OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 47

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Colleton County Taxpayers Association, Edisto Beach Property Owners Association, Inc., South Carolina Public Interest Foundation, David Cannon, Joseph Mire, Marion Rizer, and Randy White, individually, and on behalf of all others similarly situated, Plaintiffs,

v.

The School District of Colleton County, Superintendent Charles W. Gale, Jr., SCAGO Educational Facilities Corporation for Colleton School District, Miles Crosby, Rachel Farris, Redell Fields, P. A. Pournelle, III, and Wayne Shider, Defendants.

ORIGINAL JURISDICTION

Opinion No. 26240
Heard October 31, 2006 – Filed December 11, 2006

DECLARATORY JUDGMENT ISSUED

James G. Carpenter, of the Carpenter Law Firm, of Greenville, for Plaintiffs.

Francenia B. Heizer, Robert L. Widener, and Paul D. Harrill, all of McNair Law Firm, of Columbia, for Defendants.

CHIEF JUSTICE TOAL: This original jurisdiction case involves a contractual arrangement entered into by the School District of Colleton County ("the School District") and whether this arrangement is illegal in light of the South Carolina Constitution's limits on the amount of debt a public school district may incur. We hold that the arrangement complies with the relevant constitutional provisions and statutes.

FACTUAL/PROCEDURAL BACKGROUND

In September 2006, the School District adopted a complicated resolution designed to renovate its existing public school facilities and acquire new public school facilities.[1] In its simplest terms, this resolution is an agreement between the School District and the South Carolina Association of Governmental Organizations ("SCAGO").

Under the resolution, SCAGO is obligated to create a non-profit corporation ("the Corporation") which will fund the renovation and construction of the county's public schools. The resolution requires the School District to convey the existing school facilities to the Corporation and

[1] The School District adopted a similar resolution in July 2006. At the relevant September meeting, the Board repealed the previous resolution and enacted the one at issue.

to lease the land on which these facilities sit to the Corporation.[2] The Corporation will then issue corporate revenue bonds to fund the renovation of the existing facilities and the construction of new school facilities, and will also appoint the School District as the Corporation's agent to oversee the renovation and construction. The resolution further provides that the School District may purchase the renovated or newly constructed facilities by making annual installment payments to the Corporation.[3]

In August 2006, several Colleton County citizens and taxpayer organizations ("Plaintiffs") sued the School District and the other Defendants (collectively "Defendants") in the circuit court for Colleton County. This suit requested that the court declare that the resolution and its attendant agreements contained numerous violations of the South Carolina Consolidated Procurement Code, *see* S.C. Code Ann. §§ 11-35-10 to -5270 (Supp. 2005), and that the scheme constituted a "financing agreement" which would impact the amount of the School District's outstanding general obligation debt.[4] The Plaintiffs contemporaneously requested a temporary restraining order to stop the School District from issuing general obligation bonds to raise cash for its first installment payment. The circuit court heard

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[2] This process is detailed in the document titled "Base Lease and Conveyance Agreement."

[3] The resolution and its attendant agreements anticipate that the Corporation will issue approximately $90 million worth of bonds to fund the renovation and construction. The repurchasing process is detailed in the document titled "Installment Purchase and Use Agreement."

[4] The South Carolina Constitution provides that a public school district may incur general obligation debt only in an amount less than or equal to the value of eight percent of the total assessed property value in that district unless a majority of voters in the school district, by referendum, provide otherwise. S.C. Const. art. X, §§ 15(5) and (6). This value for the School District is approximately $12 million. The date of the Plaintiffs' complaint precedes the resolution at issue in this case because the Plaintiffs originally challenged the first resolution enacted by the School District.

this motion the same day the Plaintiffs filed the complaint and denied the request the following day.

At the Defendants' request, this Court removed this case from the circuit court and agreed to hear the matter in the Court's original jurisdiction. Following the grant of original jurisdiction, this Court accepted additional pleadings regarding summary judgment as well as an amended complaint and a supplemental answer. Accordingly, all issues before the Court involve competing requests for declaratory judgments raised either by the unresolved motion for summary judgment or the amended complaint and answer.[5]

The parties present the following issues for review:

I. Do the resolution and its attendant agreements constitute a "financing agreement," and if so, has the School District exceeded its allowable amount of outstanding general obligation debt?

II. Do the resolution and its attendant agreements violate the terms of two prior referenda?

III. Is the Corporation the agent or alter-ego of the School District and thus subject to the South Carolina Constitution's outstanding general obligation debt limit?

IV. Do the resolution and its attendant agreements violate the School District's procurement code and is the School District's "professional services exception" to its procurement code valid?

[5] The Defendants' original and amended answers contain counterclaims for declaratory judgments that the resolution and its attendant agreements do not violate the relevant procurement procedures and that the scheme does not impermissibly impact the amount of the School District's outstanding general obligation debt.

V. Did the School District have a "valid public purpose" for its September issuance of general obligation bonds?[6]

LAW/ANALYSIS

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). This case primarily involves the interpretation of statutes, which are questions of law. *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

I. Financing Agreement/Constitutional Debt Limit

The Plaintiffs argue that the resolution and its attendant agreements constitute a "financing agreement" and that the School District has exceeded its allowable amount of outstanding general obligation debt. We disagree.

S.C. Code Ann. § 11-27-110 (B) (Supp. 2005) provides that unless a governmental entity obtains voter approval, the entity may not enter into a "financing agreement" if the sum of the "principal balance" of the financing agreement and the amount of the entity's outstanding bonded debt at the time of execution exceeds eight percent of the assessed value of taxable property

[6] This catalogue of the issues differs slightly from the manner in which the parties organized their briefs. We have listed the issues according to the causes of action presented in the Plaintiffs' amended complaint. For the sake of convenience, we have grouped the Plaintiff's fourth, fifth, sixth, seventh, and eighth causes of action together under Issue IV, which deals with the School District's procurement code. Similarly, the Plaintiffs' ninth cause of action, which deals with whether the School District or the Corporation is the entity ultimately responsible for the school renovation and construction, falls under Issues III (alter-ego) and IV (procurement code).

in the entity's jurisdiction.[7] The Code defines a "financing agreement" in section 11-27-110 (A)(6), and it is undisputed that the agreement at issue in this case does not qualify as a financing agreement under the version of the statute reproduced in the 2005 Code Supplement.[8]

Act No. 388 of 2006, however, substantially revised § 11-27-110 (A)(6), and it is these revisions that have led to the current dispute. Under revised § 11-27-110 (A)(6), a financing agreement includes:

> any [contract] entered into after August 31, 2006, *pursuant to which installment payments of the purchase price are to be paid* by a school district or other political subdivision to a non-profit corporation, political subdivision, or any other entity, *from any source other than the issuance of general obligation indebtedness by the school district*, in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities.

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[7] Thus, this statute parallels the South Carolina Constitution's limit on the amount of bonded debt a school district may carry.

[8] Specifically, this version of the statute provides that a financing agreement means a contract under which a governmental entity (1) acquires the use of an asset, (2) makes payments in more than one fiscal year, (3) divides the payments into principal and interest components, and (4) acquires title to the asset if all scheduled payments are made. S.C. Code Ann. § 11-27-110 (A)(6) (Supp. 2005). The agreements at issue here meet requirements one and two, however, the agreements do not provide for payments to be divided into principal and interest components.

Furthermore, under these agreements, title to the renovated and newly constructed school facilities is not contingent upon the School District's satisfying the entire amount of corporate bonds issued by the Corporation. Instead, the Corporation transfers title to an undivided interest in the facilities to the School District each time a payment is made.

Part V, Section 4, Act No. 388, 2006 S.C. Acts 3133, 3166-68 (emphasis added). The Plaintiffs allege the resolution and its attendant agreements meet this definition.[9]

As the statute instructs, the application of the revised definition of a "financing agreement" in this case turns on the source of the funds that the School District will use to make installment payments to the Corporation. The Plaintiffs argue that although the School District manifests an intention to use constitutionally permissible amounts of general obligation debt to raise funds for the installment payments, the agreements use permissive terms that do not restrict the School District to using only general obligation debt. To counter, the School District argues that it intends to make installment payments using only funds derived from the issuance of general obligation debt, and that the permissive terms are used exclusively to protect the School District's rights (1) to opt out of making the payments at any time (an event generally referred to as "non-appropriation") and (2) to use other funds that may be appropriated by another entity for this purpose in the future.

A close examination of the scheme here at issue reveals no violations of the relevant constitutional or statutory provisions. The resolution and its attendant agreements specifically provide that the School District is not obligated to make any payments to the Corporation unless the School District appropriates funds for that purpose. Furthermore, unless and until the School

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[9] Revised § 11-27-110 (A)(6) provides additional definitions of arrangements that constitute financing agreements. These definitions include:

> any contract entered into after December 31, 2006, pursuant to which installment payments of the purchase price are to be paid by a school district or other political subdivision to a non-profit corporation . . . in order to finance the acquisition, construction, renovation, or repair of school buildings or other school facilities.

Id. The School District does not dispute that the resolution and its attendant agreements would meet the definition of a financing agreement if executed after December 31, 2006.

District appropriates funds for an installment payment from a source other than the issuance of general obligation indebtedness, this claim is speculative and thus not ripe for judicial review. *See Waters v. South Carolina Land Res. Conservation Comm'n* , 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996) (stating that an issue that is contingent, hypothetical, or abstract is not ripe for judicial review).

The crux of the Plaintiffs claim goes to the fund raising/repayment scheme on which they allege the School District plans to embark. To make installment payments to the Corporation, the Plaintiffs allege that the School District plans to use revenues to retire a portion of its outstanding general obligation debt, and then issue new general obligation bonds to raise proceeds for the installment payments. The Plaintiffs assert that this bond retirement/re-issuance scheme will occur on an annual basis, and that this process violates § 11-27-110(A)(6)'s requirement that, to avoid classification as a "financing agreement," the installment payments must come from "the issuance of general obligation indebtedness."

While not entirely unpersuasive, this argument overlooks the inescapable fact that the scheme put in place by the resolution and its attendant agreements complies with the letter of the statute's requirements. Undoubtedly, a school district possesses the authority and ability to use revenue to retire a portion of its general obligation debt. Furthermore, the law clearly supports the proposition that a school district may incur general obligation debt provided the school district remains within the constitutional and statutory limits. We are aware of no authority permitting this Court to regulate a school district's activities of this type absent a violation of a constitutional or statutory limitation.

Our jurisprudence in a similar area supports this conclusion. On several prior occasions, numerous South Carolina school systems have struggled with how to finance their infrastructural growth while remaining within the boundaries of their constitutional and statutory general obligation debt limitations. At one time, alternative financing arrangements known as "lease-purchase" agreements were a popular means by which school districts sought to achieve these goals. Under these agreements, a school district

would typically lease its land and buildings to a non-profit corporation for a long period of time. After execution of the lease, the corporation would privately raise funds to finance the school renovation and construction, and the corporation would lease the new and renovated facilities back to the school district until the school district had repaid the principal and interest necessary to fund the construction.

As occurred in the instant case, taxpayers challenged these arrangements as violating the relevant limits on a school district's general obligation indebtedness. In both *Redmond v. Lexington County Sch. Dist. No. Four*, 314 S.C. 431, 445 S.E.2d 441 (1994), and *Caddell v. Lexington County Sch. Dist. No. 1*, 296 S.C. 397, 373 S.E.2d 598 (1988), this Court held that lease-purchase arrangements did not constitute general obligation debt as defined under Article X, § 15 of the South Carolina Constitution. *Caddell* represents this Court's first pronouncement on the subject, and in that case, the Court began by examining the Constitution's definition of general obligation debt. 296 S.C. at 399-400, 373 S.E.2d at 599. Noting that this definition included only debt that is "secured . . . by a pledge of [the school district's] full faith, credit and taxing power," this Court held that the lease-purchase agreements did not implicate the school district's constitutional debt limit. *Id* . at 400, 373 S.E.2d at 599. The Court stated:

> In its historical context, general obligation debt refers to that which is "ultimately secured by taxes on the property within the political entity." Thus, general obligation debt embraces neither yearly expenses payable from current revenues nor contingent liabilities of the governmental entity. This is so because the governmental entity is not obligated to impose property taxes for their payment.
> ***
> Similarly, a leaseback arrangement containing an explicit non-appropriation clause places no such requirement on the political entity. . . . Liability under the leaseback arrangement is, at most contingent: The District has the option of terminating simply by refusing to appropriate money for rent.

Id. (footnotes omitted).

Although the instant case involves an "installment-purchase" agreement and not a "lease-purchase" agreement, we believe that much of *Caddell*'s reasoning nonetheless applies. As we stated in *Caddell*, and reiterated in *Redmond*:

> The premise of the plaintiffs' argument that the plan for financing and construction . . . is a fraud or works an injustice upon the city's taxpayers is that it is a device to accomplish, by change of form with no change of substance, the same result which has been rejected by the voters. This premise is faulty. It is not the construction . . . for which voter approval is required . . . . Rather, it is the creation of a general obligation debt . . . which requires the assent of the voters. The plan submitted to and rejected by the voters would have created such a general obligation debt. The plan now proposed does not. This difference is constitutionally significant.

Redmond, 314 S.C. at 434, 445 S.E.2d at 443; *Caddell*, 296 S.C. at 401-02, 373 S.E.2d at 600 (quoting *Guide v. City of Lakewood*, 636 P.2d 691, 697 (Colo. 1981) (internal citations and internal emphasis omitted)).

Although it presented the identical issue dealt with in *Caddell*, *Redmond* is particularly informative because it added the element of an expression of legislative dissatisfaction with school districts' use of lease-purchase arrangements. Specifically, at the time this Court rendered its decision in *Redmond*, legislation requiring that the amount expended in a lease-purchase agreement be counted towards a school district's general obligation debt limit had passed the South Carolina Senate and was under consideration in the South Carolina House of Representatives. *See Redmond*, 314 S.C. at 434-35, 445 S.E.2d at 443. This Court stated, "[i]f this bill is eventually passed . . . the Defandant's position will obviously not merit the same result reached in *Caddell* and in this case. Until the legislature has definitively spoken on this issue, however, we must apply the law as it currently exists." *Id*.

Turning to the instant case, revised § 11-27-110(A)(6), particularly the definition in effect after this coming December 31, clearly represents a legislative pronouncement of the type discussed in *Redmond*. Unlike *Redmond*, this case involves legislation which has been passed by the Legislature, signed by the Governor, and is now effective. However, as in *Redmond*, the instant case involves a scheme which complies with the letter of the statutes currently in effect.

The portion of § 11-27-110(A)(6) currently in effect requires only that the school district use funds derived from the issuance of general obligation debt to make payments under an installment-purchase agreement. So long as the School District abides by this requirement, they have not violated the statute's requirements.

Accordingly, we deny the Plaintiffs' request for a declaratory judgment that the resolution and its attendant agreements are "financing agreements" which implicate the School District's constitutional and statutory debt limits. Additionally, and in accordance with the Defendants' request, we hereby issue a declaratory judgment that the resolution and its attendant agreements are in compliance with the relevant constitutional and statutory provisions and limitations.

II. Violations of Prior Referenda

The Plaintiffs argue that the resolution and its attendant agreements violate the results of two prior referenda which denied the School District the right to exceed its general obligation debt limit. We disagree.

In 1998, the citizens of Colleton County rejected a referendum which would have allowed the School District to issue approximately $42 million in general obligation bonds; well in excess of the School District's general obligation debt limit. Similarly, in 1999, voters rejected a resolution which would have allowed the School District to issue approximately $39.5 million in general obligation bonds. The Plaintiffs claim that a decision of the

School District which results in an increase of the School District's general obligation debt beyond its debt limit violates the results of these referenda.

We hold that this claim does not state a cause of action. The relevant question is whether the School District has violated the constitutional or statutory limits on the amount of outstanding general obligation debt it may incur. The Plaintiffs provide no authority supporting the proposition that a referendum which is wholly rejected (and therefore a nullity) can form the basis of a legal claim.

Accordingly, we grant the Defendants' motion for summary judgment as to this claim on the grounds that it fails to state a cause of action.

III. Alter-Ego/Agency

The Plaintiffs argue that the Corporation is the alter-ego of the School District. Accordingly, the Plaintiffs argue that the Corporation is subject to the general obligation debt limit the South Carolina Constitution imposes on a school district. We disagree.

An alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby. *Peoples Fed. Sav. & Loan Assoc. v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992). Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity. *Id*. However, this theory does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice. *Id*; *see also Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367-68, 271 S.E.2d 596, 600 (1980) (holding that control, in and of itself, is not sufficient. It is necessary to show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy).

A grant of summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Tupper v. Dorchester*

County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Furthermore, when a motion for summary judgment is made and properly supported, an adverse party may not rest solely upon the allegations or denials in his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRCP.

To support their alter-ego cause of action, the Plaintiffs' amended complaint alleged that the School District or its agents would create the Corporation and select the Corporation's directors, and also that the Corporation would have "no purpose other than to do the will of the School District." In their motion for summary judgment, the Defendants relied in large part on the affidavit of the chairman of SCAGO's board of directors which directly refuted the Plaintiffs' allegations. Specifically, this affidavit established that SCAGO, not the School District, would form the Corporation, appoint the board of directors, approve the Corporation's by-laws, and oversee the Corporation's functions. The affidavit further established that SCAGO is a South Carolina non-profit corporation that was formed in 2002 and that the School District does not have control over SCAGO, nor does it have financial ties to SCAGO.

As the evidence illustrates, the affidavit offered by the Defendants in support of their motion for summary judgment directly refutes the allegations raised in the Plaintiffs' alter-ego claim. The Plaintiffs have not contested the substance of this affidavit, nor have they set forth any specific facts showing that there is a genuine issue for trial on this claim. Accordingly, there is no impediment to our deciding this claim on summary judgment.

Viewing the evidence in the light most favorable to the Plaintiffs, there is simply no support for the conclusion that the Corporation is the alter-ego of the School District. Our alter-ego jurisprudence instructs that the issues of domination and control over one entity by another are two touchstones of the relevant analysis. In the instant case, there is no evidence suggesting the existence of either of these conditions.

For this reason, we grant the Defendants' motion for summary judgment and hold that the Corporation is not the alter-ego of the School District.

In addition to an alter-ago claim, the Plaintiffs allege that the Corporation will be acting as the agent of the School District. Accordingly, the Plaintiffs' contend that the Corporation is bound by the School District's general obligation debt limit because an agent may possess no more authority than the principal. We disagree.

"An agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties." *Thompson v. Ford Motor Co.*, 200 S.C. 393, 414, 21 S.E.2d 34, 43 (1942) (quoting *South Carolina v. W.T. Rawleigh Co.*, 172 S.C. 415, 174 S.E.2d 385 (1934)). Whether one person or entity is the agent of another is determined by examining whether the party alleged to be the principal has the right to control the conduct of the alleged agent. *Newell v. Trident Med. Cent.*, 359 S.C. 4, 12, 597 S.E.2d 776, 780 (2004).

In the instant case, the record contains no evidence indicating that the Corporation will be acting as the School District's agent in any capacity. As we have previously indicated, the evidence illustrates that SCAGO, not the School District, will form the Corporation, appoint the board of directors, approve the Corporation's by-laws, and oversee the Corporation's functions. Although the Corporation will raise money to fund the renovation of the School District's facilities, the Plaintiffs cite no authority supporting the proposition that this, in and of itself, creates an agency relationship. Similarly, the record does not contain any evidence indicating that the School District will have any right to control the Corporation's activities.

Although the Plaintiffs' argument may accurately summarize the law regarding whether an agent may legally perform acts which, if done by the principal, would be illegal, the Plaintiffs do not present any evidence which tends to establish that the Corporation will serve as the School District's

agent in any fashion. Absent such a showing, this axiom of agency law has no framework in which to apply.

Accordingly, we grant the Defendants' motion for summary judgment and hold that the Corporation is not the agent of the School District.

IV. Violations of District Procurement Code

The Plaintiffs allege that the resolution and its attendant agreements violate the School District's procurement code because (A) the agreements create contracts with financial advisors, bond attorneys, a bond insurance company, and a company acting as a trustee, all without competitive bidding; (B) the agreements create contracts with SCAGO and the Corporation without competitive bidding; and (C) the contracts with SCAGO and the Corporation are improper multi-year contracts. We disagree.

A. Agreements with financial advisors, bond attorneys, a bond insurance company, and a trustee

The School District's procurement code applies to the expenditure of "public funds irrespective of their source." *See* District Procurement Code § 1-102. Thus, generally speaking, the School District's procurement code would apply to contracts the School District enters into with financial advisors, bond attorneys, and other similar parties, provided that the contracts require the School District to spend public funds.

In the instant case, however, the resolution and its attendant agreements provide that the Corporation, not the School District, will enter into several of the challenged contracts with financial advisors, bond attorneys, a bond insurance company, and a company acting as a trustee. Unless the School District is a party to these contracts, we can discern no basis upon which to conclude that the School District's procurement code is applicable in these circumstances. Because the record indicates that the School District is not a party to these contracts, it naturally follows that the School District's procurement code, in these events, is inapplicable.

Second, § 2-101 of the School District's procurement code generally provides that all contracts awarded by the School District are to be awarded by competitive sealed bidding. This requirement is not absolute, however, and one exception to this procedure applies to contracts for professional services which are normally obtained on a fee basis. *See id.* at § 1-103(i) (listing attorneys, accountants, physicians, and dentists as examples of these types of services).

The School District argues that any contracts or agreements it has already formed or will form with bond attorneys or financial advisors will clearly fall under the procurement code's "professional services" exception. The Plaintiffs do not dispute this assertion, but instead argue that the School District's "professional services" exception is invalid because the South Carolina General Assembly repealed a similar exception from the South Carolina Consolidated Procurement Code in June 2006.[10] We disagree with the Plaintiffs' contention.

This argument is unpersuasive. The General Assembly's repeal of the Consolidated Procurement Code's professional services exception has no relevance to the validity of the School District's identical exception. The Plaintiffs do not argue that Act No. 376 directly repealed the School District's exception, nor do they suggest that the act implicitly repealed the School District's exception. Instead, the Plaintiffs suggest that Act No. 376 amounts to a determination that a professional services exception no longer embodies "sound principles of appropriately competitive procurement" within the meaning of S.C. Code Ann. § 11-35-50 (Supp. 2005).

We hold that this conclusory statement is insufficient to present any issue to this Court for review. The Plaintiffs' brief presents only this blanket conclusion and provides no authority supporting their argument. Thus, the Plaintiffs have effectively waived this argument. *See Solomon v. City Realty*

[10] S.C. Code Ann. § 11-35-1270 (Supp. 2005) is substantially similar to the School District's "professional services" exception. The General Assembly repealed this entire section during its 2006 session. *See* Section 63, Act No. 376, 2006 S.C. Acts 2839, 2894.

Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974) (an exception was deemed effectively abandoned where the argument relating to the exception consisted solely of an inaccurate "bald conclusion").

Accordingly, we hold that the School District did not violate its procurement code by entering into contracts with financial advisors or bond attorneys. Furthermore, we hold that the School District's procurement code is irrelevant to contracts the Corporation may enter into with financial advisors, bond attorneys, a bond insurance company, or a company acting as a trustee.

B. Agreements with SCAGO and the Corporation

The Plaintiffs claim that the resolution and its attendant agreements improperly create contracts with SCAGO and the Corporation without complying with the competitive bidding requirement in the School District's procurement code. We disagree.

As our jurisprudence instructs, an issue that is contingent, hypothetical, or abstract is not ripe for judicial review. *Waters*, 321 S.C. at 227, 467 S.E.2d at 917-18. Stated differently, "[a] justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Id.* (quoting *Pee Dee Elec. Co-Op, Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)).

The Plaintiffs' claims on this issue can be grouped into challenges to three arrangements: (1) the arrangement under which the School District is to convey the existing school facilities to the Corporation and lease the land on which these facilities sit to the Corporation; (2) the arrangement under which the School District may purchase the renovated or newly constructed facilities by making annual installment payments to the Corporation; and (3)

the construction contracts the School District may enter on behalf of the Corporation.[11]

As a first matter, neither conveying the existing facilities nor leasing the Corporation the land on which these facilities sit involves the expenditure of public funds. Therefore, the procurement code does not apply to these agreements.

Second, an adjudication of the Plaintiffs' claims on the remaining agreements at the present time presumes too much. As yet, no public funds have been appropriated as installment payments under the "Installment Purchase and Use Agreement." Thus, this challenge can only be deemed an academic and premature exercise. Furthermore, the Plaintiffs' remaining claim assumes that the School District will award the renovation and construction contracts in a manner other than by competitive sealed bidding. Because this claim involves pure hypothesis and speculation, this claim is not ripe for judicial review. Assuming the Plaintiffs meet the required elements of standing, the proper time to bring this claim would be after the School District awarded a construction contract to a contractor without using the sealed competitive bid process. [12]

Accordingly, we dismiss the Plaintiffs' claims that the agreements improperly create contracts with SCAGO and the Corporation without competitive bidding. Most of these claims fail on their merits, and those remaining are not ripe for review.

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[11] The Plaintiffs also challenge the School District's agreement with SCAGO. However, because neither the resolution nor any attendant agreement provides for the School District to pay SCAGO any money, there seems to be no basis upon which we can conclude that the procurement code would apply to such an agreement.

[12] Furthermore, we think it might be argued that these construction contracts do not involve spending public funds. Of course, the parties have not presented these arguments, presumably because none of these contracts currently exist.

C. Multi-year Contracts

The Plaintiffs argue that the "Installment Purchase and Use Agreement" (providing for the buy-back of renovated or newly constructed school facilities) and the "Base Lease and Conveyance Agreement" (leasing the land on which the renovated school facilities currently sit to the Corporation) violate the procurement code's limit on the term of contracts. We disagree.

Section 2-302 of the School District's procurement code generally provides that the School District may not enter into a contract for "supplies" or "services" which contains a term agreement extending beyond five years. The procurement code's definitional section defines "service" as "the furnishing of labor, time, or effort." *See id.* § 1-201(22). The section defines "supplies" as "[a]ll property including . . . leases of real property, excluding land or a permanent interest in land." *Id.*

Because the procurement code's plain terms clearly exclude "land or a permanent interest in land" from the definitional provisions which are subject to the code's limitations on the terms of contracts, concluding that the "Base Lease and Conveyance Agreement" is excluded from the procurement code's time limit is a rather elementary determination.

Turning to the "Installment Purchase and Use Agreement," we hold that this contract is also exempt from the procurement code's time limitation, but for a different reason. The agreement expressly provides that it is not an agreement for a multi-year term, but is instead a one-year agreement that may, at the School District's option, be renewed until the School District has completely purchased the renovated and newly constructed school facilities from the Corporation. Because this agreement is not for a multi-year term, the procurement code's time limitation on contracts does not apply.

Accordingly, we hold that the School District has not violated the time limit on contracts found in its procurement code.

V. Illegal Bond Offering

The Plaintiffs allege that the School District did not have a "valid public purpose" for its September issuance of general obligation bonds because the School District issued these bonds to raise cash for its first installment payment under the resolution. We disagree.

Our determination that the resolution and its attendant agreements are in conformance with the relevant constitutional and statutory provisions effectively forecloses this claim. Accordingly, we deny the Plaintiffs' request to issue a declaratory judgment that the School District's September issuance of general obligation bonds was illegal, invalid, or *ultra vires*.

CONCLUSION

For the foregoing reasons, we hold that the resolution and its attendant agreements do not constitute "financing agreements" as defined by the provisions of § 11-27-110 (A)(6) which are currently in effect. We therefore determine that the School District has not exceeded its constitutional and statutory debt limit. We further hold that the School District has committed no violations of its procurement code, and we find in favor of the School District on the remaining causes of action.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Annie Lee Jones, individually, and as Personal Representative Applicant for the Estate of Katherine Elaine Jones, deceased, and on behalf of her minor children and heirs Khadijah Jones, Keyia Sanders, Robert Canty and Da-Nayia Sailes, Appellant,

v.

John or Jane Doe (unknown physician), Spartanburg Regional Medical Center, Respondents.

Appeal From Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4184
Heard November 7, 2006 – Filed December 18, 2006

AFFIRMED

Theo W. Mitchell, of Greenville, for Appellant.

Perry D. Boulier, of Spartanburg, for Respondents.

GOOLSBY, J.: This is a medical malpractice case. Annie Lee Jones (Jones), individually and on behalf of the estate of Katherine Elaine Jones (Katherine), contends the trial court erred in failing to grant her motion for a continuance and in granting summary judgment to the defendants in this action. We affirm.

FACTS AND PROCEDURAL HISTORY

On November 9, 2001, Katherine was admitted to Spartanburg Regional Medical Center (SRMC) for the birth of her child. The child was delivered by cesarean section the same day. Katherine was discharged on November 12, 2001; however, the child remained under medical care at SRMC. According to a postpartum discharge form that Katherine had signed, she was instructed to return to SRMC on November 19, 2001, for an incision check.

During the early hours of November 17, 2001, Katherine was found dead in her apartment. Based on autopsy results, it was determined Katherine "died as a result of internal hemorrhage secondary to partial dehiscence" of the uterine incision from her cesarean section. The dehiscence of this incision resulted in internal bleeding that caused her death.[1]

On October 31, 2002, Jones, as special administrator of Katherine's estate, filed this wrongful death and survival action, claiming SRMC employees committed medical malpractice resulting in Katherine's death.

[1] The term "dehiscence" has been defined as "[a] bursting open, as of a graafian follical or a wound, esp. a surgical abdominal wound." Taber's Cyclopedic Medical Dictionary 507 (17th ed. 1993).

The lawsuit was filed against SRMC and "John or Jane Doe (unknown physician)" (collectively Defendants).

In her deposition, Jones testified Katherine was in good spirits when she left SRMC and did not complain about any physical problems resulting from the cesarean section. A day or two later, however, Katherine complained to Jones in a telephone conversation that her stomach hurt and her feet were swelling. Although Jones told Katherine to go to the hospital if the pain became severe and even offered to drive her there, Katherine said she would be all right.

Priscilla Jones, Katherine's sister, stated in an affidavit that she visited Katherine almost every day after Katherine returned home from SRMC. According to Priscilla, Katherine complained regularly to her about feeling cold and having swollen feet after the procedure. In addition, Priscilla stated she heard Katherine, during a visit with her newborn child at SRMC, make similar complaints to "attending medical staff," whom Priscilla did not otherwise identify. In her deposition, Priscilla similarly testified she saw Katherine every day from the time she was discharged to the time of her death and the only complaints Katherine had concerned the swelling of her feet. Although Priscilla also testified she was present when Katherine called her doctor to make an appointment, she only heard Katherine say her feet were swollen.

Minnie Montgomery, Katherine's grandmother, stated in her affidavit Katherine had complained to her numerous times about abdominal pain. According to the affidavit, Montgomery heard Katherine relate she had complained about her abdominal pain to a nurse while visiting her newborn at SRMC the previous day and the nurse said "it was just normal after birth symptoms." Although Montgomery told Katherine to insist on seeing a doctor, Katherine said she would "try to make it until the appointment [on November 19]."

Joel S. Engel, M.D., Jones's expert witness, gave his opinion in an affidavit that "had [Katherine] had post-operative medical attention when complaining of her [severe] abdominal pain . . . identification of the

incisional disruption and the finding of the hematoperitoneum would have prevented the untimely death of this woman." He further stated that "[d]ehiscence of a uterine and/or surgical incision is a known and acceptable risk assuming the operative procedure is performed in an accepted manner"[2]; however, in his deposition, he agreed it was a rare occurrence and acknowledged he had never been personally involved in a similar case.

Furthermore, when asked during his deposition to summarize his opinions in this case, Engel replied SRMC's only deviation from the standard of care was its failure to respond in an appropriate manner to Katherine's alleged complaints of severe abdominal pain that were "outside the normal postoperative complaints."[3] Engel further stated he received no records from SRMC suggesting a physician at SRMC had been made aware of any complaints from Katherine regarding abnormal abdominal pain. He further agreed it was appropriate follow-up care to schedule an appointment for a patient who had just had a cesarean section seven days after her discharge.

After Engel's deposition on February 14, 2005, Defendants moved for summary judgment. The Spartanburg County Court of Common Pleas scheduled the motion for a hearing on June 6, 2005, at 3:15 p.m.

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[2] Priscilla stated in her affidavit she was present during the surgery and heard one of the doctors performing the cesarean section say "Oh-oh" "in an alarming manner, as though a mistake had been made" and, when she asked if anything was wrong, a physician said, "We'll take care of it." Despite this allegation, there was no attempt to develop the theory that Katherine's death resulted from the surgery itself.

[3] Although Engel testified no dictated operative report was present in Katherine's file and stated this omission was "one glaring deficiency in the records," there was no showing that Jones made any attempt to obtain such a report or that the absence of the report was proximately linked to the damages claimed in this lawsuit.

According to the record on appeal, on June 6, 2005, at 11:14 a.m., the Spartanburg County Clerk of Court filed a motion by Jones's attorney to continue the hearing based on an allegation that Defendants untimely served their memorandum in support of summary judgment and Jones's attorney still had not received a transcript of a deposition. Around 12:42 p.m. that same day, Judge John C. Hayes, a visiting judge presiding at the summary judgment hearing, received a faxed letter from Jones's attorney advising counsel would not be available that afternoon because he had a divorce hearing in McCormick County that morning. When the case was called, it appears no one on Jones's behalf was present. Judge Hayes stated on the record that he called the McCormick County Courthouse and had been informed by the clerk the hearing had concluded "before lunch," and counsel "had left there saying he was heading to Spartanburg." Reasoning counsel had ample time to arrive at the summary judgment hearing, Judge Hayes then allowed Defendants' attorney to present arguments concerning both the requests for a continuance and the summary judgment motion.

On June 9, 2005, Judge Hayes issued an order granting summary judgment to Defendants, finding Jones "has not presented any admissible evidence that Defendants were ever contacted by [Katherine] following her discharge on November 12, 2001 with any complaints of post-operative complications" and concluding that "[a]s Dr. Engel's opinions against Defendants are premised on the contention that the Defendants were negligent in failing to provide prompt and timely follow-up care, [Jones's] claims fail as a matter of law."

Jones moved for reconsideration pursuant to Rules 59 and 60, SCRCP. By order dated June 22, 2005, Judge Hayes denied the motion. Jones then filed this appeal.

LAW/ANALYSIS

1. We disagree with Jones that Judge Hayes erroneously "assumed the authority" of the chief administrative judge in denying her motion for a continuance of the summary judgment hearing. The only legal authority Jones has cited to this court in support of this argument is Rule 40(i)(1),

SCRCP. Although that rule concerns requests for continuances, it authorizes "the court" to grant such requests "for good and sufficient cause."[4] Furthermore, the letter counsel faxed requesting postponement of the hearing was addressed to Judge Hayes, notwithstanding he was a visiting judge in the circuit.

2. We further find Judge Hayes committed no abuse of discretion in refusing to continue the summary judgment hearing either for the reasons advanced in Jones's formal motion or because of potential scheduling conflicts that were referenced in the subsequent letter that her attorney faxed to the court.[5]

By letter dated May 16, 2005, counsel for Defendants notified Jones's attorney the summary judgment motion would be heard on June 6, 2005, at 3:15 p.m. It was not until the day of the scheduled hearing that Jones filed a formal motion for a continuance, which was followed by the faxed letter from her attorney advising that he had a hearing in another county that morning.

Regarding the scheduling conflict, Judge Hayes issued an order on June 21, 2005, in which he acknowledged he may have been under the misapprehension that Jones's attorney had left the McCormick County Courthouse at noon rather than at 1:00 p.m. Nevertheless, Judge Hayes determined there was still ample time for counsel to drive to Spartanburg for the summary judgment hearing even if he had departed one hour later than originally assumed and a telephone call could have addressed the situation if he had been running late. Judge Hayes noted he based his finding about the

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[4] Rule 40(i)(1), SCRCP. Although paragraph (h) of Rule 40 requires "[t]he Chief Judge for Administrative Purposes, in cooperation with the clerk" to be "responsible for setting all matters on the Nonjury Docket for disposition," the rule does not specify that scheduling changes need approval from the chief administrative judge.

[5] See Jackson v. Speed, 326 S.C. 289, 309, 486 S.E.2d 750, 760 (1997) (stating a ruling on a motion for a continuance is within the trial court's sound discretion).

driving time on www.mapquest.com. Jones has not offered anything in her brief on appeal to suggest this source was unreliable.

As to the grounds advanced in Jones's formal motion, we hold neither is of sufficient merit to warrant a determination that Judge Hayes's refusal to continue the hearing amounted to an abuse of discretion. The South Carolina Rules of Civil Procedure do not set a deadline for submitting memoranda of law prepared in conjunction with summary judgment motions. In fact, such memoranda are not required at all. Moreover, the deposition that Jones claimed she needed a transcript for had been taken twenty-four days before the scheduled hearing, giving her ample time to move for a continuance. Accordingly, Judge Hayes did not err in refusing to grant the requested continuance.[6]

3. Turning to the merits of the case, we disagree with Jones's contention that summary judgment was improper.

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to

[6] In her formal motion for a continuance, Jones alleged as good cause for a continuance that SRMC "challenges the affidavit of Plaintiff's witness Minnie Montgomery, who was deposed Friday, May 13, 2005, and whose requested deposition transcript has not been received by Plaintiff, and to provide said transcript to Plaintiff's medical expert as an additional basis for his opinion . . . ." Pursuant to Jones's motion for reconsideration, Judge Hayes issued an order in which he noted he read the deposition at issue "out of interest" and found the "firsthand knowledge" Montgomery claimed to have regarding Katherine's attempt to obtain medical care was actually inadmissible hearsay testimony. Jones does not specifically challenge this finding in her brief. Assuming, then, without deciding that Jones did not receive timely notice that Montgomery's affidavit would be challenged, she failed to make a showing on appeal that Montgomery's deposition would have cured the defects in the earlier statement.

judgment as a matter of law."[7] "In reviewing an order of summary judgment, an appellate court applies the same standard as that which the circuit court applied in determining whether to enter the order."[8] "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below."[9]

A plaintiff alleging medical malpractice must provide evidence of (1) "the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances,"[10] and (2) a departure by the defendant "from the recognized and generally accepted standards, practices and procedures in the manner alleged by the plaintiff."[11] In addition, there must be evidence that the defendant's failure to meet the recognized standard of care was the proximate cause of the plaintiff's alleged injuries and damages.[12]

In the present case, Engel opined Defendants departed from the standard of medical care in failing to provide post-operative medical attention to Katherine after she complained of severe abdominal pain. Absent, however, is any admissible evidence suggesting that anyone responsible for

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[7] Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005).

[8] Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005).

[9] Willis v. Wu, 362 S.C. 146, 150-51, 607 S.E.2d 63, 65 (2004).

[10] Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985).

[11] Id.

[12] David v. McLeod Regional Med. Ctr., 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006).

Katherine's care and treatment, physician or otherwise, was made aware of her abdominal pain.

Here, Priscilla Jones's affidavit and deposition were the only evidence that a witness actually heard Katherine voice any complaints to hospital personnel. As we have recounted earlier in this opinion, Priscilla stated in her affidavit that she heard Katherine tell a nurse that her feet were swollen and she had been feeling cold. Likewise, in her deposition, Priscilla testified she heard Katherine telephone her doctor for an appointment; however, she only recalled Katherine complaining about her swollen feet. In neither instance did Priscilla attest to hearing Katherine tell anyone at SRMC that she was experiencing abdominal pain.

Although Jones testified she heard about Katherine's abdominal pain from Katherine herself, Jones never stated she was present during any conversations that Katherine may have had with staff members at SRMC. Montgomery's affidavit indicates Montgomery had, at best, hearsay knowledge about Katherine's complaints to medical personnel about her abdominal pain. Finally, as noted in footnote 6 of this opinion, Jones does not specifically take issue with Judge Hayes's finding that any claim by Montgomery in her deposition that she knew Katherine sought medical care for her abdominal pain was actually hearsay testimony.[13]

4. Finally, Jones appears to argue Judge Hayes failed to give due consideration to an undated, unsigned document entitled "Statement of Annie Jones," in which Jones purportedly averred Katherine "said for four days that she had been repeatedly calling the doctor, complaining of constant severe abdominal pain, but the doctor neglected to schedule an appointment to see her until finally an appointment was given for November 19, 2001 –

[13] See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). In any event, we found nothing in Montgomery's deposition indicating she heard Katherine report complaints of abdominal pain to appropriate hospital personnel.

however, she died on November 17, 2001." In support of this argument, Jones notes in her brief that Engel acknowledged he reviewed this document, which was provided to him by Jones's attorney. The implication appears to be that, notwithstanding the hearsay characteristics of the statement at issue and the fact that the document itself lacked authentication, the statement and document were admissible as factual evidence because they formed the basis of Engel's opinion. We disagree.

Although Jones does not cite any particular rule of evidence in her brief, she apparently relies on Rule 703, SCRE. This rule permits an expert giving an opinion to rely on facts or data "that are not admitted in evidence or even admissible into evidence."[14] The rule, however, does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion. Rather, as aptly set forth in one treatise:

> [T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. It is received only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception.[15]

Applying this interpretation of Rule 703 to the present case, we hold that, even if Jones is correct that Engel "had information about complaints by [Katherine] to the Hospital or any physician in the unsigned, undated, typewritten 'Statement of Annie Jones,' " the document and the assertion that Katherine "said for four days that she had been repeatedly calling the doctor,

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[14] Rule 703, SCRE notes.

[15] 2 Kenneth S. Broun, et al., McCormick on Evidence § 324, at 418 (2006) (emphasis added); see also Kim v. Nazarian, 576 N.E.2d 427, 433 (Ill. App. Ct. 1991) ("Rule 703 does not create an exception to the rule against hearsay because the underlying facts or data are admitted not for their truth, but for the limited purpose of explaining the basis of the expert's opinion.").

complaining of constant abdominal pain" were, at best, admissible only to explain how Engel reached his determination regarding whether there was a breach of a duty in this case. Neither the document nor the statement within it could have been admitted as evidence that someone responsible for Katherine's care and treatment at SRMC was alerted to her complaints of abdominal pain. Absent such evidence, Jones has failed to present a genuine issue of material fact as to whether Defendants deviated from the applicable standard of care.

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Henry Claude Dismuke, Jr., Respondent,

v.

South Carolina Department of Motor Vehicles, Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4185
Submitted November 1, 2006 – Filed December 18, 2006

AFFIRMED

Frank L. Valenta, Jr., and Kelli G. Maddox, both of Blythewood, for Appellant.

James D. Calmes, III, of Greenville, for Respondent.

GOOLSBY, J.: Henry Claude Dismuke, Jr. brought this action pursuant to South Carolina Code Ann. § 56-1-410 (2006) to reinstate his

driver's license, contending the two-year term for the suspension of his license had run following his plea of guilty to driving with an unlawful alcohol concentration over two years before. By this appeal, the South Carolina Department of Motor Vehicles challenges the trial court's order rescinding the Department's suspension order.[1] We affirm.[2]

On February 18, 2002, Dismuke pled guilty, as we indicated above, to driving with an unlawful alcohol concentration in violation of South Carolina Code Ann. § 56-5-2933 (2006). The Greenville County Clerk of Court did not forward the ticket relating to Dismuke's conviction to the Department

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[1] We do not address the Department's second issue regarding whether Dismuke "owes" nearly five months suspension time to the State. Dismuke testified he obtained another driver's license on September 25, 2003, following his release on June 19, 2003, from federal prison after fourteen months imprisonment for a parole violation. The Department first raised the issue of extending Dismuke's suspension in the court below during oral argument at the close of the case. Although the trial court acknowledged in its oral remarks that Dismuke's suspension ended on February 18, 2004, without regard to the license that Dismuke obtained in 2003, the trial court never addressed in its written order the effect of Dismuke's obtaining another license some five months before his period of suspension ended. See Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) (noting an issue must be both raised to and ruled on by the trial court to be preserved for appellate review); cf. Owens v. Magill, 308 S.C. 556, 564, 419 S.E.2d 786, 791 (1992) ("[A] judge was not bound by a prior oral ruling and could issue a written order which conflicted with the prior oral ruling."). In addition, the Department did not ask the court to address the issue in a motion to alter or amend its judgment pursuant to Rule 59(e), SCRCP. Without an express ruling on this issue, we are powerless to review it. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding the court of appeals should not address an issue that the "circuit court did not explicitly rule on" and was not the subject of a Rule 59(e), SCRCP motion to amend or alter the judgment).

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

until June 15, 2005.[3] Upon receipt of the ticket, the Department suspended Dismuke's driver's license and notified him the period of his suspension would begin on July 9, 2005 and end on July 9, 2007. Dismuke then brought this action.

At the hearing upon his petition for reinstatement of his license, Dismuke testified he surrendered his license when he pled guilty. An employee of the Greenville County Clerk of Court, however, testified nothing on the face of the indictment indicated this had in fact occurred as would usually be the case had it done so.

South Carolina Code Ann. § 56-5-2990(F) (2006) provides in part:

> Except as provided for in Section 56-1-365(D) and (E), the driver's license suspension periods under this section begin on the date the person is convicted, receives sentence upon a plea of guilty or of nolo contendere, or forfeits bail posted for the violation of Section 56-5-2930, 56-5-2933 . . . .

Another code section, South Carolina Code Ann. § 56-1-365(C) (2006), provides in part:

> Except as provided in Section 56-5-2990, if the defendant surrendered his license to the magistrate or clerk immediately after conviction, the effective date of the revocation or suspension is the date of surrender. If the magistrate or clerk wilfully fails to forward the license and ticket to the department within five days, the suspension or revocation does

[3] Testimony given by a clerk of court employee indicated an in-office audit led to the discovery of Dismuke's ticket in 2005. The witness blamed a computer coding error and a change in the case management system for the failure to report Dismuke's conviction to the Department.

> not begin until the department receives and processes the license and ticket.

The trial court made only two findings of fact: that the clerk of court "did not wilfully fail to forward [Dismuke's] license and ticket to the [D]epartment within five (5) days" and that Dismuke's suspension began on February 18, 2002 and ended on February 18, 2004. The trial court viewed section 56-5-2990(F) as controlling. We agree.

Absent a finding that Dismuke did not surrender his driver's license "immediately after [his] conviction" upon his plea of guilty and absent a finding that the clerk of court "wilfully fail[ed] to forward the license" to the Department, "the driver's license suspension period[ ]" in question "beg[an] on the date [he] . . . receive[d] sentence upon a plea of guilty"; i.e., February 18, 2002.

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Commissioners of Public Works, City of Charleston and North Charleston Sewer District, Respondents,

v.

South Carolina Department of Health and Environmental Control, Appellant.

Appeal From Berkeley County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 4186
Heard October 11, 2006 – Filed December 18, 2006

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED

Carlisle Roberts, Jr. and Jacquelyn Sue Dickman, both of Columbia and Evander Whitehead, of Charleston, for Appellant.

Frank Paul Calamita, III, of Richmond and Mary D. Shahid and Lucas C. Padgett, Jr., both of Charleston, for Respondents.

KITTREDGE, J.: The South Carolina Department of Health and Environmental Control (DHEC) appeals the circuit court's order finding DHEC erred in imposing certain flow and load limits in permits issued to the Charleston Commissioners of Public Works and the North Charleston Sewer District (hereinafter "Respondents"). For the reasons discussed below, we affirm in part, reverse in part, vacate in part, and remand to the circuit court for the purpose of remanding to the DHEC Board.

I.

Respondents collect and treat wastewater for portions of Charleston and Berkeley counties. The treated wastewater, called effluent, is discharged into either the Cooper River or Charleston Harbor. This discharge is permitted, subject to National Pollutant Discharge Elimination System (NPDES) permits issued by DHEC. In February 2003, DHEC issued Respondents renewed NPDES permits. Respondents requested a contested case hearing to challenge various provisions of the renewed permits.

Respondents challenged the renewed permits in two respects. First, Respondents argued there was no factual or legal basis for DHEC to impose weekly and monthly volumetric effluent flow limits (flow limits) in the renewed permits. Second, Respondents argued there was no factual or legal basis for DHEC to impose ultimate oxygen demand (UOD) load limits in the renewed permits. The UOD load limits set forth in the renewed permits vary depending on the time of the year; the limits set for the months of November

through February ("winter months") are approximately three times higher than the limits set for the months of March through October.[1]

The UOD load limits were based upon a Total Maximum Daily Load (TMDL) established by DHEC.[2] The TMDL purports to implement regulation 61-68(D)(4)(a) of the South Carolina Code (Supp. 2005), a regulation known as the "0.1 Rule." The "0.1 Rule" prohibits the quality of surface water from being cumulatively lowered more than 0.1 mg/l for dissolved oxygen from point sources and other activities when natural conditions cause a depression of dissolved oxygen. S.C. Code Ann. Regs. 61-68(D)(4)(a) (Supp. 2005). Respondents argued DHEC has no authority to apply UOD load limits during a given month in which there is no evidence of a depression of dissolved oxygen in the Cooper River or Charleston Harbor system for that month. Specifically, Respondents challenged the imposition of lower UOD load limits during March, April, May, and October (the "shoulder months").[3] DHEC sought to justify the imposition of UOD load limits for the "shoulder months" on a predictive modeling analysis—a holistic approach that does not narrowly depend on the data for a specific month to warrant UOD load limits for that month.

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[1] Higher UOD limits are easier for Respondents to meet; lower UOD limits are more restrictive and, therefore, more difficult for Respondents to meet.

[2] DHEC's Exhibit 6 provides this description of the TMDL process: "The TMDL process establishes the allowable loading of pollutants or other quantifiable parameters for a waterbody based on the relationship between pollution sources and instream water quality conditions, so that the states can establish water quality based controls to reduce pollution from both point and non-point sources and restore and maintain the quality of their water resources."

[3] Respondents raised an additional issue at the contested case hearing regarding whether requirements for whole effluent toxicity testing were properly included in the permits. The testing requirements were found proper and this finding was not challenged on appeal.

The Administrative Law Judge (ALJ) affirmed the issuance of the permits subject to two modifications. First, the ALJ ordered DHEC to remove the flow limits. The ALJ found DHEC lacked the authority to impose flow limits in an NPDES permit, concluding neither the South Carolina Code nor DHEC regulations authorize imposition of flow limits. Further, the ALJ found that, under the facts of this case, flow limits were unnecessary to protect water quality.

Second, the ALJ ordered DHEC to remove the UOD load limits set for the "shoulder months." The ALJ adopted Respondents' view and held the "0.1 Rule" does not apply to the "shoulder months" because there is no evidence of a depression in dissolved oxygen levels attributable to a natural condition during these months. The ALJ thus concluded that the "0.1 Rule" is only applicable during months in which such a depression is exhibited. The ALJ determined the UOD load limits established for the "winter months" should also apply to the "shoulder months." The ALJ further found DHEC was not authorized to rely on the TMDL to set permit limits because the TMDL was not promulgated as a regulation.

DHEC appealed the ALJ's order to the DHEC Board (the Board). Citing the South Carolina Pollution Control Act (SCPCA), S.C. Code Ann. §§ 48-1-10 to -350 (1987 and Supp. 2005), and regulation 61-9 of the South Carolina Code (Supp. 2005), the Board first held DHEC has the "legal authority to require flow limits in NPDES permits." The Board, however, joined the ALJ in concluding effluent flow limits were not warranted on the facts presented in this case. Accordingly, the Board affirmed the removal of the flow limits.

The Board next held the ALJ erred in interpreting the "0.1 Rule" as a matter of law. The Board construed the statute and regulation as follows: "If a waterbody is found to be a 'naturally dissolved oxygen waterbody' for some period during the year, the requirements of Code §48-1-83 and related Regulation 61-68.D.4 apply." Thus, contrary to the ALJ's narrow interpretation that DHEC may only impose UOD load limits during the months a depression in dissolved oxygen levels is exhibited, the Board ruled

the UOD load limits may be imposed any time during the year provided the "0.1 Rule" is triggered at some point in the year. Because DHEC did not appeal the ALJ's finding that the TMDL was improperly relied on to establish UOD load limits, the Board remanded the permits to DHEC to establish UOD load limits without relying on the TMDL.[4]

Respondents appealed to the circuit court. Regarding the effluent flow limits (which had been ordered removed from the challenged permits), the circuit court proceeded to address the legal issue of whether DHEC has authority to impose effluent flow limits in NPDES permits. The circuit court ruled DHEC lacks any express authority, either in statute or regulation, to impose flow limits. The circuit court also held that "while the Board ordered the removal [sic] flow limits from the [Respondents'] permits, those limits have not been removed and the issue of the Board's authority to impose flow limits is justiciable nevertheless because it is capable of repetition."

The circuit court agreed with Respondents' legal claim that section 48-1-83 of the South Carolina Code (Supp. 2005) and regulation 61-68(D)(4)(a)—regarding the "0.1 Rule"—were unambiguous. Although the statute and the regulation are silent as to *when* the "0.1 Rule" may be applied, the circuit court ruled the law only allows the imposition of UOD load limits for a particular month when dissolved oxygen levels in a waterbody fall below the standard for that month. As a result, the circuit court found the Board erred in remanding Respondents' permits to DHEC staff for the purpose of calculating UOD loads for the "shoulder months." The circuit court reversed the Board and reinstated the ALJ's order. This appeal followed.

[4] DHEC did not challenge the ALJ's rejection of the TMDL. The Board, sitting in an appellate capacity, was thus bound by the ALJ's determination in this regard. We further note that DHEC's decision to impose, or not to impose, UOD load limits for eight months of the year (other than the "shoulder months") was not challenged, although the TMDL served as the basis for DHEC's permitting decisions.

II.

The ALJ presides over all hearings of contested DHEC permitting cases and, in such cases, serves as the finder of fact. See S.C. Code Ann. § 1-23-600(B) (Act No. 387, 2006 S.C. Acts 387, eff. July 1, 2006); see also Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). The Board, pursuant to section 1-23-610(D) of the South Carolina Code (2005), reviewed the ALJ's order.[5] On appeal of such a contested case, a reviewing tribunal "must affirm the ALJ if the findings are supported by substantial evidence, not based on the [reviewing tribunal's] own view of the evidence." Dorman v. S.C. Dep't of Health & Envtl. Control, 350 S.C 159, 166, 565 S.E.2d. 119, 123 (Ct. App. 2002); § 1-23-610(D). The circuit court conducted the second appellate review under section 1-23-380(A)(6) of the South Carolina Code (2005).[6]

Our review of the circuit court, which constitutes the third appellate review, is also governed by section 1-23-380(A)(6). Accordingly, this court

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[5] Section 1-23-610(D) was amended by Act No. 387, 2006 S.C. Acts 387; however, the applicable language at all times pertinent to the present appeal is found in section 1-23-610(D) of the South Carolina Code (2005). Pursuant to the amendment, effective July 1, 2006, DHEC administrative appeals will no longer track the awkward path followed here where the DHEC Board sits in an appellate capacity and applies the substantial evidence standard of review under the Administrative Procedures Act. See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 573, 577, 595 S.E.2d 851, 853 (Ct. App. 2004) (outlining the DHEC Board's standard of review prior to the 2006 amendment). Instead, the DHEC Board will make findings of fact and its findings will be subjected to the deferential substantial evidence standard of review. Additionally, under the amendment the Board's decision will be appealed to the Administrative Law Court, which, in turn, is appealed directly to this court.

[6] This section was also amended by Act No. 387, 2006 S.C. Acts 387; however, as above, the applicable language at all times pertinent to the present appeal is found in section 1-23-380(A)(6) of the South Carolina Code (2005).

may reverse the ALJ's decision if substantial rights of the appellant have been prejudiced and the findings, inferences, conclusions or decisions (1) violate constitutional or statutory provisions, (2) exceed the statutory authority of the agency, (3) are based upon unlawful procedure, (4) are affected by other error of law, (5) are clearly erroneous in light of the reliable, probative and substantial evidence on the entire record, or (6) are either arbitrary, capricious, or reflect abuse of discretion or the obvious unwarranted exercise of discretion. § 1-23-380(A)(6); Weaver v. S.C. Coastal Council, 309 S.C. 368, 374, 423 S.E.2d 340, 343 (1992).

Under our standard of review, we may not substitute our judgment for that of the ALJ as to the weight of the evidence on questions of fact unless the ALJ's findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record. See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 573, 580, 595 S.E.2d 851, 855 (Ct. App. 2004). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000).

III.

DHEC contends the circuit court erred in finding Respondents adequately preserved issues for appeal because Respondents' Petition for Judicial Review (petition) failed to properly raise the issues for consideration. We disagree. Having carefully reviewed the petition, we find it adequately apprised the circuit court of "the abuse or abuses allegedly committed below through a distinct and specific statement of the rulings complained of." Smith v. S.C. Dep't of Soc. Servs., 284 S.C. 469, 471, 327 S.E.2d 348, 349 (1985). Because the issues were sufficiently preserved in the appeal to the circuit court, we now turn to the merits.

IV.

DHEC alleges the circuit court erred in rejecting the Board's interpretation of the "0.1 Rule" and finding the rule may only be applied during the months in which a natural depression in dissolved oxygen levels is demonstrated. DHEC argues the regulation is ambiguous and, therefore, the Board's interpretation is entitled to deference. We agree.

Generally, "the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). Indeed, the courts will typically defer to agency interpretation. Id. at 515, 560 S.E.2d at 415.

We note, however, "[t]he primary rule of statutory construction is that the Court must ascertain the intention of the legislature." Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002). Moreover, where the terms of the statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Moody v. Dairyland Ins. Co., 354 S.C. 28, 30-31, 579 S.E.2d 527, 529 (Ct. App. 2003). Thus, the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation. Brown, 348 S.C. at 515, 560 S.E.2d at 415.

Section 48-1-83(A) of the South Carolina Code (Supp. 2005), the controlling statute of the "0.1 Rule," provides:

> [DHEC] shall not allow a depression in dissolved oxygen concentration greater than 0.10 mg/l in a naturally low dissolved oxygen waterbody unless the requirements of this section are all satisfied by demonstrating that resident aquatic species shall not be adversely affected. The provisions of this section

> apply in addition to any standards for a dissolved oxygen depression in a naturally low dissolved oxygen waterbody promulgated by [DHEC] by regulation.

Regulation 61-68(D)(4) of the South Carolina Code (Supp. 2005), drafted pursuant to the authority granted by the SCPCA, provides:

> Certain natural conditions may cause a depression of dissolved oxygen in surface waters while existing and classified uses are still maintained. The Department shall allow a dissolved oxygen depression in these naturally low dissolved oxygen waterbodies as prescribed below pursuant to the Act, Section 48-1-83, et seq., 1976 Code of Laws:
>
> a. Under these conditions the quality of the surface waters shall not be cumulatively lowered more than 0.1 mg/l for dissolved oxygen from point sources and other activities . . . .

We find the statute and regulation are ambiguous as to when the "0.1 Rule" applies. Clearly, the regulation requires the quality of the surface waters "not be cumulatively lowered more than 0.1 mg/l for dissolved oxygen from point sources or other activities" when "[c]ertain natural conditions . . . cause a depression of dissolved oxygen . . . ." Id. The regulation is silent, however, as to the timing of the limitations' application and allows for multiple interpretations. DHEC asserts, for example, that the "0.1 Rule" may be applied year-round whenever natural conditions cause a depression of dissolved oxygen in a waterbody at some point during the year.

There is support for DHEC's position in the record before us. Larry Turner, manager of the Water Quality Modeling section for DHEC, testified that DHEC developed loadings that are protective and conservative. He explained that during the four winter months (not at issue), DHEC determined less restrictive limits are required based on a number of factors

including the cold weather and the increased ability of the system to absorb a pollutant without violating the standard during that period of the year. For the remainder of the year, DHEC applied the "0.1 Rule" as a protective measure given that the four summer months have a clearly demonstrated need for the "0.1 Rule."

We appreciate Respondents' desire that we find the statute and regulation mandate a monthly justification for the imposition of UOD load limits for a given month. There is, however, no language in the statute or regulation that suggests DHEC is confined to a narrow examination of a particular month's testing results to justify the application of the "0.1 Rule" for that month.

We find the statute is ambiguous and, therefore, defer to the Board's interpretation. See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."); see also Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.").

We find no compelling reasons to overrule the Board's interpretation as it is neither arbitrary nor capricious, and does not constitute an abuse of discretion. Further, Larry Turner's testimony provides a sound basis for why DHEC would take a holistic approach (and not a myopic month-to-month analysis) in evaluating when reasonable UOD load limits in a naturally dissolved oxygen waterbody are warranted. Admittedly, UOD load limits are issued in monthly intervals, but the decision whether to impose UOD load limits in a given month is not restricted to testing data for that month.

We find the Board's interpretation of the "0.1 Rule"—the statute and regulation it is charged with enforcing—is reasonable and in line with its overall statutory mandate. We hold the circuit court erred in reversing the Board and adopt the Board's finding that when natural conditions cause a

depression of dissolved oxygen in a waterbody at some point during the year the "0.1 Rule" may be applied.

V.

DHEC asserts the circuit court erred in reversing the Board's remand of the renewed permits for a determination of the applicable UOD load limits for the "shoulder months." We agree.

Initially, we note the procedural posture of this case is awkward and confusing. Respondents acknowledge decreased UOD load limits apply during the critical summer months and only challenge the imposition of the lower limits during the "shoulder months." The ALJ found DHEC improperly relied on the TMDL to establish UOD load limits and this ruling was not challenged by DHEC. Thus, while DHEC used the TMDL to establish the renewed permit conditions for the entire year, DHEC is barred in connection with these permits from using the TMDL to establish limits for the "shoulder months." As a result, the Board, after finding the "0.1 Rule" may be applied year-round, remanded the renewed permits to DHEC to allow UOD load limits to be imposed during the "shoulder months" without relying on the TMDL. Yet, the TMDL was used to determine the limits for the other months.

Nevertheless, pursuant to section 1-23-610(D) of the South Carolina Code (2005), the Board has authority to remand a case for further proceedings. Because we defer to DHEC's interpretation of the application of the "0.1 Rule," we necessarily reinstate the Board's remand of the permits to DHEC. DHEC must be given the opportunity to establish UOD load limits for the "shoulder months" without relying on the TMDL.

VI.

DHEC alleges the circuit court erred in finding DHEC does not have the authority to impose flow limits in an NPDES permit. We decline to

address this legal issue because any ruling issued by this court would be merely advisory.

It is unchallenged that there is no factual basis for flow limits in the subject NPDES permits. The ALJ ordered DHEC to remove the flow limits from the renewed permits, and the Board affirmed this ruling. DHEC did not appeal the removal of the flow limits from the NPDES permits. Therefore, this is the law of the case. Ulmer v. Ulmer, 369 S.C. 486, __, 632 S.E.2d 858, 861 (2006) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.") (quoting Austin v. Specialty Transp. Servs., 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004)).

The only issue concerning flow limits addressed and decided by the circuit court was whether DHEC has the legal authority to impose the flow limits. The circuit court erred in addressing this issue. Determining whether DHEC is authorized to include flow limits in an NPDES permit will have no impact on a party in a case where flow limits have been ordered to be removed from the renewed permits. We hold DHEC's inability to enforce the flow limits based on the unchallenged factual findings makes any opinion regarding DHEC's authority to impose flow limits advisory. Accordingly, this court will not address the issue.[7] See Binkley v. Rabon Creek Watershed

[7] Our decision not to address this issue is further supported by the uncertain circumstances surrounding it. If DHEC has the authority to impose flow limits in NPDES permits, as it contends, DHEC has done nothing required to promulgate this authority into a regulation. See S.C. Code Ann. § 48-1-30 (1987) (providing that DHEC is required to promulgate regulations to implement the SCPCA); see also Sloan v. S.C. Bd. of Physical Therapy Exam'rs, Op. No. 26209 (S.C. Sup. Ct. Filed Sept. 25, 2006) (Shearouse Ad. Sh. No. 36 at 46) ("In order to promulgate a regulation, the APA generally requires a state agency to give notice of a drafting period during which public comments are accepted on a proposed regulation; conduct a public hearing on the proposed regulation overseen by an administrative law judge or an agency's governing board; possibly prepare reports about the regulation's impact on the economy, environment, and public health; and submit the

Conservation Dist. of Fountain Inn, 348 S.C. 58, 76 n.36, 558 S.E.2d 902, 911 n.36 (Ct. App. 2001) ("This court will not issue advisory opinions that have no practical effect on the outcome."); see also In re Chance, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have "consistently refrained" from issuing purely advisory opinions).

VII.

We find (1) the Board's interpretation of the application of the "0.1 Rule" is entitled to deference because the statute and regulation are ambiguous; (2) the Board's remand of the renewed permits to allow DHEC to determine the UOD load limits for the "shoulder months" without relying on the TMDL was proper; and (3) the circuit court erred in deciding the issue of whether DHEC has the authority to impose flow limits in an NPDES permit because the issue is not in controversy. Moreover, to the extent the issue of DHEC's legal authority to impose effluent flow limits was addressed below, all legal conclusions are vacated. The Board's order should be reinstated except for the finding regarding DHEC's authority to impose flow limits.

The decision of the circuit court is accordingly

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

STILWELL and BEATTY, JJ., concur.

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regulation to the Legislature for review, modification, and approval or rejection.") (citing S.C. Code Ann. §§ 1-23-110 to -160 (2005 and Supp. 2005)). Conversely, DHEC argues it can apply flow limits as it chooses because its action does not establish a "binding norm." Yet, DHEC has provided this court with no standard setting forth the conditions under which DHEC will impose the flow limits.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Kimmer, **Respondent,**

v.

Murata of America, Inc. and Liberty Mutual Insurance Company, **Appellants.**

Appeal from Chester County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 4187
Heard December 5, 2006 – Filed December 18, 2006

REVERSED

Pope D. Johnson, III, of Columbia, for Appellants.

Thomas H. Pope, of Newberry, for Respondent.

ANDERSON, J.: In this workers' compensation action, Richard Kimmer sought benefits for an alleged work injury. Before filing his workers' compensation claim and without notifying his employer-carrier (collectively Murata), Kimmer settled a third party claim for the liability policy limit. The single commissioner concluded Kimmer elected his remedy by failing to notify Murata, and his workers' compensation claim was barred. The Appellate Panel adopted the single commissioner's conclusion. Kimmer appealed to the circuit court, which reversed the Appellate Panel and awarded Kimmer total disability benefits. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

On January 29, 1999, Kimmer sustained injuries in a motor vehicle accident as he was driving to work for his employer, Murata. The driver at fault was Anthony Pendergrass. As a result of the accident, Kimmer was diagnosed with meniscal tears in both knees, a ruptured disc at L4-5, post-traumatic stress syndrome and depression. Following the accident, Kimmer had three surgeries on his right knee and one surgery on his left knee.

Pendergrass had automobile liability insurance with a policy limit of $15,000. Following the accident and without notice to Murata, Kimmer negotiated a settlement of the third party claim with Pendergrass' liability carrier for the policy limit. On June 16, 1999, Kimmer signed a release of all claims against Pendergrass.

Kimmer filed a Form 50 on June 18, 1999, and an Amended Form 50 on May 29, 2002, seeking workers' compensation benefits. On June 18, 2002, Murata filed its Form 51 denying Kimmer's claim and asserting as a defense that the third party action had been settled without consent. On December 10, 2002, a hearing was held to determine the issues set forth in the Forms 50 and 51. The single commissioner found Kimmer's injuries compensable because Murata provided him with a car allowance and mileage. However, she denied Kimmer's claim. Relying on Fisher v. S.C. Dep't of Mental Retardation-Coastal Ctr., 277 S.C. 573, 291 S.E.2d 200 (1982), the single commissioner concluded the settlement of the third party

claim, without notice to Murata, constituted an election of remedies and barred the workers' compensation claim.

The Appellate Panel affirmed and adopted the order of the single commissioner. On appeal to the circuit court, the trial judge (1) reversed the order of the Appellate Panel, (2) awarded total and permanent disability to Kimmer, (3) awarded Murata an offset of $10,000 (the net amount of the third party settlement), and (4) entered judgment in favor of Kimmer in the amount of $209,235.00.

On July 25, 2005, Murata filed a Motion for Reconsideration. The circuit court issued an amended order reversing the order of the Appellate Panel and finding that (1) Murata suffered no prejudice as a result of the settlement without notice, (2) Kimmer was totally and permanently disabled, and (3) Kimmer was entitled to an award of total and permanent disability, less an offset for the third party settlement. Murata then filed a Motion to Reconsider arguing the circuit court erroneously inserted a prejudice requirement into workers' compensation cases involving election of remedies. The motion was denied on September 1, 2005.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation commission decisions. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005) cert. granted, November 2, 2006; Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). A reviewing court may reverse or modify an agency decision if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(5) (Act No. 387, 2006 S.C. Acts 387, eff. July 1, 2006). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate

Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 495 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(5) (Act No. 387, 2006 S.C. Acts 387, eff. July 1, 2006).

An administrative agency's findings are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 48, 515 S.E.2d 532, 533 (1999); Gadson v. Mikasa Corp., 368 S.C. 214, 222, 628 S.E.2d 262, 266 (Ct. App. 2006). Accordingly, a reviewing court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Stephen, 324 S.C. at 337, 478 S.E.2d at 76. It is not within our province to reverse findings of the Appellate Panel which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). Instead, review of issues of fact is limited to determining whether the findings are supported by substantial evidence in the record. Hargrove, 360 S.C. at 289, 599 S.E.2d at 610-11. "On appeal, this court must affirm an award of the Workers' Compensation Commission in which the circuit court concurred if substantial evidence supports the findings." Solomon v. W.B. Easton, Inc., 307 S.C. 518, 520, 415 S.E.2d 841, 843 (Ct. App. 1992). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 417, 586 S.E.2d 111, 113 (2003).

LAW/ANALYSIS

The circuit court held Kimmer's workers' compensation action was not barred by his third party settlement, but only subject to an offset for the third party settlement he received. Murata contends this holding was error because Kimmer settled his third party claim without notice to Murata, thereby electing his remedy. We agree.

The South Carolina Workers' Compensation Act provides claimants with three remedies for job-related injuries:

> (1) Pursuant to section 42-1-560 (c) of the South Carolina Code (Supp. 2005) a claimant may proceed solely against the employer, thereby allowing the employer-carrier the opportunity to pursue reimbursement against the third party for its obligated payments:
>
> > If, prior to the expiration of the one-year period referred to in subsection (b), or within thirty days prior to the expiration of the time in which such action may be brought, the injured employee . . . shall not have commenced action against or settled with the third party, the right of action of the injured employee . . . shall pass by assignment to the carrier; provided, that the assignment shall not occur less than twenty days after the carrier has notified the injured employee . . . in writing, by personal service or by registered or certified mail that failure to commence such action will operate as an assignment of the cause of action to the carrier.
>
> (2) Alternatively, a claimant may proceed solely against the third party tortfeasor under section 42-1-550 of the South Carolina Code (Supp. 2005) by instituting and prosecuting an action at law:

> When an employee, his personal representative or other person may have a right to recover damages for injury, loss of service or death from any person other than the employer, he may institute an action at law against such third person before an award is made under this Title [Workers' Compensation Act] and prosecute it to its final determination.

(3) Or a claimant may proceed against both the employer-carrier and the third party tortfeasor by complying with section 42-1-560 (b) of the South Carolina Code (Supp. 2005):

> The injured employee . . . shall be entitled to receive the compensation and other benefits provided by this Title [Workers' Compensation Act] and to enforce by appropriate proceedings his or their rights against the third party . . . . In such case the carrier shall have a lien on the proceeds of any recovery from the third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier, less the reasonable and necessary expenses, including attorney fees, incurred in effecting the recovery, and to the extent the recovery shall be deemed to be for the benefit of the carrier . . . . Notice of the commencement of the action shall be given within thirty days thereafter to the Industrial Commission, the employer and carrier upon a form prescribed by the Industrial Commission.

See Fisher v. S. C. Dep't of Mental Retardation, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982) (emphasis added).

I. Notice

The imperative nature of the statutory language mandating notice of a third party claim to the employer-carrier is well established by our precedent. In 1982, our Supreme Court announced that a claimant who settled his third party case without notice to the employer or carrier elected his remedy and waived any right to workers' compensation benefits. Fisher, 277 S.C. at 576, 291 S.E.2d at 201. As in the instant case, Fisher sought workers' compensation benefits after making a compromise settlement with a third party tortfeasor without the consent of the carrier. The single commissioner, Appellate Panel, and circuit court agreed Fisher had elected to proceed against a third party without complying with section 42-1-560 and, having done so, had no further remedy under the South Carolina Workers' Compensation Act. Noting section 42-1-560 (b) does not specifically state the consequences of failure to notify the employer-carrier of a third party claim or settlement, the court emphasized, "it is clear from a reading of the statute that the legislature did not intend for a claimant to settle his third party case without regard to the employer's rights for subrogation under § 42-1-560 and still maintain a workmen's compensation claim." Fisher, 277 S.C. at 575, 291 S.E.2d at 201. The Fisher court reiterated an earlier observation that "[t]he object of § 42-1-560 is to effect an equitable adjustment of the rights of all the parties." Stroy v. Millwood Drug Store, Inc., 235 S.C. 52, ___, 109 S.E.2d 706, 709 (1959). Drawing from its analysis in a case decided under prior statutes, the court recognized "[i]t would 'defeat this objective to allow the employee to demand compensation from the employer after having destroyed the employer's normal right to obtain reimbursement from the third party.' " Id. at 575-76, 291 S.E.2d at 201(quoting Stroy, 235 S.C. 52, 109 S.E.2d at 709).

The South Carolina Supreme Court reaffirmed the principle articulated in Fisher when it addressed a dilemma generated by asbestos claims. In Talley v. John-Mansville Sales Corp., workers' instituted product liability actions against asbestos manufacturers. 285 S.C. 117, 118, 328 S.E.2d 621, 622 (1985). The workers sought to have the asbestos manufacturers' settlement offers approved by the South Carolina Workers' Compensation Commission in order to comply with section 42-1-560 and protect their

potential workers' compensation claims. Id. at 118, 328 S.E.2d at 622. The Commission refused to approve the settlements, ruling it had no jurisdiction because the workers had not yet become disabled. Id. Consequently, the workers applied for a stay of the civil actions, which the circuit judge denied. Id. at 119, 328 S.E.2d at 623. Our Supreme Court reversed the denial, explaining: "[h]ad [the workers] concluded their product liability actions, by settlement or otherwise, they would have made a binding election of remedies under Fisher v. S.C. Dep't of Mental Retardation, 277 S.C. 573, 291 S.E.2d 200 (1982), and would be barred from pursuing benefits under workers' compensation at a later date." Talley, 285 S.C at 118, 328 S.E.2d at 622. On the other hand, if the workers waited until they became disabled for workers' compensation purposes, their third party actions would be barred by the statute of limitations. Id. The court declined to carve out an exception in the statute to accommodate these unusual circumstances, concluding: "[s]uch a change is a function of the legislature, and this court refuses to usurp legislative authority in this matter." Id. at 119, 328 S.E.2d at 622. Instead, the court ordered entry of the stay to avoid the inequity that would result from the application of Fisher to the circumstances in Talley. Id. at 199, 3289 S.E.2s at 623, n. 2.

Subsequently, the Court of Appeals addressed the notice requirement in Johnson v. Pennsylvania Millers Mut. Ins. Co., 292 S.C. 33, 354 S.E.2d 791 (Ct. App. 1987) and Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988). In Johnson, the claimant prosecuted his third party claim to an adverse conclusion. 292 S.C. at 34, 354 S.E.2d at 792. The single commissioner and Appellate Panel, relying on Fisher, agreed with Pennsylvania Millers that the claimant had elected his remedy and waived his right to compensation. Id. at 34-5, 354 S.E.2d at 792. The circuit court disagreed. Id. at 36, 354 S.E.2d at 796. On appeal, we distinguished Fisher as inapplicable in Johnson, because the claimant in Johnson did not settle the third party action; rather, he prosecuted the case to its full conclusion. Id. at 39, 354 S.E.2d 794. "If [the claimant] had settled the third party action and had done so without Pennsylvania Millers' consent, the Supreme Court's holding in Fisher would have barred him from thereafter pursuing a workers' compensation claim." Id. (emphasis added) Neither the single commissioner nor the Appellate Panel had determined whether the claimant had complied

with the notice requirements. Id. Consequently, we remanded to the Commission for that determination and emphasized if the claimant gave proper notice of the third party action, then he had not elected his remedy or waived his workers' compensation claim.

> Neither Section 42-1-550, which allows an injured worker to maintain a third party action "before an award is made," nor Section 42-1-560, which preserves an injured employee's right to pursue a third party claim while also seeking workers' compensation, can be read to constitute, under the doctrine of election of remedies, a bar to an employee subsequently proceeding against the carrier once the action at law is prosecuted to a final, but unsuccessful, determination where the injured employee gave the carrier proper notice of the third party action.

Id. at 40, 354 S.E.2d at 795 (emphasis added).

Hudson v. Townsend Saw Chain Co. illustrates the scope of the notice requirement's applicability. 296 S.C. 17, 21-22, 370 S.E.2d 104, 106 (Ct. App. 1988). Hudson prosecuted a third-party claim to its conclusion, without issuing the required statutory notice. Id. The single commissioner and Appellate Panel found Hudson had elected her remedy and her workers' compensation claim was barred. Id. at 19, 370 S.E.2d at 105. The circuit court reversed, deeming the section 42-1-560(b) notice requirement inapplicable where an employee prosecutes the third-party claim to a final determination before filing for workers' compensation. The circuit court viewed section 42-1-560's notice requirement applicable only to the situation in which an employee pursues a workers' compensation claim simultaneously with a third-party action. Id. at 19, 370 S.E.2d at 105-06. In reversing the circuit court, we clarified:

> [I]rrespective of whether an employee pursues a third-party action before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b). If the employee fails to give the notice

> required by Section 42-1-560(b) and prosecutes the third-party action to a final determination, either before or simultaneously with filing a workers' compensation claim, the employee will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits.

Id. at 20-21, 370 S.E.2d at 106.

The undisputed facts of the instant case are nearly identical to those in Fisher. Kimmer instituted his third party claim against a tortfeasor without notice to Murata. Subsequently, he settled with the liability carrier and released the at-fault driver from all claims without Murata's consent. South Carolina appellate courts have conclusively held a claimant who pursues a third party action without giving proper notice to the employer-carrier and settles the third party action or pursues it to an unsuccessful conclusion is regarded as having elected his remedy and is barred from receiving workers' compensation benefits. The circuit court's order, which awards Kimmer workers' compensation benefits, notwithstanding his failure to give the required notice to Murata, is inconsistent with our precedent. As a result of Kimmer's noncompliance with the statutory procedure, he made an election of his remedy and waived any rights he may have had to recover workers' compensation benefits.

II. Prejudice

Murata maintains the circuit court erred in determining Kimmer's failure to give timely notice of his third party claim did not prejudice Murata, and, consequently, did not bar Kimmer's recovery of workers' compensation benefits. We agree with Murata.

Contrary to Kimmer's suggestion, the mere mention of the word "prejudice" in an opinion does not mean that such a requirement exists. Neither section 42-1-550 nor section 42-1-560 contains a provision establishing prejudice as a factor in considering whether a compensation claim is barred when an employee settles or concludes a third party claim

without notice. Moreover, our precedent's strong and unwavering emphasis on the importance of notice outweighs the relevance of prejudice in considering whether a worker's compensation claim is barred. See Fisher v. S. C. Dep't of Mental Retardation-Coastal Center, 277 S.C. 573, 291 S.E.2d 200 (1982); Talley v. John-Mansville Sales Corp., 285 S.C. 117, 328 S.E.2d 621, (1985); Johnson v. Pennsylvania Millers Mut. Ins. Co., 292 S.C. 33, 354 S.E.2d 791 (Ct. App. 1987); Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988). The Fisher court interpreted the implicated statutes but made no mention of a prejudice requirement. 277 S.C. at 573, 291 S.E.2d at 200. In Hudson, the claimant urged that a workers' compensation claim should be permitted if the carrier was not prejudiced by the lack of notice. Hudson at 22, 370 S.E.2d at 107. We declared: "Hudson's contention and the circuit court's holding regarding lack of prejudice, however, is unpersuasive, if in fact the question of prejudice is relevant at all." Id.; see Stroy v. Millwood Drug Store, Inc., 235 S.C. 52, ___, 109 S.E.2d 706, 709 (1959) (rejecting an almost identical argument made by a workers' compensation claimant in a case decided under former statutes). Additionally, in Talley, our Supreme Court declined to carve out an exception to the statutes as interpreted by Fisher, regarding any such change as a function of the legislature, not the courts.

As a result of the failure to notify of a third party claim, the employer-carrier loses a voice in the litigation and is clearly prejudiced. Stroy, 235 S.C. 52, 109 S.E.2d at 709.[1] That voice encompasses the right to select one's own counsel, conduct one's own investigation, and direct the litigation. See id. Notice makes it possible for the employer-carrier to offer the employee meaningful assistance in prosecuting the third party claim. Hudson, 296 S.C. at 22, 370 S.E.2d at 107. With timely knowledge the employer-carrier gains the opportunity to lend support to an effort that could lead to the carrier's recovery of some or all of the compensation it might later be required to pay the injured employee under the Workers' Compensation Act. Id.; see S.C. Code Ann. § 42-1-560 (c). The statute's underlying purpose serves to protect

[1] Though this case was decided under the former statute, its discussion on what constitutes prejudice is instructive.

the carrier's subrogation interests and prevents an employee's double recovery.

Hypothetically, if prejudice to the employer-carrier were required as an additional element to find the claimant elected his remedy, we identify prejudice to Murata in the instant case.

The single commissioner's findings comport with our determination:

> [T]he claimant's settling of this claim was prejudicial to the carrier since it [Murata] was not able to participate in the litigation or affect the full and final release executed by the claimant. The carrier had no opportunity to investigate whether there was [sic] other assets or other coverage available to the claimant from the third party.

Kimmer avers his settlement for the liability policy limit is distinguishable from the "compromise" settlement in Fisher because the at-fault party had no additional assets for Murata to pursue. Though Kimmer's counsel determined the coverage under one liability policy and consulted Chester county records to discover any undisclosed assets, his investigation was by no means exhaustive. In South Carolina, statutory provisions allow for the initiation and institution of supplementary proceedings. Section 15-39-310 of the South Carolina Code (1976) provides:

> [T]he judgment creditor . . . is entitled to an order from a judge of the circuit court requiring such judgment debtor to appear and answer concerning his property before such judge at a time and place specified in the order within the county to which the execution was issued.

At the hearing in regard to a supplementary proceeding, a prospective debtor is required to answer under oath all queries as to real and personal property, including, but not limited to, policies of insurance, cash, jewelry, household furniture, and the entire spectrum and gamut of legal ownership possibilities. Additionally, a judgment obtained against a motorist that is

unpaid subjects the motorist to driver's license suspension pursuant to section 56-9-430 of the South Carolina Code (1976). Murata's right to avail itself of the full range of investigatory opportunities was foreclosed by the absence of notice of the third party claim. Furthermore, as part of the third party settlement, Kimmer released the at-fault driver from all liability, extinguishing any recourse Murata may have had in pursuing third party assets.

CONCLUSION

We rule that the settlement of a third party claim without notice to the employer and carrier bars a workers' compensation action. We hold that prejudice is **NOT** an element to be considered in regard to the failure to give the mandated statutory notice. Assumptively concluding that prejudice is a factor in the analysis, we conclude that there was actual prejudice in the case sub judice in regard to the employer and carrier.

Accordingly, the decision of the circuit court is reversed and the order of the Appellate Panel reinstated.[2]

REVERSED.

HUFF and WILLIAMS, JJ., concur.

[2] Because we reverse on the previous issue, we need not reach the additional issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("[A]n appellate court need not address remaining issues when disposition of prior issue is dispositive.").