ALC erred in affirming DHEC's conclusion that Chem-Nuclear complied with subsection 7.11.11.1.

2. Subsection 7.11.11.2

Subsection 7.11.11.2 requires that Chem-Nuclear design and construct its disposal units and engineered barriers "to minimize the migration of waste or waste[-] contaminated water out of the disposal units." DHEC and Chem-Nuclear contend the same definition of minimize used in the previous section applies to the analysis of this subsection.

Based on the plain language of subsection 7.11.11.2, Chem-Nuclear must minimize the migration of two types of wastes: (1) the radioactive waste-form contained within the disposal containers, and (2) water that has been contaminated by radioactive waste. As to the first, we agree with the ALC's determination that Chem-Nuclear's disposal units and engineered barriers minimize the migration of radioactive waste-forms out of disposal units. The record establishes that Chem-Nuclear uses disposal containers and reinforced concrete vaults, which prevent the migration of these waste-forms out of disposal units. Thus, we affirm the ALC's

---

[14] DHEC argues in its petition for rehearing that we "misapprehended the requirement of subsection 7.11.11.1" because "[t]he regulation does not require a design that prevents rainfall onto the disposal units." We do not believe our opinion can be fairly read to require Chem-Nuclear to prevent all rainfall onto the disposal units. Rather, the opinion is written to the requirement in subsection 7.11.11.1 that Chem-Nuclear "minimize" rainfall. *See* § 7.11.11.1 (requiring that Chem-Nuclear design and construct its disposal units and engineered barriers "to *minimize* the migration of water onto the disposal units" (emphasis added)). We chose the phrase "prevent even one raindrop from migrating onto one active vault or trench" in contemplation of the reality that to minimize rainfall onto disposal units, Chem-Nuclear must start by taking some action in an attempt to stop one drop of rain. We are struck by the lack of any evidence that Chem-Nuclear has taken any action to stop any rainfall onto the disposal units.

ruling that DHEC correctly determined Chem-Nuclear is in compliance with this subsection as to the migration of the waste itself out of the disposal units.

We next address whether Chem-Nuclear is in compliance as to the migration of waste-contaminated water out of the disposal units. According to the 2005 order, the vaults contain holes that allow water to drain from them and into the trenches. As for the trenches, they are lined with partially impermeable materials so that liquids may drain to the soil below the trench. Thus, "rainfall that accumulates in the trenches eventually percolates into the soil" and groundwater beneath the trenches. Also, the water table may rise during "wet periods," causing groundwater to "rise up into the [vaults]."

The ALC relied on its previous findings related to subsection 7.11.11.1 to hold Chem-Nuclear complied with this subsection because the methods "designed to minimize the infiltration of water into the vaults" serve to "minimize[] the migration of . . . waste-contaminated water out of them." We agree evidence of compliance with subsection 7.11.11.1 is relevant to our determination of compliance with this subsection. This is because reducing the initial migration of water onto disposal units has a reciprocal effect upon reducing the migration of waste-contaminated water out of disposal units. Therefore, our holding that Chem-Nuclear failed to comply with subsection 7.11.11.1 relates to whether it complied with subsection 7.11.11.2 as to waste-contaminated water.[15]

Relying on the two-part definition of minimize discussed in the previous section, we must first analyze whether there is evidence that Chem-Nuclear reduced the migration of waste-contaminated water out of disposal units. The ALC found Chem-Nuclear's use of disposal containers prevents waste from coming into direct contact with water that enters vaults, which reduces the potential for water to become contaminated. This, in turn, reduces the migration of waste-contaminated water out of vaults. Second, the ALC found that although the drainage holes in the vaults allow "water to rise up into the containers" and drain into the trenches below, they also allow water to drain away from the waste. This decreases the

[15] Noncompliance with subsection 7.11.11.1 would not conclusively establish non-compliance with this subsection. Subsection 7.11.11.1 regulates the migration of "water," while subsection 7.11.11.2 regulates the migration of "waste[-] contaminated water." Thus, the fact that water migrates onto and, subsequently, out of disposal units does not itself violate this subsection. A violation occurs only when water is allowed to come in contact with waste and waste-contaminated water then migrates out of disposal units.

likelihood that water entering the vaults will become contaminated. We agree the ALC's findings support the conclusion that Chem-Nuclear has taken *some* action to reduce the migration of waste-contaminated water from the disposal units.

However, the ALC did not address the second part of the analysis—whether these measures are sufficient to meet DHEC's definition of minimize. As we previously stated regarding subsection 7.11.11.1, compliance with subsection 7.11.11.2 depends on whether there is evidence to support a finding that Chem-Nuclear's actions "reduce to the smallest amount possible" the migration of waste-contaminated water out of disposal units.

On this point, the 2005 order stated "trench water . . . becomes contaminated by the fact that there is some residual tritium on . . . vaults and waste packages that have . . . water on them as a result of rain." Based on this fact, the following findings in the 2005 order demonstrate the vaults and trenches allow water that has come into contact with residual tritium on the disposal containers to migrate out of them:

(1) The "floors of the vaults have holes to allow water to drain from the vaults";
(2) These drainage holes "can also allow water to rise up into the containers";
(3) "[N]one of the trenches . . . have an impermeable liner";
(4) "The bottoms of the trenches" are not designed to "prevent the migration of liquids out of the bottom of trenches" and, in fact, are "designed to be partially impermeable and . . . allow liquids to infiltrate the soil below the trenches"; and
(5) "Precipitation in and on the disposal trenches drives tritium into the groundwater beneath the [facility]."

As we acknowledged above, the holes in the vaults allow water to drain away from the waste, which decreases the likelihood that water entering the vaults will become contaminated. Nevertheless, these holes permit water that has come in contact with residual tritium to drain into the trenches, which, in turn, allow the water to percolate into the soil and groundwater beneath the facility. This supports that Chem-Nuclear has not taken action to reduce to the smallest possible amount the migration of waste-contaminated water out of its vaults and trenches. Moreover, the fact that Chem-Nuclear has failed to minimize the migration of water onto vaults under subsection 7.11.11.1 weighs in favor of non-compliance with subsection 7.11.11.2.

In affirming DHEC's conclusion that Chem-Nuclear complied with this subsection, the ALC recognized that trench bottoms "are designed to be partially impermeable and allow liquids to infiltrate the soil below" them. However, the ALC noted the 2005 order contained "no finding that Chem-Nuclear's waste disposal design is faulty or fails to minimize the migration of . . . waste-contaminated water out of disposal units." We find the ALC erred in relying on the absence of such a finding in the 2005 order.

In *Chem-Nuclear I*, we held "section 7.11 imposes additional compliance requirements" not addressed by the 2005 order. 387 S.C. at 435, 693 S.E.2d at 19. We remanded for the ALC "to apply its factual findings [in the 2005 order] to the technical requirements" of section 7.11—including subsection 7.11.11.2. 387 S.C. at 435, 693 S.E.2d at 18-19. Thus, the ALC could not rely on the fact that the 2005 order did not contain the conclusion we ordered the ALC to make on remand—whether, based on the factual findings in the 2005 order, the disposal units minimized the migration of waste-contaminated water out of them. The lack of such a conclusion in the 2005 order was the very reason we remanded for the ALC to make this determination.

We also find the ALC erred in relying on evidence that "improvements in waste disposal procedures" have reduced the "tritium concentration at the compliance point." As acknowledged by the ALC in the remand order, this evidence "does not get to the heart of the technical requirements" established by the subsection. This is because subsection 7.11.11.2 imposes technical requirements, and we find the evidence does not relate to the requirement that the disposal units be designed to minimize the migration of waste-contaminated water out of them. Instead, this evidence relates to Chem-Nuclear's compliance with the result-based performance objectives contained in section 7.18—that Chem-Nuclear keep radioactive releases to the general environment "as low as is reasonably achievable." Subsection 7.11.11.2 required DHEC and the ALC to analyze the sufficiency of Chem-Nuclear's actions to comply with the plain language of this subsection. Thus, we cannot base our decision on the fact that Chem-Nuclear has reduced the overall tritium concentration at the compliance point.

We conclude the record demonstrates Chem-Nuclear has taken measures to reduce the migration of waste-contaminated water out of disposal units. However, the record does not support a finding that Chem-Nuclear complied with subsection 7.11.11.2. We base our holding on (1) Chem-Nuclear's failure to comply with subsection 7.11.11.1, and (2) there being no evidence, and no finding, that Chem-

Nuclear has taken action to "minimize"—reduce to the smallest amount possible—the migration of waste-contaminated water out of disposal units. We hold the ALC erred in affirming DHEC's conclusion that Chem-Nuclear complied with subsection 7.11.11.2.

3. Subsection 7.11.11.4

Subsection 7.11.11.4 requires Chem-Nuclear to design and construct its disposal units and engineered barriers in a way that allows for "temporary collection and retention of water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures without the contamination of groundwater or the surrounding soil." The plain language of this subsection imposes multiple requirements on Chem-Nuclear: (1) collect and retain water that migrates onto the disposal units, (2) test this water for radioactive waste material, (3) if such waste material is discovered, engage in removal or remedial measures, and (4) accomplish this without contaminating the groundwater or surrounding soil.

The ALC relied on the following findings in the 2005 order to support its conclusion that Chem-Nuclear complied with this subsection:

(1) Chem-Nuclear implements a surface water management plan to manage precipitation that collects in trenches, which involves pumping water into adjacent trenches or a lined pond; and
(2) The trenches are designed to prevent the flow of surface water from coming into contact with waste.

We find neither finding supports—and only one addresses—the ALC's determination that DHEC correctly concluded Chem-Nuclear complied with this subsection. Finding (1)—regarding Chem-Nuclear's surface water management plan—is relevant to the first requirement of subsection 7.11.11.4, "temporary collection and retention of water." However, there is no evidence that Chem-Nuclear tests the water pumped from the trenches for radioactive waste material. The subsection requires Chem-Nuclear to do more than collect and retain the water. Finding (2)—that trenches are designed to prevent surface water from coming into contact with waste—is irrelevant to Chem-Nuclear's compliance with this subsection. It has nothing to do with collecting, testing, or removing contaminated water from the disposal units. Because the ALC cited no additional evidence of Chem-Nuclear's compliance with this subsection, we hold the ALC erred in affirming DHEC's determination that Chem-Nuclear complied with subsection 7.11.11.4.

Upon our review of the 2005 order, we find no evidence of compliance with this subsection.[16] In fact, the evidence in the record demonstrates Chem-Nuclear is not in compliance. First, the vaults and trenches are designed to allow water that enters them to drain into the soil and groundwater below. That water is not tested before it enters the ground. Second, the only other evidence relevant to this subsection is the finding in the 2005 order that states, "None of the trenches at the [facility] have . . . a leachate collection system." Leachate is defined as "any liquid, including any suspended or dissolved components in the liquid, that has percolated through or drained from the [radioactive] material." 10 C.F.R. § 40 app. A (2011). Although the regulation does not define "leachate collection system," in common industry usage, it is "a system or device . . . that is designed, constructed, maintained, and operated to collect and remove leachate" for proper disposal. 40 C.F.R. § 503.21(i) (2011); *see also* 40 C.F.R. § 264.301(a)(2) (2011).[17] Such a system would allow Chem-Nuclear to satisfy the four requirements of subsection 7.11.11.4—(1) collect water migrating onto the disposal units, (2) test this water, (3) remove waste-contaminated water, and (4) do this without contaminating the groundwater because the system would collect the leachate for alternate disposal. Thus, the ALC's finding regarding the non-existence of a leachate collection system undermines its conclusion that Chem-Nuclear complied with this subsection and supports our determination that the ALC erred in reaching that conclusion.

---

[16] This regulation imposes requirements for the design and construction of "disposal units" and "engineered barriers." While Chem-Nuclear has monitoring wells to test the groundwater for contamination and a system to monitor water accumulation in trenches, neither of these qualifies as a disposal unit. *See* § 7.2.8 (defining "disposal unit" as "a discrete portion of the disposal site into which waste is placed for disposal"). To the extent they are considered engineered barriers—"a man-made *structure or device* that is intended to improve the land disposal facility's ability to meet the performance objectives in this part," § 7.2.9 (emphasis added)—there is no evidence these monitoring "devices" allow Chem-Nuclear to collect and test this water "without the contamination of the groundwater." § 7.11.11.4.

[17] These regulations provide the Environmental Protection Agency's definition of "leachate collection system" as stated in the regulations for "surface disposal" of "sewage sludge," 40 C.F.R. § 503.20(a) (2011), and "dispos[al] of hazardous waste in landfills," 40 C.F.R. § 264.300 (2011).

DHEC and Chem-Nuclear argue Chem-Nuclear is justified in not having a leachate collection system due to "concerns regarding the radioactive exposure to workers handling and processing the leachate." We find the argument contrary to the purpose and intent of the regulation. We fail to see how the danger of radioactive contamination to workers actually *justifies* releasing it into the groundwater without testing and remediation. Rather, it seems the danger to health and safety *requires* testing and remediation. We believe the drafters of these regulations imposed such a requirement for just that purpose. Subsection 7.11.11.4 contains no language excusing Chem-Nuclear's duty to comply with its regulatory requirements, which is especially important when the excuse for not taking a particular action is the very reason for the regulation—health and safety. Instead, the focus of compliance is on what action Chem-Nuclear did take—whether it designed and constructed its engineered barriers in a manner that allows it to collect, test, and remove contamination before it percolates into the soil and groundwater.[18]

We find no evidence to support a finding that Chem-Nuclear meets the requirements imposed by this subsection. We hold the ALC erred in affirming DHEC's conclusion that Chem-Nuclear complied with subsection 7.11.11.4.

4. Subsection 7.11.11.6

Subsection 7.11.11.6 requires Chem-Nuclear to design and construct its disposal units and engineered barriers in a way that provides "reasonable assurance that the waste will be isolated for at least the institutional control period."

We hold the ALC did not err in affirming DHEC's determination that Chem-Nuclear's current disposal units and engineered barriers—including the disposal containers, concrete disposal vaults, disposal vault lids, disposal trenches, and

[18] In deciding whether Chem-Nuclear's operations met the ALARA standard, the 2005 order appropriately weighed Chem-Nuclear's concerns regarding exposure to workers because an ALARA analysis involves balancing the benefit to the general public with the risk associated with worker exposure. *See* 24A S.C. Code Ann. Regs. 61-63 § 7.20 (1992) ("Operations at the land disposal facility shall be conducted in compliance with the standards for radiation protection . . . [and] governed by 7.18."). In determining compliance with the technical requirements of subsection 7.11.11.4, however, we consider the actions taken by Chem-Nuclear to comply, not the reasons why it decided not to implement a certain measure based on its own ALARA analysis.

enhanced caps on inactive trenches—comply with subsection 7.11.11.6. Waste is put into a disposal container, which is then placed into a reinforced concrete vault that is covered with an initial clay cap and buried in a disposal trench. Once the trench is full, Chem-Nuclear installs an enhanced cap over the trench. The following findings from the 2005 order demonstrate that the use of these disposal units and engineered barriers provide reasonable assurance the waste will be isolated from the general environment and inadvertent intruders "for at least the institutional control period": (1) the predictions of a "continually declining trend in radioactive releases to the general environment"; and (2) the Blue Ribbon Panel's conclusion that the facility's disposal practices "pose a minimal risk to either the environment or members of the public, both today and *in the long-term future*." (emphasis added).

5. Subsection 7.11.11.7

Subsection 7.11.11.7 requires Chem-Nuclear to design and construct its disposal units and engineered barriers in a way that "prevent[s] contact between the waste and the surrounding earth, except for earthen materials which may be used for backfilling within the disposal units." We interpret the plain language of this subsection as seeking to prevent waste, and not waste-contaminated water, from coming in contact with soil. Otherwise, the regulatory effect of subsections 7.11.11.1 and 7.11.11.2 becomes obsolete.[19] Under this interpretation, we hold the ALC did not err in affirming DHEC's determination that Chem-Nuclear complied with this subsection because the "placement of waste in a waste container and a reinforced concrete vault" prevents the waste from coming into direct contact with the soil.

[19] Subsections 7.11.11.1 and 7.11.11.2 explicitly regulate the migration of *water* onto disposal units and the migration of *waste* and *waste-contaminated water* out of disposal units. This distinction between "water," "waste," and "waste-contaminated water" in these subsections supports a conclusion that these regulations seek to prevent waste and waste-contaminated water from infiltrating the soil and groundwater beneath disposal units. Thus, we narrowly construe subsection 7.11.11.7 as applying to only the prevention of waste, and not waste-contaminated water, from coming in contact with the soil. To the extent the ALC relied on evidence related to subsections 7.11.11.1 and 7.11.11.2, we hold the ALC erred in that regard.

C. Subsection 7.23.6

Subsection 7.23.6 requires Chem-Nuclear to design the disposal site in a way that "minimize[s] to the extent practicable the contact of water with waste during storage, the contact of standing water with waste during disposal, and the contact of percolating or standing water with wastes after disposal."[20]

As we previously discussed, subsection 7.23.6 imposes technical requirements that require Chem-Nuclear to take action to design and construct the disposal site to meet the specifications of this subsection. Thus, DHEC and Chem-Nuclear cannot demonstrate compliance with subsection 7.23.6 simply by showing Chem-Nuclear met the performance objectives of other subsections. *Chem-Nuclear I*, 387 S.C. at 436, 693 S.E.2d at 19. Instead, we must consider whether Chem-Nuclear took any actions to meet the technical requirements of this subsection, and if so, the sufficiency of Chem-Nuclear's actions.

This subsection distinguishes between "water," "standing water," and "percolating water" and between the three different phases of operations at the facility—storage, disposal, and after disposal. This subsection requires Chem-Nuclear to implement practices that drain or remove water from active vaults and trenches, as well as minimize to the extent practicable the entry of water into inactive vaults and trenches. Although the failure to minimize the migration of water onto active vaults and trenches under subsection 7.11.11.1 contributes to the accumulation of standing water, the regulatory effect of this subsection, when narrowly construed, requires Chem-Nuclear to implement methods to minimize to the extent practicable standing water that has already migrated into the disposal units.

As to the requirement that Chem-Nuclear design the disposal site in a way that minimizes to the extent practicable the contact of water with waste *during storage*, the ALC found that "[a]ny 'storage' of waste is temporary" because "there is available disposal capacity at the [facility]." The ALC stated that when a shipment of waste is received, it is taken either to the appropriate trench for disposal or to the Cask Maintenance Building, where Chem-Nuclear inspects the casks and prepares them for off-loading. The ALC found that "[b]ased on the practice of inspecting and preparing waste for disposal within the [Cask Maintenance Building], Chem-

[20] "Disposal site" is defined as "that portion of a land disposal facility which is used for disposal of waste" and "consists of disposal units and a buffer zone." 24A S.C. Code Ann. Regs. 61-63 § 7.2.7 (1992).

Nuclear minimizes the contact of water with waste prior to off-loading the waste into the trench." We affirm because this evidence relied on by the ALC supports compliance with this particular requirement of subsection 7.23.6.

As to whether Chem-Nuclear designed the disposal site to minimize to the extent practicable the contact of standing water with waste *during disposal*, we interpret this requirement as applying to Chem-Nuclear's active vaults and trenches. We hold the ALC did not err in affirming DHEC's conclusion that Chem-Nuclear complied with this requirement of subsection 7.23.6 because the following findings from the 2005 order support this conclusion:

(1) The vaults and trenches are designed to allow water to flow out of them;
(2) Trenches are sloped and contain other design features that prevent "water from coming in contact with waste";
(3) Each trench has a drainage system that allows Chem-Nuclear to monitor any water that accumulates in the trench; and
(4) Chem-Nuclear implements a surface water management plan to manage rainwater that collects in the open trenches.

Turning to the requirement regarding minimizing to the extent practicable the contact of percolating or standing water with wastes *after disposal*, we interpret this as applying to Chem-Nuclear's inactive vaults and trenches. We hold the following findings relied on by the ALC support DHEC's determination of compliance:

(1) When vaults become full, Chem-Nuclear places an initial clay cap over inactive vaults;
(2) When trenches become full, Chem-Nuclear installs an impermeable enhanced cap on inactive trenches; and
(3) Employees fill void spaces between the vaults with backfill, which "minimizes the potential for subsidence of the enhanced caps."

Based on the above discussion, we hold the ALC did not err in finding DHEC correctly determined Chem-Nuclear is in compliance with subsection 7.23.6.

D. Subsection 7.10.7

Subsection 7.10.7 requires DHEC to find Chem-Nuclear "provides reasonable assurance that the applicable technical requirements of [part VII] will be met." The technical requirements relevant to this appeal include those set forth in

subsections 7.11.11 and 7.23.6. Based on Chem-Nuclear's noncompliance with subsections 7.11.11.1, 7.11.11.2, and 7.11.11.4—particularly the absence of evidence that Chem-Nuclear took *any* action to comply with the technical requirements of subsections 7.11.11.1 and 7.11.11.4—we do not understand how DHEC could make, nor how the ALC could affirm, a finding that Chem-Nuclear provided assurance it would meet the applicable technical requirements.

DHEC argues, however, Chem-Nuclear is in compliance with these subsections because "tritium concentrations began to decline at the compliance point" after "the incorporation of new disposal techniques." While this may have been a reasonable position for DHEC to take prior to our opinion in *Chem-Nuclear I*, the argument ignores our holding in that case—that the "specific technical requirements" of 7.11.11 cannot be met by satisfying the "performance objectives" of 7.10. As we found in *Chem-Nuclear I*, "section 7.11 imposes additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address[] whether Chem-Nuclear is in compliance with section 7.11." 387 S.C. at 435, 693 S.E.2d at 19.

DHEC nevertheless continues to argue the "technical requirements are written to meet the performance objectives," and Chem-Nuclear may comply with them without taking any action—as long as it meets the performance objectives. In its petition for rehearing, DHEC states "the Court overlooks and misapprehends the crucial interplay of the performance objectives and [technical] requirements," and argues "evidence that the performance objectives have been met is appropriate to demonstrate compliance with other requirements of the regulation." We disagree with DHEC's interpretation of the regulations. The "interplay" between the performance objectives and the technical requirements of the regulations was squarely raised in *Chem-Nuclear I*. In that case, DHEC specifically "argue[d] the [court] . . . must apply the [performance objectives] criteria set forth in section 7.10 . . . rather than apply [technical requirements] criteria set forth in sections 7.11 and 7.23.6." 387 S.C. at 431, 693 S.E.2d at 16. We specifically rejected the argument and held the technical requirements of the regulation must also be met—they cannot be satisfied simply by meeting performance objectives. 387 S.C. at 435-36, 693 S.E.2d at 18-19.

There can be no doubt that the technical requirements are designed to bring about compliance with the performance criteria. As DHEC points out, "The overarching purpose of the Part VII requirements is to ensure that the performance objectives of subsection 7.18 (ALARA) through 7.21 are met." However, DHEC's argument renders the technical requirements optional, and thus essentially writes them out of

the regulations. To illustrate this point, we consider how DHEC's argument would affect Chem-Nuclear's duty to comply with subsection 7.24.2. DHEC acknowledges in its petition for rehearing that subsection 7.24.2 "contain[s] requirements for specific action[]" by Chem-Nuclear. Under the subsection, Chem-Nuclear must place five meters of material above the top of the waste after the storage unit becomes inactive. We also consider subsection 7.11.11.7, which requires Chem-Nuclear to "prevent[] . . . contact between the waste and the surrounding earth." Under DHEC's theory that it may demonstrate compliance with the technical requirements of these subsections simply by meeting the performance objectives in other subsections, Chem-Nuclear is not actually required to place five meters of fill on top of the waste, or prevent contact between the waste and the earth. Rather, DHEC's argument allows Chem-Nuclear to ignore the specific, clear, and unambiguous requirements of these subsections by demonstrating compliance with performance objectives—despite the fact that the technical requirements subsections do not provide such an exception. We fully understand the technical requirements are interconnected with the performance objectives and are designed primarily to ensure the performance objectives are achieved. We do not agree, however, that the technical requirements may be ignored as long as the performance objectives are met.

In light of our holding in *Chem-Nuclear I*, however, it is no longer reasonable for DHEC to argue Chem-Nuclear complied with subsection 7.10.7 without considering what action Chem-Nuclear took to comply with the technical requirements of 7.11.11. This is particularly true given that Chem-Nuclear failed to take *any* action to comply with the requirements of subsections 7.11.11.1 and 7.11.11.4. And yet, DHEC continues to assert Chem-Nuclear "provide[d] reasonable assurance that the applicable technical requirements of [its own regulations] will be met." Considering, for example, the technical requirement in subsection 7.11.11.1—that Chem-Nuclear "minimize the migration of [rainfall] onto the disposal units"—DHEC could not identify one action Chem-Nuclear took to meet this requirement. Nevertheless, DHEC determined Chem-Nuclear complied with subsection 7.10.7 by providing reasonable assurance that this technical requirement of 7.11.11.1 would be met.

To determine whether DHEC complied with subsection 7.10.7 in light of these facts, we consider DHEC's role in the disposal of low-level radioactive waste. In 1967, our General Assembly enacted the Atomic Energy and Radiation Control Act. *See* Act No. 223, 1967 S.C. Acts 305 (*codified at* S.C. Code Ann. §§ 13-7-10 to -100 (1977 & Supp. 2013)). Noting "that remarkable scientific developments have occurred in the field[] of atomic energy," and "plans for further developments

. . . are creating broad opportunities and also responsibilities for the states," *id.* at 305, the General Assembly found "[i]t is prudent and wise that the State [give] . . . full consideration of the health and safety requirements of its people." *Id.* at 305-06. Based on these findings, the General Assembly required DHEC to "formulate, adopt, [and] promulgate . . . regulations relating to the control of ionizing and nonionizing radiation." S.C. Code Ann. § 13-7-40(F)(3) (Supp. 2013). Pursuant to this mandate, DHEC promulgated Part VII of regulation 61-63. Under the authority of the Act, the regulations are the law of South Carolina,[21] and DHEC is required by law to enforce them. *See* S.C. Code Ann. § 13-7-40(A) (Supp. 2013) (providing DHEC "is designated as the agency of the State which is responsible for the control and regulation of radiation sources"); § 13-7-40(F)(9) (stating DHEC "shall . . . provide by regulation for the licensing . . . of radiation sources").

The United States Nuclear Regulatory Commission (NRC), through its federal enforcement policy, has emphasized the importance of regulatory enforcement when nuclear disposal facilities do not conduct their operations with "the necessary meticulous attention to detail" and in accordance with "the high standard of compliance" imposed by the applicable regulations. General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Pt. 2, app. C (1995). Thus, while it is important for private companies such as Chem-Nuclear to comply with applicable regulations, it is equally important, if not more so, that the administrative agency mandated by law to enforce the regulations require adherence to its own standard for compliance. To allow otherwise would impede the purpose for which DHEC was created—to act in the public interest—and risk the health and safety of our citizens. *See* S.C. Code Ann. § 48-1-20 (2008) ("It is declared to be the public policy of the State to maintain reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of its citizens, . . . [and] that to secure these purposes and the enforcement of the provisions of this chapter, [DHEC] shall have authority to abate, control and prevent pollution.").

DHEC promulgated regulation 61-63 under statutory mandate for the obvious reason that nuclear waste can adversely affect the health and welfare of our citizens if not disposed of properly. In doing so, DHEC required Chem-Nuclear to comply with the "technical requirements" and "performance objectives" that DHEC chose to put in the regulations. It is important that DHEC enforce its own regulations

[21] *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010) (noting "a regulation has the force of law").

and require Chem-Nuclear to take action to comply with the technical requirements. This importance derives not simply from the need to avoid the serious consequences of non-compliance; it is important because it is the law. We are concerned that DHEC did not follow the law in failing to require Chem-Nuclear to comply with all of the technical requirements of subsection 7.11.11.

We are also concerned by DHEC's decision not to amend the requirements for issuance of the license after the ALC instructed Chem-Nuclear in its 2005 order to submit a report to DHEC regarding the feasibility of covering trenches and sealing vaults. The propriety of DHEC's decision to "concur[] with the report's evaluation of the issues" is not before this court, and we do not base our holding on the merits of that decision.[22] However, the fact that DHEC did not require Chem-Nuclear to take *any* action or make *any* changes to its disposal practices casts doubt upon DHEC's decision to renew the license.

Regardless of our affirmance of Chem-Nuclear's compliance with the remaining subsections of 7.11.11, we hold the ALC erred in affirming DHEC's determination that Chem-Nuclear complied with subsection 7.10.7.

V. Remedy

As to four separate subsections of regulation 61-63, DHEC failed to enforce the law of South Carolina. As to each, the ALC erred in finding Chem-Nuclear in compliance. Under the law, Chem-Nuclear's license to operate the facility is invalid. However, the appellant informed the court at oral argument it does not seek revocation of the license; it asks simply that DHEC enforce its regulations, and that Chem-Nuclear comply. In light of this request, we decline to rule the permit is invalid. Rather, we remand to DHEC for further proceedings.

---

[22] A footnote in the ALC's order states Chem-Nuclear conducted these studies and DHEC "concurred with the report's evaluation of the issues." The record does not contain the results of these studies or the reasons DHEC chose not to amend the license requirements as a result of the report. The basis of DHEC's decision not to amend the license or impose additional requirements for operating the facility is not before this court. While DHEC must enforce—and Chem-Nuclear must comply with—the regulations, it is not our place to disagree with DHEC as to how it should enforce its own regulations, or mandate how Chem-Nuclear should comply with these regulations. We merely review the ALC's and DHEC's determinations of compliance without passing judgment upon the technical aspects of how this compliance is accomplished.

DHEC and Chem-Nuclear argue on rehearing that this court's requirement in *Chem-Nuclear I* that all remand proceedings be based only on the factual findings of the 2005 order has hampered both DHEC and Chem-Nuclear's efforts to demonstrate to this court compliance with subsections 7.11.11.1 and 7.11.11.2 and others. We understand the problem. On remand, DHEC shall consider all available information as to whether Chem-Nuclear has complied with the regulations. On appeal to the ALC, it may conduct its proceedings with no limitations from this court on the evidence it may consider.

VI. Conclusion

We affirm the ALC as to all issues presented to this court, except Chem-Nuclear's compliance with subsections 7.11.11.1, 7.11.11.2, 7.11.11.4, and 7.10.7. As to those four subsections, we hold the ALC erred in affirming DHEC's conclusion that Chem-Nuclear was in compliance.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

George Wigington, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-193670

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
Doyet A. Early, III, Trial Judge
Roger L. Couch, Post-Conviction Relief Judge

Opinion No. 5340
Heard February 2, 2015 – Filed August 12, 2015

REVERSED AND REMANDED

Appellate Defender Dayne C. Phillips and Appellate Defender Laura Ruth Baer, both of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Suzanne Hollifield White, both of Columbia, for Respondent.

LOCKEMY: In this post-conviction relief (PCR) action, George Wigington (Petitioner) argues the PCR court erred in finding trial counsel was not ineffective for failing to properly argue to the trial court and preserve for appellate review whether he was entitled to an involuntary manslaughter jury charge. We reverse and remand for a new trial.

FACTS/PROCEDURAL BACKGROUND

In August 2005, Petitioner was indicted by a Spartanburg County grand jury for murder and possession of a weapon during the commission of a violent crime.

At trial, Petitioner testified his son, his son's girlfriend, and his two granddaughters lived with him at the time of the incident. Petitioner testified he got home around seven in the evening on the day of the incident and heard what sounded like a very loud argument. He explained he heard his son's voice. He testified when he got inside the house, he walked into his son's bedroom and saw his granddaughter, Jessica Wigington, standing near the bed crying and his son was berating her. Petitioner stated he told his son to calm down and not be so loud, then left the bedroom and went into the den to watch television. He explained his son and granddaughter came into the den shortly thereafter, and they were still arguing. He testified he again told his son to quiet down and give his granddaughter a chance to talk. He stated they sat down, but the loud arguing continued. Petitioner explained he stood up, walked over to the chair where his son was seated, put his left hand on his son's right shoulder, and told his son to calm down. He further explained his son immediately stood up and said, "if you put your hands on me again, I'll kill you." He testified he had previously been the victim of criminal domestic violence with his son, and he felt he "didn't know what was going to happen next." Petitioner stated he "felt for [his] safety and [he] felt for [his] grandchildren's safety." He explained he believed he was in danger because his son had just threatened to kill him.

Petitioner testified the situation had escalated out of control and he needed to do something to protect himself and his grandchildren, so he went to his car and got his pistol out of the locked glove box. He stated he made sure the safety was on, and then put the gun in his pocket. He explained he walked back into the den, with his hand in the pocket where the gun was located. Petitioner testified his son asked him if he went to retrieve his gun, and he told his son he had because the situation was getting out of control. He stated he took the gun out of his pocket and was holding it, but was not pointing it at his son. Petitioner explained he walked closer

to the chair his son was sitting in, and then his son grabbed his hand holding the gun. He testified the struggle felt like it lasted a long time, but he was sure it was only a few seconds. He stated he did not mean to pull the trigger and was surprised when the gun discharged because he thought the safety was on. He explained his son had not done anything to him to make him want to shoot him.

At the conclusion of trial, the trial court stated it intended to charge the jury on murder, accident, and possession of a weapon during the commission of a violent crime. Trial counsel asked the trial court to charge the jury on voluntary manslaughter, self-defense, and involuntary manslaughter. As to involuntary manslaughter, trial counsel argued "if you were going to charge self-defense, I believe we, we would be entitled to a, an instruction on involuntary manslaughter." The trial court granted trial counsel's request to charge the jury on voluntary manslaughter, but denied trial counsel's request to charge the jury on self-defense and involuntary manslaughter.

The jury convicted Petitioner of murder and possession of a weapon during the commission of a violent crime. The trial court sentenced Petitioner to concurrent sentences of life imprisonment for murder and five years' imprisonment for possession of a weapon during the commission of a violent crime.

On appeal, this court held Petitioner was not entitled to a jury instruction on self-defense because he was at fault in bringing on the difficulty and he did not reasonably believe he was in actual danger. As to Petitioner's argument that he was lawfully armed in self-defense at the time of the shooting and did not intentionally discharge the weapon, this court held Petitioner's argument was unpreserved because Petitioner did not raise this argument to the trial court. Instead, Petitioner only argued he would be entitled to a charge on involuntary manslaughter if the trial court determined it was appropriate to charge self-defense. Accordingly, this court affirmed Petitioner's convictions. *See State v. Wigington*, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007).

Petitioner subsequently filed a PCR application. At the PCR hearing, Jessica testified she was present when Petitioner killed her father. She stated she was looking at her father's head when he was shot in the head. She explained she did not see Petitioner point the gun at her father or pull the trigger. She testified Petitioner and her father did not wrestle over the gun, and her father was not touching Petitioner at the time Petitioner shot him.

Roger Poole, an employee of the Spartanburg County Public Defender's Office, testified he had trial counsel's file from Petitioner's case and had reviewed it.[1] Poole testified trial counsel requested jury charges on self-defense and involuntary manslaughter, and the trial court denied trial counsel's requests. He stated this court affirmed the trial court's denial.

Petitioner also testified at the PCR hearing regarding his version of the facts leading up to the incident. He stated he felt the trial court "took away [his] entire defense." Petitioner explained his defense was the fact that his son was "raging on crack cocaine," his son was screaming at his granddaughter, and his son threatened to kill him, so he went and got his gun for protection. Petitioner testified he did not intentionally point the gun at his son, and during their struggle over the gun, it just went off. Petitioner asserted he did not want trial counsel to "fight on the self-defense claim" because Petitioner "didn't think [he] had a self-defense claim." Petitioner stated he felt his strongest defense was the fact that his son had drugs in his system. Petitioner further testified his defense was accident, asserting his son's death was an "[a]ccidental death." He explained the threatening manner his son was acting was important because it was why he went to get his gun. Petitioner further explained his son was considerably stronger than he was, and he was seventy-four years old at the time of the incident.

The PCR court denied Petitioner's application, finding Petitioner's "testimony to be completely lacking in credibility." The PCR court also found trial counsel "was not ineffective for failing to persuade the [trial] court to adopt self-defense and involuntary manslaughter jury [charges]." Moreover, the PCR court found trial counsel "properly made this request and the trial court denied the request." Further, the PCR court found Petitioner failed to show the trial court and this court's rulings were incorrect and Petitioner failed to establish any error by trial counsel in his presentation of these arguments to the trial court. Petitioner did not file a Rule 59(e), SCRCP, motion asking the PCR court to rule on whether trial counsel was ineffective for failing to preserve the argument that he was lawfully armed at the time of the shooting and the evidence reduced the crime from murder to manslaughter. This court granted Petitioner's petition for certiorari on March 12, 2014.

[1] Petitioner's trial counsel, Michael Bartosh, died before Petitioner's PCR hearing.

STANDARD OF REVIEW

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. *See Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Rule 71.1(e), SCRCP. This court gives great deference to the PCR court's findings of fact and conclusions of law. *McCray v. State*, 317 S.C. 557, 560 n.2, 455 S.E.2d 686, 688 n.2 (1995). If matters of credibility are involved, this court gives deference to the PCR court's findings because this court lacks the opportunity to observe the witnesses directly. *Solomon v. State*, 313 S.C. 526, 530, 443 S.E.2d 540, 542 (1994), *overruled on other grounds by State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013). If there is any probative evidence to support the findings of the PCR court, those findings must be upheld. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Likewise, a PCR court's findings should not be upheld if there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996).

LAW/ANALYSIS

Petitioner argues the PCR court erred in finding trial counsel was not ineffective for failing to preserve the involuntary manslaughter jury charge issue for appellate review. Petitioner contends he was entitled to an involuntary manslaughter jury charge under the second definition of involuntary manslaughter based on the evidence presented during his trial. Petitioner asserts trial counsel's performance was deficient because he failed to preserve the issue and trial counsel argued the wrong law to the trial court. Further, Petitioner contends trial counsel's deficient performance prejudiced his case because if trial counsel preserved his involuntary manslaughter argument, Petitioner would have been entitled to a new trial and a jury charge on involuntary manslaughter.

A. Law

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984); *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625. To show prejudice, the applicant must

show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson*, 325 S.C. at 186, 480 S.E.2d at 735.

"If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction." *State v. Smith*, 391 S.C. 408, 412, 706 S.E.2d 12, 14 (2011). "[A] trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence" presented at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The law to be charged to the jury is determined by the evidence presented at trial." *Id.*

> Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.

Smith, 391 S.C. at 414, 706 S.E.2d at 15. For the purposes of an involuntary manslaughter jury charge, "'[a] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.'" *State v. Brayboy*, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (quoting *State v. Crosby*, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003)). "[A] self-defense charge and an involuntary manslaughter charge are not mutually exclusive . . . ." *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 470 (2008).

> There is a difference between being armed in self-defense and acting in self-defense . . . . [In] determining whether one is armed in self-defense, the court is "concerned only with whether the defendant had a right to be armed for purposes of determining whether he was engaged in a lawful act, i.e. was lawfully armed, and not whether he actually acted in self-defense when the shooting occurred."

Brayboy, 387 S.C at 181, 691 S.E.2d at 486 (quoting *Light*, 378 S.C 641, 664 S.E.2d 465). Our appellate courts have held that "evidence of a struggle over a weapon between a defendant and victim supports submission of an involuntary manslaughter charge" when the evidence shows the defendant was lawfully armed in self-defense at the time of the shooting and the defendant recklessly handled the loaded gun. *Id.* at 180, 691 S.E.2d at 485; *see also State v. Rivera*, 389 S.C. 399, 404-05, 699 S.E.2d 157, 159-60 (2010); *Light*, 378 S.C. at 648-49, 664 S.E.2d at 468-69; *Tisdale v. State*, 378 S.C. 122, 125-26, 662 S.E.2d 410, 412 (2008); *State v. Burriss*, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." *State v. Pittman*, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2008).

B. Analysis

We find Petitioner was entitled to a jury instruction under the second definition of involuntary manslaughter. *See Smith*, 391 S.C. at 414, 706 S.E.2d at 15 (defining involuntary manslaughter under the second definition as "the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others"); *id.* at 412, 706 S.E.2d at 14 ("If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction."). Petitioner's testimony from trial provides some evidence that Petitioner did not intend to kill his son. Petitioner's testimony indicates the gun went off during his struggle with his son, he did not mean to pull the trigger, and his son had not done anything to make Petitioner want to shoot him.

The closer question is whether Petitioner was "engaged in a lawful activity with reckless disregard for the safety of others." *Smith*, 391 S.C. at 414, 706 S.E.2d at 15. Petitioner's testimony establishes his actions amounted to presenting a loaded firearm, a felony.[2] *See* S.C. Code Ann. § 16-23-410 (2003) ("It is [a felony] for a person to present or point at another person a loaded or unloaded firearm."); *In re Spencer R.*, 387 S.C. 517, 522-23, 692 S.E.2d 569, 572 (Ct. App. 2010) (defining "the phrase 'to present' a firearm in section 16-23-410 as: to offer to view in a threatening manner, or to show in a threatening manner"); *State v. Cabrera-Pena*, 361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004) (concluding the defendant was not entitled to a jury charge under the first definition of involuntary manslaughter because the defendant's use of a firearm to intimidate the victim constituted presenting a firearm, a felony). Petitioner, who was in his home at the time of the

[2] Petitioner was not charged with pointing or presenting a firearm.

killing, was permitted to carry his gun on his property; it was still a felony for him to present a firearm to another person, unless he had the right to arm himself in self-defense. *See* S.C. Code Ann. § 16-23-20(8) (Supp. 2014) (allowing a person to carry a handgun on their person when in their home); S.C. Code Ann. § 16-23-410 (permitting a person to point or present at firearm at another person in self-defense).

Nevertheless, we note the trial court charged the jury on the defense of accident. *See State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999) ("A homicide will be excusable on the ground of accident when (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon."). The distinction between involuntary manslaughter's second definition and accident is essentially the manner in which the defendant handles the weapon. *Compare id.* (setting forth the elements of the defense of accident) *with Smith*, 391 S.C. at 414, 706 S.E.2d at 15 (defining involuntary manslaughter under the second definition as "the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others"). The trial court's decision to charge the jury on the defense of accident indicates the trial court found some evidence indicating Petitioner was acting lawfully.

Our appellate courts have held that evidence of a struggle over a gun supports an instruction on involuntary manslaughter when the evidence shows the defendant was lawfully armed in self-defense at the time of the shooting and the defendant recklessly handled the loaded gun. *See Rivera*, 389 S.C. at 404-05, 699 S.E.2d at 159-60; *Light*, 378 S.C. at 648-49, 664 S.E.2d at 468-69; *Tisdale*, 378 S.C. at 125-26, 662 S.E.2d at 412; *Burriss*, 334 S.C. at 265, 513 S.E.2d at 109; *Brayboy*, 387 S.C. at 180-82, 691 S.E.2d at 485-86. Petitioner's testimony indicates Petitioner's gun went off during the struggle over the gun. According to Petitioner, at the time of the shooting, Petitioner's son grabbed his hand that was holding the gun, which Petitioner asserted was not pointed at his son. Petitioner testified he made sure the safety was on when he put the gun in his pocket and he was surprised when it fired because he believed the safety was still on. Petitioner also testified his son's threat and prior act of domestic violence against him made him afraid for his and his grandchildren's safety. Accordingly, evidence from trial indicates Petitioner may have been armed in self-defense at the time of the shooting and Petitioner may have been recklessly handling the loaded gun at the time of his son's death.

Trial counsel failed to preserve Petitioner's involuntary manslaughter issue for appeal because he never argued the evidence from trial entitled Petitioner to such a

charge. *See State v. Wigington*, 375 S.C. 25, 35-36, 649 S.E.2d 185, 190 (2007) (holding Petitioner's involuntary manslaughter argument was not preserved). This was deficient, particularly in light of trial counsel's erroneous argument to the trial court that Petitioner would have been entitled to a jury charge on involuntary manslaughter only if the trial court determined a self-defense charge was appropriate. *See Light*, 378 S.C. at 650, 664 S.E.2d at 470 ("[A] self-defense charge and an involuntary manslaughter charge are not mutually exclusive . . . ."); *Hill*, 315 S.C. at 262, 433 S.E.2d at 849 ("[A] trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence.").

We further find Petitioner was prejudiced by trial counsel's improper argument to the trial court regarding Petitioner's entitlement to an involuntary manslaughter jury charge. *See Strickland v. Washington*, 466 U.S. at 688-89 (holding that to establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient, and the deficient performance prejudiced the applicant's case). Had trial counsel properly raised this issue to the trial court, Petitioner would have been entitled to an involuntary manslaughter charge.

Accordingly, we reverse the PCR court's finding that defense counsel was not ineffective for failing to properly argue to the trial court and preserve for appellate review whether Petitioner was entitled to an involuntary manslaughter jury charge.

CONCLUSION

We reverse the PCR court's dismissal of Petitioner's PCR application and remand to the trial court for a new trial.

REVERSED AND REMANDED.

SHORT and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alphonso Chaves Thompson, Appellant.

Appellate Case No. 2012-213141

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5341
Heard June 11, 2015 – Filed August 12, 2015

AFFIRMED

Michael Patrick Scott, of Nexsen Pruet, LLC, of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Mark Reynolds Farthing, and Assistant Attorney General Mary Williams Leddon, all of Columbia, and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

HUFF, J.: Alphonso Chaves Thompson appeals from his trafficking in cocaine, possession of a weapon during the commission of a violent crime, and possession with intent to distribute marijuana convictions. Thompson contends the trial court

erred in (1) denying his motion to suppress all evidence found as the result of an illegal search, (2) denying his motion to suppress his confession, and (3) denying his motion for a directed verdict on the charge of possession of a weapon during the commission of a violent crime. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Following issuance of a search warrant for 120 River Street[1] in Spartanburg, South Carolina, officers discovered cocaine, marijuana, various guns, and certain drug and gun related items at the residence.[2] Thompson had been arrested at his business pursuant to an arrest warrant and was transported to the River Street address as the search warrant was being executed. During the search, Thompson confessed that the marijuana and cocaine found in the home were his. He was thereafter charged in a two count indictment with trafficking in more than four hundred grams of cocaine and possession of a firearm during the commission of or attempt to commit a violent crime. He was also charged in a separate indictment with possession with intent to distribute marijuana.

Thompson moved to suppress all of the evidence obtained as a result of the search warrant, which included the marijuana, cocaine, and weapons recovered from the warrant, as well as his confession. Thompson argued the affidavit in support of the search warrant included stale information and conclusory statements, it failed to set forth the reliability or basis of knowledge of the confidential reliable informants referred to in the affidavit, and it lacked specific facts giving the issuing judge[3] a basis to believe the evidence would be found at 120 River Street, and therefore there was no probable cause to support the issuance of the search warrant. The trial court denied this motion. Thompson also made a separate motion to suppress his statement to police, which the trial court also denied. Following the close of evidence by the State, Thompson moved for a directed verdict with respect to the

---

[1] The address is alternately referred to as River Street and River Drive in the transcript.

[2] Although not included in the search warrant affidavit, evidence was submitted at trial that Thompson's mother had entered into a lease-purchase agreement to buy 120 River Street and this is where Thompson's parents resided.

[3] The search warrant affidavit was not taken to a magistrate, but was presented to a circuit court judge.

weapons charge. The trial court likewise denied this directed verdict motion, as well as Thompson's renewal of this motion after presentation of his defense.

Upon submission of the case to the jury, Thompson was found guilty on all charges. The trial court then sentenced him to concurrent sentences of twenty-five years on the trafficking charge, five years on the weapons charge, and five years on the possession with intent to distribute charge.

LAW/ANALYSIS

I. Search Warrant

On May 13, 2010, Investigator Chris Raymond, with the Spartanburg County Sheriff's Office, executed an affidavit setting forth the following information in support of issuance of a search warrant for 120 River Street:

> In June of 2007 Investigators from the Spartanburg County Sheriff's Office Narcotics Division had two different Confidential Reliable Informants (CRI) give information that they had been buying large amounts of cocaine from a black male that they only knew as "POO BEAR." These two CRI's stated that several large cocaine transactions took placed [sic] over the course of several months. These CRI's furnished information that was able to be corroborated such as vehicle descriptions and photo identifications. Both CRI's stated that they knew POO BEAR to drive a gray in color Honda Accord Station wagon when he would conduct these drug deals. It was learned through this Investigation that "POO BEAR" was positively identified as Alfonso Thompson and he also had an F350 Ford Dually blue and Gold in color. In August of 2007 the SCSO Narcotics Division arrested Keith Jeter who stated that he was being supplied 4½-9 oz. of cocaine at a time from Alfonzo Thompson aka "POO BEAR." Jeter further stated that "POO BEAR" would bring the cocaine to his residence on Huxley St. in Spartanburg City. In September of 2008 the SCSO Narcotics Division interviewed a [sic]

individual named Fred Meadows who stated that he was being supplied cocaine from "POO BEAR" and that "POO BEAR" drove a blue and gold Ford F-350 Dually. Meadows further stated that he grew up with "POO BEAR" in the city and has known him for a long time. Meadows stated that "POO BEAR" would deliver the cocaine to his house on Virginia St. in the city of Spartanburg. Also in late 2008 Spartanburg City Police Narcotics had an informant who came forward and stated the [sic] "POO BEAR" had a residence at the end of River St. on the left hand side and that "POO BEAR" was a large scale cocaine Trafficker. In January of 2009 the Spartanburg County Narcotics Division had two more different CRI's that came forward and stated that they had purchased 18 ounces of cocaine from "POO BEAR". They identified Alfonzo Thompson in a photo lineup as being the "POO BEAR" that they had dealt with. These two CRI's also confirmed that "POO BEAR" had an F-350 Ford Dually and it was Blue and Gold in color. On February 11, 2009 The Spartanburg County Narcotics Division arrested Jose Luis Diaz-Arroyo with a kilo of cocaine. During the interview with Arroyo he stated that his brother in law Alejandro Sosa Galvan was supplying a black male named "POO BEAR." Arroyo further stated that Sosa Galvan had multiple Kilos of cocaine delivered to "POO BEAR" at this River St. address on several different occasions. On July 30, 2009 a fifth CRI stated he was being supplied by a Deangelo Young aka "LITTLE MAN" and that Young was getting his cocaine from his cousin "POO BEAR." This CRI made a controlled buy from "LITTLE MAN" by taking him $4000 in Spartanburg County Sheriff's Office recorded funds. "LITTLE MAN" left the buy location and was followed to 1868 Tamara Way where he met with "POO BEAR" (THOMPSON). Thompson was driving a white in color Honda Civic Sc[sic] tag . . . . This Civic is registered to a Pamela D. Jones of 1868 Tamara Way. Pamela Jones is a known girlfriend of "POO BEAR".

"LITTLE MAN" left "POO BEAR" and met with the CRI at the buy location where he turned over 4 ounces of Cocaine to him.

Over the past 6 months the Spartanburg County Sheriff's Office Narcotics Division has conducted surveillance on 120 River St. and on several occasions has seen Thompson driving different vehicles to include the Ford F-350 Dually blue and gold in color and the white in color Honda Civic to and from this location. Investigators have also seen the gray in color Honda Accord station wagon come and go from this residence.

Over the past 6 months Investigators have witnessed Thompson visit this 120 River St. address just before making cocaine deliveries throughout Spartanburg City.

On May 11, 2010 Investigators bought ½ ounce of cocaine base from Authur Jones. When Jones was approached he started cooperating with the SCSO Narcotics Division. Jones stated that he was buying his cocaine from Alfonzo Thompson aka "POO BEAR." Jones stated that "POO BEAR" was fronting him about 9 ounces of Powder Cocaine a month. Jones stated that he would take the powder and then turn it into cocaine base and then sell it. When it was all gone he would call "POO BEAR" and tell him that he was ready for him. Jones stated that he was paying $1000 an ounce for the cocaine. On 05-11-2010 Jones placed a recorded telephone call to Thompson stating that he was ready to re-up. Thompson agreed to come by. Jones stated that Thompson's M.O. was to come by in the next couple of days. On 05-12-2010 Jones called "POO BEAR" again with no response. At approximately 6:30 PM Jones received a telephone call from "POO BEAR" . . . asking Jones if he was going to be home. Jones stated yes and hung up. Jones knew this to mean that "POO BEAR" was coming shortly. At Approximately [sic] 7:19 PM Thompson pulled into Jones [sic] driveway driving the white Honda Civic. Thompson exited the vehicle and

> came inside. Once inside Jones handed Thompson $9000.00 in recorded funds. Thompson stated that he would bring the package in the morning. Jones knew this to mean that Thompson would bring the cocaine to him the next day. Investigators were inside the residence watching the transaction take place as well as the transaction being Video and Audio recorded. There was [sic] also outside surveillance units near the scene. Thompson was loosely followed in the Honda Civic after the transaction.
>
> This investigator feels that Thompson has demonstrated a pattern over the course of the last 2 years of large scale cocaine trafficking. It is believed that Items related to the Drug Trafficking Trade will be located inside this residence as well as Cocaine and or Cocaine Base. It is also known by Investigators that Drug Traffickers hide their drugs and proceeds from drugs [sic] sales in various places about the residence and cartilage [sic] areas. Due to the violent Nature of Drug Trafficking Organizations a "NO KNOCK WARRANT IS REQUESTED."

On appeal, Thompson contends the trial court erred in denying his motion to suppress all of the evidence found as a result of the illegal search of 120 River Street. In particular, he argues the affidavit failed to demonstrate veracity and basis of knowledge of the numerous individuals providing information for the warrant, it failed to provide a sufficient link to the River Street home to provide probable cause that drugs would be found at the property, and all the relevant information in the affidavit was stale. Accordingly, he maintains the affidavit in support of the search warrant does not pass the "totality of the circumstances test" to show a substantial basis for the issuing judge to conclude probable cause existed. We disagree.

Both the United States Constitution and the South Carolina Constitution provide a safeguard against unlawful searches and seizures, guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," and avowing no warrants shall issue except upon probable cause, supported by oath or affirmation, "and particularly describing

the place to be searched," as well as the persons or things to be seized. U.S. Const. amend. IV; S.C. Const. art. I, § 10. South Carolina allows issuance of a search warrant "only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (2014). "Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court." *State v. Gentile*, 373 S.C. 506, 512, 646 S.E.2d 171, 174 (Ct. App. 2007).

A search warrant may issue only upon a finding of probable cause, and it is the duty of the reviewing court to ensure the issuing judge had a substantial basis upon which to conclude that probable cause existed. *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

> Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [judge's] decision [to issue a search warrant]. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."

Id. at 235.

"A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014). Under the "totality of the circumstances" test,

> [t]he task of the issuing [judge] is simply to make a practical, common sense decision whether, [given all] the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of

> persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Johnson, 302 S.C. 243, 247, 395 S.E.2d 167, 169 (1990) (quoting *Gates*, 462 U.S. at 238-39). The duty of a court reviewing a determination of probable cause for a search warrant is to ensure the issuing judge had a substantial basis for concluding that probable cause existed. *State v. Bellamy*, 336 S.C. 140, 144, 519 S.E.2d 347, 349 (1999). "The appellate court should give great deference to [an issuing judge's] determination of probable cause." *State v. Gore*, 408 S.C. 237, 247, 758 S.E.2d 717, 722 (Ct. App. 2014).

In *Johnson*, our supreme court found an affidavit defective because "it [did] not set forth any information as to the reliability of the informant nor was the information corroborated." 302 S.C. at 247, 395 S.E.2d at 169. If an affidavit fails to include

> any information concerning the reliability of the informant, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime, or . . . by an unidentified informant.

Id. at 248, 395 S.E.2d at 169 (citation omitted). However, an informant's veracity or reliability and his basis of knowledge should not "be construed as entirely separate and independent requirements to be rigidly exacted in every case." *Bellamy*, 336 S.C. at 143, 519 S.E.2d at 348-49. Rather, they are closely intertwined elements and relevant considerations in the totality-of-the-circumstances analysis, and "a deficiency in one of the elements may be compensated for . . . by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 143-44, 519 S.E.2d at 349. Further, the failure to specifically include past reliability and/or basis of knowledge of an individual providing information is not always fatal to a search warrant affidavit. Our courts have determined "nonconfidential informants and eyewitnesses have more credibility than confidential informants." *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 679 (2000). "[E]vidence of past reliability is not usually required when information is provided by an eyewitness because, unlike the paid informer, the

eyewitness does not ordinarily have the opportunity to establish a record of previous reliability." *State v. Driggers*, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996). "[A] non-confidential informant should be given a higher level of credibility because he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false." *Id.* at 511, 473 S.E.2d at 60. Additionally, an informant may be considered reliable "if he possesse[s] a special relationship and capacity to gain knowledge that should prompt belief in the veracity of his information." *Id.* at 512, 473 S.E.2d at 60.

"In order for an affidavit in support of a search warrant to show probable cause, it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *State v. Winborne*, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (internal quotation marks omitted). "Whether averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case." *State v. Beckham*, 334 S.C. 302, 316, 513 S.E.2d 606, 613 (1999) (internal quotation marks omitted).

The affidavit in support of the search warrant in this case can be summarized as providing the following pertinent information:

1. In June 2007, two unnamed informants indicated Thompson had been supplying them with large amounts of cocaine.

2. In August 2007 and September 2008, two *named* individuals, Keith Jeter and Fred Meadows, stated Thompson was supplying them with cocaine, noting Thompson would deliver the cocaine to their homes.

3. In late 2008, another unnamed informant stated Thompson was a large scale cocaine trafficker and that Thompson had "a residence at the end of River St."

4. In January 2009, two unnamed informants stated they had purchased eighteen ounces of cocaine from Thompson, identifying Thompson in a photo line-up.

5. On February 11, 2009, a *named* individual, Jose Luis Diaz-Arroyo, who had been arrested with a kilo of cocaine, stated that his brother-in-law was supplying Thompson and that his brother-in-law had multiple kilos of cocaine delivered to Thompson at the River Street address "on several different occasions."

6. On July 30, 2009, another unnamed informant stated he was being supplied by a cousin to Thompson who was getting cocaine from Thompson. The unnamed informant made a controlled buy from the cousin by taking the cousin $4,000. The cousin left the location and was followed to the home of Thompson's girlfriend where he met with Thompson and the cousin then left Thompson and met up with the unnamed informant at the buy location where the cousin turned over four ounces of cocaine to the unnamed informant.

7. In the six months preceding the affidavit, surveillance had been conducted on 120 River Street, and Thompson was observed on several occasions driving different vehicles to and from this location.

8. In the six months preceding the affidavit, investigators "witnessed Thompson visit this River Street address just before making cocaine deliveries throughout Spartanburg."

9. On May 11, 2010, after investigators purchased cocaine from a *named* individual, Arthur Jones, Jones began cooperating with authorities, informing them he was buying his cocaine from Thompson and that Thompson would front him about nine ounces of cocaine a month. On May 11, 2010, Jones placed a recorded call to Thompson stating he was ready to "re-up, and Thompson agreed to come by." On May 12, 2010, Jones received a phone call from Thompson asking if the individual was going to be home, and within an hour from the call Thompson arrived at Jones's home. Inside the home, Jones handed Thompson $9,000 in recorded funds and Thompson stated he would "bring the package in the morning," which Jones knew to mean Thompson would bring him cocaine. Investigators were inside Jones's home watching the money transaction take place, and the transaction was video and audio recorded.

We agree with Thompson that the affidavit fails to set forth information as to the veracity, reliability or basis of knowledge of several of the informants referenced. However, even disregarding all of the information supplied by the unnamed informants, there is substantial other evidence from named and/or eyewitness informants contained in the affidavit, and the affidavit includes information which is sufficiently closely related in time to the issuance of the search warrant so as to justify a finding of probable cause.

As to the information that, in August 2007 and September 2008, Thompson was supplying two of the informants with cocaine and delivered the cocaine to their homes, the affidavit specifically provides the names of these two individuals, Keith Jeter and Fred Meadows. Further, this information from Jeter and Meadows, though somewhat stale, is supported by the current information concerning the Jones transaction, which occurred within the two days preceding issuance of the search warrant and showed Thompson was of the habit of delivering cocaine to his buyers at his buyers' homes. Notably, the information concerning the Arthur Jones transaction indicates both reliability and basis of knowledge as Jones is a nonconfidential informant and part of the information was actually witnessed by the authorities, thus lending credibility to Jones's information. Next, there is information in the affidavit from another named informant indicating large quantities of drugs were, in the past, delivered to the River Street address. Specifically, in February 2009, Jose Luis Diaz-Arroyo stated that his brother-in-law was supplying Thompson with multiple kilos of cocaine, which his brother-in-law had delivered to Thompson at the River Street address "on several different occasions." While this information is likewise somewhat stale, it is supported by information in the affidavit that the River Street address had been under surveillance for the preceding six months before issuance of the search warrant, and during that time Thompson was observed driving to and from the location and investigators "witnessed Thompson visit this 120 River St. address just before making cocaine deliveries throughout Spartanburg City."[4] Further, there is more

[4] Notably, Thompson did not request a *Franks* hearing in order to challenge any portion of the affidavit as being false or made with reckless disregard for the truth, and at no point did Thompson ask the trial court to consider any portions of the affidavit false or made with reckless disregard. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) ("[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.").

current and first-hand information in the affidavit concerning the authorities' observation of Thompson, both coming and going from the River Street address and stopping by there before making cocaine deliveries, as well as him engaging in a monetary exchange pursuant to a drug transaction within a day of issuance of the warrant. Accordingly, the affidavit contains information from four named sources, whose veracity and/or basis of knowledge is otherwise supported in the affidavit, and additionally contains first-hand eyewitness information from the police. From this can be gleaned the following information in the search warrant affidavit to support probable cause: (1) in 2007 and 2008, Thompson was supplying cocaine and delivering cocaine to the homes of his buyers; (2) in February 2009, authorities were informed that Thompson was being supplied multiple kilos of cocaine, and the cocaine was delivered to Thompson at the River Street address; (3) in the six-month time period prior to issuance of the search warrant, investigators observed Thompson driving different vehicles to and from the River Street address, and also observed him visiting the River Street address right before making cocaine deliveries; and (4) two days before the issuance of the search warrant, an individual informed investigators he was buying nine ounces of cocaine a month from Thompson, on that date the individual spoke to Thompson on the phone indicating he was ready for more drugs, and the day before issuance of the warrant Thompson arrived at the individual's home where he received $9,000 from the individual after which Thompson agreed to bring the individual "the package" in the morning, with this monetary transaction being observed, as well as audio and video recorded, by investigators. There is very recent information in the affidavit showing Thompson's habit of selling to his buyers by taking the cocaine to his buyers' homes. Logically, Thompson would have to retrieve the drugs from some location in order to complete the Jones drug transaction, and viewing the affidavit as a whole, it would have been reasonable for the issuing judge to assume and make a "practical, common sense decision," under the totality of circumstances set forth in the affidavit, that there was a fair probability Thompson would be retrieving those drugs from the River Street address. *See United States v. Grossman*, 400 F.3d 212, 217-18 (4th Cir. 2005) (finding a search warrant affidavit which fails to include any factual assertions directly linking the items sought to a residence can nonetheless establish a sufficient nexus between a defendant's criminal conduct and a residence linked to the defendant, and the fact that a defendant may split his time among several different homes will not render the search of the different homes invalid).

Based upon the above, a review of the matter convinces us that, under the totality of the circumstances set forth in the affidavit, the issuing judge had before him information supporting a fair probability that contraband or evidence of a crime would be found at 120 River Street, and the judge therefore had a substantial basis upon which to conclude that probable cause existed for issuance of the search warrant.

II. Confession

Thompson also made an in limine motion to suppress his statement to police. In a *Jackson v. Denno*[5] hearing, Thompson maintained he confessed to owning the drugs found because the officer threatened to take his parents to jail if he did not. The officer denied any promises or threats were made to Thompson and particularly denied threatening that Thompson's parents would go to jail. The trial court found the State established by the greater weight of the evidence that Thompson's statement was freely and voluntarily made and, therefore, denied Thompson's motion to exclude it. Thereafter, over Thompson's objection, his taped confession and his written confession were admitted into evidence.

On appeal, Thompson contends his confession should have been suppressed because (1) it flowed from an illegal arrest and (2) it was coerced. We find no error.

A. Illegal Arrest

First, Thompson argues his arrest was unsupported by probable cause because the affidavit in support of his arrest was deficient.

This argument is clearly not preserved for our review. In order to be preserved for appellate review, an issue must have been raised to and ruled upon by the trial court. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "Issues not raised and ruled upon in the trial court will not be considered on appeal." *Id.* at 142, 587 S.E.2d at 693-94. "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Id.* at 142, 587 S.E.2d at 694. "For an objection to be preserved for appellate review, the objection must be made . . . with sufficient specificity to

[5] 378 U.S. 368 (1964).

inform the [trial court] of the point being urged by the objector." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). At no time did Thompson ever argue before the trial court that the arrest warrant affidavit was insufficient to establish probable cause for his arrest, much less that his confession should be suppressed on this basis. Accordingly, we affirm based on error preservation grounds.

B. Coerced Confession

Thompson also contends his confession was improperly coerced and, because it was obtained under duress, it should have been suppressed. We disagree.

A "confession may not be extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence." *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (alteration in original) (internal quotation marks omitted). A police threat to arrest family members unless a defendant confesses to a crime could render the defendant's confession involuntary if it in fact occurred. *State v. McClure*, 312 S.C. 369, 371, 440 S.E.2d 404, 405 (Ct. App. 1994). However, the question of the voluntariness of such a confession can come down to a question of credibility, which may be resolved by the trial court in favor of the officers. *Id.* at 371-72, 440 S.E.2d at 405-06. "On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." *Rochester*, 301 S.C. at 200, 391 S.E.2d at 247. "When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Here, though Thompson testified he was threatened with the arrest of his parents if he did not confess to ownership of the drugs, Investigator Raymond denied any promises or threats were made to Thompson and particularly denied threatening that Thompson's parents would go to jail. As in *McClure*, the issue boils down to one of credibility. Accordingly, based upon the record before us, there is evidence to support the trial court's ruling and we find no error.

III. Directed Verdict on the Weapons Charge

At trial, the State presented evidence that, along with cocaine located in the detached garage and marijuana located in both the house and in the detached garage, numerous weapons were found during the search of the house at 120 River Street, including an Intratec 9mm pistol. A trace on the pistol showed it was purchased by Thompson on November 17, 2000, at a pawn shop. The police had no documentation linking Thompson to any of the other weapons. One of the bags of marijuana found in the house was located in the same bedroom as the pistol that was registered to Thompson.

Following the presentation of evidence by the State, Thompson moved for a directed verdict with respect to the weapons charge, asserting the State failed to present evidence (1) he constructively possessed any of the weapons found in the home or (2) that he was engaged in a violent crime. The solicitor argued one of the firearms found there was registered to Thompson. The trial court found there was some evidence tending to establish the elements of the crime and, therefore, denied the motion. After Thompson testified in his own defense and rested his case, he renewed his motion for a directed verdict as to the weapons charge, arguing his testimony showed the only weapon linked to him was given by Thompson to his father. He maintained the State failed to meet its burden of (1) linking him to any weapons found and (2) showing he was "guilty in any way of a violent crime." The trial court again denied the motion.

On appeal, Thompson argues his weapons conviction should be reversed because the State (1) failed to prove he constructively possessed any weapon and (2) failed to establish any nexus between any weapon and any violent crime, as required by *State v. Whitesides*, 397 S.C. 313, 725 S.E.2d 487 (2012). We find no reversible error.

A. Constructive Possession

Thompson argues, of the various weapons introduced by the State that had been found at the River Street home, the State only attempted to link the 9mm pistol to him, and the State's witnesses conceded he was not present when the pistol was found and he did not reside at the home. He further notes, although he initially testified the pistol that was purchased ten years earlier was his, he explained he had

given this gun to his father. Thus, he maintains there was no direct or circumstantial evidence to show he constructively possessed any weapon found at the River Street home, and the trial court therefore erred in denying his motion for directed verdict on the weapons charge. We disagree.

"When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the state." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury." *Id.* at 292-93, 625 S.E.2d at 648.

In *State v. Halyard*, 274 S.C. 397, 264 S.E.2d 841 (1980), "the South Carolina Supreme Court resolved the issue of whether a person not in actual possession of a firearm could nevertheless be convicted for possession of the firearm." *State v. Jennings*, 335 S.C. 82, 86, 515 S.E.2d 107, 109 (Ct. App. 1999). In *Halyard*, the court held, "[t]o prove constructive possession [of an item], the State must show a defendant had dominion and control, or the right to exercise dominion and control over the [item]." 274 S.C. at 400, 264 S.E.2d at 842. "Constructive possession may be established through either direct or circumstantial evidence, and possession may be shared." *Jennings*, 335 S.C. at 87, 515 S.E.2d at 109.

We believe the evidence, viewed in a light most favorable to the State, created a jury issue as to whether Thompson was in constructive possession of the pistol. Thompson admitted that he stayed at his parents' home "every now and then," he had a key to the house and the gate, he could come and go from the house whenever he wanted whether his parents were there or not, and the car in the garage—where a large amount of the cocaine was found—belonged to Thompson's friend and was in his parents' garage because Thompson was working on it. Thompson also acknowledged he helped build a fence around the house and helped set up the home's security system. Also, Lieutenant Cooper, who oversaw the search of 120 River Street, testified they had information Thompson had control of the residence. Further, though Thompson claimed he gave the pistol found in the home to his father, the State presented evidence that Thompson bought the pistol and it was registered to him. Accordingly, we find the State presented evidence of Thompson's constructive possession of the pistol,and the trial court therefore did not err in declining to grant a directed verdict on this basis.

B. Nexus to Violent Crime

Thompson also argues, even if the State presented sufficient evidence that he constructively possessed a firearm, it failed to provide a sufficient nexus between any firearm and any violent crime. Citing *Whitesides*, Thompson contends the State failed to show any firearm was accessible to him, that he ever let anyone know he carried a weapon, or that any weapon ever provided him with a defense against potential robbers. We find this argument is not properly preserved.

As noted, in order to be preserved for appellate review, a matter must have been raised to and ruled upon by the trial court, and arguments which have not been raised to and ruled upon by the trial court will not be considered on appeal. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94. Though "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Id.* at 142, 587 S.E.2d at 694. Further, "[a] party may not argue one ground at trial and an alternate ground on appeal." *Id.*

When trial counsel made his motion for a directed verdict with respect to the weapons charge, he argued the State "would have had to have proven constructive possession of those weapons, and they would have to prove also of course that he was engaged in a violent crime. We believe the State has failed to meet [its] burden in that respect." He then went on to present argument concerning only the State's failure to show constructive possession. When trial counsel renewed his motion for directed verdict, he stated as to the weapons charge as follows:

> [T]he only link with any of the weapons is the purchase of a 9mm pistol which my client has freely admitted that he did not have possession of, constructive or actual, at the time of his arrest and which was found in his father's house which had been given to him by my client.
>
> Again, I don't believe the State has met its burden of linking him with any of the weapons and for that matter showing that he was guilty in any way of a violent crime.

While Thompson's argument on appeal as to constructive possession is properly preserved for our review, his appellate argument concerning the State's failure to

show a *nexus* to a violent crime is not. At most, trial counsel argued the State failed to present evidence Thompson *committed* a violent crime. Thus, Thompson never asserted to the trial court, as he does on appeal, that the State was required to show a nexus between a violent crime and his actual or constructive possession of a firearm during its commission.[6]

CONCLUSION

Based upon the foregoing, we affirm the trial court's denial of Thompson's motion to suppress all the evidence, finding under the totality of the circumstances the search warrant affidavit set forth facts from which the issuing judge could conclude there was a fair probability that drugs would be found at 120 River Street, and, therefore, the issuing judge had a substantial basis upon which to conclude that probable cause existed. We also affirm the admission of Thompson's confession and the denial of his directed verdict motion.

AFFIRMED.

WILLIAMS, J., concurs.

FEW, C.J., dissenting: I agree with the majority the trial court correctly admitted Thompson's confession into evidence and denied his motion for a directed verdict on the weapons charge. I also agree with the circuit judge who issued the warrants—and the trial court—the officers had probable cause to search Thompson's residence, his business, and his girlfriend's residence, and to arrest Thompson on drug charges. I do not agree, however, the officers had probable cause to search the River Street home. On this point, I respectfully dissent. Because the vast majority of the drugs for which Thompson was convicted were

[6] While it is true Thompson's trial began January 23, 2012, and the opinion in *Whitesides* was not filed until April 4, 2012, just as the appellant in *Whitesides* raised the issue to the trial court that it was necessary for the weapon in question to facilitate the trafficking crime and mere possession of a weapon would not be sufficient to support a possession of a weapon during the commission of a violent crime charge, Thompson could have made such an argument to the trial court in his case, but failed to do so.

seized from the River Street home, I would find the error of denying his motion to suppress that evidence prejudiced Thompson, and I would reverse his convictions.

I begin my analysis by emphasizing two important categories of facts. The first relates to the locations where all of this took place. The River Street home is Thompson's parents' home—not Thompson's. It is located in downtown Spartanburg. Thompson lived in Fountain Inn, in a different county. Thompson's girlfriend—whose home was also searched—lived approximately seven miles from the River Street home. Thompson's business—which was searched—was located in Boiling Springs, also miles from the River Street home.

The second category relates to timing. The affidavit submitted in support of the warrant to search the River Street home shows Thompson engaged in extensive drug-related activity from at least June 2007 through July 30, 2009, much of which is directly connected to the River Street home. The affidavit also shows Thompson was engaged in drug-related activity on May 11 and 12, 2010. However, the affidavit—dated May 13, 2010—contains no specific facts showing any connection between Thompson's drug-related activity and the River Street home after February 11, 2009. The only evidence of such a connection is found in the following conclusory statements:

> Over the past 6 months the Spartanburg County Sheriff's Office Narcotics Division has conducted surveillance on 120 River St. and on several occasions has seen Thompson driving different vehicles [including three vehicles connected to his drug activity] to and from this location.
>
> Over the past 6 months Investigators have witnessed Thompson visit this 120 River St. address just before making cocaine deliveries throughout Spartanburg City.

While the affidavit contains extensive and specific evidence of Thompson's drug-related activity over a long period of time, these non-specific references to Thompson's activity at the River Street home after February 2009 do not provide a substantial basis to support a finding of probable cause that evidence of his crimes would be found at River Street in May 2010. *See State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) (stating "circuit court judges must determine

whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed"); *see also United States v. Lalor*, 996 F.2d 1578, 1582 (4th Cir. 1993) ("In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched.").

In fact, the specific detail in the affidavit of Thompson's activities before July 2009 and during May 2010 compared with the conclusory descriptions of his activities in the interim has the opposite effect of supporting probable cause. The statements that officers "on several occasions ha[ve] seen Thompson driving different vehicles . . . to and from" River Street and "Investigators have witnessed Thompson visit . . . 120 River St[reet] . . . just before making cocaine deliveries" are representations that officers saw these events, and thus demonstrate the officers had access to the same level of detail the affidavit contains of other events. This comparison raises serious questions as to why that specific detail is lacking for the fifteen months immediately preceding the search. Importantly, the circuit judge who signed the search warrant did not question the officer to supplement the information provided in the affidavit.

The officers clearly believed there was a connection between Thompson's drug-related activities and the River Street home. In retrospect, they were correct. The Fourth Amendment, however, does not permit officers to make the decision that probable cause exists to support a search warrant—that decision must be made by the judge who issues the warrant. Otherwise, "'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime.'" *State v. Johnson*, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990) (quoting *Aguilar v. Texas*, 378 U.S. 108, 115, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723, 729 (1964)).

In my opinion, this affidavit did not provide the judge with a substantial basis for a finding of probable cause that evidence of Thompson's drug-related activity would be found at River Street. I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland, Sharon Louise Holland, Joyce C. Sobel, Robert W. Waruszewski, Richard N. Taylor, Robert K. Spillers (a/k/a Robert Spillers), Deborah T. Spillers (a/k/a Deborah Spillers), Patrick A. DiAngelo, Deborah A. DiAngelo, Gary E. Owens, Joyce M. Owens, Fount L. Shults, Lynda M. Shults, Dennis Ridgeway, and Teresa Lynn Ridgeway, Plaintiffs,

Of whom John Steven Goodwin, Louise C. Goodwin, Gary E. Owens, and Joyce M. Owens are the Appellants,

v.

Landquest Development, LLC, Kyle C. Corkum, South Bay Properties, LLC, C.R. Thompson and Sons, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, Bayside Property, Inc., The City of Georgetown, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and National Land Sales, Inc., f/k/a Source One Communities, LLC, a/k/a Source One Signature Communities, Defendants,

Of whom Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, Bayside Property, Inc., The City of Georgetown, Hartford Casualty Insurance Company, and Hartford Fire Insurance Company are the Respondents.

Appellate Case No. 2013-001644

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5342
Heard June 3, 2015 – Filed August 12, 2015

REVERSED AND REMANDED

K. Douglas Thornton, of Conway, and John M. Leiter, Law Offices of John M. Leiter, PA, of Myrtle Beach, for Appellants.

Charles T. Smith, of Georgetown, for Respondents Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc.;

Andrew F. Lindemann, Davidson & Lindemann, PA, of Columbia, and Elise Freeman Crosby, Crosby Law Firm, LLC, of Georgetown, for Respondent The City of Georgetown;

Lawrence Michael Hershon and James Lynn Werner, Parker Poe Adams & Bernstein, LLP, both of Columbia, for Respondents Hartford Casualty Insurance Company and Hartford Fire Insurance Company.

FEW, C.J.: John and Louise Goodwin and Gary and Joyce Owens appeal the circuit court's refusal to restore their case to the docket after it was "stricken" due to one defendant's bankruptcy. The circuit court denied the motion to restore the case on the ground the case was barred by the statute of limitations. We hold that because the Goodwins and Owenses complied with the statute of limitations when they initially filed and served the summons and complaint, it was not necessary for them to comply with the statute again when they attempted to restore the case to the docket. We reverse and remand for further proceedings.

I. Facts and Procedural History

In September 2007, Bonnie and Ronald Charlton and Bayside Property, Inc. sold a tract of land on Winyah Bay in the city of Georgetown to South Bay Properties, LLC for $20.85 million—$6.27 million in cash and a $14.58 million note secured by a mortgage. South Bay—a joint venture of Landquest Development, LLC, C.R. Thompson and Sons, LLC, and Kyle C. Corkum—planned to develop the property into a residential subdivision named the Harbor Club on Winyah Bay. Prior to construction, South Bay sold fifty-four lots—including one each to the Goodwins and Owenses—generating $14,737,600 in proceeds.

On July 9, 2009, after South Bay failed to build the basic infrastructure of the subdivision in a timely manner, the Goodwins and Owenses, along with other lot owners, filed this lawsuit ("lot owners' action") and recorded a lis pendens on the property still owned by South Bay. The record indicates the lawsuit was promptly served.

In June 2010, South Bay filed a petition for bankruptcy. The record reflects no further activity in the lot owners' action until it appeared on the trial roster for July 25, 2011. South Bay then filed a motion for a "continuance," relying on the "automatic stay" imposed under the federal bankruptcy code. *See* 11 U.S.C. § 362(a)(1) (2012) (discussed in section II. A. of this opinion). The circuit court granted South Bay's motion for a continuance, and in a separate Form 4, it ordered "Case Stricken Due To Bankruptcy." On August 12, 2011, the bankruptcy court dismissed South Bay's bankruptcy case.

In August 2012, the Charltons and Bayside filed an action to foreclose on the mortgage. They named as defendants any party that "may have or claim" an interest in the property, including the Goodwins and Owenses. The Goodwins and Owenses—without an attorney—filed answers that contained only a general denial of the allegations in the complaint. The Charltons and Bayside filed a motion for an order of reference to the master-in-equity.

On January 22, 2013, the Goodwins and Owenses—then represented by an attorney—filed two motions. The first was a motion to "Reinstate/Restore" seeking "an Order . . . reinstating the [lot owners'] action to the active trial docket" and to consolidate the lot owners' action and the foreclosure suit. The second was

a motion to amend their answers in the foreclosure suit to assert counterclaims and cross-claims seeking the same relief they sought in the lot owners' action.[1]

The circuit court denied the motion to restore the lot owners' action, ruling the Goodwins' and Owenses' claims were barred by the statute of limitations. As to consolidation, the circuit court stated, "Since restoration . . . is denied, consolidation of this case . . . is moot." In a separate order in the foreclosure suit, the circuit court referred that case to the master and declined to rule on the motion to amend. The Goodwins and Owenses filed motions to alter or amend both orders pursuant to Rule 59(e), SCRCP. In the foreclosure suit, they asked the circuit court to rescind the order of reference and repeated their request to amend their answers. After the master recused himself for unrelated reasons and returned the foreclosure suit to circuit court, the court entered orders denying the Rule 59(e) motions in both cases.[2]

II. Motion to Restore

The Goodwins and Owenses argue the circuit court erred in denying their motion to restore on the grounds that their claims were barred by the statute of limitations. We agree.[3]

The statute of limitations provides, "Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued . . . ." S.C.

---

[1] The cross-claims and counterclaims in the proposed amended answers in the foreclosure suit are nearly identical to the claims in the lot owners' action.

[2] The Goodwins and Owenses interpreted the order in the foreclosure suit as denying their motion to amend. In a separate appeal in the foreclosure suit, we found the order did not deny the motion to amend and was not an immediately appealable order. We dismissed the other appeal and remanded for further proceedings.

[3] Because this is a question of law, we review the circuit court's decision de novo. *See Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (stating an appellate court "reviews questions of law de novo" (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008))).

Code Ann. § 15-3-20(A) (2005). Thus, the statute of limitations applies to the date a lawsuit is "commenced." Rule 3(a) of the South Carolina Rules of Civil Procedure provides, "A civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations . . . ." Section 15-3-530 of the South Carolina Code (2005) prescribes the limitations period for this case as three years. The Goodwins and Owenses complied with the statute of limitations in 2009 when they filed the summons and complaint and served them on the defendants within the three-year limitations period. Thus, the circuit court erred by finding the lawsuit barred by the statute of limitations.

The respondents argue, however, the Goodwins and Owenses did not comply with the tolling provisions of 11 U.S.C. § 108(c) (2012) and Rule 40(j) of the South Carolina Rules of Civil Procedure. As we will explain, because the lawsuit had already been commenced, there was nothing to toll. Therefore, the tolling provisions are irrelevant.

A. 11 U.S.C. § 108(c)

The filing of a petition for bankruptcy by a defendant in a state civil proceeding invokes 11 U.S.C. § 362(a)(1). Section 362 is entitled "Automatic stay," and provides the filing of the petition "operates as a stay . . . of . . . the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor." § 362(a)(1). This automatic stay prevents a state court from proceeding with the action while the stay is in effect. Under 11 U.S.C. § 362(c)(2)(B) (2012), "the stay . . . continues until . . . the [bankruptcy] case is dismissed."

Our rules of procedure do not address how a circuit court must deal with the automatic stay. However, neither our rules nor 11 U.S.C. § 362 require the dismissal of the action. Here, the circuit court did not dismiss the action. The circuit court employed a Form 4 order provided by our supreme court that contains various boxes for the court to check to indicate the effect of the order.[4] The form

[4] *See* Rule 84, SCRCP ("The Supreme Court shall prescribe the content and format of forms required by these rules."). By order dated June 24, 2008, the supreme court approved the form used by the circuit court in this case. *See* Order re*:* Form 4, Judgment in a Civil Case, No. 2008-06-24-01 (S.C. Sup. Ct. filed June 24, 2008), *available at* http://www.sccourts.org/courtOrders/displayOrder.cfm?

includes boxes for the dismissal of an action and the reason for the dismissal, but the court did not check the dismissal boxes in this order. Rather, the circuit court checked the box labeled "ACTION STRICKEN," and as a reason for striking, the box labeled "Bankruptcy." In the portion of the form provided for text, the circuit court wrote, "Case Stricken Due To Bankruptcy."

In deciding not to restore the case to the docket, the circuit court relied on 11 U.S.C. § 108(c), which states,

> [I]f applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay.

The circuit court incorrectly concluded section 108(c) has any application to this case. By its terms, the subsection tolls "a [time] period for commencing or continuing a civil action" when the time period is "fixe[d]" by (1) "applicable nonbankruptcy law," (2) "an order," or (3) "an agreement." Here, there is no order or agreement fixing any period of time for restoring the lawsuit, and the only "law" the respondents contend is applicable is the statute of limitations. However, the Goodwins and Owenses commenced the lot owners' action, and thus complied with the statute of limitations, before the automatic stay took effect. Under these circumstances, the statute of limitations was no longer an "applicable

---

orderNo=2008-06-24-01 (last visited August 7, 2015). The Form 4 form has subsequently been revised. *See* Order re*:* Judgment in a Civil Case Form (SCRCP Form 4C), No. 2013-03-26-01 (S.C. Sup. Ct. filed Mar. 26, 2013), *available at* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2013-03-26-01 (last visited August 7, 2015).

nonbankruptcy law" that "fixe[d] a period for commencing or continuing a civil action."[5] Therefore, the tolling provision in section 108(c) is irrelevant in this case.

B. Rule 40(j), SCRCP

The circuit court also relied on Rule 40(j) of the South Carolina Rules of Civil Procedure. We find the court erred in relying on this rule for several reasons. First, the lot owners' action was stricken due to bankruptcy, not pursuant to Rule 40(j). Second, even if Rule 40(j) was at issue, the rule does not set a deadline for restoring a case. As our supreme court has explained,

> Rule 40(j) does not *require* that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, *if* the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period. . . . A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period provided by the rule.

Maxwell v. Genez, 356 S.C. 617, 620-21, 591 S.E.2d 26, 28 (2003).

Under Rule 40(j), therefore, the applicable deadline remains the statute of limitations. The effect of the rule is not to set a new deadline, but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year. Because the Goodwins and Owenses commenced the lawsuit within the statute of limitations, there was nothing to toll and they did not need the tolling provision in Rule 40(j).

Third, the requirement of complying with the statute of limitations after a case is stricken pursuant to Rule 40(j) depends on the event of "striking" being considered

---

[5] 11 U.S.C. § 108(c) is applicable to a situation where the automatic stay has prevented the commencement of a lawsuit before the statute of limitations expires, or where a law, order, or agreement otherwise sets some time limit for "commencing or continuing" a lawsuit.

a dismissal. While our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal, there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed. In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as "substantially revis[ing] the procedure for *dismissing* a case previously found in Rule 40(c)(3)." Rule 40, SCRCP Notes, Notes to 1994 Amendments (emphasis added). The notes go on to state, "Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken . . . . Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored . . . ." *Id.*; *see also Maxwell*, 356 S.C. at 621, 591 S.E.2d at 28 (relying on the notes in interpreting Rule 40(j)).

Moreover, the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal. *See Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27 ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."); *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."); *Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992) ("[W]here possible, all provisions of a statute must be given full force and effect.").

There is also an historical basis for considering a case stricken pursuant to Rule 40(j) as the equivalent of dismissed. We adopted our Rules of Civil Procedure in 1985. *See* Rule 86(a), SCRCP ("These rules shall take effect on July 1, 1985."). Before then, the circuit court had the power to dismiss an action without prejudice if it was called for trial and the parties were not ready to proceed. *See Small v. Mungo*, 254 S.C. 438, 441, 443, 175 S.E.2d 802, 803, 804 (1970) (holding the inability of counsel "to contact plaintiff and his witnesses and be ready for trial" and "the failure of plaintiff and his counsel to appear when the case was called for trial constituted a failure to proceed with the cause . . . and a ground for dismissal of the action"). When the supreme court decided *Small*, former Circuit Court Rule 81 was in effect. The rule provided, "When a case is reached on the Common Pleas trial roster and is called for trial, . . . if counsel are not ready to go forward with the case it shall be placed . . . at the foot of the Calendar." S.C. Code Ann. vol. 22, Circuit Court Rule 81 (Supp. 1984) (repealed 1985). In 1985, former Rule

40(c)(3), SCRCP, took effect. Similar to the procedure described in *Small*, Rule 40(c)(3) applied only if the parties were not prepared to proceed when the case was called for trial. However, the rule allowed the circuit court to "strike" the action. The rule provided:

> When an action is reached on the trial roster and is called for trial, it shall not be continued by consent, and if counsel are not ready to go forward the court shall strike the action from the calendar (file book) with leave to restore, unless continuance is granted for good cause shown.

Rule 40(c)(3), SCRCP (West 1994) (repealed 1995).

The rule did not use the word "dismissed," but tracking the language of former Circuit Court Rule 81, it did require a restored case to "be placed at the foot of the calendar (file book) and a new case number assigned." Rule 40(c)(3); *see* Rule 40(c)(3), Notes ("This Rule 40 is substantially a compendium of present Circuit Court Rules . . . ."). Our law treated the striking of a case pursuant to Rule 40(c)(3) as the equivalent of a dismissal,[6] and our courts required the plaintiff to comply with the statute of limitations upon restoring the case. *See Graham v. Dorchester Cnty. Sch. Dist.*, 339 S.C. 121, 122, 125 n.1, 528 S.E.2d 80, 81, 82 n.1 (Ct. App. 2000) (stating in a case "struck . . . from the trial roster . . . pursuant to former Rule 40(c)(3), SCRCP" that "the statute of limitations clearly expired" before the motion to restore was filed). *But see Robinson v. J.F. Cleckley & Co.*, 751 F. Supp. 100, 105 (D.S.C. 1990) (stating for purposes of calculating timely removal pursuant to 28 U.S.C. § 1446(b) (2012), "an action which has been removed from the docket pursuant to [Rule] 40(c)(3) is pending while it is off of the docket" and is not "commenced when it is restored to the calendar").

There is no such basis in our law, however, for considering the striking of a case due to bankruptcy as a dismissal. In fact, the striking of a case from the docket due to bankruptcy is not mentioned in our rules at all. In practice, our courts have treated the striking of a case due to bankruptcy as not being a dismissal. For example, in an "Administrative Order" dated May 4, 1988, then Chief Justice

---

[6] *See* Rule 40, SCRCP Notes, Notes to 1994 Amendments (referring to "the procedure for dismissing a case previously found in Rule 40(c)(3)").

Gregory provided, "I . . . find that if a common pleas case is struck from the calendar (file book) due to bankruptcy and later restored, it should be restored at its original place on the calendar (file book), without the payment of an additional filing fee." *See* Administrative Order, No. 1988-05-04-01 (S.C. Sup. Ct. filed May 4, 1988), *available at* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=1988-05-04-01 (last visited August 7, 2015).

We acknowledge the Form 4 uses the term "stricken"—the same term that equates to "dismissed" under Rule 40(j). However, while the forms are provided for in the Rules, *see* Rule 84, SCRCP, and are designed to assist courts to carry out the Rules, the forms themselves are not the law. *See Robinson*, 751 F. Supp. at 105 (stating "this court would be remiss if we allowed administrative laws . . . to dictate important procedural rights").

It is also important to note that striking a case pursuant to Rule 40(j) may be done only by consent. *See* Rule 40(j), SCRCP (providing the party asserting a claim may strike it only when "all parties adverse to that claim . . . agree in writing that it may be stricken"). To the contrary, many cases are stricken due to bankruptcy whether the parties consent or not. In this case, for example, the record contains no indication the case was stricken with the consent of the Goodwins or Owenses. In fact, it appears the circuit court entered the order striking the case on its own initiative, with no prior notice to the parties.[7] To consider the striking of this case—or any case where the automatic stay applies—as a dismissal without the consent of the party making the claim would conflict with Rule 41(b), SCRCP, which provides limited circumstances in which an action may be dismissed involuntarily.[8]

---

[7] The only motion in our record that mentions South Bay's bankruptcy is South Bay's motion for a continuance, which recites the "consent of all parties." However, the motion does not request striking the action. In the Goodwins' and Owenses' Rule 59(e) motion, they indicate they did not consent to striking the case, stating, "The case was struck either at the request of South Bay . . . or on the Court's own initiative."

[8] *See also* Rule 79(f), SCRCP ("No action listed in the file book . . . shall be . . . stricken . . . unless and until: (1) plaintiff shall file and serve a notice . . . or stipulation of dismissal . . . ; or (2) counsel . . . have prepared and filed an order . . .

For these reasons, we find the tolling provision of Rule 40(j) is irrelevant in a case stricken due to bankruptcy.

III. Conclusion

We **REVERSE** the denial of the Goodwins' and Owenses' motion to restore the case and **REMAND** for further proceedings. Because our resolution of the issues discussed above is dispositive of the appeal, we do not address the Goodwins' and Owenses' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (An "appellate court need not address remaining issues when disposition of prior issue is dispositive").

HUFF and WILLIAMS, JJ., concur.

---

bearing the written consent of all interested parties . . . ; or (3) dismissal is ordered by the court."). None of those events occurred in this case.