The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF SCOTT D REYNOLDS, PETITIONER

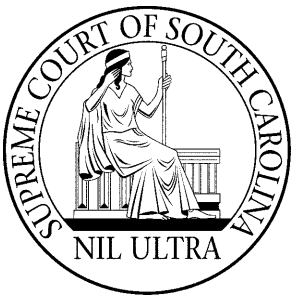
Petitioner was definitely suspended from the practice of law for nine (9) months. *In the Matter of Scott D. Reynolds*, 751 S.E.2d 662 and 406, S.C. 356 (2013). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
September 23, 2015



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 38
September 30, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Zachary Steven Naert, Respondent

Appellate Case No. 2015-001244

Opinion No. 27574
Submitted September 14, 2015 – Filed September 30, 2015

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Peter Demos Protopapas, of Rikard & Protopapas, LLC, and Michael J. Virzi, both of Columbia, for Respondent.

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 a public reprimand or published anonymous admonition. He further agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within ninety (90) days of the imposition of discipline and to complete the Legal Ethics and Practice Program Ethics School and Advertising School within one (1) year of the imposition of discipline. We accept the Agreement, issue a public reprimand, and impose conditions as hereafter stated in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent and Joseph DuBois, Esquire, are partners in Naert & DuBois, LLC, a law firm handling a variety of legal matters, including timeshare litigation. In 2013, respondent created a website for the firm when the law firm opened in 2013. The website address did not contain the name of the law firm or any part of the names of the partners. In March 2013, respondent created a Google AdWords account as part of the law firm's Internet marketing campaign.

Google AdWords is an Internet marketing technique in which the advertiser places bids for "keywords." When an Internet user of particular search engines associated with Google enters an Internet search that includes words in common with the advertiser's selected keywords, the search results may or may not include the advertiser's ad amongst the list of other nonadvertising or unpaid website search results. The advertiser pays Google if the Internet user clicks on the advertiser's ad from amongst the search results.

At the time Naert & DuBois, LLC, used Google AdWords, if an advertiser's ad appeared in the search results, it appeared under the heading "Ad related to [keyword or keywords]." At that time, ads for Google AdWords could appear amongst the search results with no visible designation or delineation of an area on the webpage specifically designated for advertisement.

Naert & DuBois, LLC, has filed a number of lawsuits on behalf of clients against a timeshare company (the Company). The Company and other individuals related to the Company are represented in various capacities by Attorney A, Attorney B, and Attorney C.

Naert & DuBois, LLC, bid on the names of Attorney A, Attorney B, and Attorney C as well as the name of the Company in its list of keywords for the firm's Google AdWords campaign. The firm's advertisement appeared in some Internet search results in which Internet users entered one or more of the Attorneys' names in a Google search. The firm's advertisement read as follows:

> Timeshare Attorney in SC - Ripped off? Lied to? Scammed?
> Hilton Head Island, SC Free Consult

Sometimes the Attorneys' names appeared as the first result in the list of search results and, other times, the Attorneys' names appeared later in the list of search results. Naert & DuBois, LLC, paid for its advertisement each time an Internet searcher clicked on the firm's advertisement.

Naert & Dubois, LLC, terminated bidding on the use of the Attorneys' names prior to notice of the disciplinary investigation.

Respondent admits he is the attorney responsible for the Google AdWords campaign on behalf of Naert & DuBois, LLC. He further admits the firm's advertisement did not contain his name, Mr. DuBois' name, or the name of any other lawyer responsible for the advertisement's content. Respondent agrees use of opposing counsels' names as keywords in an Internet marketing campaign in a derogatory manner violates provisions of the Lawyer's Oath.

Law

Respondent admits that by his conduct he has violated the following provision of the Rules of Professional Conduct (RPC), Rule 407, SCACR: Rule 7.2(d) (any communication made pursuant to Rule 7, RPC, shall include the name and office address of at least one lawyer responsible for its content). Respondent further admits that, by his conduct, he violated provisions of the Lawyer's Oath contained in Rule 402(k), of the South Carolina Appellate Court Rules (SCACR) (by taking Lawyer's Oath, lawyer pledges to opposing parties and their counsel fairness, integrity, and civility in all written communications and to employ only such means consistent with trust, honor, and principles of professionalism).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Within ninety (90) days of the date of this opinion, respondent shall pay the costs

incurred in the investigation and prosecution of this matter by ODC and the Commission. Within one (1) year of the date of this opinion, respondent shall attend and complete the Legal Ethics and Practice Program Ethics School and Advertising School and, no later than ten (10) days after the completion of the programs, submit proof of completion to the Commission.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Laura Riley, as the Personal Representative of the Estate of Benjamin Riley, Petitioner,

v.

Ford Motor Company, Respondent.

Appellate Case No. 2014-001192

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Bamberg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 27575
Heard June 16, 2015 – Filed September 30, 2015

REVERSED

Ronnie L. Crosby, of Hampton; and Daniel E. Henderson and Matthew V. Creech, both of Ridgeland, all of Peters Murdaugh, Parker, Eltzroth & Detrick, PA, Petitioner.

C. Mitchell Brown, A. Mattison Bogan, and Michael J. Anzelmo, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Curtis L. Ott and Laura W. Jordan, both of Gallivan, White & Boyd, PA, of Columbia, for Respondent.

JUSTICE KITTREDGE: This products liability action arose following the death of Benjamin Riley, who was killed in a motor vehicle accident involving a negligently designed door-latch system in his 1998 Ford F-150 pickup truck. Petitioner Laura Riley, as the Personal Representative of the Estate, filed suit against Respondent Ford Motor Company and the at-fault driver, Andrew Marshall Carter, II. Carter settled with the Estate for $25,000, with $20,000 allocated to the survival claim and $5,000 allocated to the wrongful death claim. Petitioner and Ford proceeded to trial on the wrongful death claim. The jury returned a verdict for Petitioner in the amount of $300,000. The trial court granted a *nisi additur* of $600,000, bringing the judgment to $900,000.

Ford appealed. The court of appeals upheld the finding of liability but reversed the trial court as to *nisi additur*, as well as the allocation and setoff of settlement proceeds. *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014). We issued a writ of certiorari to review the decision of the court of appeals.[1] We reverse the court of appeals and reinstate the judgment of the trial court.

I.

This case arises from an automobile accident that occurred in August 2007 and resulted in the death of Benjamin Riley, the Sheriff of Jasper County. The facts of the accident are not in dispute and are essentially as follows: Riley was driving a Ford F-150 pickup truck on S.C. 231 just south of Bamberg when Carter, a sixteen-year-old driver who was on his way home from school, pulled out in front of him. Riley swerved in an attempt to avoid Carter's vehicle, but a collision ensued, causing the driver's door of Riley's pickup to open. The impact of the collision sent Riley's pickup truck crashing into a nearby tree; Riley was ejected from the vehicle and thereafter died from the resulting injuries.

Petitioner Laura Riley (Riley's widow), as Personal Representative of the Estate, filed survival and wrongful death claims against Carter and Ford. Specifically,

[1] Ford also appealed the trial court's denial of its JNOV motion, which the court of appeals affirmed. *Riley v. Ford Motor Co.*, 408 S.C. 1, 13, 757 S.E.2d 422, 429 (Ct. App. 2014). Ford did not petition this Court for a writ of certiorari from this aspect of the court of appeals' decision, so the JNOV issue is not before the Court.

Petitioner alleged Carter was negligent for failing to yield the right-of-way and that Ford defectively designed the door-latch system in Riley's F-150, which allowed the door to open upon impact, and that Riley would not have died had he not been ejected from the vehicle. Petitioner settled with Carter for $25,000, agreeing to allocate $20,000 to the survival claim and $5,000 to the wrongful death claim. In April 2010, the settlement was approved by the trial judge, and the claims against Carter were dismissed.

The case against Ford proceeded to trial in September 2011. At trial, evidence of post-collision conscious pain and suffering was presented;[2] however, Petitioner withdrew the survival claim mid-trial, and only the wrongful death claim was submitted to the jury. The jury returned a verdict for Petitioner in the amount of $300,000 in actual damages, and although the jury also found there was clear and convincing evidence that Ford's conduct rose to the level of willful, wanton, or reckless, the jury ultimately declined to award any punitive damages.

Thereafter, Petitioner sought a new trial *nisi additur*, which the trial court granted in the amount of $600,000, bringing the total recovery to $900,000. Additionally, Ford moved for JNOV, and in the alternative, to offset the full $25,000 amount of the prior settlement against the jury's verdict in the wrongful death action, arguing post-verdict settlement reallocations are permitted in South Carolina and that such a reallocation was appropriate in this case because Petitioner "voluntarily withdrew the survival claim during trial." The trial court denied both motions.

II.

Ford appealed. The court of appeals reversed, finding the trial court erred in denying Ford's motion for setoff and in granting the Estate's motion for a new trial *nisi additur*. Specifically, as to the new trial *nisi additur*, the court of appeals stated "the trial court's mere disagreement with the jury's determination of the proper amount of [] damages is not a compelling reason for granting additur," and the court of appeals found it was inappropriate for the trial court to "impose its will on a party by substituting its judgment for that of the jury." *Id*. at 19–20, 757 S.E.2d at 432–33. The court of appeals acknowledged that the jury's $300,000 verdict was only slightly more than the Estate's total economic loss, despite the

[2] An eyewitness to the accident saw Riley face-down in the bushes and heard a "gasping sound" immediately after the wreck.

Estate's extensive presentation of compelling evidence of noneconomic damages, and that Ford's trial strategy was not to "actively contest" the Estate's damages but instead to focus its efforts on the issue of liability. The court of appeals nevertheless found that because the jury must have awarded *some* amount in noneconomic damages, no "compelling reason" existed for the trial court to "invade the jury's province" by granting a new trial *nisi additur*. *Id*. at 19 n.10, 757 S.E.2d at 432 n.10. Thus, the court of appeals reversed the additur award and reinstated the jury's $300,000 verdict.

Regarding setoff, the court of appeals found there was evidence in the record to support a survival action against the other driver and that allocating a portion of the settlement to the survival claim "makes sense." The court of appeals also acknowledged that $20,000 was a reasonable amount for the other driver to pay to settle the survival claim on the facts of this case. Nevertheless, purportedly relying upon this Court's decision in *Rutland v. South Carolina Department of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012), the court of appeals determined it was appropriate for an appellate court to reevaluate the agreed-upon, and court-approved, settlement allocation, stating:

> [W]hen an agreed-upon allocation of settlement proceeds is not reasonably based on the evidence and does not fairly advance the policy of preventing double-recovery, a non-settling defendant who is entitled to a setoff but was not involved in the settlement negotiation is entitled to have the court consider reallocating the settlement proceeds.[3]

Id. at 16–17, 757 S.E.2d at 431.

The court of appeals determined a "fair allocation" of the Estate's settlement with the other driver was to apportion $5,000 to the survival claim and $20,000 to the wrongful death claim, in essence flipping the allocation the settling parties reached and the allocation the trial court approved. *Id*. at 17, 757 S.E.2d at 431. The court of appeals reasoned reapportionment was appropriate because Ford was not a party to the settlement negotiations between Petitioner and the other driver and because

[3] We note the court of appeals' decision includes no discussion of how or why the agreed-upon settlement allocation was not "reasonably based on the evidence" or how it ran afoul of the public policy preventing a plaintiff's double recovery.

the court of appeals felt "allocating eighty percent of the settlement to survival is not reasonable." *Id*. at 15, 757 S.E.2d at 430. The court of appeals did not question the actual amount ($20,000) originally allocated to the survival action but reexamined only the percentage breakdown. Essentially, the court of appeals decided it was within the province of a reviewing court to evaluate the reasonableness of not only the dollar amounts but also the relative percentage of settlement proceeds assigned to each claim. In so holding, the court of appeals stated, "We hold that in the context of a non-settling defendant's claim for setoff, the court should examine whether the percentages allocated to one claim or the other by the settling parties are reasonable. If the allocation is not reasonable, the court may reallocate the funds." *Id*. at 16, 757 S.E.2d at 430. Based on these findings, the court of appeals held Ford was entitled to offset the increased amount of $20,000 against the jury's verdict in the wrongful death action.

III.

Petitioner urges this Court to reverse the court of appeals' decision on the basis that it is a departure from well-established law concerning *nisi additur* and that the court of appeals erred in modifying the negotiated, court-approved settlement allocation and in finding Ford was entitled to offset the amount of $20,000. We agree and address each issue in turn.

A. New Trial *Nisi Additur*

Petitioner argues the court of appeals erred in reversing the trial court's order granting a new trial *nisi additur* because the trial court's decision was an appropriate exercise of discretion and was supported by compelling reasons. We agree.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530–31, 431 S.E.2d 557, 558 (1993) (citing *Easler v. Hejaz Temple*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985)). "When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial *nisi*." *Id*. at 531, 431 S.E.2d at 558 (citing *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556

(1993)). "However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge and this Court to set aside the verdict absolutely." *Id*. (citing *Easler,* 285 S.C. at 356, 329 S.E.2d at 758).

"'Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge.'" *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984) (quoting *Toole v. Toole,* 260 S.C. 235, 195 S.E.2d 389 (1973)). "'His exercise of such discretion, however, is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law.'" *Id*. at 401–02, 321 S.E.2d at 45. "Compelling reasons" must be given to justify the trial court invading the jury's province in this manner. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) (citing *Pelican Bldg. Ctrs. v. Dutton,* 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)).

At trial, Petitioner presented expert testimony that the Riley family suffered more than $228,000 in economic damages as a result of Riley's death. Petitioner also presented numerous witnesses who testified as to noneconomic damages suffered by his surviving family, all of whom testified about the type of caring and loving husband and father Riley was. Indeed, the evidence of noneconomic damages was so compelling and pervasive that the trial judge eventually ruled it had become cumulative under Rule 403, SCRE. During an *in camera* discussion regarding whether the trial court would permit further witnesses to testify about noneconomic damages, the experienced trial judge stated:

> I've been doing this a long time and I can't remember a trial that I was either involved in as a lawyer or as a judge where I've heard more glowing testimony and genuine testimony about the person's life and his service to his family and to the community. I mean, it's been—it's been very touching, to be quite frank with you; so tell me what else you want to do other than what you have already done.

In his order granting the motion for a new trial *nisi additur*, the trial judge found the jury's verdict of $300,000 was inadequate in light of the evidence and testimony presented at trial. The trial judge stated:

> The evidence at trial showed that Benjamin Riley was a loving father and husband and a central figure not only in the lives of his family, but also within his church and his community. During the trial of this case, [Petitioner] Laura Riley testified, as did three of Riley's five adult children. . . . The family's testimony established Riley's support, both moral and economic, of his family, as well as genuine love, affection, esteem, and regard held by the testifying beneficiaries of the Estate of the decedent. The testimony established that throughout their married lives, Riley and his wife were "best friends" and companions. The family's testimony as well as that of non-family members, left no question as to the grief, emotional turmoil, and loss suffered. Their testimony showed that this family of beneficiaries, perhaps more than most wrongful death beneficiaries, suffered great loss under this element of wrongful death damages.

In evaluating this issue on appeal, the court of appeals ignored the applicable abuse-of-discretion standard of review, instead focusing its inquiry on a *de novo* evaluation of whether, in its view, there was sufficient justification for "invading the jury's province." This was error. Applying the correct standard of review to the trial court's findings, we find the trial court did not abuse its discretion in granting an additur of $600,000. In his order granting the motion, the trial judge gave a thorough recitation of the "uncontested, and emotionally compelling" evidence, including testimony and supporting exhibits that demonstrated both the pecuniary losses suffered by the Riley family and also the noneconomic compensable elements of loss that are recoverable in a wrongful death action. *See Garner v. Houck*, 312 S.C. 481, 488, 435 S.E.2d 847, 850 (1993) (finding damages for mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship are recoverable in a wrongful death action) (citing *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972)). It is clear from the record that the trial judge found the jury's verdict to be inadequate, yet not shockingly so, such that a new trial absolute would be warranted. In light of the trial judge's correct application of the law and the extensive evidence on the proper elements of damages in a wrongful death action, the trial court did not abuse its discretion in granting the *nisi additur*.

Further, it appears the decision of the court of appeals was based on the belief that a *nisi additur* is not available where any amount of noneconomic damages is

awarded. This was an error of law. While the presence of some amount of noneconomic damages may be a factor mitigating against the granting of a new trial *nisi additur*, there is no categorical rule prohibiting a *nisi additur* where a jury verdict includes some measure of noneconomic damages. The court of appeals' new *nisi additur* categorical rule formulation would remove the discretion vested in trial court judges. Here, the trial court judge was well aware that the jury verdict included an award of noneconomic damages, yet he articulated compelling circumstances that he believed warranted the *nisi additur*. Under this record, we cannot say the trial judge abused his discretion. We reverse the court of appeals and reinstate the trial court's grant of the new trial *nisi additur*.

B. Reallocation and Setoff of Settlement Proceeds

Petitioner argues the court of appeals erred in the reallocation and setoff of settlement proceeds. We agree.

"A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (citing *Welch v. Epstein*, 342 S.C. 279, 312–13, 536 S.E.2d 408, 425 (Ct.App.2000)). The right to setoff has existed at common law in South Carolina for over 100 years. *See, e.g.*, *Rookard v. Atlanta & Charlotte Air Line Ry. Co.*, 89 S.C. 371, 71 S.E. 992, 995 (1911) (stating "[t]he jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties" and noting the court's ability to order setoff "is not founded on any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction which the court exercises over suitors in it"). Allowing setoff "prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong." *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145 (citation and internal quotations omitted).

In 1988, these equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act (the Act), S.C. Code Ann. §§ 15-38-10 to -70 (2005 & Supp. 2014). Specifically, section 15-38-50 provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50. Thus, the Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's "strong public policy favoring the settlement of disputes." *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010).

Despite a defendant's entitlement to setoff, whether at common law or under section 15-38-50, any "reduction in the judgment must be from a settlement for the same cause of action." *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998) (citing *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (refusing to apply settlement for pain and suffering cause of action to judgment in wrongful death action)). Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset.

There is no real dispute that Ford is entitled to offset whatever portion of the $25,000 is attributable to the wrongful death claim. Indeed, the Estate concedes as much in its brief. Thus, the real dispute is whether the court of appeals erred in reapportioning the $25,000 settlement between the survival and wrongful death claims.

We find the court of appeals erred in reapportioning the settlement proceeds on the sole basis that the particular agreed-upon allocation between the survival and

wrongful death claims did not seem to be, in the court of appeals' view, proportionately reasonable. Given the totality of the circumstances, and particularly in light of the reasonableness of the overall amount of $20,000 and the evidence in the record of Riley's conscious pain and suffering, we believe it was error to disturb the settling parties' agreed-upon allocation solely because the apportionment may have been advantageous to the Estate. *See In re Wells*, 43 S.C. 477, 21 S.E. 334, 337 (1895) (finding the party seeking departure from the application of standard set-off rules bears the burden of proof and must be "prepared to justify such [reallocation] as fair, bona fide, and just," particularly where "there is an executed contract between [the parties], which is not contested as between them but which is sought to be invalidated by third parties"); *see also Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1018 (Ill. App. 2009) ("Although the manipulation of an allocation can be evidence of bad faith in a settlement negotiation, it is not *per se* bad faith to engage in the advantageous apportioning of a settlement.") (citation omitted).

Indeed, we agree with the approach taken by the Illinois Court of Appeals, which stated:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Lard, 901 N.E.2d at 1019 (citing *Muro v. Abel Freight Lines, Inc.*, 669 N.E.2d 1217 (Ill. App. 1996)).

The court of appeals erred in accepting Ford's invitation to reapportion the agreed-upon allocation of settlement proceeds based on the purported impropriety of an apportionment favoring the Estate. Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is

insufficient to justify appellate reapportionment for the sole purpose of benefitting Ford. Here, the trial court-approved allocation is unquestionably reasonable under the facts. In fact, Ford has never suggested that $20,000 for the survival action is unreasonable. Ford's effort to invalidate the allocation of settlement proceeds based on a "percentages" analysis is manifestly without merit under these circumstances. We reverse the court of appeals and hold that Ford is entitled to set off only the $5,000 the settlement agreement apportioned to the wrongful death claim.

IV.

We reverse the court of appeals. The case is remanded to the trial court for further proceedings pursuant to the granting of the new trial *nisi additur* motion.

REVERSED AND REMANDED.

PLEICONES, Acting Chief Justice, BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Deerfield Plantation Phase II B Property Owners Association, Appellant,

v.

South Carolina Department of Health and Environmental Control and Deertrack Golf, Inc., Respondents,

v.

Bill Clark Homes of Myrtle Beach, LLC, Respondent.

Appellate Case No. 2009-135686

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

Opinion No. 27576
Heard June 4, 2015 – Filed September 30, 2015

AFFIRMED AS MODIFIED

Amy Elizabeth Armstrong, of South Carolina Environmental Law Project, of Pawleys Island, for Appellate.

Mary Duncan Shahid, Stephen Peterson Groves, Sr., and Angelica M. Colwell, all of Nexsen Pruet, LLC, of Charleston, Stanley E. Barnett, of Smith Bundy Bybee & Barnett, PC, of Mt. Pleasant, Stephen Philip Hightower,

of Columbia, Bradley David Churdar and Nathan Michael Haber, both of Charleston, for Respondents.

CHIEF JUSTICE TOAL: Deerfield Plantation Phase II B Property Homeowners Association (Appellant) appeals the Administrative Law Court's (ALC) decision affirming Respondent South Carolina Department of Health and Environmental Control's (DHEC) decision to grant a National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Large and Small Construction Activity and Coastal Zone Consistency Certification to Respondent Deertrack Golf, Inc. (Deertrack Golf).[1] We affirm as modified the ALC's decision upholding DHEC's issuance of the permit. Further, in light of the subsequent declaration of federal jurisdiction as to part of the acreage subject to the permit, we remand the case to DHEC for further administrative action consistent with this opinion.

FACTS/PROCEDURAL BACKGROUND

Deertrack Golf owns the real property that is the subject of this dispute, a non-operational golf course known as the Old South Golf Course (the Old South Course), which consists of approximately 158 acres in Surfside Beach, South Carolina. In 2005, Deertrack Golf decided to sell the Old South Course for redevelopment. On September 2, 2005, Bill Clark Homes entered into a contract with Deertrack Golf to purchase the Old South Course. Bill Clark Homes designed a residential subdivision to be constructed within the acreage known as Phase I of the Old South Course, and obtained approval from Horry County for a subdivision consisting of 278 lots and comprising approximately 85 acres. The Old South Course is adjacent to an existing residential development known as Deerfield Plantation Phase II B, and Appellant represents its residents, who oppose the residential redevelopment of the Old South Course.

The redevelopment plan necessitated the construction of a new stormwater management system utilizing an existing drainage network of stormwater ponds on the Old South Course. Therefore, Deertrack Golf sought to obtain an NPDES

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[1] Respondent Bill Clark Homes of Myrtle Beach, LLC (Bill Clark Homes) previously intervened in this action, but no longer has a contractual interest in the development tract and is no longer participating in the action.

permit (the Permit) from DHEC. Likewise, because the Old South Course is located within one of the eight coastal counties that comprise South Carolina's coastal zone, DHEC's Office of Ocean and Coastal Resource Management (OCRM) reviewed the project to determine its consistency with the Coastal Management Program (the CZC Certification). Finally, the redevelopment required a jurisdictional determination from the Army Corps of Engineers (the Corps) regarding whether any portion of proposed redevelopment acreage contained "waters of the United States" subject to the Corps' jurisdiction under the federal Clean Water Act.

In August 2006, the Corps determined that the tract did not contain any federal waters subject to the Corps' jurisdiction. On February 29, 2008, DHEC issued the Permit to Deertrack Golf, and OCRM issued the CZC Certification. Appellant filed a contested case in the ALC, arguing that DHEC wrongfully issued the Permit.

A hearing was held in the ALC on March 10–12, 2009. On June 9, 2009, the ALC issued a Final Order affirming DHEC's issuance of the Permit and the CZC Certification. Appellant appealed the decision to the court of appeals on July 29, 2009.

However, in 2010, upon Appellant's application, the Corps declared federal jurisdiction over .37 acres of the existing waters on the proposed 85-acre redevelopment tract. Appellant appealed the decision to the United States District Court for the District of South Carolina, arguing the Corps erred in failing to declare federal jurisdiction over the remaining waters found within the proposed redevelopment tract, and the District Court granted summary judgment to the Corps. *Deerfield Plantation Phase II–B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 801 F. Supp. 2d 446, 449–51 (D.S.C. 2011). Appellant appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, which affirmed. *See Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc., v. U.S. Army Corps of Engineers*, 501 F. App'x 268 (4th Cir. 2012).

During the pendency of the federal appeals, the South Carolina Court of Appeals variously stayed and held in abeyance the state appeal. However, on January 12, 2012, the court of appeals remanded the case "to the ALC to further remand the matter to DHEC for additional administrative action." The ALC remanded the case to DHEC on February 21, 2012. On May 17, 2013, after DHEC

took no additional administrative action, the court of appeals dismissed the appeal. After Respondents filed petitions for rehearing claiming the court of appeals misapprehended DHEC's reasons for taking no action on the Permit, the court of appeals reinstated the appeal on September 20, 2013. This Court then certified the case for review pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the ALC erred in upholding DHEC's decision to grant the Permit as a matter of law?

II. Whether the subsequent declaration of federal jurisdiction over a portion of the existing stormwater ponds as "waters of the United States" has the effect of terminating the Permit?

STANDARD OF REVIEW

A party who has exhausted all administrative remedies available within an agency and who is aggrieved by an ALC's final decision in a contested case is entitled to judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2014). In an appeal from a decision by the ALC, the Administrative Procedures Act provides the appropriate standard of review. *See* S.C. Code Ann. § 1-23-610(B) (Supp. 2014). This Court will only reverse the decision of an ALC if that decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. Thus, this Court's review is limited to determining whether the ALC's findings were supported by substantial evidence, or were controlled by an error of law. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010) (citations omitted). As to questions of fact, the Court may not substitute its judgment for the ALC's judgment when weighing the evidence. S.C. Code Ann. § 1-23-610(B). Thus, in determining whether the ALC's decision was supported by substantial evidence, this Court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Hill*, 389 S.C. at 9–10, 698 S.E.2d at 617.

LAW/ANALYSIS

I. Permitting Decision

As part of a NPDES permitting decision, DHEC applies regulations it administers pursuant to the NPDES Program,[2] regulations controlling stormwater runoff,[3] and regulations encompassing South Carolina's Water Classification and Standards.[4]

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[2] *See* S.C. Code Ann. Regs. 61-9.122.1 to .122.64 (2011). The NPDES Program requires permits for the discharge of "pollutants" from any "point source" into "waters of the State" or "waters of the United States." *Id.* 61-9.122.1(b)(1); *see also id.* 61-9.122.2 (defining these terms). The regulations were promulgated pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387 (2006), and the South Carolina Pollution Control Act (Pollution Control Act), S.C. Code Ann. §§ 48-1-10 to -350 (2008 & Supp. 2014). *See* S.C. Code Ann. Regs. 61-9.122.1(a)(1).

[3] *See* S.C. Code Ann. Regs. 72-300 to -316 (2012). These regulations are promulgated pursuant to the Stormwater Management and Sediment Reductions Act, S.C. Code Ann. §§ 48-14-10 to -170 (2008).

[4] *See* S.C. Code Ann. Regs. 61-68 (2012). The State Water Classification and Standards regulations were also promulgated pursuant to the Pollution Control Act, and "establish a system and rules for managing and protecting the quality of South Carolina's surface and ground water." *See id.* 61-68(A). Further, the regulations "establish the State's official classified water uses for all waters of the State, establish general rules and specific numeric and narrative criteria for protecting classified and existing water uses, and establish procedures for classifying waters

The stormwater regulations provide that unless exempted, "a person may not undertake a land disturbing activity without an approved stormwater management and sediment control plan." S.C. Code Ann. Regs. 72-305(A). In other words, all non-exempt development construction sites must have a permitted plan for handling stormwater, the requirements of which depend on the size and complexity of the project. *See id.* 72-305(B). These regulations contain requirements for both temporary construction site stormwater management and permanent stormwater management systems within the completed development. *See id.* 73-307(B) (temporary) & 73-307(C) (permanent). Likewise, the NPDES regulatory scheme requires a stormwater permit for redevelopment construction sites and also contains additional stormwater management requirements. *See id.* 61-9.122.26. Compliance with the interrelated regulations is accomplished in one permitting action, and DHEC grants coverage under a general permit known as the "NPDES General Permit for Stormwater Discharges, from Large and Small Construction Activities"—here, the Permit.

In addition, Regulation 61-68 classifies various bodies of water, and provides for standards to protect and maintain these bodies of water based on their classifications. Relevant to this controversy, Regulation 61-68(E)(4) provides:

> Any discharge into waters of the State must be permitted by [DHEC] and receive a degree of treatment and/or control which shall produce an effluent which is consistent with the [Pollution Control] Act, the CWA . . . , this regulation, and related regulations. No permit issued by [DHEC] shall be interpreted as creating any vested right in any person . . . . [DHEC] may require best management practices (BMPs) for control of stormwater runoff as part of the requirements of an NPDES permit, a State construction permit, or a State 401 Water Quality Certification.

S.C. Code Ann. Regs. 61-68(E)(4). "Waters of the State" is defined as "lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of

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of the State." *Id.*

the State, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction." *Id.* 61-9.122.2(b).

Here, while the ALC found the existing stormwater drainage ponds located on the Old South Course were "waters of the State," it further attempted to reconcile what it saw to be a conflict in the applicable regulatory schemes. To this end, the ALC concluded as a matter of law that no pretreatment was required pursuant to Regulation 61-68 because the more specific regulations relating to stormwater management and stormwater discharges (Regulations 72-300 to 72-316 and 61-9.122.26) controlled instead. In addition, the ALC noted:

> To endorse [Appellant's] position[] that the existing drainage ponds on the golf course cannot be incorporated into the stormwater management plan and system for the proposed redevelopment of the golf course without requiring pre-treatment of the stormwater discharge would require this [c]ourt to ignore not only the intent and purpose of the Stormwater Management Act and regulations, but common sense as well. Pre-treatment of stormwater running into a stormwater pond is a contradiction in terms. The very purpose of the stormwater pond is to intercept and treat the stormwater before discharge into a receiving waterbody.

Appellant now argues that once the ponds are found to be "waters of the State," Regulation 61-68's pretreatment requirement must be met. Appellant therefore asserts that this Court should reverse the ALC and remand the case to DHEC for the proper application of Regulation 61-68.

We agree with the ALC and Appellant that these ponds fall within the definition of "waters of the State," and we agree with Appellant that the ALC erred in finding that the regulations relating to stormwater management and discharges conflicted with Regulation 61-68. Thus, we find that as "waters of the State," the ponds are subject to the requirements contained in Regulation 61-68. However, we disagree with Appellant that the only way these requirements may be met under Regulation 61-68(E)(4) is through pretreatment.

Instead, Regulation 61-68(E)(4) plainly states that "[a]ny discharge into waters of the State must . . . receive a degree of treatment ***and/or control*** which

shall produce an effluent which is consistent with the [Pollution Control] Act, the [CWA] . . . , this regulation, and related regulations." S.C. Code Ann. Regs. 61-68(E)(4) (emphasis added). Moreover, the Regulation states that DHEC "***may require best management practices (BMPs) for control of stormwater runoff as part of the requirements of an NPDES permit***, a State construction permit, or a State 401 Water Quality Certification." *Id.* (emphasis added).

BMPs are defined as "a wide range of management procedures, schedules of activities, prohibitions on practices and other management practices which have been demonstrated to effectively control the quality and/or quantity of stormwater runoff and which are compatible with the planned land use." *Id.* 72-301(5). One such BMP is the use of detention structures, defined as "a permanent stormwater management structure whose primary purpose is to temporarily store stormwater runoff and release the stored runoff at controlled rates." *Id.* 72-301(11). Detention structures—i.e., the existing stormwater ponds at issue here—are a common BMP.

Thus, we find the existing stormwater ponds built on the Old South Course to provide control of stormwater runoff comply with Regulation 61-68(E)(4)'s "pretreatment and/or control" requirement. To declare that pretreatment is required would be to ignore the underlying function of these ponds—to control stormwater. To this end, we agree with the ALC that it would be illogical to interpret Regulation 61-68 as requiring pretreatment of stormwater before that same stormwater is discharged into a detention pond set up for that purpose. While the ALC wrongly found the applicable regulations to be conflicting, we find that Appellant's interpretation of Regulation 61-68 ignores the "control" language.

By its plain terms, Regulation 61-68 requires some degree of pretreatment *or* control, and by implementing a BMP in the form of detention ponds, Deertrack Golf has complied with the regulation.[5]

Therefore, we affirm as modified the ALC's decision to uphold DHEC's issuance of the Permit.

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[5] Along the same lines, while DHEC was initially incorrect in its assertion that these ponds were not "waters of the State," we note that DHEC's application of Regulation 61-68 was ultimately correct in that the stormwater ponds were providing a mechanism of control complicit with the regulatory scheme such that no other pretreatment of the stormwater runoff was required.

II. Subsequent Declaration of Federal Jurisdiction

Appellant next argues that the subsequent declaration of federal jurisdiction[6] over a portion of the waters on the redevelopment site necessitates an entirely new permit. Appellant primarily argues that a new permit is required because federal permitting is a *precondition* to the granting of a NPDES permit. Therefore, Appellant asks this Court to reverse DHEC's decision to grant the Permit, which in turn would require Deertrack to seek an entirely new permit. Respondents concede that Deertrack Golf will likely have to submit to an additional approval process, but contest Appellant's assertion that an entirely new permit is needed. We agree with Respondents.

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[6] The CWA authorizes the Corps to "issue formal determinations concerning the applicability of the [CWA] . . . to activities or tracts of land and the applicability of general permits or statutory or statutory exemptions to proposed activities." *See* 33 C.F.R. § 320.1(a)(6) (2015). In addition, the Corps is authorized to decide whether a tract of land is subject to the agency's regulatory jurisdiction under Section 404 of the CWA, 33 U.S.C § 1344 (2015). *See* 33 C.F.R. § 331.2 (2015) ("Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the [CWA] . . . . For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved."). Section 404 requires, *inter alia*, a permit for the "discharge of dredged or fill material into the navigable waters," which are defined in turn as "waters of the United States." 33 U.S.C. §§ 1344(a) (permitting discharge into navigable waters at specified disposal sites), 1362(7) (defining "navigable waters" as "the waters of the United States, including the territorial seas"); 33 C.F.R. § 328.3(a) (2014) (defining "waters of the United States"). Thus, an entity that intends to fill a portion of "waters of the United States" must obtain a permit prior to taking action pursuant to this section of the CWA. The Corps issues the permit based upon an evaluation under the Guidelines for Specification of Disposal Sites for Dredged or Filled Material, which are codified at 40 C.F.R. § 230 (2015).

First, as noted by Respondents, at the time of the ALC's decision, the Corps had not found that the tract contained federal jurisdictional waters. Because the ALC labored under the Corps' initial determination that there were "no waters of the United States on the site," and the current assertion of jurisdiction was made after the ALC's decision was issued, we consider the question only as it relates to the existing Permit.

To this end, we disagree with Appellant's contention that the entire Permit is invalid. As Respondents suggest, the Permit itself dictates what should occur in light of the subsequent assertion of federal jurisdiction.

Section 2.1(C) of the Permit provides that "[i]f a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA . . . for permanent or temporary storm water control structures, DHEC may not grant you coverage under the [Permit] until the 404 Permit has been issued and is effective." However, section 2.1(C)(1) of the Permit also provides that "[i]n situations where the 404 [p]ermit decision will not affect the implementation of [the stormwater pollution prevention plan], [DHEC] will issue approval of the [the stormwater pollution prevention plan] and grant coverage under this permit before the 404 Permit decision is effective." Moreover, section 2.1(C)(2) of the Permit provides that "[i]n situations where the 404 [p]ermit decision will affect only a portion of the 'Project Area', [DHEC] may grant the unaffected portion of the 'Project Area' coverage under this permit," and "[t]he remaining portion of the 'Project Area' will be considered after the 404 [p]ermit is issued and effective."

Thus, even if the Corps' assertion of jurisdiction requires a 404 inquiry, such inquiry would only affect .37 acres of approximately 85 total acres, and regardless of the outcome of the inquiry, the Corps' decision would not affect the remainder of the project covered by the Permit. Accordingly, we find that the subsequent assertion of federal jurisdiction does not defeat the Permit in its entirety. However, because additional agency action may be necessary with regard to the .37 acres over which the Corps has asserted jurisdiction, we remand the case to DHEC for further action consistent with this opinion.

CONCLUSION

We affirm as modified the decision of the ALC, but remand the case to DHEC for further action as necessary to implement the Permit.

PLEICONES, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

Abbeville County School District, et al., Appellants-Respondents,

v.

The State of South Carolina, et al., of whom Hugh K. Leatherman, Sr., as President Pro Tempore of the Senate and as a representative of the South Carolina Senate and James H. Lucas, as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives are, Respondents-Appellants,

and

State of South Carolina, Nikki R. Haley, as Governor of the State of South Carolina, are, Respondents.

Appellate Case No. 2007-065159

ORDER

On November 12, 2014, a majority of this Court found that the State of South Carolina, Governor Nikki R. Haley, President Pro Tempore Hugh K. Leatherman, Sr., and the South Carolina Senate, and Speaker Pro Tempore James H. Lucas and the South Carolina House of Representatives (collectively, the Defendants) violated their constitutional duty to ensure that the students of South Carolina receive a minimally adequate education. *Abbeville County School District v. State* (*Abbeville II*), 410 S.C. 619, 624, 767 S.E.2d 157, 159 (2014). [1] Moreover, the

[1] Specifically, the Court found that the Defendants had enacted what appeared to be a robust educational scheme; however, despite the Defendants' good intentions,

Court stated that the Plaintiff Districts were partially responsible for their own problems, at times prioritizing popular programs such as student athletics above the academic environment. *Id.* at 660, 767 S.E.2d at 178. Therefore, the Court noted that "the Plaintiff Districts must work in concert with the Defendants to chart a path forward which appropriately prioritizes student learning," rather than placing sole blame on the Defendants. *Id.* at 660, 767 S.E.2d at 178–79.

To ensure the parties' compliance, the Court ordered "both the Plaintiff Districts and the Defendants to reappear before this Court within a reasonable time . . . and present a plan to address the constitutional violation announced today, with special emphasis on the statutory and administrative pieces necessary to aid the myriad troubles facing these districts at both the state and local levels." *Id.* at 661, 767 S.E.2d at 179. Until that time, the Court retained jurisdiction of the case. *Id.*

Following the Court's ruling, Speaker Pro Tempore Lucas formed the House Education Policy Review and Reform Task Force (the House Task Force). The House Task Force has conducted public hearings and is developing remedies addressing the findings of the Court. Similarly, President Pro Tempore

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the Record demonstrated that the statutory scheme resulted in abysmal student and school district performance. *Abbeville II*, 410 S.C. at 633–42, 767 S.E.2d 164–69. The Court noted that the evidence at trial demonstrated that insufficient transportation, poor teacher quality, high teacher turnover, local legislation, school district size, and poverty all potentially contributed to the problems facing the Plaintiff Districts. *Id.* at 642–50, 654–55, 767 S.E.2d at 169–73, 175–76.

The Court recognized that the "principle of separation of powers directs that the legislature, not the judiciary, is the proper institution to make major educational policy choices." *Id.* at 655–56, 767 S.E.2d at 176. Thus, the Court "charged [the Defendants] with identifying the issues preventing the State's current efforts from providing the requisite constitutional opportunity," ordering them "to take a broader look at the principal causes for the [poor student and district performance] beyond mere funding." *Id.* at 653, 660, 767 S.E.2d at 175, 178. To that end, the Court stated that it would likely be necessary to hold "lengthy and difficult discussions regarding the wisdom of continuing to enact multiple statutes which have no demonstrated effect on educational problems, or attempting to address deficiencies through underfunded and structurally impaired programming." *Id.* at 660, 767 S.E.2d at 178.

Leatherman formed the Senate Finance Special Subcommittee for Response to the *Abbeville* Case (the Senate Special Subcommittee), which is in the process of developing remedies addressing the Court's findings. The Plaintiff Districts also formed a committee of education experts and others following the ruling to develop remedies addressing the Court's findings. The Plaintiff Districts reduced their proposed remedies to writing and presented them to the House Task Force and the Senate Special Subcommittee.

On June 18, 2015, the Plaintiff Districts filed a motion for entry of a supplemental order proposing a detailed framework and requesting the Court establish a more concrete timeline for addressing the constitutional violations announced by the Court in *Abbeville II*. We grant the Plaintiff Districts' motion as amended and order as follows:

1. To facilitate the discussions and work of the House Task Force and the Senate Special Subcommittee, and to assist this Court, the parties will engage a panel of three experts (the expert panel) by October 15, 2015. The panel will be tasked with the responsibility of identifying the educational needs of students in the Plaintiff Districts by: (1) examining the various defects detailed in the Court's analysis in *Abbeville II*—including alarmingly-low student and school district performance, insufficient transportation, poor teacher quality, high teacher turnover, local legislation, school district size, and poverty; and (2) proposing remedies which address these educational needs and constitutional defects. The Defendants shall select one of the experts and bear the cost of that expert. The Plaintiff Districts shall select one of the experts and bear the cost of that expert. The third expert shall be the State Superintendent of Education, who has agreed to serve on the panel. These experts will bring their expertise to bear and to serve as facilitators in helping marshal information and obtain proper input from the various stakeholders, including the Plaintiff Districts, the Defendants, the House Task Force, and the Senate Special Subcommittee. The expert panel will be granted access to meetings with such office holders, school districts, and state personnel as is necessary to perform their work.

2. By February 1, 2016, the Defendants will present to the expert panel their plan for implementing a constitutionally compliant education system, and will send a copy of the proposed plan to the Plaintiff Districts and the Court. Proposed legislation supporting the plan shall be drafted prior to the meeting and presented at the meeting. Staffing and other critical needs may require

time to fully implement the plan, but the plan and proposed legislation shall specifically provide reasonable dates for their full implementation.

3. By March 1, 2016, the Plaintiff Districts will present to the expert panel their reaction to the Defendants' proposed plan.

4. By March 15, 2016, the expert panel will present a written report that includes its assessment of whether the Defendants have proposed a viable plan for remedying the constitutional violations and provide it to the parties and the Court. The report will include a description of the panel's recommended methodology for assessing constitutional compliance. Should the experts disagree on parts of this report, the experts shall so note their disagreement in the report.

5. The Court will conduct a de novo review of the Defendants' plan and the expert panel's report and recommendations on implementing a constitutionally-compliant education system. As the Court assesses whether the plan and the report provide a remedy for the constitutional defects identified in *Abbeville II*, it should give due consideration to the General Assembly's prerogative to choose the methodology by which the constitutional violation shall be remedied, and give due consideration to the expertise of the panel members chosen.

6. The Court will issue an order after conducting its review of the plan and the expert panel's findings stating whether the plan is a rational means of bringing the system of public education in South Carolina into constitutional compliance, and whether the Court's continued maintenance of jurisdiction is necessary.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ Kaye G. Hearn J.

JUSTICE KITTREDGE: Because I adhere to my view that this Court has violated fundamental separation of powers principles by involving itself in a matter

that lies exclusively in the Legislative Branch, I would deny the motion of the Plaintiff Districts.

s/ John W. Kittredge J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

September 24, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Eugenia Boggero, d/b/a Boggero's Portable Toilets,
Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2014-000214

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

Opinion No. 5356
Heard May 12, 2015 – Filed September 30, 2015

AFFIRMED

Burnet Rhett Maybank, III, of Nexsen Pruet, LLC, of Columbia; and Roy R. Hemphill and Hannah Khristin Metts, both of McDonald Patrick Poston Hemphill & Roper, LLC, of Greenwood, for Appellant.

Carol I. McMahan, of Anderson; and Milton Gary Kimpson, Ann Marie Thompson, and Harry T. Cooper, Jr., all of Columbia, for Respondent.

LOCKEMY, J.: Eugenia Boggero, d/b/a Boggero's Portable Toilets, appeals the Administrative Law Court's order, finding the gross proceeds from her portable toilet business were subject to the South Carolina sales and use tax. Boggero

argues the ALC erred in applying the tax because the "true object" of her business is a service. We affirm.

FACTS

Boggero owns and operates Boggero's Portable Toilets in Greenwood as a sole proprietor. It is a family business, started by her father, which Boggero acquired in 2005. Boggero has never applied for a retail sales tax license, collected sales or use tax from customers, or paid sales or use tax to Respondent South Carolina Department of Revenue (the Department).

The Department audited Boggero for sales and use tax for the tax period January 1, 2009, through December 31, 2011 (the audit period). As a result of this audit, the Department imposed sales taxes on the "gross proceeds" from Boggero's portable toilet business in the amount of $8,891.96, plus interest of $602.27, and penalties of $3,191.36. In response to Boggero's protest of the notice, the Department issued a determination, affirming the imposition of the tax. Boggero then requested a contested case hearing before the ALC.

At the hearing, Boggero argued the "true object" of her business was a service—the removal and disposal of human waste—and, therefore, it was not subject to the state sales and use tax.[1] The ALC affirmed the Department's decision, finding the true object sought by the customer was the use of the portable toilets and other tangible personal property. This appeal followed.

LAW/ANALYSIS

Boggero argues the ALC erred in finding the gross proceeds of her business were subject to sales and use tax because the true object of her business is a service—the removal and disposal of human waste. We disagree.

"Tax appeals to the ALC are subject to the Administrative Procedures Act (APA)." *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 68 (2013) (internal quotation marks omitted). "The decision of the [ALC] should not

[1] Generally, the gross proceeds from services are not subject to sales and use tax. *See* S.C. Code Ann. Regs. § 117-308 (2012) ("The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax unless . . . [certain inapplicable exceptions apply].").

be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Id.* (internal quotation marks omitted).

"Certain situations involve a mixed question of law and fact." *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007), *aff'd by* 383 S.C. 310, 680 S.E.2d 1 (2009). For example, "[s]tatutory interpretation is a question of law." *Id.* "But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." *Id.* Likewise, "whether an agency correctly applied the facts of a case to a statute is a question of fact." *Id.* at 483, 646 S.E.2d at 167; *see also Bursey v. S.C. Dep't of Health & Envtl. Control*, 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006), *overruled on other grounds by Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (recognizing the meaning of a statutory term is a question of law, but whether a gas and electric company's activities met this definition is a question of fact); *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 251, 772 S.E.2d 505, 509 (2015) (stating whether a tract of land was "on and within" Folly Island, as defined under a regulation, was a question of fact).

In *Bursey*, the South Carolina Electric and Gas Company (SCE&G) planned to build a back-up dam on Lake Murray and contacted the Department of Health and Environmental Control (DHEC) to determine whether it was required to obtain a mine operating permit. 369 S.C. at 179, 631 S.E.2d at 901. DHEC informed SCE&G no permit was necessary because the planned excavation did not fall within the definition of "mining" under the South Carolina Mining Act.[2] *Id.* In response to DHEC's determination, a resident filed an appeal with the Mining Council. *Id.* The Mining Council found SCE&G was required to obtain a mine operating permit because its planned activities constituted "mining" and did not fall within a statutory exception for "on-site" excavation.[3] *Id.* Both the circuit court and this court affirmed, finding substantial evidence supported the Mining Council's decision that SCE&G's project required a permit. *Id.* at 184, 631 S.E.2d at 904.

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[2] S.C. Code Ann. § 48-20-10 (2008) *et. seq*.

[3] *See* S.C. Code Ann. § 48-20-40(1) (2008) ("Mining does not include excavation or grading when conducted solely in aid of on-site farming or of on-site construction.").

On appeal to our supreme court, SCE&G argued our court erroneously applied the substantial evidence standard of review to a legal determination—whether SCE&G's project fell within an exception to the permitting requirements—rather than examining this determination for an error of law. *Id.* at 183, 631 S.E.2d at 903. Our supreme court disagreed, stating:

> The question of whether SCE&G's activities on the project meet the exception to the permitting requirements carved out by the statute is a mixed question of fact and law. There is a question of law in determining the meaning of the term excavation in the exception. There is also a question of fact in determining whether SCE&G's activities in association with the project exceed the scope of the definition of excavation in the exception.

369 S.C. at 184-85, 631 S.E.2d at 904 (citations and internal quotation marks omitted). Thus, the supreme court determined "the issue of whether SCE&G's activity is excavation" was subject to the substantial evidence standard of review. *Id.* at 185, 631 S.E.2d at 904. Because substantial evidence supported the Mining Council's decision that SCE&G's activities "constituted mining and did not fall within the statutory exception [for excavation,]" the supreme court affirmed. *Id.* at 186, 631 S.E.2d at 905 (citing *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.")).

Here, the Department of Revenue audited Boggero's transactions with her customers for the tax period January 1, 2009, through December 31, 2011, (the audit period) to determine whether the proceeds were "gross proceeds from the rental of portable toilets" and therefore subject to sales tax under subsection 12-36-910(A) of the South Carolina Code (2014).[4] As a result of this audit, the Department imposed sales tax on the "gross proceeds" from Boggero's portable toilet business. In response to Boggero's protest of the notice, the Department

[4] *See id.* (imposing a sale tax on "the gross proceeds of sales" "upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.").

issued a determination, affirming the imposition of the tax. Boggero then requested a contested case hearing before the ALC. The question before the ALC was whether Boggero's "gross proceeds from the rental and servicing of portable toilets [were] subject to sales tax." In answering this question in the affirmative, the ALC applied the "true object" test. The ALC determined "the true object of the transactions at issue is for the rental or lease of . . . the portable toilets and other personal property provided."

Boggero's sole issue on appeal is whether "[the ALC] erred in finding that the true object of [her] business was not a service and that [her] gross proceeds were therefore subject to the state sales and use tax." In other words, the gross proceeds of her business were not subject to sales tax because the true object of her business is a service—the removal and disposal of human waste. To answer this question, we must first determine the proper standard of review from the ALC's decision.

Initially, we believe the dispute in this appeal is not primarily a question of statutory interpretation. *Cf. CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below."). The parties agree that if the transactions at issue are a rental or lease of "tangible personal property," the sales tax applies. *See* § 12-36-910(A) ("A sales tax . . . of the gross proceeds of sales, is imposed upon every person . . . in the business of selling tangible personal property at retail."); S.C. Code Ann. § 12-36-90(b)(ii) (2014) (defining "[g]ross proceeds of sales" as "the value proceeding or accruing from the sale, lease, or rental of tangible personal property"); S.C. Code Ann. § 12-36-100 (2014) (defining "[s]ale" as "any transfer . . . of tangible personal property for a consideration including . . . a rental, lease, or other form of agreement"). On the other hand, the parties agree that if the transactions are a service, the sales tax does not apply. *See* S.C. Code Ann. Regs. § 117-308 (2012) ("The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax unless [inapplicable exceptions apply]").

There is no dispute between the parties over the *meaning* of any terms used in the applicable taxing statutes. *Cf. Sonoco Products Co. v. S.C. Dep't of Revenue*, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008) (implicitly applying a de novo standard of review when "[t]he ultimate decision in this case is dependent upon the Court's determination of the term 'contiguous' within the meaning of [a statute]"). To the

extent there is a question of statutory interpretation here, it most resembles the "mixed question of law and fact" present in *Bursey*. The source of contention in this appeal is whether Boggero's transactions with her customers during the audit period constitute a rental or service. Similar to *Bursey* where the Mining Council found SCE&G's activities "constituted mining and did not fall within the statutory exception [for excavation,]" the question before the ALC here was whether Boggero's activities were a rental or service as defined in the applicable statutes. *See Bursey*, 369 S.C. at 184-85, 631 S.E.2d at 904 (holding the question of "whether SCE&G's activities in association with the project exceed[ed] the scope of the definition of excavation in the [statutory] exception" was a question of fact). As such, we believe the issue presented is a question of fact, subject to the well-known substantial evidence standard of review.

The question of our standard of review here is complicated by the fact that there is no clear authority as to whether a determination under the true object test is a question of law or fact. At least two states have explicitly stated the issue of whether a transaction is a sale or rental of a good or a service is a question of fact. *See Comm'r of Revenue v. Houghton Mifflin Co.*, 487 N.E.2d 1388, 1390-91 (Mass. 1986) (noting the Appellate Tax Board's finding that "the taxpayer's basic purpose in contracting for the purchase of the work of artists and cartographers was to obtain their creative services embodied in the finished product" was a finding of fact, subject to the substantial evidence standard of review); *Fin. Computer Servs., Inc. v. Lindley*, 436 N.E.2d 1025, 1026 (Ohio 1982) ("'[W]hether a customer's true object is a service or property is a question of fact.'" (quoting *Servi-Clean Indus., Inc. v. Collins*, 362 N.E.2d 648, 652 (Ohio 1977))). Other states, however, have declared this issue a question of law. *See, e.g., State ex rel. Clayburgh v. Am. W. Cmty. Promotions, Inc.*, 645 N.W.2d 196, 209 (N.D. 2002) (stating the true object test is a question of law when "[t]he parties . . . have stipulated to the facts and do not dispute any of the factual findings of the administrative law judge"); *Questar Data Sys. v. Comm'r of Revenue*, 549 N.W.2d 925, 928 (Minn.1996) (examining the "essence of the transaction" between a taxpayer and its customers as a question of law); *MCI Airsignal, Inc. v. State Bd. of Equalization*, 2 Cal. Rptr. 2d 746, 748 (1991) (implying the application of the true object test was a question of law); *James v. TRES Computer Serv., Inc.*, 642 S.W.2d 347, 348 (Mo. 1982) (same). While our appellate courts have not addressed this issue, our supreme court has deferred to the trial court's factual findings when deciding whether a particular transaction was subject to a statutorily-imposed tax. *See Palmetto Net, Inc. v. S.C. Tax Comm'n*, 318 S.C. 102, 105, 456 S.E.2d 385, 387 (1995) (affirming the circuit

court's finding that the transactions at issue were "a sale of services" and not a "lease" as defined under section 12-36-70 when the finding was "supported by the following evidence of record").

We also note that the analysis under the true object test focuses on factual questions; namely, whether the customer's purpose for entering the transaction was to procure a good or a service. *See* Clyde L. Ball, *What is a Sale for Sales Tax Purposes*, 9 Vand. L. Rev. 231 (1956) (explaining the true object test "is one of basic purpose of the buyer"). The parties agree this determination "must be evaluated on a transaction-by-transaction basis." Such a fact-intensive inquiry indicates a question of fact warranting the substantial evidence standard of review. Moreover, as Boggero asserted during oral argument before our court, this is a "difficult case." We agree the case is difficult and the ALC could have reasonably found that the true object of the transactions at issue was a service. The fact that reasonable minds could differ as to the nature of these transactions supports our holding that this appeal is one for substantial evidence review. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (defining "[s]ubstantial evidence" as "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached" (citation omitted)); *id.* at 136, 276 S.E.2d at 307 ("[A] judgment upon which reasonable men might differ will not be set aside."). Therefore, we find this appeal presents a question of fact subject to our substantial evidence standard of review.[5]

Having found the issue presented is a question of fact, we next address whether substantial evidence supports the ALC's finding that the true object of the transactions at issue was "the rental or lease of . . . the portable toilets and other personal property provided." Substantial evidence supports the ALC's decision for

[5] We further note with interest that, in their briefs, both parties appeared to agree the issue on appeal was subject to the substantial evidence standard of review. *Compare* Resp. Br. 13-14 ("[T]he ALC applied the 'true object' test based on the factual determinations laid out in its [f]indings of [f]act. The ALC's [f]actual [f]indings were based on the substantial evidence on the record as a whole and the ALC committed no error of law."); *with* App. Reply Br. 1 ("[The Department] has conceded that the imposition of the sales tax must be evaluated on a transaction-by-transaction basis and *is a factual determination*." (emphasis added)). Upon query by this court at oral argument, however, *both* parties responded that the issue on appeal is a question of law.

several reasons. First, Boggero's website, which was included in the record before the ALC and this court, is evidence she is in the business of renting portable toilets. Her website states that in 1969, her company "became the first portable toilet rental business in the area." It further declares that "[w]hen considering your restroom *rental* needs, please take into consideration our second-to-none service . . . and our attention to detail and you'll agree that the most time efficient and cost productive *rental* for you will be from Boggero's Services[.]" (emphasis added). The terms of Boggero's "service agreement" with her customers also support the ALC's decision that the true object of the transactions was a rental. The agreement states the customer requests "delivery *and use of* portable toilet(s) . . . from Boggero's" and agrees "service fees for the *use of* portable toilets . . . may increase in the future." (emphasis added).

Perhaps most importantly, when examining the nature of many of the transactions, there is evidence the customer is paying for the use of Boggero's personal property for a limited amount of time—an arrangement essential to a lease or rental. For example, Boggero offers customers optional "special event" toilets for social gatherings such as weddings and festivals. The invoices for these special event transactions indicate Boggero charges between $100 and $150 as a "special event rate." Boggero testified these charges were for delivery and pickup of the toilets and were in addition to her service charges for removing the waste. Although Boggero testified she generally did not charge a delivery or pickup fee, a review of the invoices during the audit period indicates many of the transactions included these flat fees.

Invoice number 4822 states Boggero charged the Greenwood Commission of Public Works four pickup or delivery charges of $35 between February and March 2009. Invoice number 5112 dated May 11, 2009, indicates Boggero charged Joanna Festival $180 for two "Special event standard units" and $150 for one "Handicap Special Event" unit. Invoice number 5218 dated May 13, 2009, is for customer Storm Services, LLC. Boggero charged Storm Services $150 for one "Special event handwash unit" and $120 for six "Extra Services." Invoice 5220 dated May 14, 2009, was for Relay for Life. This invoice indicates Boggero charged $100 for each standard special event toilet and $150 for one handicap-accessible unit. Invoice 5228 dated June 5, 2009, was for Episcopal Church of the

Resurrection and states Boggero charged $150 for a "special event VIP unit."[6] These invoices are evidence the customer was paying for something other than, as Boggero claims, "the removal of human waste."

When asked why she charges a delivery or pickup fee for special event customers but not for her construction customers, Boggero replied, "A special event, they want it specifically delivered on a Friday, and they want it specifically picked up the following Monday." One inference from the evidence is the delivery and pickup fees were, in fact, disguised rental fees because the customer will only have possession of the toilet for a limited number of days, thus limiting the times the toilet can be serviced and reducing Boggero's expected profit. Whether these fees were rental fees was essentially a credibility determination for the ALC, which further supports our finding that the issue on appeal is a question of fact. Moreover, a reasonable inference from the fact Boggero charges $150 for her "Special event handwash unit" and "special event VIP unit" yet only $100 for a "special event standard unit" is that a portion of these "delivery" fees pay for extra amenities included depending on the model of toilet. While Boggero testified she charges more for special event toilets because they generally accrue more waste than her construction units which results in higher disposal costs, there was no evidence that the price difference between the types of special event toilets was due to extra service costs between the toilets. A reasonable inference from the higher costs depending on the type of special event toilet is that the customer is paying a premium for extra amenities provided with the toilet. Consequently, this is evidence the customer is interested in the use of the toilet, rather than the "removal of human waste."

Admittedly, there were transactions where the customer did not pay a delivery or pickup fee, and perhaps the true object of those transactions was a service. Nevertheless, this decision goes to the weight of the evidence, a province for the ALC rather than this court. *See* S.C. Code Ann. § 1-23-610(B) (Supp. 2014) (stating this court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact."). After reviewing the record

[6] These examples are just the tip of the iceberg. A review of Boggero's invoices from June 2009 through August 2009 indicates a substantial portion of her business was for special event toilets that included flat fees ranging from $100 and $150.

as a whole, there is substantial evidence supporting the ALC's order. Accordingly, the ALC's decision is

AFFIRMED.

MCDONALD, J., concurs. SHORT, J., concurring in result only.