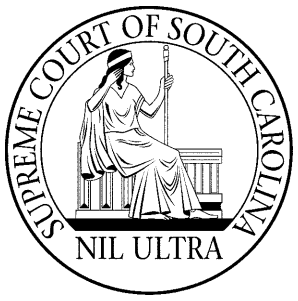

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 26, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jane Matthews Moody, Respondent.

Opinion No. 26809
Submitted March 30, 2010 – Filed April 26, 2010

DEFINITE SUSPENSION

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

Jane Matthews Moody, of Blackville, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed two (2) years with conditions and payment of costs. See Rule 7(b), RLDE, Rule 413, SCACR. She requests the suspension be made retroactive to the date of her interim suspension. [1]

[1] Respondent was placed on interim suspension on October 1, 2009. In the Matter of Moody, 385 S.C. 239, 684 S.E.2d 175 (2009).

We accept the Agreement and impose a definite suspension of two years with conditions and payment of costs. The suspension shall run retroactively from the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent operated a solo practice in Barnwell for approximately fifteen years. In October 2007, she closed her law office after training to teach high school. At the time, respondent had more than fourteen active clients. She did not notify her clients, opposing counsel, or the courts that she had ceased practicing law. Further, although she had ceased going to her office, she did not make arrangements to have her mail forwarded or to notify the South Carolina Bar of her current mailing address.

In April 2008, respondent was suspended from the practice of law for non-payment of license fees. In June 2008, she was suspended for failure to comply with mandatory continuing legal education requirements. Respondent did not notify her clients that she had been suspended.

Respondent failed to respond to several inquiries from ODC and to Notices of Full Investigation. Although she did appear to give statements pursuant to subpoena in two matters, she did not produce all of the subpoenaed records or her trust account records. On October 1, 2009, respondent was placed on interim suspension after she failed to respond to subsequent disciplinary inquiries and failed to appear for a Rule 19(c), RLDE, interview in September 2009. Id. At the time of her interim suspension, respondent still had not informed her clients that she had closed her law office.

Matter I

On October 30, 2007, ODC sent respondent the complaint from Complainant A with a request that she respond in writing within fifteen days. When no response was received by December 4, 2007,

ODC sent respondent a reminder letter requesting her immediate response. Respondent did not open either letter because she had allowed mail to gather and remain unopened in her law office.

On January 22, 2008, ODC issued a Notice of Full Investigation which was subsequently returned by the post office marked "unclaimed." On February 27, 2008, a SLED agent served the notice on respondent at the high school where she was employed. The notice required respondent to provide a written response within thirty days, but respondent did not respond. On May 6, 2008, respondent appeared at the Office of Disciplinary Counsel pursuant to subpoena and gave a Rule 19(c)(5), RLDE, statement under oath.

Based on respondent's statement and review of the client file, ODC has determined that respondent was appointed to represent Complainant A in a post-conviction relief action in the summer of 2006. Respondent appeared on Complainant A's behalf at the PCR hearing in August 2007. The PCR judge indicated that he was denying the PCR application and instructed the attorney for the State to prepare a formal order. At that time, respondent briefly discussed the denial of the application with Complainant A and told him that, while an appeal was possible, she did not believe there were any meritorious issues.

After the hearing respondent took no action on behalf of Complainant A. At the time she closed her law office in October 2007, she had not received the proposed order from the attorney for the State. Respondent neither notified Complainant A, the court, or opposing counsel that she had closed her office, nor provided them with new contact information. Respondent did not regularly collect or open her mail at the law office from October 2007 forward.

As of May 2008, when respondent appeared at ODC pursuant to Rule 19(c)(5), RLDE, she did not know the status of Complainant A's case. In June 2008, respondent had a colleague send Complainant A a copy of the order in his PCR action. At no time did respondent file a notice of appeal, advise Complainant A of the time

limitations on his ability to appeal, or provide him with his file so that he could pursue the matter.

Matter II

In late 2004, Complainant B retained respondent to file for reconsideration of a denial of Social Security benefits. Respondent filed the request for reconsideration; it was denied in July 2005. Respondent then filed a request for an administrative hearing. Because of the delay in obtaining administrative hearings, it was respondent's practice to wait a year from the date of the request before contacting the Social Security Administration about the status of the request for a hearing. However, respondent took no action on Complainant B's behalf after filing the request for hearing.

Respondent did not communicate with Complainant B after the first of 2006. She did not notify Complainant B or the Administrative Law Judge's office that she closed her law office in October 2007. Respondent did not receive or respond to a certified letter sent to her by Complainant B in March 2008 because she did not routinely retrieve or open mail sent to her law office address.

Respondent did submit a response to the Notice of Full Investigation in this matter. She appeared to give an interview on October 3, 2008. Respondent had been served with a subpoena to bring the client file, but she did not produce the client file at the interview. She stated she had mailed the original file to Complainant B, but had retained a copy. At the conclusion of the interview, ODC instructed respondent to deliver the file immediately. As of the date of the Agreement, respondent had not produced the file and had not responded to further contact from ODC.

Matter III

On April 13, 2007, Mr. and Mrs. Doe paid respondent $1,100.00 to assist them in adopting the child of their deceased daughter-in-law. On April 17, 2007, the Does' son signed a termination

of parental rights. Respondent's file contained a draft Complaint and Petition for Appointment of Guardian ad Litem dated June 29, 2007. Respondent took no action in the matter after June 29, 2007. Respondent did not communicate with Mr. and Mrs. Doe after June 2007, did not notify them that she closed her office in October 2007, or that she was suspended in April 2008.

Respondent did not submit a written response to the Notice of Full Investigation in this matter. She did respond to questions when she appeared at ODC in October 2008. At that time, respondent was unsure if she actually filed the action for Mr. and Mrs. Doe. She agreed at that time to contact the court to find out and provide the information to ODC within fifteen days. Respondent did not provide the information as requested and did not communicate with ODC about this matter since that time.

At the time respondent represented Mr. and Mrs. Doe, she did not maintain a client trust account. It was her practice to convert payments received from her clients to cash and hold it in the file until she needed it for filing fees and other expenses. Respondent charged flat fees for her work, but did not hold the funds in trust until earned.

Matter IV

On May 31, 2007, respondent received a fee of $700.00 to handle a name change for Complainant C. Respondent did not hold the fee in trust until it was earned. Respondent did not take any meaningful action on behalf of Complainant C and, to date, respondent had not returned the fee. Respondent did not respond to the Notice of Full Investigation in this matter.

Matter V

Respondent represented Complainant D in a domestic matter that was concluded in July 2007. Sometime after the end of that representation, Complainant D asked respondent for her client file. Because Complainant D moved out of state, disconnected her local

telephone number, and changed her name, respondent was unable to contact her in order to make arrangements to deliver the file.

Complainant D provided her current contact information when she filed a grievance complaining that she had not received her file from respondent. ODC gave respondent the contact information on October 3, 2008. At the time of respondent's interim suspension in October 2009, respondent still had not provided Complainant D with her client file. Respondent failed to appear at ODC pursuant to subpoena in September 2009 for a Rule 19(c), RLDE, interview.

Matter VI

In April 2007, Complainant E paid respondent $475.00 to handle a divorce matter. Respondent failed to diligently pursue the matter.

On July 9, 2007, respondent wrote Complainant E and informed her she was going to start teaching school. In the letter, respondent stated she would not be closing her law office and agreed to continue to handle Complainant E's case, however, respondent closed her law office in October 2007 without informing Complainant E and took no further action on the case.

Complainant E left numerous telephone messages for respondent. The messages were not returned. Complainant E wrote respondent and asked for a refund, but respondent did not respond or comply.

Respondent did not respond to the Notice of Full investigation in this matter. She did not appear for the Rule 19(c), RLDE, interview in September 2009.

LAW

Respondent admits that her misconduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (lawyer

shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). In addition, respondent admits she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (lawyer shall consult with client about objectives of representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter, promptly comply with reasonable requests for information, and explain matter to extent reasonably necessary to permit client to make informed decisions regarding the representation); Rule 1.5 (lawyer shall not charge unreasonable fee); Rule 1.15(a) (lawyer shall safeguard client property); Rule 1.15(c) (lawyer shall deposit into client trust account unearned legal fees and expenses paid in advance, to be withdrawn by lawyer only as fees are earned or expenses incurred); Rule 1.16 (upon termination of representation, lawyer shall take steps to the extent reasonably practicable to protect client's interests, including reasonable notice to client, refunding of unearned advance payment fee, and surrendering property to which client is entitled); Rule 8.1(a) (lawyer shall not knowingly make a false statement of material fact in connection with a disciplinary matter); Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of two years, subject to the following condition: within ninety days of this opinion, respondent shall pay restitution as follows: $1,100.00 to Mr. and Mrs. Doe, $700.00 to Complainant C's mother, and $475.00 to Complainant E; if the Lawyers Fund for Client Protection (the Fund) paid or pays any claims on respondent's behalf, respondent shall reimburse the Fund within thirty

days of payment.[2] Respondent's suspension shall be imposed retroactively to October 1, 2009, the date of her interim suspension. In the Matter of Moody, supra.

Further, within thirty days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter to the ODC and the Commission on Lawyer Conduct. Finally, should she seek reinstatement, in addition to any other requirements imposed by this Court upon reinstatement, respondent shall 1) enter into a two-year monitoring contract with Lawyers Helping Lawyers[3] and 2) within one year of reinstatement, complete the South Carolina Bar Legal Ethics and Practice Program Trust Account School and Ethics School. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

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[2] If the Fund paid claims to the individuals listed herein, respondent shall not be required to pay the individuals but to reimburse the Fund.

[3] On a quarterly basis during the contract period, respondent shall be required to file an affidavit with the Commission on Lawyer Conduct attesting to her compliance with the terms of the contract.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charleston County Magistrate Mary Brown Holmes, Respondent.

Opinion No. 26810
Submitted March 30, 2010 – Filed April 26, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, Office of Disciplinary Counsel.

Mary Brown Holmes, of Ravenel, pro se.

PER CURIAM: In this judicial disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and impose a public reprimand. The facts as set forth in the agreement are as follows.

FACTS

A defendant who was charged with simple assault failed to appear for her trial before respondent. Respondent found the defendant guilty in her absence without any witness being present to offer any testimony under oath. Instead, respondent found the defendant guilty based upon the officer's written statements and witness forms.

The defendant was sent a letter which stated she had been found guilty in her absence and fined $1,092.00 to be paid within fifteen days or she would be required to serve thirty days in jail. Respondent submits she found the defendant guilty and sent the letter "to get the defendant's attention" and find out why she had not appeared at trial. Respondent explains that she intended to set the conviction aside once she heard from the defendant.

The defendant contacted respondent and explained that she did not appear for trial because she believed the county attorney was going to dismiss the case. Respondent set aside the conviction and ordered a new court date.

Respondent regrets her error. She now recognizes that she erred in finding the defendant guilty in absentia and that she should not have proceeded to trial without either party being present.

LAW

By her misconduct, respondent has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 3B(2) (judge shall be faithful to the law and maintain professional competence in it) and Canon 3B(8) (judge shall dispose of all judicial matters promptly, efficiently and fairly). By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR (it shall be ground for discipline for judge to violate the Code of Judicial Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Accordingly, respondent is hereby reprimanded for her misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Friends of the Earth, Appellant,

v.

The Public Service Commission of South Carolina, South Carolina Electric & Gas, and Office of Regulatory Staff, of whom South Carolina Electric & Gas, and Office of Regulatory Staff are Respondents.

In Re:Combined Application of South Carolina Electric & Gas Company for a Certificate of Environmental Compatibility and Public Convenience and Necessity and for a Base Load Review Order for the Construction and Operation of a Nuclear Facility in Jenkinsville, South Carolina.

Appeal From The Public Service Commission of South Carolina

Opinion No. 26811
Heard March 4, 2010 – Filed April 26, 2010

AFFIRMED

Robert Guild, of Columbia, for Appellant.

Belton T. Zeigler and Lee E. Dixon, both of Pope Zeigler, LLC, Florence P. Belser, Nanette S. Edwards and Shannon Bowyer Hudson, all of Office of Regulatory Staff, James B. Richardson, Jr., Mitchell Willoughby and Tracey Green, both of Willoughby & Hoefer, all of Columbia, and K. Chad Burgess, and Catherine D. Taylor, both of SC Electric & Gas Co., of Cayce, for Respondents.

JUSTICE HEARN: Friends of the Earth (Appellant) appeals from the order of approval issued by the Public Service Commission (Commission) of the combined application of South Carolina Electric & Gas Company (SCE&G) to construct and operate an additional two-unit nuclear facility, as well as to revise its rates to reflect the cost of capital applied to the project. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In May of 2008, SCE&G filed a combined application for certificate of environmental compatibility, public convenience and necessity (Application) pursuant to the Utility Facility Siting and Environmental Protection Act (Siting Act),[1] and the Base Load Review Act,[2] with the Commission. The purpose of the Application was to seek the approval of the Commission to construct and operate a new two-unit nuclear generating facility (Facility) in Jenkinsville, South Carolina. The project is to be jointly owned by SCE&G and the South Carolina Public Service Authority (Santee Cooper). The application was put together following an evaluation of the growing demand for electricity and a comparison of the available electricity generation

[1] S.C. Code Ann. § 58-33-10 et seq. (1977 & Supp. 2009).
[2] S.C. Code Ann. § 58-33-210 et seq. (Supp. 2009).

technologies, which arrived at the conclusion that nuclear generation was the least costly alternative available. As a part of the Application under the Base Load Review Act, SCE&G also applied for: (1) a pre-construction review of the prudency of its decision to construct the Facility; (2) approval of cost and milestone targets for completing the Facility; and (3) an initial rate adjustment of one-half of one percent to reflect the cost of constructing and carrying the Facility.

Appellant is a not-for-profit membership organization that advocates clean energy usage initiatives, based on efficiency improvements, along with renewable energy sources such as wind, geothermal, and solar power. Appellant claims membership consisting of ratepayers of SCE&G and residents of South Carolina, including neighbors of the site of the proposed Facility, who allege they have direct and material interests in access to economical, clean, and sustainable electric service, as well as an interest in protecting the use and enjoyment of the natural resources of the State. Appellant opposed the Application of SCE&G, and timely filed a petition to intervene in the proceeding before the Commission, which was allowed.[3] Additionally, The Office of Regulatory Staff (ORS) was a party to the Application[4] pursuant to section 58-4-10(B) of the South Carolina Code (Supp. 2009), and is a respondent in this matter on appeal.

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[3] In addition to Appellant, the Commission also received timely petitions to intervene from CMC Steel South Carolina, Pamela Greenlaw, Mildred A. McKinley, Lawrence P. Newton, the South Carolina Energy User Committee, Ruth Thomas, Maxine Warshauer, Samuel Baker, and Joseph Wojcicki. Although petitions for rehearing from the order on appeal were filed by the South Carolina Energy User Committee and Wojcicki, in addition to that filed by Appellant, none of the above-listed intervenors are a part of the appeal before us.

[4] South Carolina Department of Health and Environmental Control, South Carolina Department of Natural Resources, South Carolina Department of Parks, Recreation and Tourism, and the Town of Jenkinsville were all listed as parties based on the provisions of section 58-33-140 of the South Carolina Code (Supp. 2009), but did not appear or take part in the proceedings.

The Commission held a hearing on the Application, and by Order No. 2009-104(A) approved the Application of SCE&G, authorizing the construction and operation of the Facility. Petitions for Rehearing or Reconsideration were filed on behalf of Appellant, the South Carolina Energy User Committee, and Joseph Wojcicki, which were denied by the Commission by Order No. 2009-218. Thereafter, Appellant appealed the denial to this Court.

LAW/ANALYSIS

I. Standard of Review applied under the Base Load Review Act

Initially, Appellant contends this Court should apply a new standard of review to the analysis of the Commission below, because this is the first combined application the Commission has decided under the Base Load Review Act.[5] Appellant maintains a new standard of "heightened scrutiny" is the appropriate standard this Court should apply to decisions of the Commission under the Base Load Review Act. We disagree.

Ordinarily, the Court's application of varying degrees of scrutiny is limited to those cases where a statute's constitutionality is being challenged under the Equal Protection Clause of the Constitution. *See* U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. The application of heightened, or strict scrutiny is warranted in cases where "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage . . . ." *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 431, 574 S.E.2d 717, 722 (2002) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). Appellant cites no authority for the proposition that application of this level of scrutiny is necessary to review the utility regulation decisions of the Commission, and moreover fails to identify a fundamental right that has been abridged. At the core of Appellant's argument is its assertion that the Base Load Review Act so fundamentally changes the landscape of Commission review of a

[5] The General Assembly enacted the Base Load Review Act in 2007, by Act No. 16 , effective upon signature of the Governor on May 3, 2007.

company's proposal, a heightened level of scrutiny is necessary on the front end of the review process. We find Appellant's claim unsubstantiated and against the plain reading of the Base Load Review Act. Section 58-33-240(A) of the South Carolina Code (Supp. 2009) specifically provides that "[e]xcept as otherwise specified in this article, all procedural requirements that apply to general rate proceedings by law or regulation shall apply to proceedings and combined proceedings, to revised rates proceedings, *and to the judicial review of orders issued under this article*." (emphasis added). As a result, we find no basis for the application of a heightened level of scrutiny to appeals under the Act.

Consequently, "[t]his Court employs a deferential standard of review when reviewing a decision of the Public Service Commission and will affirm that decision when substantial evidence supports it." *Duke Power Co. v. Public Service Comm'n of South Carolina*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001) (citing *Porter v. South Carolina Public Service Comm'n*, 333 S.C. 12, 507 S.E.2d 328 (1998)). In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, unless its findings or conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); S.C. Code Ann. § 1-23-380 (Supp. 2009). Substantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency. *Lark* at 135-36, 276 S.E.2d at 306-07.

Furthermore, the Court may not substitute its judgment for the Commission's on questions about which there is room for a difference of intelligent opinion. *Duke Power Co.*, 343 S.C. at 558, 541 S.E.2d at 252. Because the Commission's findings are presumptively correct, the party challenging a Commission order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record. *Id.*

II. Alleged Failings of the SCE&G Application

Appellant next contends SCE&G failed to update its integrated resource plan (IRP) or complete a review of potential energy efficiency and demand side management (DSM) load reductions, thus SCE&G has failed to adequately demonstrate the need for the proposed capacity expansion of the Facility. We disagree.

The Commission's order references SCE&G's then-forthcoming DSM reports, as well as the company's requirement under section 58-37-20 of the South Carolina Code (Supp. 2009) to file an IRP. Based on the evidence and testimony included in SCE&G's combined application, both in favor and against, the Commission determined SCE&G had adequately accounted for and addressed these concerns in its forecasts. The consensus reached by the Commission was that SCE&G had demonstrated a need to build the Facility, irrespective of the concerns.

DSM programs are designed to reduce the overall energy consumption of customers. There are two general types of DSM programs: first, demand reduction programs that involve motivating customers to shift their use of power away from peak energy usage periods, thus limiting or reducing the growth of energy consumption during a utility's peak demand; and second, energy efficient programs which seek to reduce customers' overall energy consumption through customer information and energy conservation programs designed to educate the energy-consuming public. With respect to SCE&G's DSM reports, the Commission noted that SCE&G, at the time of the order, was exploring the revitalization of its programs in light of the current energy prices, general economic conditions, and the increased environmental concerns of its customers. In addition, the Commission acknowledged that SCE&G could have made a better effort at establishing its energy efficiency programs in the past, and stated its anticipation at reviewing the company's new DSM programs in June of 2009. Nonetheless, viewing the entirety of the evidence before it, the Commission determined that DSM programs were not a viable substitute for the base load capacity for

which SCE&G had established a need, and sought to fulfill in the construction of the Facility.

Appellant also contends SCE&G's most recent IRP update, which was completed in May of 2008, was not done close enough in time to the Application, and failed to give an accurate portrayal of the need SCE&G was facing. According to the Commission:

> The objective of the IRP process is the development of a plan that results in the minimization of the long run total costs of the utility's overall system and produces the least cost to the consumer consistent with the availability of an adequate and reliable supply of electricity while maintaining system flexibility and considering environmental impacts. In conjunction with the overall objective, the IRP should contribute toward the outcomes of improved customer service, additional customer options, and improved efficiencies of energy utilization.

Order No. 1991-885, August 28, 1991. Under section 58-37-40(A) of the South Carolina Code (Supp. 2009), electrical utilities are required to file a detailed, fifteen year IRP with the State Energy Office, every three years, with updates made annually.

Appellant maintains that, because SCE&G did not conduct a separate IRP specifically for this combined application -- and based on its typical IRP schedule, SCE&G's last IRP filing was in May of 2008 -- the data and forecasts that were a part of their most recent IRP were unreliable. As part and parcel to this argument, Appellant contends SCE&G failed to consider alternatives to nuclear power, such as solar, wind, landfill gas, biomass, natural gas, and coal. However, this argument is contradicted by the direct testimony of SCE&G's experts and employees, wherein they stated SCE&G considered each of the seven types of energy generation facilities listed above.

Finally, Appellant argues the Commission should have deferred its decision on SCE&G's combined application, or in the alternative, should have prospectively limited the company's ability to make adjustments in the approved schedule or budget for completion of the Facility. This argument is made, in principal part, due to the Application's alleged inadequacies regarding SCE&G's IRP and DSM plans. However, under the plain reading of the Base Load Review Act, neither of these requests are contemplated or authorized; therefore, Appellant's contentions are without merit. The General Assembly specifically provided that the Commission must rule and issue an order, either approving or disapproving, a request made by a utility, including requests made in an application under the Base Load Review Act, within nine months of the filing of the combined application. *See* S.C. Code Ann. § 58-33-240(E) (Supp. 2009) (modifying, for the purposes of the Base Load Review Act, the Commission's traditional requirement that all orders be filed within six months). This provision grants the Commission no discretion to delay the issuance of its order. Furthermore, section 58-33-270(E) of the South Carolina Code (Supp. 2009) provides that once a final order by the Commission has been issued, a "utility may petition the commission . . . for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section." Clearly the General Assembly did not contemplate the Commission's ability to prevent subsequent modification of its orders under the Base Load Review Act, as subsection (E) expressly provides the utility that right.

As explained above, based on the overwhelming amount of evidence in the record, the Commission's determination that SCE&G considered all forms of viable energy generation, and concluded that nuclear energy was the least costly alternative source, is supported by substantial evidence.

III. Failure of SCE&G to prove a need for the Facility

Appellant finally contends the Commission erred in finding SCE&G had established the proper need and prudency of building the Facility, given:

SCE&G's size relative to other utility companies; the steep economic downturn the country and South Carolina is facing; and the fact that SCE&G will be the first utility to build this type of facility. Because the record demonstrates the Commission adequately considered each of the requirements under the Base Load Review Act, and its determinations are supported by substantial evidence in the record, we disagree.

Section 58-33-240(D) of the South Carolina Code (Supp. 2009) provides that in proceedings before the Commission, upon the filing of a combined application, "the utility shall have the burden of proving that the decision to build the plant was prudent, and shall have the burden of proof as to all matters on which the commission is required to enter findings under Section 58-33-270(A), (B), (C), (D), and (E)." Furthermore, under the new requirements of the Base Load Review Act, the Commission is obligated to go beyond the findings required under the Siting Act to conduct a full pre-construction prudency review of the Facility and the Engineering, Procurement and Construction Contract under which it will be built, including setting out the construction and annual capital cost schedules establishing the prudency and reasonableness of the Facility's costs. S.C. Code Ann. § 58-33-270 (Supp. 2009). Section 58-33-270 requires the Commission to hold a hearing, and thereafter, if the application is approved, issue an order setting out the following findings:

> (1) that the utility's decision to proceed with construction of the plant is prudent and reasonable considering the information available to the utility at the time;
> (2) for plants located in this State, that the utility has satisfied the requirements of Section 58-33-160 of the Utility Facility Siting and Environmental Protection Act, either in a past proceeding or in the current proceeding if the current proceeding is a combined proceeding; and
> (3) for plants located outside South Carolina, that the utility has satisfied the requirements of Section 58-

33-160(1)(a), 58-33-160(1)(d), and 58-33-160(1)(f) of the Utility Facility Siting and Environmental Protection Act.

(B) The base load review order shall establish:
(1) the anticipated construction schedule for the plant including contingencies;
(2) the anticipated components of capital costs and the anticipated schedule for incurring them, including specified contingencies;
(3) the return on equity established in conformity with Section 58-33-220(16);
(4) the choice of the specific type of unit or units and major components of the plant;
(5) the qualification and selection of principal contractors and suppliers for construction of the plant; and
(6) the inflation indices used by the utility for costs of plant construction, covering major cost components or groups of related cost components. Each utility shall provide its own indices, including: the source of the data for each index, if the source is external to the company, or the methodology for each index which is compiled from internal utility data, the method of computation of inflation from each index, a calculated overall weighted index for capital costs, and a five-year history of each index on an annual basis.

(C) If revised rates are requested, the base load review order shall specify initial revised rates reflecting the utility's current investment in the plant which must be determined using the standards set forth in Section 58-33-280(B) and implemented according to Section 58-33-280(D).

> (D) The base load review order shall establish the rate design and class allocation factors to be used in calculating revised rates related to the plant. In establishing revised rates, all factors, allocations, and rate designs shall be as determined in the utility's last rate order or as otherwise previously established by the commission, except that the additional revenue requirement to be collected through revised rates shall be allocated among customer classes based on the utility's South Carolina firm peak demand data from the prior year.

In reviewing the decision of the Commission under a statute for which it is charged with the administration, the Commission is "the 'expert' designated by the legislature to make policy determinations regarding utility rates; thus, the role of a court reviewing such decisions is very limited." *Hamm v. South Carolina Public Service Comm'n,* 289 S.C. 22, 25, 344 S.E.2d 600, 601 (1986) (quoting *Patton v. South Carolina Public Service Comm'n,* 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984)). "[The Court has] traditionally given the [Commission], just as any other agency, respectful consideration in their interpretation of a statute. Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason." *Nucor Steel, a Div. of Nucor Corp. v. South Carolina Public Service Comm'n*, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992).

Without addressing all of the considerations SCE&G advanced to establish its need for the Facility in the Application, the record is replete with evidence from which the Commission could come to the conclusion that SCE&G's need was satisfactorily established. The crux of Appellant's argument is that SCE&G is too small of a utility to be the guinea pig for these types of nuclear facilities, and that given the cost of capital estimates associated with projects of this magnitude, coupled with the downturn in the economy, the costs for this risky facility would ultimately be passed on to the

SCE&G customers. While this is a valid and noteworthy point, the Commission addressed each and every concern Appellant presented, over and above the findings it was required to make under section 58-33-270. At the end of the day, the Commission, in a very thorough and reasoned order, determined SCE&G has appropriately established a need for the Facility, and thereafter approved SCE&G's proposed rate increases as reasonable costs to be passed on to the customers for the construction of the Facility. Without a doubt, these determinations are supported by substantial evidence in the record.

CONCLUSION

On balance, Appellant essentially asks this Court to substitute its judgment for that of the Commission, in an area in which the Commission is recognized as the expert. Although Appellant's concerns are deserving of evaluation, SCE&G's Application, as well as the Commission's thorough and well-reasoned order, reveal these considerations were adequately considered in the determination to approve the Application. Accordingly, the decision of the Commission is

AFFIRMED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Michael Mark McAdams, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Benjamin Albert Baroody, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Baroody shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Baroody may make disbursements from

respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Benjamin Albert Baroody, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Benjamin Albert Baroody, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Baroody's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

April 21, 2010

The Supreme Court of South Carolina

RE: Amendments to Appendix A to Rule 402, SCACR
Rules of the Board of Law Examiners

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the Rules of the Board of Law Examiners, Appendix A(B)(2)(f), to Rule 402, SCACR, is amended to state as follows:

> (f) In addition, an applicant seeking special testing accommodations due to a learning disability or attention deficit/hyperactivity disorder must provide appropriate documentation provided by a licensed professional qualified to diagnose such disability including, but not limited to, a licensed physician, learning disability specialist or psychologist. Learning disability and attention deficit/hyperactivity disorder evaluations must meet all requirements stated on the Board's written forms and should be completed or updated within the past three (3) years. An updated evaluation does not necessarily need to be a full, comprehensive diagnostic evaluation, but must provide information concerning relevant treatment, course of condition, current impairment, and rationale for current accommodation requests. The previous comprehensive diagnostic evaluation must be submitted with the updated evaluation. It is the applicant's responsibility to insure the Board is provided with a complete record fully demonstrating the existence and extent of impairment.

These amendments shall take effect ninety (90) days from the date of this order. See Rule 402(a)(4), SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 23, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ernest F. Middleton, III, and Marjorie Ann Middleton as Co-Trustees Under the Last Will and Testament of Ernest F. Middleton, Jr., Appellants,

v.

Manly Eubank, 1625 Partnership, A South Carolina General Partnership, and Palmetto Ford, Inc., Respondents.

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 4675
Heard December 10, 2009 – Filed April 19, 2010

AFFIRMED

Thomas H. Hesse and Daniel S. McQueeney, Jr., both of Charleston, for Appellants.

J. Rutledge Young, Jr., Stephen L. Brown, Russell G. Hines, and Stephen A. Spitz, all of Charleston, for Respondents.

SHORT, J.: In this dispute involving the interpretation of a real property lease, Ernest Middleton, III, and Marjorie Middleton (collectively, Appellants), as co-trustees of the will of Ernest Middleton, Jr., appeal from the Master-in-Equity's order finding in favor of Manly Eubank, 1625 Partnership, and Palmetto Ford, Inc. (collectively, Respondents), the lessees of the property owned by Ernest Middleton, Jr. We affirm.

FACTS

On July 28, 1983, Ernest Middleton, Jr. (Lessor) signed a lease with Eubank, individually and as President of Palmetto Ford, Inc., and Hugh Cannon (Lessees), whereby Middleton leased real property in Charleston, South Carolina to Palmetto Ford to relocate its dealership on the land.[1] The leased property was composed of two tracts: a 3.476-acre tract on Highway 17, and a 4.79-acre tract.[2] The two parcels were separated by a third tract that was owned by a third party. At that time, Ford required its dealerships to be built on at least seven acres of property. Therefore, the parties agreed the lease would be contingent upon the acquisition of an easement to the third-party tract of land that would provide access between the two parcels of land, allowing the two parcels to function as one and meet Ford's acreage requirement. Almost one year later, Lessor and 1625 Partnership were granted two easements for $25,000 in consideration paid by 1625 Partnership and $200 per month to use a portion of the property owned by the third party to provide "vehicular and pedestrian access to and from both parcels" of the leased land. The first easement connected the two separated parcels and the other provided access from the property onto Highway 17. The lease described the property as being composed of two tracts, but referred to them collectively as the "Property." The lease did not mention the easements. The

[1] On July 22, 1983, the parties signed an agreement that detailed the provisions to be included in the lease. Four months later, the lease was amended by a supplemental agreement. On January 18, 1984, Eubank, Hugh Cannon, and Palmetto Ford assigned the property lease to 1625 Partnership. Thereafter, on October 30, 1984, the lease was amended to add a new section entitled "Leasehold Mortgage." The lease term began on November 1, 1984.

[2] Tax map numbers 349-01-00-014 and 349-01-00-026.

lease further stated the Respondents would be making improvements to the property:

> Leesee [sic] will have improvements constructed and added to the Property, at a cost of approximately $1.1 million, including buildings, paved areas for display and parking of vehicles, driveways, lighting, signs, landscaping, and the equipment and fixtures (such as heating and air conditioning) which are customarily deemed to become a part of the real property to which they are affixed (but excluding equipment which is solely for automotive uses) (hereinafter, all such included improvements shall be collectively referred to as the "Improvements").

The lease provided the initial term of the lease would be for thirty years, with the possibility of two ten-year renewals, and the annual rent would be an amount equal to nine percent of the valuation of the property, to be paid in monthly installments. The lease listed the then-current value of the parcels separately and together. The property was to be revalued three years from the first day of the lease term, and every three years thereafter, and the rent for the following three years was to be based on the valuation set at that time. Section four of the lease, titled "Valuation," stated, "The property shall be revalued by a MAI appraisal based on raw, unencumbered land with no Improvements, for the highest and best use thereof at such time, without regard to any improvements thereon or to the use then being made of the property by lessee."[3] Further, the lease provided the "Valuation [of the property] shall not be decreased during the first Fifteen (15) years of the Property Lease term, and that the Valuation for this same Fifteen (15) years shall not be increased more than Six percent (6%) per year."

Several different appraisers appraised the land from 1984 to 2005. The initial appraisal was done on January 13, 1984. Fred Attaway, Jr., MAI, valued the property, after the completion of the proposed improvements, at

[3] Hereinafter referred to as "the valuation clause."

$1.83 million for the fee simple estate and at $1.3 million for the leasehold estate.[4] On January 24, 1994, Attaway re-appraised the raw land at $1.23 million and the leased estate at $1.5 million. In this appraisal, Attaway mentions the property is divided into two parcels that can function fully; however, he states the division has a negative effect on the value because the property is separated by an access easement. On August 11, 1999, Attaway appraised the property at $2.1 million for the fee simple estate, considering the tracts as one parcel because they function as one. Appellants did not increase the rent after the 1999 appraisal because the parties disagreed about the amount of the appraisal. As a result, the parties reached a temporary agreement that the valuation for the following three years would be $1.7 million.

In 2002, Christopher Donato, MAI, appraised the property for Appellants. On November 13, 2002, Donato appraised the land "as is" at $2,897,000. He appraised the property as one parcel connected by the easements because the "two easements facilitate access to both tracts and have the affect of linking the two tracts such that they can be used in concert." One month later, Donato re-appraised the land at $2,845,000. In this appraisal, at the request of Respondents, he appraised the property as separate tracts independent of each other without the access easements. On October 21, 2005, Donato appraised the land "as is" at $6.34 million.

Michael Robinson, MAI, appraised the property for Respondents. On March 3, 2003, Robinson appraised the 3.476-acre tract, as if vacant, at $1,911,800 and the 5.577-acre tract, as if vacant, at $655,300. He appraised the property as two separate and distinct tracts. Hugh Cannon, the attorney who drafted the lease, contacted Robinson in January or February 2003 and suggested the easements should not be considered in the appraisal. On November 15, 2005, Robinson appraised both tracts, as if vacant, at $3,504,400.

On March 2, 2006, Appellants filed a complaint in Charleston County Court of Common Pleas against Respondents, seeking a judicial declaration

[4] This appraisal was completed prior to the acquisition of the easements.

as to the rights and obligations of the parties under the Lease. The complaint alleged that based on the clear language of the valuation clause, the parties intended that the appraisal would be based upon the most valuable and profitable use of the property, which includes the easements and appraising both parcels together as a unit. However, Respondents asserted the parcels must be appraised as separate, unrelated, and unconnected parcels. Appellants also claimed Respondents refused to agree on a methodology for appraising the value of the property. In their amended answer, Respondents alleged:

> [T]he "Property," as defined in the Lease and as it actually existed at the time the Lease was entered, was two separate and distinct tracts of land, not connected by easements, and thus the "Property" that is to be revalued pursuant to [the valuation clause] should continue to consist of two separate tracts of vacant land, as they existed on July 28, 1983, unconnected by any easements and should therefore continue to be appraised as raw, unencumbered land with no Improvements as set forth in the Lease.

On July 30, 2007, the parties consented to refer the declaratory judgment action to the Master-in-Equity for Charleston County. A non-jury trial was held on December 5 and 6, 2007. At the close of the presentation of their case, Appellants moved for a directed verdict on the question of whether an easement is an improvement under the law and the lease.[5] At the conclusion of the trial, the master ruled for Respondents from the bench, and on December 18, 2007, he issued his order. The master found that (1) the lease was unambiguous; (2) the plain language of the lease negated consideration of easements in the revaluation; (3) the easements were improvements; (4) the parties' subsequent conduct supported his

[5] The master did not rule on the motion, stating: "Aren't you getting a little ahead of yourself? . . . You are asking me, essentially, for the ultimate decision in the case. And I've only heard from one side, the other side hadn't moved for any kind of motion, yet."

interpretation of the lease; and (5) Appellants' interpretation of the lease would lead to unjust or absurd results. Appellants filed a motion for new trial, or in the alternative, for reconsideration, pursuant to Rule 59(e), SCRCP, which was denied. This appeal followed.

STANDARD OF REVIEW

A declaratory judgment action 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). A lease agreement is a contract, and an action to construe a contract is an action at law. Duncan v. Little, 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009); Piedmont Interstate Fair Ass'n v. City of Spartanburg, 274 S.C. 462, 465, 264 S.E.2d 926, 927 (1980). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). When a contract's language is clear and unambiguous, the language alone determines the force and effect of the contract. Id. "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." Id. However, if a contract is deemed ambiguous, the fact finder must ascertain the parties' intentions from the evidence presented. Duncan, 384 S.C. at 425, 682 S.E.2d at 790. "It is a question of law for the court whether the language of a contract is ambiguous." McGill, 381 S.C. at 185, 672 S.E.2d at 574. In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless there is no evidence that reasonably supports the court's findings. Id.

LAW/ANALYSIS

Appellants argue the master erred in ignoring the plain language of the lease that required a MAI appraisal of the property according to its highest and best use at the time, which they assert includes the easements. We disagree.

All of the parties asserted the lease was unambiguous; therefore, the court was required to ascertain and give legal effect to the parties' intentions as determined by the contract language. See McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009).

Appellants argue the revaluation of the property according to "its highest and best use at the time" must include the easements. Appellants assert their expert witnesses, Thomas Hartnett and Christopher Donato, both real estate appraisers, recognized the highest and best use of the property at the time they conducted their appraisals included the easements because the easements allowed the two separate tracts to function as one parcel. Therefore, they testified that pursuant to the valuation clause of the lease, the two parcels should be revalued as a single unified parcel with the connecting easements. They also testified the easements did not qualify as subsequently-acquired improvements that would be excluded under the valuation clause of the lease. However, Donato admitted that under Webster's Dictionary's definition of the word "improvement," the easements would be defined as improvements because they added a benefit and value to the property.

In contrast, Mike Robinson and Debra Haskell, both real estate appraisers hired by Respondents, testified the property should be valued as two separate parcels. They also testified the easements are subsequent improvements to the property; therefore, they should not be considered in revaluing the two tracts of land because "improvements" were to be excluded according to the valuation clause of the lease. The master stated he found Robinson and Haskell to be highly credible and persuasive.

In looking at the language of the lease, we note it referred to two separate and distinct tracts, and it does not mention the easements. As the master stated in his order, "the lease calls for just what it says – revaluation under paragraph [four] of the 'property' being 'leased,' and that is, quite clearly, the two separate and distinct tracts of land referred to [in] the Lease itself." Therefore, we find the clear language of the lease supports the master's conclusion that "[i]t could not have been intended under the Lease

itself, or under Section [four] of that Agreement, to address a future easement, sold to the parties a year after the lease was entered into, which was never previously owned by either the landlord or the tenant but by a totally independent third party." We also find the evidence supports the master's conclusion that this was the "only reasonable construction" of the lease when considered as a whole and "[t]o interpret a subsequent sale [the easements] as new leased property is contrary to common sense and would lead to an unjust and absurd result."

Because we affirm the master's finding that the lease was unambiguous and the plain language of the lease negated consideration of the easements in the revaluation of the property, we need not address Appellants' remaining arguments. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the master's order is

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sheila King, Respondent,

v.

Margaret James, Beaufort County, a political subdivision of the State of South Carolina and Joy Logan, in her capacity as Treasurer for Beaufort County, South Carolina, Appellants.

Appeal From Beaufort County
Marvin H. Dukes, Master-In-Equity

Opinion No. 4676
Heard December 10, 2009 – Filed April 20, 2010

AFFIRMED

Mary B. Lohr, of Beaufort, for Primary Appellants; J. Thomas Mikell, of Beaufort, for Secondary Appellants.

Alysoun M. Eversole, of Beaufort, for Respondent.

WILLIAMS, J.: In this case, Beaufort County (the County) argues the Master erred in finding the two-year statute of limitations in South Carolina Code section 12-51-160 (Supp. 2008) did not apply to Sheila King's (King) action to set aside the 1999 tax sale of her property even though the action was brought in 2006. The County also contends the Master erred in finding the defenses of laches, estoppel, abandonment, acquiescence, and stale demand were inapplicable in this case. We affirm.

FACTS AND PROCEDURAL HISTORY

This case involves a parcel of real property located in Hilton Head Island, South Carolina (the Property). King acquired title to the Property by deed from her brother-in-law in 1976 and has used the Property as her primary residence since that time. When King first acquired the Property, the address was Route 2, Box 328. At some point thereafter, the address changed to 92A Gumtree Lane. In the late 1990s, the address changed once again to 9 Holmes Lane, which is King's current address. King testified before the Master that the changes in the Property's address have occasionally caused her mail to arrive late or not at all.

King lived with her husband and daughter, Salina, on the Property. Because King does not drive, she always paid her property taxes by traveling with her husband to the courthouse and paying in cash. However, King's husband died in 1997 after a prolonged battle with lung cancer. According to the County's tax records, King failed to pay taxes on the Property for 1998. As a result, on October 4, 1999, the County sold the Property to Margaret James (James) for $2,100.[1]

Beaufort County Deputy Treasurer Herschel Evans (Evans) testified that leading up to the tax sale, the County sent tax delinquency notices to King in accordance with all statutory requirements. Pursuant to South Carolina Code section 12-51-40(a) (Supp. 2008), the County first sent notice to King on or about April 1, 1999, that she had not paid her 1998 property

[1] The tax sale produced an overage of $1,458.68.

taxes. After the taxes remained unpaid for thirty days, the County sent King another tax bill via certified mail pursuant to section 12-51-40(b). The certified mail notice was returned undelivered. In response to the return of the certified mail notice, Evans claimed the County took exclusive possession of the Property by posting the Property pursuant to section 12-51-40(c). Although Evans did not personally post the Property, he supported his assertion that it was posted by noting the County's tax records, which indicated Walter Mack, an agent of the County, posted the Property on August 6, 1999.[2] Evans testified that the County followed all statutory mandates leading up to the tax sale of the Property; however, the County concedes on appeal the notices to King were defective under Hawkins v. Bruno Yacht Sales, 353 S.C. 31, 577 S.E.2d 202 (2003).[3] Thereafter, pursuant to section 12-51-40(d), the County advertised the Property and sold it at a tax sale to James in 1999.

Although the Property was very close to James' home, she testified she had only a rough idea of the Property's location until she had it surveyed in March 2005. In fact, James believed she had purchased the land adjacent to the Property. After the survey showed James was the owner of the Property, James visited the Property and spoke with King and Salina. James first offered to sell the Property back to King for $50,000. However, the sale never materialized. Subsequently, James offered to lease the Property to King and Salina for $500 per month, and they entered into a lease agreement from September 2005 until September 2006.

In April 2006, King brought an action against James and the County to set aside the tax sale. James and the County answered, asserting as defenses the two-year statute of limitations under section 12-51-160, laches, estoppel, waiver, abandonment, acquiescence, and stale demand. The case was tried in

[2] Although Mack was present at the trial, Mack was never called to testify.

[3] In Hawkins, the supreme court held delinquent tax notices stamped with payment deadlines that were weeks before the actual date of sale were not in strict compliance with statutory requirements, and therefore, the supreme court set aside the resulting tax sale. 353 S.C. at 38, 577 S.E.2d at 206. The County conceded it did not correct its notices pursuant to Hawkins until 2003. Therefore, these defective stamps were in the notices sent to King.

Beaufort County before Master-in-Equity Marvin H. Dukes (the Master) in 2008.

King and Salina testified at the hearing before the Master they had never received any notice from the County that the taxes on the Property were delinquent, nor had they seen any posting by the County on the Property. King testified when she attempted to pay taxes on the Property in 2000 at the Beaufort County courthouse, an employee told her the County would not accept her money, that there was an unspecified "problem" with her property taxes, and she should contact an attorney. King hired an attorney, Doug MacNielle, in 2001. According to King, MacNielle informed her he had "run a survey," and it showed her name "was still on the [Property]." When asked whether she thought to ask anybody else at the treasurer's office why she was not receiving any tax bills for the Property after 2000, she responded, "Honestly, no."

The Master held the statute of limitations in section 12-51-160[4] was inapplicable to King's action because King remained in possession of the Property at all times and, to the extent the execution of the lease in 2005 constituted an "ouster," King brought her action to set aside the tax sale within two years of the ouster. In reaching this conclusion, the Master relied on Dibble v. Bryant, in which our supreme court held the earlier version of section 12-51-160[5] "was intended to bar a defaulting and ousted taxpayer from maintaining an action to defeat the title of the tax sale purchaser and recover the land if brought more than two years from the date the purchaser came into possession." 274 S.C. 481, 487, 265 S.E.2d 673, 677 (1980).

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[4] Pursuant to South Carolina Code section 12-51-160 (2006 & Supp. 2008), "An action for the recovery of land sold pursuant to this chapter or for the recovery of the possession must not be maintained unless brought within two years from the date of the sale as provided in Section 12-51-90(C)." (emphasis added).

[5] The applicable statutory procedure for the sale of a delinquent taxpayer's property at the time Dibble was decided was set forth in sections 12-49-410 to -570, but was effectively repealed on January 1, 1986. See 1985 Act No. 166, § 17. The applicable code sections governing tax sales, such as King's, are now designated in sections 12-51-40 to -170.

As to the actual tax sale, the Master noted: "[T]ax sales must be conducted in strict compliance with statutory requirements." Hawkins, 353 S.C. at 36, 577 S.E.2d at 205. In light of the County's stipulation that notice was improper under Hawkins, the Master found the County failed to meet the "strict compliance" standard, and therefore, the tax deed was void and of no effect. The Master further held the County had failed to prove by a preponderance of evidence that King ever received any delinquent tax notices. Finally, the Master found "[n]o competent evidence was presented that [the Property] was properly posted," because Evans – the County's only witness – had no personal knowledge of the posting other than what was in the County's records, and both King and Salina testified they never saw a posting on the Property.[6] This appeal followed.

STANDARD OF REVIEW

An action to set aside a tax sale lies in equity. Smith v. Barr, 375 S.C. 157, 160, 650 S.E.2d 486, 488 (Ct. App. 2007). Our scope of review for a case heard by a Master permits us to determine facts in accordance with our own view of the preponderance of the evidence. Id. However, this scope of review does not require this court to disregard the Master's factual findings because the Master saw and heard the witnesses and was, therefore, in a better position to judge the witnesses' credibility and demeanor. Id.

LAW/ANALYSIS

1. Tax Sale

King argues the tax sale and resulting tax deed are invalid because the County failed to strictly comply with statutory notice requirements leading up to the tax sale. We agree.

"Tax sales must be conducted in strict compliance with statutory requirements." In Re Ryan, 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999)

[6] Evans testified in 2003 the County began keeping photographic records of postings as evidence of postings.

(citing Dibble, 274 S.C. at 483, 265 S.E.2d at 675). "[A]ll requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded [as] mandatory and are to be strictly enforced." Donohue v. Ward, 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct. App. 1989) (citing Osborne v. Vallentine, 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941)). "Even actual notice is insufficient to uphold a tax sale absent strict compliance with statutory requirements." Ryan Inv. Co., 335 S.C. at 395, 517 S.E.2d at 693. "Failure to give the required notice [of a tax sale] is a fundamental defect in the tax sale proceedings which renders the proceedings absolutely void." Rives v. Bulsa, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996).

Appellants have conceded the tax sale was not proper under Hawkins due to the defective stamp in the notices to King. Moreover, neither of the Appellants has appealed the Master's finding that the tax sale was not conducted in strict compliance with statutory requirements. Therefore, this ruling is the law of the case. See ML-Lee Acquisition Fund, LP v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case). Accordingly, we affirm the Master's finding as to the invalidity of the tax sale and tax deed.

2. Statute of Limitations

Appellants argue even if the tax sale was improper under Hawkins due to the defective notice, the Master nevertheless erred in failing to apply the two-year statute of limitations from section 12-51-160 to bar King's claim because (1) section 12-51-160 clearly states the statute begins to run "from the date of the [tax] sale," and (2) alternatively, even if King did not have actual knowledge of the sale, the statute began to run against her in 2000 when an employee of the treasurer's office told her there was a "problem" with her taxes. We disagree.

One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights. McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989). The statute of limitations begins to run at the time the cause of

action accrues. Harvey v. S.C. Dep't. of Corr., 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000) (citing Matthews v. City of Greenwood, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991)). In analyzing a limitations defense, "[t]he fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it." Id. (quoting Matthews, 305 S.C. at 269, 407 S.E.2d at 669). Thus, a particular cause of action accrues "at the moment when the plaintiff has a legal right to sue on it." Id.

This court has held the purpose of the statute of limitations as set forth in section 12-51-160 is "to create a time limit during which one who lost title to property through a tax sale, after proper notice, may attempt to regain title." Corbin v. Carlin, 366 S.C. 187, 194, 620 S.E.2d 745, 749 (Ct. App. 2005). A review of case law in this area reveals somewhat divergent decisions regarding if and when the statute of limitations begins to run in situations such as this.

On the one hand, we find case law that says when notice to the homeowner is not in strict compliance with the statute, such a defect is "jurisdictional," and the statute of limitations does not run at all. See Donohue v. Ward, 298 S.C. 75, 82, 378 S.E.2d 261, 265 (1989) (holding where a defect in notice is jurisdictional, such a defect "invalidates the tax proceeding and prevents the running of the limitations statute"); Good v. Kennedy, 291 S.C. 204, 207, 352 S.E.2d 708, 711 (1987) (holding "the general law is that where a statute requires as a condition precedent to foreclosing a taxpayer's rights in property sold for taxes that he be given notice of his right to redeem, such a requirement is generally regarded as jurisdictional . . . .") (internal quotations omitted).

On the other hand, we also find case law in which our courts interpreted previous versions of section 12-51-160 as saying even if the notice is defective, the statute of limitations still applies, but only begins to run when the purchaser comes into possession. See Dibble v. Bryant, 274 S.C. 481, 487, 265 S.E.2d 673, 677 (1980) (holding previous version of section 12-51-160 "was intended to bar a defaulting and ousted taxpayer from maintaining an action to defeat the title of the tax sale purchaser and recover the land if brought more than two years from the date the purchaser came into

possession") (emphasis added); Glymph v. Smith, 180 S.C. 382, 384, 185 S.E. 911, 914 (1936) (holding even though the plaintiff brought the action six years after the tax sale, the two-year statute of limitations never began to run because the sheriff never took possession of the subject property, and the purchaser was never put into possession following the execution of the tax deed); Gardner v. Reedy, 62 S.C. 503, 503, 40 S.E. 947, 947 (1902) (holding the two-year statute of limitations would only begin to run if and when the purchaser took possession).

Regardless of which of the two above interpretations is correct, Appellant's argument as to the statute of limitations necessarily fails because King brought her action within two years of the buyer coming into possession. In the present case, the Master held, and we agree, the County failed to establish by a preponderance of the evidence that it took "exclusive possession" of the Property by posting, as is required under section 12-51-40(c). Moreover, James could not reasonably be said to have withheld possession of the Property from King until 2005, when she had the Property surveyed and informed King of her ownership. Then and only then would the purchaser have come "into possession" under Dibble, such that the statute would begin to run. 274 S.C. at 487, 265 S.E.2d at 677; see also Scott v. Boyle, 271 S.C. 252, 256, 246 S.E.2d 887, 889 (1978) (holding section 12-49-570 did not bar an action to set aside a tax deed brought six years after the sale because there was insufficient evidence the purchaser ever obtained possession, and therefore, the statute never began to run); Leysath v. Leysath, 209 S.C. 342, 344, 40 S.E.2d 233, 236 (1946) (holding the two-year statute of limitations in section 12-49-570 "does not begin to run until the purchaser is put into possession").

Accordingly, we affirm the Master's holding that the two-year statute of limitations of section 12-51-160 does not bar King's action to set aside the tax sale in this case.

3. Other Defenses

The Master also held the Appellants' additional defenses of laches, estoppel, waiver, abandonment, acquiescence, and stale demand were likewise inapplicable. We agree.

a. Laches and Stale Demand

Appellants argue laches and stale demand should apply to bar King's claims. We disagree.

Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Hallums v. Hallums, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988). When a Master declines to make a finding of laches, that decision will not be disturbed absent an abuse of discretion. Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001); Premium Inv. Corp. v. Green, 283 S.C. 464, 473, 324 S.E.2d 72, 78 (Ct. App. 1984).

A stale demand, on the other hand, is

> [O]ne that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and to do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that it has been abandoned or satisfied.

All Saints Parish, Waccamaw v. The Protestant Episcopal Church in the Diocese of S.C., 358 S.C. 209, 236, 595 S.E.2d 253, 268 (Ct. App. 2004).

Strictly speaking, there are some points of distinction between laches and staleness of demand. Bell v. Mackey, 191 S.C. 105, 109, 3 S.E.2d 816, 824 (1939). For instance, a stale demand implies a greater lapse of time than is necessary to laches. Id. Moreover, laches generally involves such change

in conditions as would render inequitable the enforcement of a claim, while no such change is necessary in order to create staleness of demand. Id. However, they both fall within the same general principles of equity, and the distinctions are of little practical importance. Id.[7]

We find laches and stale demand to be inapplicable for two reasons. First, the lapse of time between James' assertion of ownership in 2005 and King's filing in 2006 was not of an unreasonable length. Although King was told there was an unspecified "problem" with her taxes in 2000, her attorney advised her in early 2001 that her name was still on the property. Under the circumstances, we find it was not unreasonable for King to decline to investigate the matter further in reliance on the advice of counsel.[8]

Second, neither James nor the County has shown sufficient prejudice resulting from King's delay such that affirming the Master would lead to an inequitable result. James testified she did not even know she owned the Property until 2005, and there is no evidence showing she has entered into any obligation or changed any position based on King's delay. James' only expense on the Property has been the ongoing property tax, which is not an expense caused by delay. The only injury the County has claimed is its inability to refund the purchase price to James because the unclaimed overage

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[7] We also note some courts have declined to recognize stale demand as anything more than a laches defense. See, e.g., U.S. v. Admin. Enters., 46 F.3d 670, 672 (7th Cir. 1995) ("There is no defense of 'staleness,' despite a dictum in United States v. Gimbel, 782 F.2d 89, 93 (7th Cir.1986), on which the appellants rely. Laches is a legal doctrine; it has structure; 'staleness' is an epithet."). Nonetheless, any such distinction would not be dispositive of this issue.

[8] We do note that although King's attorney advised her in 2001 the Property was still titled in her name, King was arguably still on inquiry notice of the tax sale because despite the reassurance from her attorney, King did not receive any subsequent tax bills for the Property. The fact that King paid taxes every year since 1974 implies that she knew property taxes must be paid annually. Thus, the reasonableness of her failure to further investigate the "problem" is questionable. However, we believe laches is nevertheless inapplicable due to the Appellants' failure to show sufficient prejudice.

from the tax sale has escheated to the County's general fund pursuant to section 12-51-130 of the South Carolina Code (Supp. 2009).[9] We find it would be inequitable to allow the County to claim the automatic operation of the statute as its source of prejudice in a case where it was the County's admitted failure to strictly comply with statutory requirements that led to an invalid tax sale.

Accordingly, we affirm the Master's findings as to the Appellants' laches and stale demand claims.

b. Waiver/Abandonment/Acquiescence/Estoppel

Appellants argue the defenses of waiver, abandonment, acquiescence, and estoppel should apply because King and Salina waived their rights and/or acquiesced in James' rights to the Property by entering into a lease with James to rent the Property. We disagree.

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Eason v. Eason, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009). In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned. Id. The determination of whether one's actions constitute waiver is a question of fact. Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 337, 676 S.E.2d 139, 145 (Ct. App. 2009).

In this case, we do not believe King or Salina waived or abandoned any rights in the Property by entering into the lease with James. Salina testified they entered into the lease on advice of counsel as a means of preventing James from selling the property to a third party. Immediately upon learning of James' ownership interest in the Property, Salina and King took action to maintain the use of the property and challenge James' ownership of it. At all times after the survey in 2005, Salina and King were pursuing legal counsel, and we believe the execution of the lease was more in the nature of a strategic

[9] Section 12-51-130 provides in relevant part that overages produced at tax sales automatically escheat to the County's general fund if not claimed within five years from the date of the sale.

maneuver made in anticipation of litigation than an abandonment of their rights in the Property.

Accordingly, we affirm the Master's finding that waiver is inapplicable.

CONCLUSION

Based on the foregoing, we affirm the finding of the Master that:

1. The tax sale was invalid pursuant to Hawkins;
2. Because the statute of limitations did not begin to run until the purchaser came into possession, King's action was timely; and
3. Laches, stale demand, waiver, estoppel, acquiescence, and abandonment do not apply to King's action.

AFFIRMED.

PIEPER and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael B. Moseley and
Marsha H. Moseley, Respondents,

v.

All Things Possible, Inc. and
James H. Hampton, Appellants.

Appeal From Lexington County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4677
Heard November 4, 2009 – Filed April 22, 2010

AFFIRMED IN PART AND REVERSED IN PART

Robert J. Thomas, of Columbia, for Appellants.

Barry L. Thompson and S. Jahue Moore, both of West Columbia, for Respondents.

LOCKEMY, J.: All Things Possible, Inc. and James H. Hampton appeal the circuit court's finding that they committed fraud in the inducement through the sale of a parcel of real estate. We affirm in part and reverse in part.

FACTS/PROCEDURAL BACKGROUND

In August 2002, Michael and Marsha Moseley (the Moseleys) purchased Lot 45 in the Secret Cove subdivision in Lexington County. Lot 45 was an undeveloped lot owned by All Things Possible, Inc. of which James Hampton is the president. Lot 45 was encumbered by an underground, surface-water drainage easement running diagonally across the entire length of the property. Hampton was aware of the drainage easement and intended to build a house on the corner of Lot 45 away from the easement. The easement is not recorded in a deed; however, it is recorded in a drawing on the recorded plat of the subdivision (subdivision drawing). According to the developer of Secret Cove, Lot 45 is unbuildable due to the location of the easement.

All Things Possible listed Lot 45 for sale through its real estate agent, Loretta Whitehead. The Moseleys contacted Whitehead, and she arranged for them to purchase Lot 45. During the course of their dealings, Whitehead received a faxed copy of the plat of Lot 45 that indicated Lot 45 was unencumbered (falsified plat). She was unsure who sent the fax to her office. Whitehead, who was unaware of the easement, provided the Moseleys with the faxed copy of the falsified plat. Further, she advised the Moseleys they would be able to build a home on the lot. James Jones, the Moseley's attorney, contracted with Professional Title Services to prepare a title abstract. The Moseleys contend the title report did not contain the subdivision drawing. The Moseleys purchased Lot 45 for $37,500, unaware that the property was encumbered by the easement. In January 2005, the Moseleys learned of the easement through a real estate agent of a potential buyer.

In July 2005, the Moseleys filed suit against All Things Possible and Hampton alleging causes of action for breach of contract, fraud, and breach of contract accompanied by a fraudulent act. This action was tried without a

jury on April 24, 2007, and the Moseleys proceeded solely on the fraud cause of action. The circuit court found Hampton provided a falsified plat to the Moseleys through his real estate agent and induced them to buy Lot 45. The circuit court determined Hampton had full knowledge of the falsity of his representation and intended for the Moseleys to act upon his misrepresentation. Furthermore, the circuit court concluded Hampton's misrepresentation was material, as the Moseleys would not have purchased Lot 45 had they known of the drainage easement. The circuit court found the Moseleys were unaware at the time of purchase that there was an easement and did everything reasonable to inspect and obtain information concerning the property. Additionally, the circuit court found the Moseleys had a right to rely on and were proximately injured by Hampton's misrepresentation. Thus, the circuit court found Hampton committed fraud in the inducement.

The circuit court also found Hampton was the agent of All Things Possible and exercised complete control over the actions of the corporation. The circuit court determined Hampton's fraudulent concealment of the drainage easement and his sale of Lot 45 to the Moseleys was an action within the scope of his employment as president of All Things Possible. Consequently, the circuit court found All Things Possible vicariously liable for Hampton's fraud and determined that All Things Possible also engaged in fraud by concealment and fraud by misrepresentation. The circuit court awarded the Moseleys $44,275 in actual damages and $44,275 in punitive damages. All Things Possible and Hampton appealed.

STANDARD OF REVIEW

An action for fraud is an action at law. Hendricks v. Hicks, 374 S.C. 616, 619, 649 S.E.2d 151, 152 (Ct. App. 2007). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). An appellate court will not disturb a circuit court's findings unless they are found to be without evidence that reasonably supports those findings. Id. at 600, 675 S.E.2d at 415.

LAW/ANALYSIS

I. All Things Possible

All Things Possible and Hampton argue the circuit court erred in finding All Things Possible committed fraud by clear and convincing evidence. We disagree.

"Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right." Regions Bank v. Schmauch, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003) (citing Black's Law Dictionary 660 (6th ed.1990)). To prevail on a cause of action for fraud, a Plaintiff must prove by clear, cogent and convincing evidence the following elements:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Id. at 672, 582 S.E.2d at 444-45. To establish a claim or defense of fraud in the inducement, a plaintiff must prove the nine elements of fraud as well as the following three elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." Darby v. Waterboggan of Myrtle Beach, Inc., 288 S.C. 579, 584, 344 S.E.2d 153, 155 (Ct. App. 1986).

The circuit court found the Moseleys had a right to rely on Hampton's misrepresentations because he was the seller of real property, and his representations concerned the absence of a latent defect in the property. The circuit court determined that sellers have a duty to disclose latent defects to buyers and thus the Moseleys rightly relied to their detriment on Hampton's misrepresentation concerning the property. The circuit court noted that

easements do "not generally come within the definition of a 'latent' defect because such should be discovered upon a 'reasonable' examination of the property by way of title search or survey." However, the circuit court found this case was distinguishable because the Moseleys were deterred by Hampton's behavior from requesting or demanding a survey prior to closing.

The circuit court noted that All Things Possible and Hampton rely on LoPresti v. Burry, 364 S.C. 271, 612 S.E.2d 730 (Ct. App. 2005), to support their argument that the Moseleys had constructive notice of the easement. However, the circuit court also noted that LoPresti held constructive notice is "inapplicable especially 'where the very representations relied on induced the hearer to refrain [from] an examination of the records, where the employment of an expert would have been required to deduce the truth from an examination of the records, where confidential relations existed, or where the defrauded party was inexperienced.'" 364 S.C. at 277 n.12, 612 S.E.2d at 733 n.12 (quoting Reid v. Harbison Dev. Corp., 285 S.C. 557, 561, 330 S.E.2d 532, 534-35 (Ct. App. 1985)). The circuit court determined the Moseleys were induced to buy Lot 45 without conducting an independent survey of the property because "Hampton told them that they did not need to get another survey or plat as their lot was the last to be bought in the neighborhood," and "convinced them by drawing a home on the plat and offering to build it for them." The circuit court found All Things Possible vicariously liable for Hampton's fraud.

Relying on LoPresti, All Things Possible and Hampton argue the Moseleys had constructive notice of the easement. In LoPresti, this court held homeowners had constructive notice of a flood easement, notwithstanding the removal of a dotted line on a recorded plat showing the flood plain level, because the easement was properly recorded in the chain of title. 364 S.C. at 275, 612 S.E.2d at 732. Here, All Things Possible and Hampton contend the easement across Lot 45 was created by a plat which was approved by the Lexington County Planning Commission and recorded in the public record. The Moseleys argue they were not defrauded by documents recorded in the chain of title but were directly defrauded by All Things Possible and Hampton when they were given an altered plat by Whitehead. The Moseleys contend they justifiably relied on the plat when

deciding to buy Lot 45. They argue they were unaware of the easement and did everything reasonable to safeguard their interests.

In Slack v. James, 364 S.C. 609, 615, 614 S.E.2d 636, 639 (2005), our supreme court determined a question of fact existed as to whether a buyer's reliance on a seller's misrepresentation was reasonable although the falsity of the misrepresentation could have been discovered through an examination of the public record. Here, although the misrepresentation made to the Moseleys could have been discovered through an examination of the public records, we find evidence in the record supports the circuit court's determination that the Moseleys did everything reasonable to inspect and obtain information concerning the property. The Moseleys hired an attorney, conducted a title search, and obtained a plat from Whitehead. The Moseleys were also induced to purchase Lot 45 without obtaining an independent survey of the property after Whitehead, acting as an agent of All Things Possible, provided them with the falsified plat. While the circuit court determined Hampton was the seller of Lot 45 and that he personally provided the falsified plat to the Moseleys, Lot 45 was actually owned by All Things Possible. Additionally, the representations made concerning the property were made by Whitehead, not Hampton. Thus, we find there was evidence in the record to support the circuit court's determination that All Things Possible committed fraud, and we affirm the circuit court.

II. James H. Hampton

The Appellants also argue the circuit court erred in finding Hampton personally committed fraud by clear and convincing evidence. We agree. "An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally liable for the torts of the corporation." Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996). "To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act." Id. Here, there was no evidence Hampton personally committed fraud. Lot 45 was owned by All Things Possible, not Hampton. Whitehead, acting as an agent of All Things Possible, provided the Moseleys with the falsified plat. There was no evidence Hampton faxed the falsified plat to Whitehead. All representations made to the Moseleys concerning Lot 45 were made by

Whitehead. Accordingly, we reverse the circuit court's determination that Hampton committed fraud.

CONCLUSION

We affirm the circuit court's determination that All Things Possible committed fraud, and we reverse the circuit court's determination that James Hampton committed fraud. Accordingly, the circuit court's order is

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and PIEPER, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Carroll, Appellant,

v.

South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles, Defendants,

Of whom South Carolina Department of Motor Vehicles is the, Respondent.

Appeal From Administrative Law Court
John McLeod, Administrative Law Court Judge

Opinion No. 4678
Heard March 3, 2010 – Filed April 26, 2010

AFFIRMED

A. Randolph Hough, of Columbia, and Heath P. Taylor, of West Columbia, for Appellant.

General Counsel Frank L. Valenta, Jr., Deputy General Counsel Philip S. Porter, and Assistant General Counsel Linda A. Grice, all of Blythewood, for Respondent.

PER CURIAM: David Carroll appeals an Administrative Law Court (ALC) order affirming his license suspension for registering an alcohol concentration of 0.15% or greater. Carroll argues the ALC erred in finding he was not prejudiced by the arresting officer's failure to advise him of his implied consent rights in writing as required by section 56-5-2950(B) of the South Carolina Code (Supp. 2009). We affirm.

FACTS

On May 28, 2007, State Trooper Lance Corporal Stack received a "BOLO" (be on the lookout) alert for a grey-colored vehicle reportedly "all over the road." Trooper Stack was approaching a vehicle stopped on the shoulder of the road matching the description in the BOLO when the vehicle suddenly made a U-turn across two lanes of traffic to travel in the opposite direction. Trooper Stack turned on his blue lights and pulled the vehicle over. After noticing a strong odor of alcohol in the vehicle, he asked the driver, Carroll, to step out. Carroll's speech was slurred, and he seemed unsteady on his feet. Trooper Stack searched the vehicle and located an open container in the vehicle. He advised Carroll of his Miranda rights,[1] and Carroll stated he understood everything.

Another State Trooper, Lance Corporal Chance, arrived on the scene and advised Carroll that he was being videotaped and audio recorded. Trooper Chance informed Carroll he could refuse to take the field sobriety tests. He administered three standard field sobriety tests, all of which Carroll failed. Trooper Stack placed Carroll under arrest for driving under the influence (DUI) and transported Carroll to the Orangeburg County Law Enforcement Complex for a DataMaster blood alcohol concentration test (BAC test).

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Trooper Stack verbally advised Carroll of his implied consent rights by reading the advisement form to him. He checked Carroll's mouth for any foreign material and then waited the requisite twenty minutes before performing the BAC test. Carroll was undecided about whether to take the test or refuse it during the twenty minute waiting period. Trooper Stack asked Carroll to stand up and blow into the DataMaster machine and Carroll complied, after which he proceeded to perform three separate BAC tests. The first and second tests showed interference, but the third BAC test registered a blood alcohol level of 0.25%. Trooper Stack did not give Carroll his implied consent warning in writing until after all three tests were completed. Carroll signed the advisement of rights, along with his driver's license suspension, and copies of the BAC test reports.

Carroll requested an administrative hearing pursuant to section 56-5-2951(B)(2) of the South Carolina Code (Supp. 2009). During the hearing, Carroll stated he did not understand anything about the BAC testing process, and he "most likely would have refused" the BAC test if he had seen his implied consent rights in writing. However, on cross-examination, Carroll admitted he recalled informing Trooper Stack that he understood the verbal advisement of his implied consent rights. Carroll later explained that while he remembered telling Trooper Stack he understood, he did not truly understand the advisement of rights, and he was only agreeing with Trooper Stack at the time out of respect for Trooper Stack's rank.

After the hearing, the Department of Motor Vehicles (the Department) sustained Carroll's driver's license suspension, finding the BAC tests were administered in compliance with the implied consent statute. Carroll appealed, and the ALC affirmed the Department's decision. The ALC's order noted Carroll testified he understood his implied consent rights prior to testing, and Carroll subsequently signed a copy of the implied consent advisement of rights form. The ALC concluded Carroll was not prejudiced by the lack of written notice prior to testing. This appeal followed.

STANDARD OF REVIEW

Appellate review of an ALC order must be confined to the record. S.C. Code Ann. § 1-23-610(B) (Supp. 2009). This court may not substitute its

judgment for that of the ALC as to the weight of the evidence on questions of fact. Id. This court may affirm the decision, remand the case for further proceedings, or "reverse or modify the decision if the substantive rights of the petitioner have been prejudiced . . . ." Id. The petitioner suffers prejudice when the ALC's finding, conclusion, or decision is:

> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

LAW/ANALYSIS

Carroll argues the ALC erred in affirming his license suspicion based upon its determination that Carroll was not prejudiced by Trooper Stack's failure to advise Carroll of his implied consent rights in writing as required by section 56-5-2950(B) of the South Carolina Code (Supp. 2009). We disagree.

South Carolina's Legislature has adopted an implied consent statute that provides:

> No tests may be administered or samples obtained unless . . . prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:
>
> (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
>
> (2) his privilege to drive must be suspended for at least one month if he takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
>
> (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
>
> (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
>
> (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

S.C. Code Ann. § 56-5-2950(B) (Supp. 2009) (emphasis added). Additionally, section 56-5-2950(J) provides that the failure to follow policies or procedures set forth in section 56-5-2950 will result in the exclusion from evidence of any tests results, "if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure . . . ." S.C. Code Ann. § 56-5-2950(J) (Supp. 2009).

Our court examined a violation of the implied consent statute's "in writing" requirement in Taylor v. South Carolina Department of Motor Vehicles, 368 S.C. 33, 627 S.E.2d 751 (Ct. App. 2006) (Taylor I). Taylor heard his implied consent rights but neither read nor signed the implied consent form. Id. at 35, 627 S.E.2d at 752. This court noted Taylor needed to demonstrate both a violation of the implied consent statute and prejudice in order to warrant relief. Id. at 38, 627 S.E.2d at 754. We held Taylor was not prejudiced because "Taylor does not argue that he did not receive the implied consent rights, or that he would have provided a blood test if he had received the implied consent rights in writing." Id.

Taylor appealed this court's decision to the South Carolina Supreme Court, which affirmed in Taylor v. South Carolina Department of Motor Vehicles, 382 S.C. 567, 677 S.E.2d 588 (2009) (Taylor II).[2] Our Supreme Court found nothing in the implied consent statute mandated re-issuance of a license for lack of procedural compliance with the statute. Id. at 569-70, 677 S.E.2d at 590. The Supreme Court noted the remedy provided in the implied consent statute for any lack of procedural compliance is exclusion of the test results from evidence, and not reissuance of an individual's driver's license. Id. The Supreme Court then looked to section 56-5-2951 of the South Carolina Code (Supp. 2009), the statute authorizing the Department to suspend a driver's license, and similarly concluded nothing in that statute mandates reissuance of a driver's license upon failure to procedurally comply with section 56-5-2950. Id. at 570-71, 677 S.E.2d at 590. Section 56-5-2951(F) provides:

> An administrative hearing must be held after the request for the hearing is received by the Division of Motor Vehicle Hearings. The scope of the hearing is limited to whether the person:
>
> (1) was lawfully arrested or detained;

[2] Our Supreme Court affirmed in a three-two split. Taylor II, 382 S.C. 567, 567-71, 677 S.E.2d 588, 589-91 (2009).

> (2) was given a written copy of and verbally informed of the rights enumerated in [s]ection 56-5-2950;
>
> (3) refused to submit to a test pursuant to [s]ection 56-5-2950; or
>
> (4) consented to taking a test pursuant to [s]ection 56-5-2950, and [several conditions relating to the administration of the test].

Thus, our Supreme Court held the "in writing" requirement was merely one of four factors to examine "with an eye toward prejudice" pursuant to section 56-5-2951(F). Taylor II, 382 S.C. at 571, 677 S.E.2d at 590. They further noted "[i]f the Legislature had intended the lack of written notice (or any other factor) to be a fatal defect, it could have said so in the statute." Id. at 570, 677 S.E.2d at 590 (citation omitted). The Supreme Court found this court "properly applied a prejudice analysis" and correctly found no prejudice resulted from the lack of written notice when Taylor was verbally advised of the implied consent warning. Id. at 571, 677 S.E.2d at 590.

We believe the case sub judice is distinguishable from Taylor I. Unlike Taylor, Carroll testified he likely would have refused the BAC test had he received his implied consent rights in writing, as required by section 56-5-2950(B). However, we defer to the ALC's factual findings regarding whether Carroll verbally received and understood his implied consent rights prior to testing. See S.C. Code Ann. § 1-23-610(B) (Supp. 2009). We believe substantial evidence supported the ALC's conclusion that Carroll was not prejudiced by the lack of written notice. See id. Furthermore, we are bound by our Supreme Court's holding in Taylor II, suggesting no prejudice resulted from the lack of written notice when an individual was verbally advised of his or her implied consent rights. See Taylor II, 382 S.C. at 571, 677 S.E.2d at 590 ("Given that it is undisputed Taylor was advised of the implied consent warning, the Court of Appeals properly found he suffered no prejudice from the officer's lack of written notice.").

Accordingly, we affirm the ALC's decision affirming Carroll's license suspension.

AFFIRMED.

SHORT, WILLIAMS, and LOCKEMY, JJ., concur.