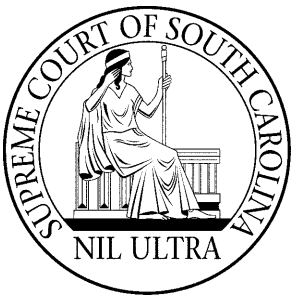

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
October 26, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nathalie I. Davaut, Employee, Claimant, Petitioner,

v.

University of South Carolina and State Accident Fund, Respondents.

Appellate Case No. 2015-001218

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the South Carolina Workers' Compensation Commission

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Opinion No. 27673
Heard May 18, 2016 – Filed October 26, 2016

REVERSED AND REMANDED

Paul L. Reeves, of Reeves Law Firm, L.L.C., of Columbia, for Petitioner.

Paul L. Hendrix, of Jones & Hendrix, P.A., of Spartanburg, for Respondents.

JUSTICE KITTREDGE: Petitioner Nathalie I. Davaut appeals the denial of her claim for workers' compensation benefits for injuries she sustained attempting to

leave her workplace. We now reverse the court of appeals, which upheld the Workers' Compensation Commission's denial of those benefits. *Davaut v. Univ. of S.C.*, Op. No. 2015-UP-041 (S.C. Ct. App. filed Jan. 21, 2015). As discussed below, we reject the suggestion that this case is controlled by the "going and coming" rule, which generally precludes workers' compensation benefits for injuries sustained while an employee is traveling to and from work. We adopt the so-called "divided premises" rule and hold that when an employee travels from one portion of her employer's property to another over a reasonably necessary and direct route, the employee remains in the course of her employment for purposes of workers' compensation. We thus remand this case to the Workers' Compensation Commission for a determination of benefits.

I.

Petitioner, a French and Spanish professor at the University of South Carolina Lancaster (USCL), was injured walking to her car after work on February 16, 2012. Petitioner had been reviewing résumés in the library on behalf of a search committee looking to hire a new Spanish professor. She left the library, where the résumés were on reserve, when it closed at 9 p.m. To reach her car, which was in a university lot provided for faculty and student parking,[1] Petitioner was required to cross Hubbard Drive (the Street), which bisects USCL's campus. While crossing the Street, Petitioner was struck by a vehicle and injured. It is undisputed that the Street and the crosswalks that span it are not owned or controlled by Petitioner's employer, the University of South Carolina (USC);[2] rather, they are maintained and controlled by the City of Lancaster. However, it is also undisputed that both

[1] According to the record, faculty members are free to park anywhere on USCL's campus, which, other than designated handicap parking, has only two categories of parking spaces: faculty and unmarked. Although faculty members are *allowed* to park in the faculty-designated spaces, they are not *required* to do so. Indeed, because of the limited number of faculty-designated spaces, faculty members are often unable to park in those spots.

[2] USCL is a regional campus within the USC system. Recognizing this relationship, and for the sake of consistency with the case caption, we refer to Petitioner's employer as USC. When describing the physical campus where Petitioner worked, however, we continue to refer to USCL.

the library—where Petitioner had been working—and the parking lot—where Petitioner was headed—belong to USC.

Petitioner sought workers' compensation benefits from her employer and its insurer, State Accident Fund (collectively, Respondents). Respondents, relying on the going and coming rule, denied Petitioner's injuries were compensable, on the basis Petitioner was injured away from USC's property.

Petitioner appeared before a single commissioner (the Commissioner), who found Petitioner's injuries were not compensable. In so finding, the Commissioner relied upon this Court's opinion in *Howell v. Pacific Columbia Mills*, 291 S.C. 469, 354 S.E.2d 384 (1987), which the Commissioner found to be controlling. In *Howell*, we held that a millworker did not suffer a compensable injury when she was struck by a car while crossing a public street via a crosswalk that connected an employer-maintained parking lot with one of the mill's main entrances. *Id.* at 471–74, 354 S.E.2d at 385–86. Because Petitioner's injuries also occurred on a public street over which her employer exercised no control, the Commissioner concluded those injuries were not compensable.

Upon review by an appellate panel of the Workers' Compensation Commission (the Panel), Petitioner argued that the Commissioner erred in relying upon *Howell* because the employee in *Howell* never reached the employer's premises before being injured. Petitioner claimed her injuries arose under distinguishable circumstances—she had already reached her employer's property; moreover, she had not yet left her employer's property because the Street, although not owned by USC, is "so close in proximity and so close in relation so as to be in practical effect a part of [USC's] premises." The Panel acknowledged that *Howell* was factually distinguishable, but nevertheless rejected Petitioner's argument and upheld the Commissioner's ruling denying Petitioner's claim.

After the Panel rejected Petitioner's arguments, she appealed to the court of appeals. Petitioner claimed that because she was injured while traveling from one portion of USC's property to another, the Panel erred in denying her relief. The court of appeals disagreed and upheld the Panel's denial of coverage. *Davaut*, Op. No. 2015-UP-041. The court of appeals concluded that "substantial evidence" supported the Panel's determination that Petitioner's injuries "did not arise out of and in the course of her employment," in part because there were no faculty-designated spaces in the lot where Petitioner parked her car. *Id.*

Petitioner asks this Court to reverse the court of appeals and find that she suffered a compensable injury when she was struck by a vehicle while crossing a public street running through USCL's campus.

II.

Petitioner argues the Commissioner, the Panel, and the court of appeals erred in accepting Respondents' contention that the going and coming rule controls this case. Consequently, Petitioner claims the Commissioner, the Panel, and the court of appeals erred in relying upon the going and coming rule to find that an employee injured traveling between two portions of her employer's premises while attempting to leave work does not suffer a compensable injury. We agree.

A.

"Under the Administrative Procedures Act (APA), ... '[t]his Court will not overturn a decision by the [Workers' Compensation] Commission unless the determination is unsupported by substantial evidence.'" *Pollack v. S. Wine & Spirits of Am.*, 405 S.C. 9, 13–14, 747 S.E.2d 430, 432 (2013) (quoting *Jones v. Ga.-Pac. Corp.*, 355 S.C. 413, 416, 586 S.E.2d 111, 113 (2003)) (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2015)). However, the Court "may reverse when the decision is affected by an error of law." *Id.* (citing S.C. Code Ann § 1-23-380(5)).

Because the facts are not in dispute, we are free to decide this case as a matter of law. *See Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007) ("Where there are no disputed facts, the question of whether an accident is compensable is a question of law." (citing *Douglas v. Spartan Mills*, 245 S.C. 265, 266, 140 S.E.2d 173, 173 (1965))). Therefore, we are not constrained by the "substantial evidence" standard of review that the court of appeals found limited its examination of this case. *See Pollack*, 405 S.C. at 13–14, 747 S.E.2d at 432 (citations omitted).

B.

"Workers' compensation pays an employee benefits for damages resulting from personal injury or death by accident arising out of and in the course of the employment." *Bentley v. Spartanburg County*, 398 S.C. 418, 422, 730 S.E.2d 296,

298 (2012) (citing S.C. Code Ann. § 42-1-310 (2015)). "'Arising out of' refers to the origin of the cause of the accident; 'in the course of' refers to the time, place, and circumstances under which the accident occurred." *Baggott v. S. Music, Inc.*, 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998) (citing *Owings v. Anderson Cty. Sheriff's Dep't*, 315 S.C. 297, 299, 433 S.E.2d 869, 871 (1993); *Eargle v. S.C. Elec. & Gas Co.*, 205 S.C. 423, 429, 32 S.E.2d 240, 242 (1944)). "An injury occurs in the course of employment 'when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto.'" *Id.* (quoting *Beam v. State Workmen's Comp. Fund*, 261 S.C. 327, 331, 200 S.E.2d 83, 85 (1973)). "In determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward providing coverage and any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." *Whigham v. Jackson Dawson Commc'ns*, 410 S.C. 131, 135, 763 S.E.2d 420, 422 (2014) (citing *Shealy v. Aiken County*, 341 S.C. 448, 455–56, 535 S.E.2d 438, 442 (2000)).

Consistent with this rule of construction, we have recognized that

> employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment . . . .

Williams v. S.C. State Hosp., 245 S.C. 377, 381, 140 S.E.2d 601, 603 (1965) (quoting *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158 (1928)) (internal quotation marks omitted). Thus, "[t]he act of leaving the employer's premises is 'in the course of' one's employment if the employee leaves the premises as contemplated at the close of the work day." *Camp v. Spartan Mills*, 302 S.C. 348, 350, 396 S.E.2d 121, 122 (Ct. App. 1990) (citing *Williams*, 245 S.C. at 381–82, 140 S.E.2d at 603). *Compare Williams*, 245 S.C. at 382, 140 S.E.2d at 603 (affirming an award of benefits to an employee injured walking from the hospital building where she worked to an employer-maintained parking lot provided for employee parking and describing the employee walking to the parking lot at the

end of her workday as "a reasonable incident to [the employee] leaving the place of her work"), *with Camp*, 302 S.C. at 350, 396 S.E.2d at 122 (holding the Workers' Compensation Commission properly concluded an employee's "delay of four hours exceeded a reasonable margin of time for leaving her work place" and therefore the employee "was no longer in the course of her employment when she [was injured]" attempting to leave her employer's premises).

Nonetheless, this Court has long held that "an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment." *Sola v. Sunny Slope Farms*, 244 S.C. 6, 14, 135 S.E.2d 321, 326 (1964). Therefore, "[t]he general rule in South Carolina is that an injury sustained by an employee away from the employer's premises while on his way to or from work does not arise out of and in the course of employment." *Howell*, 291 S.C. at 471, 354 S.E.2d at 385 (citing *Gallman v. Springs Mills*, 201 S.C. 257, 263, 22 S.E.2d 715, 717–18 (1942)). This is the well-known going and coming rule. *See, e.g.*, *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95–96, 495 S.E.2d 447, 449–50 (1998) (citations omitted) (discussing the rule but holding it did not preclude workers' compensation benefits under the facts of that case). However, there are several recognized exceptions to the going and coming rule, including where although an employee's injuries are incurred away from the employer's premises, "the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the [employee] in going to and coming from his work." *Sola*, 244 S.C. at 14, 135 S.E.2d at 326 (citations omitted). We refer to this as "the fourth *Sola* exception." *See Howell*, 291 S.C. at 472 n.1, 354 S.E.2d at 385 n.1 (noting that "[t]his is the fourth exception to the going and coming rule" listed in *Sola*).

III.

Respondents contend that Petitioner seeks relief under the fourth *Sola* exception, which was also at issue in *Howell*, and therefore our decision in that case is dispositive. Petitioner, however, argues her claim depends upon the framework set forth in *Williams* and a legal theory not addressed in *Howell*, namely, the divided premises rule. We agree with Petitioner and conclude that the Commissioner, the Panel, and the court of appeals erred as a matter of law in relying on *Howell*'s application of the going and coming rule to resolve this case.

A.

In *Howell*, we concluded the going and coming rule supported the Workers' Compensation Commission's determination that an employee's injuries "did not arise out of and in the course of [her] employment." *Howell*, 291 S.C. at 470, 354 S.E.2d at 385. The employee in *Howell* was a millworker injured in a crosswalk that connected the mill with employer-maintained parking facilities. *Id.* at 471, 354 S.E.2d at 385. However, the employee was not traveling from the employer-maintained parking facilities to the mill when she was injured; rather, she had been dropped off by her husband and exited the car directly onto the public street, where she was then struck by a vehicle. *Id.*, *see also id.* at 474, 354 S.E.2d at 386 (noting that the employee "was hit after she got out of her husband's car on a public street while on her way to work"). The employee was therefore injured going to work, and because she "failed to establish an implied requirement in her contract of employment that she cross the street in the crosswalk where the accident occurred," we rejected her contention that the fourth *Sola* exception brought her injuries within the course of her employment. *Id.* at 472, 354 S.E.2d at 385–86. We then expressly declined to consider the divided premises rule, which "relates to an employee going between an employer-maintained parking area and the employer's place of business," because the employee "had never even entered the parking area that was maintained by the employer" before she was injured. *Id.* at 474, 354 S.E.2d at 386.

Whereas the employee in *Howell* was injured *before* ever reaching her employer's premises, and thus could only have prevailed by satisfying an exception to the going and coming rule, here Petitioner had already reached her employer's premises and was injured while traveling from one portion of the premises to another. Thus, this case provides the Court an opportunity to address the question left unanswered in *Howell*: Is an employee's injury compensable when the employee is injured traveling between the employer's business and an employer-maintained parking lot located across a public thoroughfare?

Petitioner urges us to answer the above question in favor of compensability. We agree employees injured in such circumstances are entitled to workers' compensation benefits; we therefore use this occasion to join the majority of jurisdictions that have adopted the divided premises rule. *See Epler v. N. Am. Rockwell Corp.*, 393 A.2d 1163, 1167 & n.2 (Pa. 1978) (Pomeroy, J., concurring) (collecting cases and discussing the majority rule regarding employee travel along

"a necessary route between two portions of the [employer's] premises"); 2 Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law* § 13.01[4][a] (2016) (stating that "compensation is almost always awarded" to employees injured "travel[ing] along or across a public road between two portions of the employer's premises"); *id.* § 13.01[4][b] (noting that "most courts . . . hold that an injury in a public street or other off-premises place between the plant and the [employer-owned or -maintained] parking lot is in the course of employment, being on a necessary route between the two portions of the premises"). Because this case implicates the divided premises rule in the context of an employer-maintained parking lot,[3] we specifically hold that "employees who must cross a public way that bisects an employer's premises[,] and who are injured on that public way while traveling a direct route between an employer's . . . facility and parking lot, are entitled to workers' compensation benefits." *Copeland v. Leaf, Inc.*, 829 S.W.2d 140, 144 (Tenn. 1992).

[3] In fact, some courts refer to this principle as the "parking lot exception" to the going and coming rule. *See, e.g.*, *Harrison v. Winn Dixie Stores, Inc.*, 542 S.E.2d 142, 144 (Ga. Ct. App. 2000) (noting the exception "provides that an employee remains within the course of employment when traveling from the place of work to an employer-owned or -controlled parking lot, even if the course of travel necessitates that the employee traverse a public road"). However, we do not view today's holding as creating another exception to the going and coming rule, which continues to preclude recovery for injuries incurred *before an employee reaches* and *after an employee leaves* her employer's premises. For purposes of workers' compensation, however, an employee crossing over a public street while going between two portions of her employer's premises has *already reached* and *not yet left* those premises; thus, the going and coming rule is inapplicable in the first instance. *See, e.g.*, *Epler*, 393 A.2d at 1165–67 (concluding a public road separating the employer's plant from a parking lot provided for employee parking was part of the employer's premises under the state's workers' compensation law (citations omitted)); *cf. Evans v. Coats & Clark*, 328 S.C. 467, 469, 492 S.E.2d 807, 808 (Ct. App. 1997) (finding "a common area situated in the lobby of the building that housed [the employee's] place of employment" was part of the employer's premises and therefore the going and coming rule did not preclude the employee's recovery of workers' compensation benefits (citations omitted)).

B.

Applying the standard expressed above to the undisputed facts of this case, it necessarily follows that Petitioner's injuries are compensable: Petitioner was injured attempting to leave her employer's premises by traveling a direct route from the library, where she had been reviewing résumés on behalf of her employer, to her car, which was located in an on-campus parking lot provided for employee and student parking. *Cf. Williams*, 245 S.C. at 382, 140 S.E.2d at 603 (affirming an award of benefits to an employee injured while "proceeding by the most direct route from the building where she worked to the employer[-]maintained parking area").

In short, because Petitioner was injured traveling between two portions of her employer's premises—the library and the parking lot—as anticipated at the end of her work day, her injuries are compensable, notwithstanding the fact she was injured while she was not physically on USC's property. Indeed, "[w]e find no justification in logic or law which would support the conclusion that compensation should be denied, under the facts of the instant case, solely because the accident occurred while the claimant was crossing a public road." *Epler*, 393 A.2d at 1166; *accord Copeland*, 829 S.W.2d at 144 ("To allow coverage from the plant to the public street, to disallow coverage while crossing the street, and to allow coverage while walking in the parking lot to her automobile would appear inconsistent and illogical."); *cf. Williams*, 245 S.C. at 381, 140 S.E.2d at 603 ("The fact that the accident occurred shortly after the claimant had left her immediate place of work is not conclusive. A reasonable length of time must be given an employee to separate himself or herself from the place of work. The employment contemplated her entry upon and departure from the place of work as much as it contemplated her working there, and must include a reasonable interval of time for that purpose."); *Evans v. Coats & Clark*, 328 S.C. 467, 468–69, 492 S.E.2d 807, 807–08 (Ct. App. 1997) (finding an employee was entitled to workers' compensation benefits where she was injured in the lobby of the building where her employer was located even though the lobby was a common area not owned or controlled by the employer, reasoning that the lobby was effectively part of the employer's premises because it was an area over which the employer had a right of passage and it was along a route commonly used by employees to access and exit the work premises (citations omitted)).

Application of the divided premises rule is especially warranted where, as in the instant case, the employer creates the need for the employee to cross the public street. *See Epler*, 393 A.2d at 1168 (Pomeroy, J., concurring) (stating that a public road dividing the employer's property was properly considered part of the employer's premises because "the employer [wa]s responsible for creating the necessity of his employees' encountering the particular hazards of the trip between a non-contiguous parking lot and the working plant itself"); *accord Copeland*, 829 S.W.2d at 144 (noting "it was the employer who created the necessity of the employee's crossing a public street"). Moreover, it is of no moment that USC did not *require* Petitioner to use the parking lot across the Street from her worksite; what is relevant is that USC *allowed* her to and, once she did, the necessity of crossing the Street arose. *Cf. Longuepee v. Ga. Inst. of Tech.*, 605 S.E.2d 455, 457 (Ga. Ct. App. 2004) (holding that the employee's exercise of discretion in how she traveled from the employer-owned parking lot to her worksite did not remove her from the course of her employment where the employee took "a reasonably direct route to work from the parking facility"). Simply put, USC cannot avail itself of the benefits that come from providing its employees a place to park and then disclaim responsibility for the consequences of that decision. *Cf. Knight-Ridder Newspaper Sales, Inc. v. Desselle*, 335 S.E.2d 458, 459 (Ga. Ct. App. 1985) ("The parking lot was provided by the employer for the convenience of the employer and of the employees, who were encouraged to use the lot. It is immaterial that the [employee] was not required to park in the lot. He did so on this occasion.").

We acknowledge, but ultimately reject, Respondents' argument that adoption of the divided premises rule will prove unworkable. Respondents presume that under this rule, so long as an employee is traveling between two portions of an employer's premises, injuries incurred during the journey will be compensable regardless of the reason for the travel or the route taken by the employee. Respondents' fear is misplaced, for nothing in today's opinion removes the requirement that for an employee's injuries to be compensable, the employee must be injured "in the performance of his [employment] duties and while fulfilling those duties or engaged in something incidental thereto." *Baggott*, 330 S.C. at 5, 496 S.E.2d at 854 (quoting *Beam*, 261 S.C. at 331, 200 S.E.2d at 85) (internal quotation marks omitted). Our holding today merely recognizes that an employee traveling along a reasonably necessary and direct route between two portions of the employer's premises is engaged in something incidental to the employment. *Cf. Williams*, 245 S.C. at 382, 140 S.E.2d at 603 ("The act of claimant in walking from the building

where she worked to the parking area was just as much a reasonable incident to her leaving the place of her work as walking from the ward where she worked along a hallway to the door of the building."). Today's ruling also gives effect to the Court's broad construction of course of employment in *Williams*—if an employee who must cross a public street to travel from her worksite to an employer-maintained parking lot is not "passing, with the express or implied consent of the employer, . . . over [the premises] of another in such proximity and relation as to be in practical effect a part of the employer's premises," *id.* at 381, 140 S.E.2d at 603 (citation omitted), we do not know who is. *Cf. Evans*, 328 S.C.at 469, 492 S.E.2d at 808 (holding that common areas of the building where the employer is located may be considered parts of the employer's premises (citations omitted)).

Of course, determining whether an injury occurs in the course of employment remains an inherently fact-specific inquiry. *See, e.g.*, *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 541, 689 S.E.2d 615, 618 (2010) (noting that "each case must be decided with reference to its own attendant circumstances" (quoting *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 349, 656 S.E.2d 753, 759 (Ct. App. 2007)) (internal quotation marks omitted)). Our workers' compensation commissioners regularly determine whether the facts of a particular case give rise to a compensable injury, and we do not doubt they will be equally capable of applying the rule adopted in this case to deny meritless claims. *See, e.g.*, *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004) ("The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the full [Workers' Compensation C]ommission." (citing *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994))); *cf. Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52–53 (2006) (stating that to recover from a tortfeasor's employer under the doctrine of *respondeat superior*, a plaintiff must show the tortfeasor was acting in the scope of his employment by furthering his employer's business, otherwise employers are not vicariously liable for the actions of their employees (citing *Lane v. Modern Music, Inc.*, 244 S.C. 299, 304–05, 136 S.E.2d 713, 716 (1964))); *Adams v. S.C. Power Co.*, 200 S.C. 438, 441, 21 S.E.2d 17, 18–19 (1942) (recognizing that for purposes of *respondeat superior*, whether an employee was acting in the course of his employment is usually a question of fact for the jury (citations omitted)).

IV.

We reverse the court of appeals and hold that when an employee crosses from one portion of her employer's property to another over a reasonably necessary and direct route, the employee remains in the course of her employment for purposes of workers' compensation.

This case is hereby remanded to the Workers' Compensation Commission for a determination of benefits.

REVERSED AND REMANDED.

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

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Oconee County. Effective November 1, 2016, all filings in all common pleas cases commenced or pending in Oconee County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Clarendon	Lee	Greenville
Sumter	Williamsburg	Pickens
Spartanburg	Cherokee	Anderson

Oconee—Effective November 1, 2016

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Costa M. Pleicones
Costa M. Pleicones
Chief Justice of South Carolina

Columbia, South Carolina
October 20, 2016

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Rules of Professional Conduct and the South Carolina Rules for Lawyer Disciplinary Enforcement

Appellate Case No. 2015-002336

ORDER

The Commission on Lawyer Conduct and the Commission and Judicial Conduct have proposed a number of amendments to the Rules of Professional Conduct contained in Rule 407, SCACR; the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; and the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR. The proposed changes would: (1) add specific language from decisions of this Court related to the assertion of retaining liens by attorneys; (2) require that lawyers admitted in other jurisdictions self-report discipline imposed by another jurisdiction, and amend the definition of the term "lawyer" within the Rules of Professional Conduct; (3) adopt a rule providing for the mandatory random audits of lawyer trust accounts; and (4) provide for the hiring of a presiding disciplinary judge to act as a hearing officer to preside over disciplinary and incapacity hearings.

After careful consideration of the Commissions' proposed amendments, we decline to adopt the proposed changes requiring random audits of lawyer trust accounts and the hiring of a presiding disciplinary judge. We agree to adopt modified versions of the Commissions' other proposed amendments, but decline to adopt the definition of a lawyer proposed by the Commissions.

Accordingly, we amend Rules 1.16, 5.1, and 8.3, RPC, Rule 407, SCACR; and Rule 29, RLDE, Rule 413, SCACR, as set forth in the attachment to this Order. These amendments are effectively immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
October 25, 2016

Comment 9 to Rule 1.16, RPC, Rule 407, SCACR, is amended to provide:

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15; *In re Tillman*, 319 S.C. 461, 432 S.E.2d 283 (1995); *In re Anonymous Member of South Carolina Bar*, 287 S.C. 250, 335 S.E.2d 803 (1985). When permitted, a nonrefundable retainer still must comply with Rule 1.5 and not be unreasonable.

Comment 9 to Rule 5.1, RPC, Rule 407, SCACR, is amended to provide:

[9] Paragraph (d) expresses a principle of responsibility to the clients of the law firm. Where partners or lawyers with comparable authority reasonably believe a lawyer is suffering from a significant cognitive impairment, they have a duty to protect the interests of clients and ensure that the representation does not harm clients or result in a violation of these rules. See Rule 1.16(a). One mechanism for addressing concerns before matters must be taken to the Commission on Lawyer Conduct is found in Rule 428, SCACR. See also Rule 8.3(c) regarding the obligation to report a violation of the Rules of Professional Conduct when there is knowledge a violation has been committed as opposed to a belief that the lawyer may be suffering from an impairment of the lawyer's cognitive function.

Rule 8.3, RPC, Rule 407, SCACR, is amended to provide:

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Lawyer Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.

(b) A lawyer who is disciplined or transferred to incapacity inactive status in another jurisdiction shall inform the Commission on Lawyer Conduct in writing within fifteen days of discipline or transfer.

(c) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(d) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office in other respects shall inform the appropriate authority.

(e) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(f) Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Comment

[1] Self regulation of the legal profession requires, under some circumstances, that members of the profession report themselves to disciplinary authorities in order to protect the interests of the profession, the public, and the judicial process. Paragraphs (a) and (b) set forth the limited circumstances under which a lawyer is required to self-report. Any lawyer admitted to practice in South Carolina has a duty to self-report under paragraphs (a) and (b). The disciplinary procedures for handling matters giving rise to mandatory self-reports are set forth in Rules 17 and 29, RLDE, Rule 413, SCACR.

[2] Self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct by another lawyer. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a

pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. The South Carolina version of paragraph (d) modifies the model version by specifically including "honesty" and "trustworthiness" to parallel the requirement of paragraph (c).

[3] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[4] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the Office of Disciplinary Counsel unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[5] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client lawyer relationship.

[6] Paragraph (f) encourages lawyers to seek assistance from the South Carolina Bar Lawyers Helping Lawyers Committee, from a South Carolina Bar law office management assistance program, or from an equivalent county bar association program without fear of being reported for violating the Rules of Professional Conduct. Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (c) and (d) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Rule 29(a), RLDE, Rule 413, SCACR, is amended to provide:

(a) Lawyers Disciplined or Transferred to Incapacity Inactive Status in Another Jurisdiction. Within fifteen days of being disciplined or transferred to incapacity inactive status in another jurisdiction, a lawyer admitted to practice in this state shall inform the Commission on Lawyer Conduct in writing of the discipline or transfer. Upon notification from any source that a lawyer within the jurisdiction of the Commission has been disciplined or transferred to incapacity inactive status in another jurisdiction, disciplinary counsel shall obtain a certified copy of the disciplinary order and file it with the Commission and the Supreme Court.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Appellate Court Rules and the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2016-001365

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 422, SCACR, Rule 2(h), ADR Rules, and Rule 19, ADR Rules are amended as set forth in the attachment to this Order. These rule amendments, which were proposed by the Commission on Alternative Dispute Resolution (ADR Commission), alter the composition of the ADR Commission and the qualifications of persons who may be certified as family court mediators.

These amendments are effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
October 26, 2016

Rule 422(b), South Carolina Appellate Court Rules, is amended to provide:

(b) Membership of Commission. The Commission's Chair will be the Chief Justice or the Chief Justice's designee. The Supreme Court will appoint the Commission's other members as follows:

(1) State Judges: One Circuit Court judge, one Family Court judge; one judge from the state appellate bench; one summary court judge; two judges from any state court.

(2) Practicing Lawyers: Six practicing lawyers, at least four of whom are certified arbitrators and/or mediators, with due regard for diversity of practices among the members.

(3) Two public members who may be certified arbitrators or mediators.

(4) A county clerk of court.

(5) The Director of Court Administration or the Director's designee.

(6) The Chair of the House of Representatives Judiciary Committee or the Chair's designee.

(7) The Chair of the Senate Judiciary Committee or the Chair's designee.

(8) The Chair of the South Carolina Bar's Dispute Resolution Section or the Chair's designee.

(9) An at-large member who may be a certified mediator or arbitrator.

Rule 2(h), South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to provide:

(h) Certified. A mediator or arbitrator who is approved by the Board of Arbitrator and Mediator Certification to be eligible for court appointment pursuant to these rules. A certified mediator or arbitrator may refer to himself or herself as a

"Supreme Court of South Carolina Certified Mediator" or a "Supreme Court of South Carolina Certified Arbitrator."

Rule 19, South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to provide:

Rule 19

Certification of Court-Appointed Neutrals

(a) Applications. The Board of Arbitrator and Mediator Certification ("Board") shall receive and approve applications for certifications of persons to be appointed as mediators or arbitrators. The application shall be on a form approved by the Supreme Court or the Board. Recertification of a neutral who, by virtue of current job restrictions is prohibited from serving under these rules, is allowed if the neutral submits the appropriate recertification paperwork, pays the applicable fee and agrees upon termination of the prohibiting employment to promptly supplement the application to list at least one county for court appointments.

(b) Certification. For circuit court or family court certification, a person must:

(1) Either:

(A) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar, including retired or inactive lawyers. This includes members who may be on retired or inactive status and any person who holds a limited license; or

(B) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and:

(i) Be at least 21 years old;

(ii) Have received a juris doctorate degree or its equivalent from a law school approved by the American Bar Association;

(iii) Be a member in good standing in each jurisdiction where he or she is admitted to practice law. This includes persons who may be retired or inactive; and

(iv) Agree to be subject to the Rules of Professional Conduct, Rule 407, SCACR, and the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, to the same extent as a regular member of the South Carolina Bar.

(2) Be of good moral character;

(3) Have not, within the last five (5) years, been:

(A) Disbarred or suspended from the practice of law;

(B) Denied admission to a bar for character or ethical reasons; or

(C) Publicly reprimanded or publicly disciplined for professional conduct;

(4) Pay all administrative fees and comply with all procedures established by the Supreme Court, the Board and the Commission on Alternative Dispute Resolution; and

(5) Agree to provide mediation/arbitration to indigents without pay.

(6) To be certified as a Circuit Court Mediator, a person must also:

(A) Have completed a minimum of forty (40) hours in a civil mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board; and

(B) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in South Carolina.

(7) To be certified as a Family Court Mediator, a person must also:

(A) Have completed a minimum of forty (40) hours in a family court mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board;

(B) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in South Carolina.

(8) To be certified as an Arbitrator, a person must also:

(A) Have served as a Master-in-Equity, Circuit or Appellate Court Judge; or

(B) Have completed a minimum of six (6) hours in a civil arbitration training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board; and

(C) Demonstrate familiarity with the statutes, rules and practice governing arbitration hearings in South Carolina.

(c) Certification under Prior Versions of Rule 19. Persons who were certified under a prior version of Rule 19 may be recertified in accordance with Section V(B)(7), Appendix G to Part IV, SCACR. However, a certified neutral who is decertified or whose certification lapses due to a failure to seek recertification must file a new application and meet the requirements of paragraph (b) of this rule to be certified.

The Supreme Court of South Carolina

In the of Matter Scott Christen Allmon, Petitioner.

Appellate Case Nos. 2016-000209 and 2016-000163

ORDER

On May 22, 2013, the Court administratively suspended petitioner pursuant to Rule 419(d)(2) of the South Carolina Appellate Court Rules (SCACR). On January 15, 2014, the Court accepted an Agreement for Discipline by Consent entered into between petitioner and the Office of Disciplinary Counsel and suspended petitioner from the practice of law for one year retroactive to January 16, 2013, the date of petitioner's interim suspension. *In the Matter of Allmon,* 407 S.C. 24, 753 S.E.2d 544 (2014). Petitioner has now filed a Petition for Reinstatement pursuant to Rule 419(e), SCACR, and a Petition for Reinstatement pursuant to Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

After thorough consideration of the entire record, the Court grants both Petitions for Reinstatement.

s/ Costa M. Pleicones C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

We would deny both Petitions for Reinstatement.

s/ Donald W. Beatty J.

s/ John Cannon Few J.

Columbia, South Carolina

October 21, 2016

The Supreme Court of South Carolina

In the Matter of J. Fitzgerald O'Connor, Jr., Respondent.

Appellate Case No. 2016-001747

ORDER

Respondent has submitted a Motion to Resign in Lieu of Discipline pursuant to Rule 35 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). We grant the Motion to Resign in Lieu of Discipline. In accordance with the provisions of Rule 35, RLDE, respondent's resignation shall be permanent.

Within fifteen (15) days of the date of this order, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of Court.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

October 21, 2016

The Supreme Court of South Carolina

In the Matter George Constantine Holmes, Respondent.

Appellate Case No. 2016-002057

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).

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

Within fifteen (15) days of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, respondent may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

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

Columbia, South Carolina

October 24, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rent-A-Center West Inc., Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2012-208608

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

Opinion No. 5447
Heard March 16, 2016 – Filed October 26, 2016

REVERSED

John C. Von Lehe, Jr. and Bryson Moore Geer, both of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Appellant.

William J. Condon, Jr. and Sean Gordon Ryan, both of the South Carolina Department of Revenue, of Columbia, for Respondent.

KONDUROS, J.: Rent-A-Center West Inc. (RAC West) appeals the administrative law court's (ALC) finding the standard statutory apportionment formula did not fairly represent its business activities in South Carolina and the Department of Revenue's (the DOR) alternative apportionment method for

calculating its income tax was reasonable. It also maintains the ALC erred in finding it was not a unitary business. It further asserts the ALC erred by concluding the DOR did not violate its constitutional rights. We reverse.

FACTS/PROCEDURAL HISTORY

This case involves the assessment of corporate income tax on RAC West, a subsidiary of the Rent-A-Center Inc. business. Rent-A-Center is a rent-to-own business, providing consumer goods to customers for rent. Rent-A-Center East Inc. (RAC East) owns and operates retail stores in eastern states including South Carolina and is a wholly-owned subsidiary of Rent-A-Center. RAC East has two wholly-owned subsidiaries: RAC West, which owns and operates retail stores in western states, and Rent-A-Center Texas LP, which owns and operates retail stores in Texas and provides management services. RAC West does not operate any retail stores in South Carolina, but it owns and licenses the Rent-A-Center intellectual property, including the trademarks and trade names to all other Rent-A-Center companies. These royalty payments for the use of the intellectual property by the South Carolina stores are RAC West's only activity in the state. This arrangement was formalized in a licensing agreement between RAC West and RAC East. The licensing agreement sets the amount of a royalty fee equal to 3% of the gross revenues of the RAC East stores, an amount based upon a transfer pricing study.[1]

RAC West filed their corporate income tax returns for 2003, 2004, and 2005 using the three-factor apportionment formula, consisting of property, payroll, and sales.

The DOR audited RAC West's 2003-2005 initial tax returns and found RAC West owed an additional $144,971 in corporate income tax; $35,086 in interest; and $36,243 in penalties for the period of 2003-2005. According to the DOR, RAC West's only income in South Carolina was the royalty income it obtained from RAC East. The DOR applied an alternative apportionment method pursuant to section 12-6-2320(A) of the South Carolina Code, which it stated "more fairly represent[ed] the taxpayer's activity in South Carolina." The DOR based this

[1] In the relevant years, this 3% amounted to $830,247 in 2003; $861,437 in 2004; and $844,348.13 in 2005.

alternative apportionment method on RAC West's 3% royalty agreement with RAC East.

RAC West filed an appeal and requested a hearing before the ALC. One month prior to the hearing, RAC West filed amended South Carolina income tax returns, changing the method from the three-factor apportionment formula for dealers of tangible personal property to the gross-receipts method under section 12-6-2290 of the South Carolina Code.[2] This single-factor apportionment formula required RAC West to pay an additional $1,326 in taxes to what it had previously paid.

The ALC held a hearing on August 10 and 11, 2011. The DOR argued RAC West diluted the sales/gross receipts ratio by including the retail sales of RAC West in the denominator because no retail sales are in the numerator, as RAC West's only activity in South Carolina is the licensing of the intellectual property. According to testimony from Dr. Glenn Harrison, the DOR's expert witness on law and economics, the gross receipts ratio did not provide an accurate reflection of the economic connection of RAC West to South Carolina. Dr. Harrison indicated including royalty receipts in the numerator of the ratio while including both total royalty and total retail receipts in the denominator was like putting apples in the numerator and apples and oranges in the denominator. He further testified the DOR's alternative method was economically reasonable and excluding the retail operations from the calculations was essential in order to "come up with a tax burden that fairly represented the economic nexus of the entity with South Carolina." Additionally, Dr. Harrison indicated even if RAC West was a unitary business, it should still be able to separate its accounts.

RAC West argued there is a unitary relationship between the business activities of the retail stores in the western states and the licensing of intellectual property in other states because the same management is over both businesses and the stores contribute to the profitability of the intellectual property and vice versa. Further, it

[2] Under section 12-6-2290 of the South Carolina Code (2014), a taxpayer apportions its net income by using a ratio in which the numerator is its gross receipts from within South Carolina during the taxable year and the denominator is its total gross receipts from all states during the taxable year.

argued it does not separately track the costs of the intellectual property alone and this South Carolina audit was the first time it had been asked to do so.

According to RAC West's expert economist, Dr. Ronald P. Wilder, and tax policy expert, Professor Richard Pomp, RAC West was a single unitary business based upon the mutual interdependence of the trademark and retail business. Dr. Wilder was asked his opinion of whether or not the standard apportionment formula fairly represented the extent of RAC West's activities in the state, and he responded that it did. Dr. Wilder based this "conclusion on the fact that RAC West uses its total corporation income as what is to be apportioned [and t]hat the use of corporation net income corresponds to the economic concept of profit on which taxable income should be based." When asked what would result if the retail sales from RAC West were not included in the denominator of the apportionment formula, Dr. Wilder explained that because RAC West is a unitary business, the "separate accounting cannot accurately measure the activities of RAC West." Professor Pomp explained the standard apportionment worked the way it was supposed to in this case. He stated, "That's not a defect. That's not anything unusual, out of the ordinary." Further, he found an "inextricable link" and "synergy" between the value of the intellectual property and the profitability of the retail store business.

Joseph P. Southard, a former employee of the DOR who worked specifically on the RAC West audit, testified the audit began as a routine audit of Rent-A-Center as a whole. When asked why the DOR did not make an assessment based on the standard apportionment formula, Southard responded the gross receipts formula "didn't fit into the definition," so the DOR "had to come up with kind of a hybrid."

The ALC found for the DOR on all issues except the penalty, which it dismissed. Specifically, the ALC found (1) the DOR demonstrated RAC West's apportionment formula failed to fairly represent its business in South Carolina; (2) the DOR's proposed alternative apportionment method was reasonable in light of RAC West's business activities in South Carolina; (3) the imposition of an alternative method in this case did not violate the Constitution; (4) RAC West did not substantiate any expenses, therefore it was not entitled to deduct any expenses; and (5) RAC West was not liable for substantial understatement penalties.

RAC West filed a motion for reconsideration, which the ALC denied. RAC West filed a Notice of Appeal and shortly thereafter requested, with the DOR's consent, a stay of the matter until a final decision was made in *Carmax Auto Superstores*

West Coast, Inc. v. South Carolina Department of Revenue (*Carmax I*), 397 S.C. 604, 725 S.E.2d 711 (Ct. App. 2012), *aff'd as modified*, 411 S.C. 79, 767 S.E.2d 195 (2014). The parties asserted some or all of the issues could be decided or affected by the final decision in that case. This court granted the stay on April 16, 2012. Following a decision by the supreme court,[3] this appeal proceeded.

STANDARD OF REVIEW

> The review of the [ALC]'s order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2015).

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[3] *Carmax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Revenue* (*Carmax II*), 411 S.C. 79, 767 S.E.2d 195 (2014).

"In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the *de novo* contested case proceeding." *S.C. Dep't of Revenue v. Sandalwood Soc. Club*, 399 S.C. 267, 279, 731 S.E.2d 330, 337 (Ct. App. 2012). "The Rules of Procedure for the Administrative Law Judge Division require that the AL[C] make independent findings of fact in contested case hearings, and the Administrative Procedures Act clearly contemplates that the AL[C] will make [its] own findings of fact in a contested case hearing." *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997) (citation omitted). When the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 435 (2011).

"The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). "A reviewing court may reverse or modify an administrative decision if the findings of fact are not supported by substantial evidence." *Risher*, 393 S.C. at 210, 712 S.E.2d at 434. "Substantial evidence is 'evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.'" *Se. Res. Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004) (quoting *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)). Substantial evidence . . . is more than a mere scintilla of evidence." *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 605, 670 S.E.2d at 676.

"A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Lockwood Greene Eng'rs, Inc. v. S.C. Tax Comm'n*, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987). "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (alteration by court) (quoting *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)).

LAW/ANALYSIS

RAC West argues the ALC erred by finding the standard statutory apportionment formula did not fairly represent RAC West's business activities in South Carolina. We agree.

> If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State. A taxpayer subject to taxation under this section is considered to have been transacting or conducting business partly within and partly without the State if the taxpayer is subject to a net income tax or a franchise tax measured by net income in another state, the District of Columbia, a territory or possession of the United States, or a foreign country, or would be subject to the net income tax in any other taxing jurisdiction if the other taxing jurisdiction adopted the net income tax laws of this State.

S.C. Code Ann. § 12-6-2210(B) (2014).

For profits or income of a taxpayer derived from sources like those here, "the taxpayer shall apportion its remaining net income using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year." S.C. Code Ann. § 12-6-2290 (2014).

> If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> (1) separate accounting;
> (2) the exclusion of one or more of the factors;

> (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State; or
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

S.C. Code Ann. § 12-6-2320(A) (2014).

> In South Carolina, corporate income tax "is imposed annually at the rate of five percent on the South Carolina taxable income of every corporation . . . transacting, conducting, or doing business within this State or having income within this State, regardless of whether these activities are carried on in intrastate, interstate, or foreign commerce."

Carmax II, 411 S.C. at 85-86, 767 S.E.2d at 198 (alteration by court) (quoting S.C. Code Ann. § 12-6-530 (2014)). "A corporation's taxable income in South Carolina is computed using the Internal Revenue Code with modifications as provided by South Carolina law, and this amount is 'subject to allocation and apportionment as provided in Article 17 of this chapter.'" *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 145, 694 S.E.2d 525, 528 (2010) (quoting S.C. Code Ann. § 12-6-580). "When 'a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State.'" *Carmax II*, 411 S.C. at 86, 767 S.E.2d at 198 (quoting § 12-6-2210(B)).

> "Article 17, entitled 'Allocation and Apportionment,' provides certain income that is not related to business activity in South Carolina must be directly allocated to a taxpayer and is not subject to apportionment." Any income "remaining after allocation is apportioned in accordance with the general apportionment statute, section 12-6-2250, or one of the special apportionment formulas" provided in [s]ections 12-6-2290 through 12-6[-]2310.

Id. (quoting *Media Gen. Commc'ns*, 388 S.C. at 145, 694 S.E.2d at 528).

"The purpose of the allocation statutes is to provide for imposition of South Carolina income tax 'upon a base which reasonably represents the proportion of the trade or business carried on within this State.'" *Lockwood Greene Eng'rs, Inc. v. S.C. Tax Comm'n*, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987) (quoting *Hertz Corp. v. S.C. Tax Comm'n*, 246 S.C. 92, 95, 142 S.E.2d 445, 446 (1965)). Our supreme court has held that "the apportionment formula is a reasonable basis for establishing the income tax of corporations which . . . do business on a multistate level." *Eastman Kodak Co. v. S.C. Tax Comm'n*, 308 S.C. 415, 419, 418 S.E.2d 542, 544 (1992).

"[T]he statutory apportionment method found in section 12-6-2290 of the South Carolina Code . . . [is] commonly referred to as the 'gross receipts method' . . . ." *Carmax II*, 411 S.C. at 83, 767 S.E.2d at 197. "This method . . . calculates a multistate taxpayer's taxes due by creating an apportionment ratio that divides the taxpayer's receipts from financing and intangibles in South Carolina by the taxpayer's receipts from financing, intangibles, and retail sales everywhere else the taxpayer does business." *Id.*

In *CarMax*, the corporate structure of CarMax was somewhat similar to Rent-A-Center's.

> In 2002, CarMax became a separate, publicly-traded holding company of CarMax Auto Superstores, Inc., (CarMax East) and CarMax West, two wholly owned subsidiaries, which primarily performed retail automobile sales. CarMax East owned and operated the used car superstores on the East Coast and in the Midwest, including South Carolina, and managed all of the financial operations and corporate overhead of CarMax. CarMax West owned and operated the used car superstores on the West Coast and owned all of the intellectual property. From 2002-2004, CarMax East paid royalties to CarMax West for the use of this intellectual property in accordance with a licensing agreement.

Id. at 81-82, 767 S.E.2d at 196.

> In 2004, CarMax reorganized its corporate structure, and created CarMax Business Services, LLC (CBS), a multi-member limited liability company with two members: CarMax East and CarMax West. CarMax East contributed the financing operations and corporate overhead management to the partnership, and CarMax West contributed the intellectual property. Ownership percentages of CBS were based on the value of the assets contributed, and the members' income derives from their respective percentages of ownership.
>
> After the restructuring, CarMax East and CarMax West became vehicle retailers only, and CBS began to provide all of the corporate overhead services, house financing operations through its financing arm (CAF), and manage the intellectual property for its members. Both CarMax East and CarMax West pay CBS a management fee for these services.

Id. at 82, 767 S.E.2d at 196 (footnote omitted).

> CarMax West claim[ed] that it ha[d] no financial connection to South Carolina outside of royalty payments from CarMax East. From 2002-2004, CarMax East made direct payments to CarMax West for use of the intellectual property; and since 2004, CarMax East has made management fee payments to CBS on a per-vehicle-sold basis, and CAF has generated further financing revenue in South Carolina. Because of its status as an LLC, CBS is taxed as a partnership; therefore, both sources of revenue "flow through" CBS to its members, and thus indirectly, to CarMax West.

Id.

"CarMax West filed the amended tax returns in question, using the statutory apportionment method found in section 12-6-2290 of the South Carolina Code." *Id.* at 83, 767 S.E.2d at 197. That method "requires a taxpayer to 'apportion its . . . net income using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year.'" *Id.* at 86, 767 S.E.2d at 198 (alteration by court) (quoting S.C. Code Ann. § 12-6-2290). "CarMax West then multiplied its net income by the apportionment ratio, and multiplied that number by South Carolina's income tax rate to arrive at its South Carolina income tax." *Id.* at 83, 767 S.E.2d at 197.

The DOR "rejected CarMax West's use of the gross receipts method, claiming it did not fairly represent the extent of CarMax West's business dealings in South Carolina. Rather, the [DOR] proposed an alternate apportionment method pursuant to section 12-6-2320(A)(4) of the South Carolina Code." *Id.*

> The [DOR]'s proposed alternative formula employed an apportionment ratio of CarMax West's South Carolina income from intangibles and financing divided by CarMax West's intangibles and financing income from everywhere else that it does business. According to the [DOR], this alternative formula focused on CarMax West's actual business activity in South Carolina. The [DOR] sought to prevent CarMax West from diluting its income by inflating the denominator of its apportionment ratio with sales from its Western retail operations. Furthermore, the [DOR] sought to include the income from the sale of securitized consumer lending contracts in CarMax West's South Carolina income.

Id. at 84, 767 S.E.2d at 197.

"[T]he statutory language of section 12-6-2320(A) clearly evinces a two-part analysis . . . ." *Id.* at 88, 767 S.E.2d at 199.

> [W]hen a party seeks to deviate from a statutory formula under section 12-6-2320(A), the proponent of the alternate formula bears the burden of proving by a

> preponderance of the evidence that: (1) the statutory formula does not fairly represent the taxpayer's business activity in South Carolina and (2) its alternative accounting method is reasonable.

Id. at 89, 767 S.E.2d at 200.

> [W]he[n] the [DOR] alone is arguing that the statutory formula does not fairly represent the taxpayer's business in South Carolina[,]the [DOR] bears the burden to prove (1) that the statutory formula does not fairly represent CarMax West's business activity in South Carolina and (2) that the proposed alternative formula is reasonable.

Id. at 89-90, 767 S.E.2d at 200 (citing *St. Johnsbury Trucking Co. v. State*, 385 A.2d 215, 217 (N.H. 1978) (holding "an alternative formula is the exception, and the party who wants to use an alternative formula accordingly has the burden of showing that the alternative is appropriate"); *Donald M. Drake Co. v. Dep't of Revenue*, 500 P.2d 1041, 1044 (Or. 1972) (holding "the use of any method other than apportionment should be exceptional" and the party seeking to use an alternative method bears the burden of proof)). The threshold issue is whether the statutory formula fairly represents a taxpayer's business activity within South Carolina. *Id.* at 90, 767 S.E.2d at 200.

In *Eastman Kodak Co.*, the court determined:

> Since the safe harbor lease transactions were a part of Kodak's general business, they were properly included in the denominator of the apportionment formula in computing Kodak's national net income from payroll, property, and sales. The fact that a very small percentage of the leased assets are located in South Carolina is accounted for in the numerator of the apportionment formula in which Kodak's payroll, property, and sales in this state are computed. Therefore, the apportionment formula reflects a "reasonable representation" of Kodak's business in this state.

308 S.C. at 419, 418 S.E.2d at 544.

In arriving at its decision in *CarMax*,

> the ALC relied on testimony from an auditor that the business structure of CarMax West and CBS is often "linked with tax minimization strategies." Furthermore, the ALC relied on evidence regarding the sourcing of income, and the fact that CarMax West's apportionment ratio yielded a significantly lower tax than that of CarMax East, to support its determination that CarMax West's income was diluted. This was the extent of the evidence offered by the [DOR] to prove the contention that the statutory formula did not fairly represent CarMax West's business activity in South Carolina, other than bald assertions by its witnesses that it satisfied this threshold question.
>
> Even if these findings accurately characterize CarMax West's motives, they do not provide a sound evidentiary basis to support the conclusion that the statutory formula did not fairly represent CarMax West's business in South Carolina. *See St. Johnsbury Trucking Co.*, 385 A.2d at 217 ("Merely because the use of an alternative form of computation produces a higher business activity attributable to New Hampshire, is not in and of itself a sufficient reason for deviating from the legislatively mandated formula." (citations omitted)).

Carmax II, 411 S.C. at 90-91, 767 S.E.2d at 201.

In this case, the burden was on the DOR to show the statutory formula did not fairly represent RAC West's business activity in South Carolina. The DOR presented the same level of evidence in this case as in *CarMax*. Based on the supreme court's holding in *CarMax* the evidence was insufficient to meet the DOR's burden for the threshold issue, we likewise conclude the DOR failed to meet its burden here. Substantial evidence does not support finding the statutory apportionment method fairly reflected RAC West's business activities in South

Carolina. The DOR auditor, Southard, testified the investigation started because Rent-A-Center was comprised of multiple entities and he believed a management services fee was too high. He did not point to any specific evidence the standard apportionment method did not fairly represent RAC West's business activities. Additionally, the DOR's expert, Dr. Harrison, indicated excluding the retail operations from the calculations was essential to "come up with a tax burden that fairly represented the economic nexus of the entity with South Carolina." *See id*. at 91, 767 S.E.2d at 201 (holding bald assertions by the DOR's witnesses that it satisfied the threshold question was not enough to meet its burden). Dr. Harrison testified that using the standard apportionment method would be like having apples in the numerator, while having apples and oranges in the denominator. However, this is how the apportionment method is intended to work, as Professor Pomp testified. A very small amount of RAC West's business comes from the royalties; therefore, this should only comprise a small amount of its taxes. *See Eastman Kodak Co.*, 308 S.C. at 419, 418 S.E.2d at 544 ("The fact that a very small percentage of the leased assets are located in South Carolina is accounted for in the numerator of the apportionment formula in which Kodak's payroll, property, and sales in this state are computed. Therefore, the apportionment formula reflects a 'reasonable representation' of Kodak's business in this state."). Accordingly, substantial evidence does not support the ALC's finding the DOR met its burden.

Additionally, because the DOR did not meet its burden in proving the threshold issue of whether the statutory formula fairly represented RAC West's business activities in the state, we need not decide whether the ALC erred in finding the DOR's alternative method was reasonable. *See Carmax II*, 411 S.C. at 90, 767 S.E.2d at 200 (holding the threshold issue is whether the statutory formula fairly represents a taxpayer's business activity within South Carolina); *see also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). Accordingly, the ALC's decision is

REVERSED. [4]

HUFF and GEATHERS, JJ., concur.

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[4] RAC West also argues the ALC erred in (1) finding RAC West did not operate a unitary business when the uncontested evidence established it was unitary; (2) allowing the DOR to apply a separate accounting to a unitary business; and (3) concluding the DOR did not violate RAC West's constitutional rights by applying separate accounting to a unitary business. In *CarMax*, similar additional issues were raised. *See Carmax II*, 411 S.C. at 84-85, 767 S.E.2d at 197 ("On appeal, CarMax West argued the ALC erred in . . . failing to consider that CarMax West operates a unitary business and permitting the [DOR] to use separate accounting procedures when calculating tax liability of a unitary business . . . and . . . finding that the [DOR] did not violate CarMax West's constitutional rights by applying a separate accounting to a unitary business and by sourcing financing receipts to South Carolina."). The court in *Carmax II* determined it did not need to reach these issues based on its decision. Based on our decision above, like *Carmax II*, we need not address RAC West's remaining issues. *See id.* at 91 n.11, 767 S.E.2d at 201 n.11 ("We need not reach . . . CarMax West's remaining issues on appeal, as they were all raised as defenses to the [DOR]'s use of an alternative apportionment method, and the proper allocation of the burden of proof resolves this appeal." (citing *Futch*, 335 S.C. at 613, 518 S.E.2d at 598)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shanna Kranchick, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2011-191687

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

Opinion No. 5448
Heard February 10, 2015 – Filed October 26, 2016

REVERSED

Attorney General Alan McCrory Wilson and Assistant Attorney General Megan E. Harrigan, both of Columbia, for Petitioner.

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Respondent.

MCDONALD, J.: The State of South Carolina (the State) appeals the post-conviction relief (PCR) court's order granting Respondent Shanna M. Kranchick's application for PCR. The State argues the PCR court erred in determining that Kranchick's trial counsel provided ineffective assistance in failing to object to the State's forensic toxicologist's testimony as to the effects of the marijuana,

antihistamines, and cough suppressant found in Kranchick's blood after the accident. We reverse and reinstate Respondent's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

At approximately 3:00 p.m. on January 23, 2002, Kranchick lost control of the Ford Taurus she was driving eastbound on Interstate 20 in Northeast Richland County. After swerving off the road, Kranchick overcorrected and collided with the rear of a bobtail truck. The impact caused the truck to spin into the median, over the median guardrail cables, and into the path of an oncoming tractor trailer hauling sand. The smaller truck flipped onto its roof, killing the driver, Gene Croft, at the scene. Croft's passenger and the driver of the tractor trailer were severely and permanently injured in the accident.

On March 20, 2002, the Richland County grand jury indicted Kranchick for one count of felony driving under the influence (DUI) causing death and one count of felony DUI causing great bodily injury. Kranchick's first jury trial resulted in a mistrial.[1] Following a second jury trial, Kranchick was convicted and sentenced to thirteen years of imprisonment for felony DUI causing death and fifteen years of imprisonment, suspended upon the service of five years' probation, for felony DUI causing great bodily injury.[2] The PCR court subsequently granted Kranchick's application for post-conviction relief, finding "that the toxicologist was not sufficiently qualified to testify about the effects of drugs or when they are consumed." At issue is whether the PCR court erred in finding Kranchick's trial counsel ineffective for failing to object to a portion of the toxicologist's testimony.

ANALYSIS

"This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and it will reverse the PCR judge's decision when it is controlled by an error of law." *McHam v. State*, 404 S.C. 465, 473, 746

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[1] Fifth Circuit Public Defender Douglas Strickler represented Kranchick in the first trial. Kranchick was represented primarily by an Assistant Public Defender (trial counsel) in the second trial.

[2] These sentences are consecutive to an unrelated armed robbery sentence of twelve years' imprisonment.

S.E.2d 41, 45 (2013) (quoting *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007)). In order to establish a claim of ineffective assistance of counsel, an applicant must prove (1) counsel failed to render reasonably effective assistance under prevailing professional norms and (2) counsel's deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

I. Deficient Performance

At Kranchick's trial, forensic toxicologist Gregory Rock testified that he received a Bachelor of Science degree in medical technology from the University of South Carolina and additional training through the South Carolina Law Enforcement Division's (SLED's) toxicology program, "which consists of about a year-long training where [he] under[went] book work[,] oral testing[,] and written testing." Rock further testified that he worked as a forensic toxicologist at SLED for approximately two and one-half years following his training and that SLED is accredited by the American Society of Crime Lab Directors. Without objection, the trial court qualified Rock as an expert "in the field of forensic toxicology."

Rock did not testify as to his education, experience, or knowledge relating to the physical or mental effects of drugs on the human body, and trial counsel did not object when he subsequently testified as to the effects of the "significant amount of [marijuana] metabolite" and "very significant" amounts of cough suppressant and antihistamine found in Kranchick's blood following the accident.

At the PCR hearing, Strickler[3] testified that he "didn't hear anything in the testimony that qualified [Rock] in regard to the psychopharmacological effects of marijuana or the other [drugs] in this case." Thus, PCR counsel asserted trial counsel should have objected to Rock's testimony about the effects of the drugs on Kranchick as "outside the bounds of [Rock's] expertise." The State argued trial counsel was not deficient in failing to object because the definition of "toxicology" specifically "allows for the effects of drugs." *See Toxicology, Black's Law Dictionary* (5th ed. 1979) (defining "toxicology" as "[t]he science of poisons; that

[3] Trial counsel was not called to testify at the PCR hearing as she now lives out of state.

department of medical science which treats poisons, their effects, their recognition, their antidotes, and generally of the diagnosis and therapeutics of poisoning").

We find there is evidence in the record to support the PCR court's determination that "the State presented insufficient qualifications for the toxicologist to testify concerning the mental or physical effects of drugs on a person." *See State v. Priester*, 301 S.C. 165, 167, 391 S.E.2d 227, 228 (1990) (concluding the trial court erred in allowing a lab technologist, who admitted "he had no training whatsoever in determining the effect of alcohol upon the human system" to testify regarding the effects of drugs and alcohol); *cf. State v. White*, 311 S.C. 289, 295, 428 S.E.2d 740, 743 (Ct. App.1993) (concluding the trial court did not err in allowing the forensic toxicologist, who was qualified as an expert witness, to give an opinion concerning the effects of benzodiazepine when used in combination with alcohol after he admitted that different "benzos" have different effects and that he did not know which benzodiazepine the defendant had ingested).

Thus, under our deferential standard of review, we affirm the PCR court's holding that trial counsel's failure to object to the testimony exceeding Rock's presented qualifications fell below an objective standard of reasonableness. However, this does not conclude our analysis because we must determine whether Kranchick suffered any prejudice as a result of the admission of this testimony.

II. Prejudice

The State argues that even if the PCR court correctly determined trial counsel was deficient in failing to object to this portion of Rock's testimony, Kranchick cannot demonstrate the required resulting prejudice because the record establishes Rock was qualified to testify about the effects of the drugs. Moreover, there was overwhelming evidence of Kranchick's guilt. The State further contends that trial counsel's failure to object to the portion of Rock's testimony exceeding his qualifications, as presented at trial, had no reasonable impact on the outcome of the case.

A. Forensic Toxicologist Qualifications and Testimony

Rock explained that his analysis of Kranchick's urine and blood samples indicated she had ingested large quantities of marijuana as well as cough suppressant and antihistamine (collectively, cold medicine) prior to the accident. Rock tested both urine and blood samples; when he did not find any alcohol in Kranchick's blood, he

screened her urine for legal and illegal drugs. As the analysis revealed the presence of marijuana metabolite, antihistamine, and cough suppressant, Rock tested her blood to determine specific quantities.

Rock found a "significant amount of [marijuana] metabolite" in Kranchick's blood, which he explained was "more than the normal amount that we typically see." Specifically, the blood testing revealed sixty micrograms of marijuana metabolite per liter of blood. Based on the amount of marijuana metabolite found in her blood, Rock opined that Kranchick had ingested marijuana "within the last eight hours." Rock testified that although the metabolite itself does not impair a person's ability to drive, a person's ability to drive would be impaired by the amount of marijuana that must have been ingested to produce such a significant amount of metabolite. On cross-examination, Rock admitted his testing would have revealed the presence of THC—the primary mind-altering ingredient in marijuana—if the marijuana were still active in Kranchick's system. Rock also admitted that Kranchick could have ingested the marijuana nine to fourteen hours prior to the incident and up to twenty-four hours prior to the incident if she were a "chronic user" who smoked marijuana daily.

In addition to the marijuana metabolite, Rock found "very significant" amounts of cough suppressant and antihistamine in Kranchick's blood. Testing revealed 0.5 milligrams of antihistamine per liter of Kranchick's blood, 1.3 milligrams of methorphan (cough suppressant) per liter of blood, and 0.24 milligrams of methorphinan (cough suppressant) per liter of blood. Rock testified that when used for therapeutic reasons, cold medicine is "normally seen or taken at very low dosages, approximately anywhere from 0.01 to 0.05 [milligrams]." However, "[i]n this case, they were extremely high, almost twenty to thirty times that level." Rock explained that a person might take twenty to thirty doses of cold medicine accidentally or they may take it to get high. Rock further explained that the possible effects of cold medicine at these levels include euphoria, hallucinations, sedation, and muscle relaxation. With regard to the effects from the antihistamine alone, Rock stated, "You would tend to have possibly hallucinogenic effects. You would have a sedative effect. You would have a very [] muscle relaxing effect." Rock testified that ingesting twenty to thirty times the normal amount of either cough suppressant or antihistamine would impair a person's ability to drive.

Finally, Rock opined that the combination of marijuana and cold medicine in these amounts would "build on each other. They have what's called an additive effect." He testified that with such a combination of drugs "you're going to get, not

necessarily twice the effect, but you have more effect [than] just one alone." Rock concluded that a person taking these drugs in these amounts could not safely operate an automobile, and that Kranchick "would have definitely been impaired." Trial counsel did not object to Rock's testimony as to the effects of marijuana combined with excessive doses of cold medicine.

In *State v. Martin*, which also involved a defendant convicted of felony DUI resulting in death, this court concluded the trial court did not err in allowing a forensic toxicologist to testify as to the effects of drugs and alcohol on the body. 391 S.C. 508, 512–13, 706 S.E.2d 40, 42 (Ct. App. 2011). Specifically, forensic toxicologist Brandon Landrum discussed the effects of alcohol on an individual at several blood alcohol concentration (BAC) levels, explained the effects of marijuana and Xanax, and opined that an individual with a 0.167 BAC combined with marijuana and Xanax could not safely operate a motor vehicle. *Id.* at 514, 706 S.E.2d at 43.

> Landrum explained a forensic toxicologist analyzes "blood, urine, biological[,] and non-biological samples" for the presence of alcohol, drugs, and poisons. After analyzing these samples, forensic toxicologists interpret the results for coroners, police officers, and courts. Interpreting these results involves an examination of how different levels of drugs and/or alcohol cause an individual to act or respond under their influence.
>
> Landrum also explained the extent of his training and education regarding the effects of alcohol and drugs on the body. Landrum received in-house training at [SLED], which involved studying the effects of drugs and alcohol on the body. Landrum's clinical chemistry rotation during his medical technology training included a section where he studied the impairing effects of drugs and alcohol. Landrum also attended classes at the drug recognition evaluation school at the police academy . . . . [, which] involved studying the behavior of individuals clinically dosed with certain amounts of alcohol.

> Landrum further explained the difference between forensic toxicology and pharmacology. According to Landrum, pharmacology involves testing for the presence or absence of drugs or alcohol and examining the interaction between different drugs and drugs and alcohol. Forensic toxicology "takes it a step further" and determines the level of impairment for courts.

Id. at 513–14, 706 S.E.2d at 42–43 (first alteration in original).

On appeal, the *Martin* defendant argued the witness's training and expertise as a forensic toxicologist were insufficient to permit him to render an opinion regarding the effects of drugs and alcohol on the body. *Id*. at 514, 706 S.E.2d at 42. This court disagreed, finding the trial court did not abuse its discretion in permitting Landrum to so testify. *Id*. at 514–15, 706 S.E.2d at 43. Specifically, the *Martin* court relied upon the witness's testimony as to his education and experience, as well as his explanation that a forensic toxicologist tests samples for the presence of alcohol and drugs and then interprets the findings to determine an individual's degree of impairment. *Id*. at 515, 706 S.E.2d at 43. The court further noted the defendant's objections to the toxicologist's qualifications went to the weight of his testimony and not its admissibility. *Id*. at 515–16, 706 S.E.2d at 43–44. Finally, the court held that even if the trial court erred in permitting the testimony about the effects of the drugs and alcohol upon the driver, the defendant was not prejudiced because the State was entitled to an inference that the defendant was under the influence of alcohol as his BAC was 0.167 percent. *Id*. at 515, 706 S.E.2d at 43 (citing S.C. Code Ann. § 56-5-2950(G)(3) (Supp. 2012), which provides that in a prosecution for felony DUI, a BAC of greater than .08 percent gives rise to an inference that the defendant was under the influence of alcohol).

Likewise, in *State v. White*, this court found the circuit court did not err in allowing a "state forensic toxicologist" to give an opinion "concerning the rate at which a 150-pound man would eliminate alcohol and in allowing him to testify as to the effects of benzodiazepine when used in combination with alcohol." 311 S.C. 289, 295, 428 S.E.2d 740, 743 (Ct. App. 1993). There, the defendant contended the testimony was improper because the witness "admitted that different 'benzos' have different effects and he did not know which benzodiazepine White had taken." *Id*. This court disagreed, determining that defendant's objections to the toxicologist's testimony went to the weight of the evidence and not its admissibility. *Id*. at 295, 428 S.E.2d at 743 (explaining that once a witness is qualified as an expert, any

question regarding the adequacy of the expert's knowledge goes to the weight of the testimony and not to its admissibility (citing *State v. Nathari*, 303 S.C. 188, 195, 399 S.E.2d 597, 602 (Ct. App. 1990))).

Although not specifically presented, Rock's education and experience are equivalent to the qualifications of the *Martin* forensic toxicologist. Here, the PCR court found, and Kranchick conceded, that "[Rock] was sufficiently qualified to testify regarding general toxicology as [a] 'person or scientist who analyzes biological specimens for the presence or absence of alcohol, drugs or other poisons that may be present.'" Thus, it is likely that objections to Rock's further testimony concerning the effects of the drugs would have been futile because the objections would have addressed the weight of the evidence, rather than its admissibility.

Moreover, even if trial counsel had successfully objected, thus limiting Rock's testimony to the mere presence of the drugs found in the blood testing, Kranchick cannot establish the probability of a different result at trial. Kranchick does not assert that Rock's testimony concerning the results of her blood testing was improper; thus, even if the trial court had limited Rock's testimony to an opinion as to the presence of the drugs—as opposed to their effect—there is no reasonable probability of a different result at trial. The jury would still have heard evidence that Kranchick had twenty to thirty times the normal levels of antihistamine and cough suppressant—and significantly high levels of marijuana metabolite—in her system at the time of the accident.

B. Other Evidence of Impairment

Lance Corporal Jeffrey Baker of the South Carolina Highway Patrol confirmed Kranchick was the driver at the time of the accident. When Baker first approached Kranchick at the scene, she was sitting in the driver's seat of the Ford Taurus but denied that she had been driving. Once Baker interviewed the other occupants of the Taurus, however, Kranchick admitted she was the driver. Baker testified Kranchick was confused about the direction in which she was traveling; appeared mellowed and disoriented; smelled of marijuana; and swayed and was unsteady on her feet. Kranchick refused to perform some of the field sobriety tests Officer

Baker attempted to administer; she failed a horizontal gaze nystagmus test and a vertical gaze test; and her eyes were "glassy" and "bloodshot."[4]

Baker opined Kranchick was "under the influence of something" due to her reactions to his questions, her appearance, her demeanor, her swaying, and her unsteadiness on her feet. Baker further explained that based on his interaction with Kranchick at the scene, he believed her ability to drive was impaired. *See State v. Ramey*, 221 S.C. 10, 13–14, 68 S.E.2d 634, 635 (1952) (stating "a lay witness may testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him" and "the weight of such testimony is for determination by the jury").

Other witnesses testified as to the erratic movement of the Taurus prior to the accident. Daniel Sharp, the injured passenger in decedent Croft's truck, first saw the Kranchick vehicle in the far left lane, in the gravel between the median and the roadway. Because the bobtail had a number of rearview mirrors, Sharp could see that the Taurus behind the truck was "losing it." Tracy Proctor, who witnessed the accident, also observed "a car completely out of control."

Sergeant Robert Lee of the South Carolina Highway Patrol's Multi-Disciplinary Accident Investigation Team (MAIT Unit) testified that no environmental factors contributed to the crash. Lee further testified that there was no indication of braking by Kranchick's vehicle until its yaw marks began in the area of the rumble strip next to the median.[5] According to Sergeant James Day, another accident reconstructionist with the MAIT Unit, Kranchick "went so far over that she lost

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[4] Trial counsel cross-examined Baker about whether the accident itself could have rendered Kranchick unsteady and disoriented. Baker testified that emergency personnel put a Band-Aid on Kranchick's arm for an airbag burn, and he gave her some time to compose herself before attempting the field sobriety tests.

[5] A rumble strip is the strip that alerts a driver when he or she begins to run off the road. A yaw mark is made by an out-of-control vehicle when the rear tire out-tracks the front tire. Here, the yaw marks started at the rumble strip and headed back to the center of the roadway. A yaw cannot occur in a braking situation. There were no skid marks at the scene to indicate emergency braking by Kranchick's vehicle prior to the accident.

control of her vehicle at the rumble strip and she over-corrected, causing it to go out of control."

In light of the overwhelming evidence that Kranchick was impaired at the time of the accident, we do not believe trial counsel's failure to object to Rock's testimony prejudiced the outcome of her case. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."); *Huggler v. State*, 360 S.C. 627, 634–35, 602 S.E.2d 753, 757 (2004) ("[G]iven the witnesses' testimonies on direct provided overwhelming evidence that sexual abuse did in fact occur, counsel's failure to object to the admission of the written statements did not prejudice the outcome of Respondent's case."); *State v. Goode*, 305 S.C. 176, 179–80, 406 S.E.2d 391, 393–94 (Ct. App. 1991) (holding evidence supported a finding that defendant was under the influence of alcohol at the time of an accident despite the lack of evidence concerning the defendant's BAC, where the road was straight with clear visibility, the defendant had a strong odor of alcohol on his breath, alcohol was found in his blood, and there was expert testimony that the accident occurred in the oncoming vehicle's lane, with the defendant speeding and not braking before impact).

Even without Rock's testimony "concerning the mental or physical effects of drugs" on Kranchick, we believe the State provided more than enough other evidence for a reasonable jury to conclude Kranchick was impaired at the time of this tragic accident. Had trial counsel objected to this testimony, the State would have further questioned Rock regarding his education, experience, and knowledge relating to the physical and mental effects of drugs on the human body. Because we find Rock's qualifications are equivalent to those of the forensic toxicologist in *State v. Martin*, *supra*, his testimony regarding the effects of marijuana metabolite and cold medicine would have been appropriate and within his scope of expertise. Therefore, we hold the PCR court erred in determining that "but for counsel's unprofessional errors," the result of Kranchick's trial would have been different.

Accordingly, the decision of the PCR court is

REVERSED.

LOCKEMY, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ken Bruning, Janet Bruning, David Feron, individually and as Trustee; Mary Feron, individually and as Trustee; Sally Saegmuller Haley and Terrell Page Haley, Individually and Co-trustees; Martha James and Don Haarmeyer, Individually and as Co-Trustees; and Pamela S. North, Appellants,

v.

SCDHEC and Cat Island POA, c/o Gary Meyer, Respondents.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer, Petitioner,

v.

SCDHEC, Respondent.

In Re: Garfield Park Phase 3.

Appellate Case No. 2014-002010

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 5449
Heard May 4, 2016 – Filed October 26, 2016

AFFIRMED IN PART AND REVERSED IN PART

John E. North, Jr., of North & Black, PC, of Beaufort, for Appellants.

Mary Duncan Shahid, Stephen Peterson Groves, Sr., and Angelica M. Colwell, all of Nexsen Pruet, LLC, of Charleston, for Respondent Cat Island POA, and Nathan Michael Haber, of Charleston, for Respondent South Carolina Department of Health and Environmental Control.

KONDUROS, J.: Ken Bruning and other homeowners in the Rookery subdivision of Cat Island (collectively, Appellants) in Beaufort County challenged the issuance of a National Pollutant Discharge Elimination System (NPDES) permit to Cat Island POA regarding stormwater management for Garfield Park, Phase 3, another subdivision on Cat Island. Appellants appeal the Administrative Law Court's (ALC's) order affirming the issuance of the permit raising numerous grounds. We reverse in part based on the misinterpretation of a provision of the Coastal Management Program (CMP) Document. We affirm other issues based on substantial evidence in the record, and we decline to address certain issues as they are no longer relevant in light of the disposition of other issues.

FACTS/PROCEDURAL BACKGROUND

Appellants are homeowners in the Rookery subdivision of Cat Island where their property is adjacent to a seven-acre lake (the Lake) that served as a detention pond for stormwater management. The dike creating the Lake was built between 1960 to 1965, prior to the implementation of stormwater control regulations. The Lake abuts Chowan Creek, which flows into the Atlantic Ocean. Construction of the Garfield Park development began in 2004, after the implementation of stormwater management regulations. Cat Island POA, the developer, obtained a NPDES permit that authorized detention of stormwater in the Lake as the stormwater management method for Garfield Park.

In 2009, the dike began to crack, allowing the fresh water in the Lake to empty into Chowan Creek and permitting salt water to ebb and flow into and out of the Lake bed. The dike was never repaired, and the Lake transformed into a muddy, marshy

area. Cat Island POA sought a permit from the South Carolina Department of Health and Environmental Control (DHEC) to manage stormwater from Garfield park by using in-line filters or "curb inlet baskets." These baskets would allow stormwater to flow through while catching sediment and other pollutants, preventing their passage into Chowan Creek. As a result, the Lake would no longer serve as a detention pond and eventually would naturalize back into marshland.

NPDES permit requests are reviewed by the Stormwater Permitting division of DHEC along with the Ocean and Coastal Resources Management Division (OCRM) of DHEC to ensure the proposed stormwater treatment is consistent with the CMP Document. DHEC approved Cat Island POA's application for the baskets. Appellants petitioned DHEC to revoke the permit based on numerous regulatory violations and deleterious effects the abandonment of the Lake would have on the environment and their property.

The DHEC Board (the Board) found the majority of Appellants' arguments unpersuasive. However, the Board did agree with Appellants regarding a provision of the CMP Document governing stormwater runoff and proximity to shellfish beds. Because DHEC had not considered the location of the shellfish beds at high tide, the Board determined DHEC's measurements were insufficient to establish the required distance from the beds.

Appellants challenged the Board's order as to the ruling on its numerous and varied alleged violations. DHEC and Cat Island POA (collectively, Respondents) appealed the portion of the Board's order finding they had not established sufficient distance from the shellfish beds to be consistent with the governing requirements of the CMP. The ALC reversed the Board's finding DHEC's shellfish bed measurement was insufficient and affirmed the Board's other conclusions. This resulted in the issuance of the permit being approved in toto. This appeal followed.

STANDARD OF REVIEW

According to section 1-23-610 of the South Carolina Code (Supp. 2015), "[t]he review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of evidence on questions of fact." Appellate courts confine their analysis of an ALC decision to whether it is:

> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (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.

S.C. Code Ann. § 1-23-610(B). "In determining whether the ALC's decision was supported by substantial evidence, the court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). Still, the court may reverse the decision of the ALC if it is based on an error of law or in violation of a statutory provision. *Id.*

LAW/ANALYSIS

I. Interpretation of CMP Provision Section XIII(A)

Appellants argue the ALC erred in concluding Cat Island POA's NPDES permit was compliant with Chapter III, Section C(3)(XIII)(A) of the CMP Document entitled Stormwater Runoff Storage Requirements. We agree.

Section C(3)(XIII)(A) states:

> For all projects, regardless of size, which are located within one-half (1/2) mile of a receiving water body in the coastal zone, this criteria shall be storage of the first 1/2 inch of runoff from the entire site or storage of the first one (1) inch of runoff from the built-upon portion of the property, whichever is greater. Storage may be accomplished through retention, detention or infiltration systems, as appropriate for the specific site.

The ALC concluded the language in this provision is "permissive, not mandatory: 'Storage *may* be accomplished through retention, detention or infiltration systems, as appropriate for the specific site.'" (emphasis added by ALC) (quoting Chapter III, Section C(3)(XIII)(A) of the CMP Document). Respondents assert, and the ALC agreed, the use of the term "may" and the phrase "as appropriate for the specific site" provide DHEC with latitude to permit use of the curb inlet baskets proposed in Cat Island POA's permit application.[1] We disagree.

"The issue of interpretation of a statute is a question of law for the court." *State v. Sweat*, 379 S.C. 367, 373, 655 S.E.2d 645, 648 (Ct. App. 2008). "We recognize the court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where . . . the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (citation omitted). "Regulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.'" *Kiawah Dev. Partners, II*, 411 S.C. at 33, 766 S.E.2d at 717 (quoting *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Generally, "[a] specific statutory provision prevails over a more general one." *Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999). "The use of the word 'may' signifies permission and generally means that the action spoken of is optional

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[1] Additionally, the ALC relied upon Regulation 72-301(5) of the South Carolina Code (2012), which addresses "Best Management Practices" in finding this provision permissive. Regulation 72-301(5) defines "Best Management Practices" 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." The ALC's order also cites to Regulation 72-305(B)(3) of the South Carolina Code (2012), which indicates for sites less than ten disturbed acres, "the use of measures other than ponds to achieve water quality improvements are recommended."

or discretionary unless it appears to require that it be given any other meaning . . . ." *Kennedy v. S.C. Retirement Sys.*, 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001) (holding "may" could not reasonably be interpreted to mean the inclusion of an employee's unpaid leave in the calculation of retirement benefits was optional, but merely contemplated that some retirees may not have unpaid leave to include); *see also Robinson v. State*, 276 S.C. 356, 358-59, 278 S.E.2d 770, 771 (1981) (interpreting "may" as a mandatory term based on the context and legislative history of a statute proscribing certain jurisdiction in magistrate's court); *T.W. Morton Builders, Inc., v Buedingen*, 316 S.C. 388, 402-03, 450 S.E.2d 87, 97 (1994) (concluding "may" was mandatory in a provision dealing with attorney's fees secured by a mechanic's lien). "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). When interpreting a law, courts must presume a futile act was not intended and that the law intends to accomplish something. *Sweat*, 379 S.C. at 377, 655 S.E.2d at 651.

Applying the various rules of construction cited above, we conclude the ALC erred in construing the provision to permit use of the curb inlet baskets. Section C (3)(XIII)(A) states the first half inch of runoff "shall" be stored. Therefore, the requirement of storage is mandatory. Richard Geer, the DHEC engineer associate who reviewed and approved the permit application, testified at the hearing. With regard to the basket system, he stated "[i]t doesn't store. It filters that half inch of runoff."

Section C(3)(XIII)(A) further provides three options by which storage may be accomplished—detention, retention, and infiltration. With respect to infiltration, it is defined as "the passage or movement of water through the soil profile." S.C. Code Ann. Regs. 72-301(22) (2012). Infiltration inherently provides for storage as stormwater does not flow directly into the receiving body, but leeches into the soil profile over a period of time. Geer testified, and Respondents concede, the curb inlet baskets are not a method of infiltration. The use of the term "may" does not automatically render the requirements of this provision optional. Applying the maxim *inclusio unius est exclusio alterius*, the inclusion of the three named alternatives—retention, detention, and infiltration—as options implies other methods of treating the stormwater are excluded. Furthermore, the Best Management Practices cited to in the ALC's order are general, while the provision governing the storage of runoff in this case is specific and therefore, controlling.

Finally, the language "as appropriate for the site" cannot give unfettered discretion to permit a method of stormwater treatment that does not otherwise meet the established criteria. Such a construction would render the provision meaningless and futile. Reasonably interpreted, that language simply provides DHEC with the authority to consider that one of the three enumerated methods of stormwater management may not be appropriate for a particular site based on factors such as the soil profile.

Based on all of the foregoing, we conclude the ALC misinterpreted this provision as permissive. Therefore, because the method of stormwater management approved in Cat Island POA's permit is inconsistent with this provision, the permit should not have been granted, and the ALC's decision affirming that approval is reversed.

II. Modification of Existing Permit

Next, Appellants argue Cat Island POA had an ongoing obligation to maintain the stormwater treatment system approved in 2004 and in order to modify that system, the developer must show a condition for modification was present under the applicable regulations. According to Regulation 61-9.122.62(a):

> When the Department receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see section 122.41), receives a request for modification or revocation and reissuance under section 124.5, or conducts a review of the permit file), it may determine whether or not one or more of the causes listed in paragraph (d) and (e) of this section for modification or revocation and reissuance or both exist.

S.C. Code Ann. Regs. 61-9.122.62(a) (2011). One of the justifications for modification listed in subsection (d) of the regulation states modification may be allowed if there are "material and substantial alterations to the permitted facility . . . which justify the application of permit conditions that are different or absent in the existing permit." S.C. Code Ann. Regs. 61-9.122.62(d)(1) (2011).

Geer testified the regulations are binding on OCRM and the retrofit project. He further testified the regulation appeared "to allow for the modification that was requested." However, he also stated he had not read through the regulation but opined a request for modification made under the regulation could have been granted due to "material and substantial alterations or additions to the permitted facility" quoting the language from subsection (d)(1).

While this regulation was raised to the ALC, it was not addressed in the final order. Appellants raised the issue again in their motion to reconsider. The ALC denied the motion and did not mention this regulation or its applicability to the case.

We conclude Cat Island POA's Application constituted a modification and DHEC should have considered it as such under the applicable regulations. We cannot determine from the record whether circumstances justifying a modification pursuant to Regulation 61-9.122.62(d) of the South Carolina Code existed. However, even if such circumstances were present, the curb inlet baskets still do not meet the requirements of the provision discussed in Section I of this opinion. Therefore, although we determine the modification regulations should have been considered, we do not decide whether this change was a permissible modification.

III. Waiver of Water Quantity Requirements

Appellants contend the ALC erred in affirming DHEC's decision to waive certain water quantity requirements for NPDES permits pursuant to Regulation 72-302(b)(2)(a) of the South Carolina Code (2012). This issue relates specifically to DHEC's evaluation of Cat Island POA's application assuming the curb inlet baskets were an otherwise appropriate method of stormwater treatment. Because we determined the permit should not have been granted based on its inconsistency with Chapter III, Section C(3)(XIII)(A) of the CMP document, Stormwater Runoff Storage Requirements, we decline to address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address an issue when the determination of another issue is dispositive).

IV. Alteration of the Critical Area

Under the Coastal Tidelands Act and the CMP document, when dealing with a critical area, DHEC is required to consider the extent to which a project would impact the environment. S.C. Code Ann. § 48-39-30 (2008). "Critical area" is

defined as "(1) coastal waters; (2) tidelands; (3) beaches; [or] (4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in [s]ection 48-39-280." S.C. Code Ann. § 48-39-10(J) (2008).

The ALC determined the Retrofit Project does not alter the critical area and even if it did, it would be exempt under section 48-39-130(D)(3) of the South Carolina Code (2008). According to that section of the Coastal Tidelands Act, it is not necessary to apply for a permit if the activity is "[t]he discharge of treated effluent as permitted by law; provided, however, that the department shall have the authority to review and comment on all proposed permits that would affect critical areas." § 48-39-130(D)(3). Further, the ALC found the Retrofit Project was to be conducted in the uplands rather than in the critical area and the alteration to the critical area happened in the 1960s when the dike was installed and a tidal salt marsh became an open water pond.

We do not need to reach this issue, as we hold the Retrofit Project was approved in violation of Chapter III, Section C(3)(XIII)(A) of the CMP Document.

V. Proximity to Shellfish Beds[2]

Appellants contend the ALC erred in reversing the Board's decision finding DHEC's measurements from the stormwater flow to nearby shellfish beds insufficient to support DHEC's approval of the NPDES permit. We disagree.

Chapter III, Section C(3)(XIII)(A) of the CMP Document, Stormwater Runoff Storage Requirements, previously discussed in Section I, goes on to address the proximity of stormwater runoff to shellfish beds. It states: "In addition, for those projects which are located within 1,000 (one-thousand) feet of shellfish beds, the first one and one-half (1 ½) inches of runoff from the built-upon portion of the

[2] Because this issue is not tied directly to using curb inlet baskets to manage stormwater from Garfield Park, and for the sake of judicial economy, we will address it. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 599, 553 S.E.2d 110, 119 (2001) (addressing an issue for the sake of judicial economy and to prevent further litigation between the parties).

property must be retained on site."[3] The ALC found the shellfish beds were not within the one thousand-foot zone.

To determine whether the permit would violate the 1,000 foot prohibition, DHEC and Cat Island POA's engineer measured the path stormwater would follow from the nearest outfall pipe for Garfield Park toward the shellfish bed. This path was a "defined drainage pathway" in the bottom of Chowan Creek and measured at low tide. On appeal, the Board determined DHEC's measurements were insufficient because they did not take high tide into consideration and because stormwater moving through high tide would take a more direct path toward the shellfish bed rather than following the trench drainage path. Respondents appealed that determination.

At the hearing, Respondents submitted measurements that did consider high tide—a measurement of 1,002 feet. Appellants continued to contend their measurements were correct. Those measurements were made from a different outfall pipe it believed carried stormwater from Garfield Park and gave far less consideration to the defined drainage pathway. The ALC determined Respondents' measurements were more credible than those taken by Appellants' surveyor and engineer. Appellants argue in their brief that Respondents admit their measurements were from the wrong starting point. However, a closer reading of the testimony indicates this is a mischaracterization. Geer answered questions posed as

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[3] We conclude the issue regarding the term "located" as framed by the dissent is not specifically argued by Appellants on appeal, nor was it presented below. Therefore, we do not believe this precise issue is preserved for review. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))). Furthermore, we are not persuaded the term located, in the context of a regulation concerning the flow of stormwater, would necessarily be controlled by the interpretation of that term in the types of cases relied upon by the dissent.

hypotheticals, and never indicated his measurement was from an incorrect starting point.

It is somewhat concerning that Respondents' measurements are so close to the prohibited area. Such a case may warrant erring on the side of caution and protecting the shellfish beds. However, the 1,000-foot distance is an established bright line, and the appellate court is not to substitute its judgment for that of the ALC. *See Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 249, 772 S.E.2d 505, 508 (2015) ("An appellate court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact."). Because reasonable minds could reach the same conclusion as the ALC, we conclude substantial evidence in the record supported its findings on this issue. *See Murphy*, 396 S.C. at 639, 723 S.E.2d at 94-95 (2012) ("When finding substantial evidence to support the ALC's decision, the court need only determine that, based on the record as a whole, reasonable minds could reach the same conclusion.").

VI. Consistency with the CMP

Appellants argue the Retrofit Project was not consistent to the maximum extent practicable with the CMP and therefore, the ALC erred in approving it. Because we find the ALC erred in its reading of Chapter III, Section 3(C)(XIII)(A) of the CMP Document, we agree the Retrofit Project was not consistent to the maximum extent practicable with the CMP.

VII. Alteration of Freshwater or Brackish Wetlands

Appellants contend the ALC erred in approving DHEC's granting the NPDES permit because the permit will violate the section of the CMP governing residential development that states, "Residential development which would require filling or other permanent alteration of salt, brackish or freshwater wetlands will be prohibited, unless no feasible alternative exist or an overriding public interest can be demonstrated, and any substantial environmental damage can be minimized."

Again, this issue relates specifically to DHEC's evaluation of Cat Island POA's NPDES permit application assuming the curb inlet baskets were an otherwise appropriate method of stormwater treatment. Because we determined the permit should not have been granted based its inconsistency with Chapter III, Section 3(C)(XIII)(A) of the CMP Document, Stormwater Runoff Storage Requirements,

we decline to address this issue. *See* Futch, 335 S.C. at 613, 518 S.E.2d at 598 (holding an appellate court need not address an issue when the determination of another issue is dispositive).

VIII. Stormwater Treatment for Tabby Park

Appellants argue the ALC erred in approving the permit because it eliminated the proper stormwater treatment for Tabby Park, an adjacent subdivision on Cat Island. We disagree.

According to the ALC's order, Appellants did not produce evidence to refute DHEC's conclusion that none of the other developments on Cat Island relied on the Lake for stormwater treatment. Further, the ALC noted Appellant's engineer, Christopher Moore, agreed the permitting file for Tabby Park contained no information showing reliance on the Lake. Moore was asked if he saw any indication Tabby Park relied upon the Lake to detain water. He answered "[f]rom the information that I saw or that I had access to, I did not see anything." We agree with Respondents and the ALC the record contains no evidence of Tabby Park's reliance on the lake for its stormwater treatment. Therefore, DHEC was not required to consider the Retrofit Project's effect on that subdivision.

IX. Repair of the Dike

Appellants argue the ALC erred in not requiring Cat Island POA to repair the dike pursuant to the agreement between DHEC and Cat Island POA that was part of the 2004 NPDES permit for Garfield Park. We disagree.

"[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994).

The agreement to keep the dike in repair is an underlying obligation intrinsically tied to the 2004 NPDES permit. Cat Island POA is not restricted from managing Garfield Park's stormwater in a different way, provided that method is consistent with the applicable governing statutes, regulations, and provisions. While Appellants are incidental beneficiaries of the method of stormwater treatment contemplated by the 2004 permit—living adjacent to a seven-acre lake— they lack standing to compel DHEC to force repair of the dike.

CONCLUSION

We reverse the ALC's finding Cat Island POA's NPDES permit application was in compliance with Chapter III, Section 3(C)(XIII)(A) of the CMP Document. We further conclude the NPDES permit application did constitute a modification of the 2004 permit and therefore should have been evaluated under the relevant provisions related to modifications of permits. Additionally, for the sake of judicial economy, we affirm the ALC's finding the shellfish beds of Chowan Creek were outside the one thousand-foot area requiring retention of stormwater on site, affirm the ALC's conclusion treatment of stormwater for Tabby Park via the detention pond was not established at trial, and affirm the ALC's ruling Appellants could not compel DHEC to force repair of the dike pursuant to the agreement between DHEC and Cat Island POA. We decline to address the remaining issues raised as they relate to evaluation of the Cat Island POA's NPDES permit application providing for the use of curb inlet baskets. Therefore, the ALC's order is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF, J., concurs.

GEATHERS, J., concurring in part and dissenting in part in a separate opinion: I concur with most of the majority opinion. However, I must depart with the majority's analysis in section V pertaining to the project's proximity to shellfish beds.

Initially, I disagree with the majority's statement that the question of interpreting the shellfish bed provision in the Stormwater Runoff Storage Requirements is unpreserved. In Appellants' request for a contested case hearing, they referenced, through incorporation of an attached exhibit, the shellfish bed provision as one of the grounds on which they sought a hearing. This ground logically subsumes the question of the provision's interpretation, as evidenced by the ALC's discussion of interpretation in its order. Further, the ALC noted that Appellants submitted a survey reflecting "a straight line path of the stormwater flow." Appellants referenced this straight-line survey as well as their rope measurements in their opening statement at the hearing. Moreover, Appellants sufficiently argued in their appellate brief that the provision's plain language requires a direct measurement rather than the serpentine measurement employed by DHEC: "Nowhere in the

CMP is there any description of a distance based on some alleged winding drainage pathway. The language simply and clearly refers to projects 'which are located' within 1,000 feet of shellfish beds. The ALC erred when it failed to simply determine that distance without regard to some winding pathway for the stormwater."

Accordingly, the question of the provision's interpretation is undoubtedly preserved for review. Even if there were some doubt as to preservation, we note Cat Island POA and DHEC have not asserted in their joint brief that this question is unpreserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012), Toal, C.J. (concurring in result in part and dissenting in part) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation. When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw."). Therefore, I would resolve any possible doubt as to preservation in favor of Appellants on this important question.

Additionally, I disagree with the majority's application of the substantial evidence rule to the ALC's findings concerning shellfish beds before addressing whether those findings are based on a correct reading of the law. *See* S.C. Code Ann. § 1-23-610(B)(d) (Supp. 2015) (allowing this court to reverse the ALC's decision if it is affected by an error of law). The underlying question of law raised by Appellants is whether the retention requirement for projects within 1,000 feet of shellfish beds allows the method of measurement used by DHEC in this case.

"In interpreting a statute,[4] the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute." *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011). The plain language of the CMP Document's Stormwater Runoff Storage Requirements states, in pertinent part, "[F]or those projects which are *located*

[4] Regulations are interpreted using the rules of statutory construction. *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012).

within 1,000 (one thousand) feet of shellfish beds, the first one and one half (1 1/2) inches of runoff from the built-upon portion of the property must be retained on site." (emphasis added). There are no words directing that the distance between the project and the shellfish beds be measured in any way other than a straight line. *Cf. Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 220-21, 516 S.E.2d 442, 448 (1999) (discussing a zoning ordinance prohibiting the location of an adult entertainment establishment within 500 feet of a residential district and stating, "This Court requires distance measurements of this nature be done 'as the crow flies'" (citing *Brown v. State*, 333 S.C. 238, 240-41, 510 S.E.2d 212, 213 (1998))); *Brown*, 333 S.C. at 240-41, 510 S.E.2d at 213 (discussing a statute prohibiting distribution of a controlled substance within one-half mile radius of a school and stating, "Courts addressing the issue have uniformly held proximity is measured in a straight line, or 'as the crow flies'").[5]

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[5] *Compare Evans v. Thompson*, 298 S.C. 160, 162-63, 378 S.E.2d 618, 620 (Ct. App. 1989) (discussing a statute prohibiting the issuance of a mini bottle license to a business located within 300 feet of a church, school or playground as measured by the shortest route of ordinary pedestrian or vehicular travel along the public thoroughfare, and stating, "The statute is *explicit* in requiring that the route be over a public thoroughfare; the route prescribed by the [Alcoholic Beverage Control] Commission is not over a public thoroughfare; it is therefore erroneous" (emphasis added)), *with Taylor Drug Stores, Inc. v. Ind. Alcoholic Beverage Comm'n*, 497 N.E.2d 932, 936 (Ind. Ct. App. 1986) (discussing a statute prohibiting the issuance of a permit to sell alcoholic beverage for premises if a wall of the premises is within 200 feet from a wall of a school or church and stating, "In interpreting the appropriate means of measurement, we are guided by the terms within the statute. A statute may specify the precise terminal points to be used in a measurement, but in the absence of an express provision, the general rule is that measurement should be along *the shortest straight line* connecting a church and the proposed premises, regardless of intervening obstacles. [The license applicant's] initial argument, that the measurement should be based on a line of pedestrian travel from doorway to doorway, *strains our reading of the plain and ordinary meaning of the statute*. Nowhere does the statute state that the proposed premises must not be situated within a 'walking' distance of 200 feet from a church 'doorway'" (emphases added) (citations omitted)).

While the interpretation of a statute by the agency charged with its administration "will be accorded the most respectful consideration," an agency's interpretation "affords no basis for the perpetuation of a patently erroneous application of the statute." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575-76 (2010) (quotation marks omitted); *see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014) ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)); *id.* at 39, 766 S.E.2d at 720-21 ("Our role is to apply and interpret, not rewrite, regulations. Where the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper."); *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." (citation omitted)).

It is undisputed that neither DHEC nor Cat Island POA measured the distance between the project and the shellfish beds in a straight line. Therefore, I would reverse the ALC's conclusion that deference should be given to DHEC's interpretation of the shellfish bed provision in the CMP Document's Stormwater Runoff Storage Requirements, and I would reverse the ALC's findings concerning the distance between the project and the shellfish beds because they are based on this error of law.

Based on the foregoing, I concur in reversing the ALC's order upholding DHEC staff's Consistency Determination, but I respectfully dissent from affirming the ALC's findings pertaining to the distance between the project and shellfish beds.