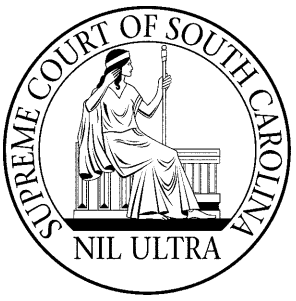

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
July 1, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cody Steven Powell, by and through his Conservator, Kelly H. Kelley, and his natural and legal guardian, Elizabeth Powell,	Respondent,
v.	
Bank of America, Karen P. Unrue, and Travis Powell,	Defendants,
and Elizabeth Powell,	Defendant/Intervenor,
of whom Bank of America is the	Appellant/Respondent,
and Elizabeth Powell is the	Respondent/Appellant.

Appeal From Williamsburg County
Howard P. King, Circuit Court Judge
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 4415
Heard May 6, 2008 – Filed June 20, 2008

APPEAL DISMISSED

Clarence Davis and T. William McGee, III, both of Columbia, for Appellant-Respondent.

Jennifer R. Kellahan, W.E. Jenkinson, III, and Ronnie Alan Sabb, all of Kingstree, for Respondent.

Helen Tyler McFadden, of Kingstree, for Respondent-Appellant.

Harry C. Wilson, Jr., of Sumter, for Defendant Travis Powell.

KITTREDGE, J.: We are presented with cross-appeals arising from an order apportioning interpleaded funds in a severed equitable action. The appeal of the Bank of America (the Bank) is dismissed because it has no legal interest in the interpleaded funds and is not an aggrieved party in the severed equitable action. Because the Bank's appeal is dismissed, we decline to address the remaining issues.

I.

On November 19, 2000, Steven Powell died in a work-related accident, leaving behind his wife, Elizabeth, and a minor son, Cody. Elizabeth received life insurance proceeds for herself and Cody from three separate policies.

In February 2001, Steven's sister, Karen Powell (now Karen P. Unrue), approached Elizabeth about managing these funds. At the time, Karen was the owner of an accounting business, Carolina Bookkeeping, and held herself out as knowledgeable regarding investments. Karen told Elizabeth that the investment firm of Charles Schwab, where Elizabeth had already invested a portion of the funds, would cheat her out of her money. Ultimately, Elizabeth began to rely on Karen for investment advice, and between

February 21 and May 1 of 2001, Elizabeth transferred $274,191 to Karen for investment.

In a March 29, 2001 order of the probate court of Williamsburg County, Karen and her brother, Travis Powell, were appointed co-conservators for the estate of Cody. Under the probate court order, the funds were to be deposited in a restricted account, and no funds were to be withdrawn or transferred without written order of the probate court. The probate court also prohibited Karen and Travis from compensating themselves out of Cody's funds.

Cody's funds were never placed in a restricted account. Karen deposited Cody's funds into her checking account at the Bank, and subsequently placed them into certificates of deposit (CDs) with the Bank in her name. As each CD matured, the money was re-deposited into Karen's personal checking account, and by September 2001, all of the funds had been withdrawn from the CDs and placed into Karen's personal account.

Karen and her husband moved to Colorado in 2001. By the end of November 2001, Karen had removed $355,000 from her checking account at the Bank and deposited the funds in an account with Vectra Bank in Colorado in the names of Karen, Travis, and Elizabeth. Elizabeth was unaware of this account. While in Colorado, Karen withdrew the funds for her own personal use. On several occasions, Elizabeth contacted Karen through a phone booth in Colorado requesting an accounting of the funds. While Karen did make several small payments at the request of Elizabeth, Karen failed to provide an accounting of the funds or to return the funds to Cody and Elizabeth.

On May 30, 2002, Elizabeth filed a complaint against Karen for conversion of the funds. The same day, Karen forwarded a check in the amount of $194,637.97 drawn from the account at Vectra Bank to a South Carolina attorney, who placed the funds in escrow. In June 2004, Elizabeth secured a judgment in her action against Karen in the amount of $249,733.39 actual damages and $750,000 punitive damages.

On May 2, 2003, Cody, through his conservator, Kelly H. Kelley, and his mother, Elizabeth, filed suit against the Bank, Travis, and Karen to recover his funds. The Bank and Travis appeared and filed answers denying liability. Karen, however, did not respond and was held in default.

By consent order filed November 21, 2003, the parties in Cody's action agreed for all funds in the escrow account to be deposited in an interest-bearing account with the clerk of court for Williamsburg County. Subsequently, on June 16, 2004, Elizabeth joined the case as a defendant-intervenor pursuant to Rule 24(a)(2), SCRCP.

Judge Howard P. King issued a scheduling order in Cody's case on December 30, 2004, which set March 1, 2005, as the deadline for completion of discovery. Subsequent to the discovery deadline, the Bank filed a motion to sever Elizabeth's equitable action pursuant to Rule 42, SCRCP. The Bank's motion, dated May 12, 2005, asserted five grounds to justify its request for severance:

> (1) Cody's claims against the Bank are "entirely separate and have no relation to the issue . . . [of] what portion of the escrowed funds belongs to [Cody] and what portion belongs to [Elizabeth]."
>
> (2) "[D]eciding the ownership of such funds furthers the important interests of judicial economy for all parties, counsel and the Court" because Elizabeth "will not have to actively participate in the trial of the primary claims[.]"
>
> (3) "[S]evering this issue from the first-party action also serves the best interest of [Cody]. . . . If the Court agrees with [the Bank's expert], [Cody] will receive over $150,000 in cash before trial . . . which is patently to his benefit."
>
> (4) "[S]everance of this claim will benefit **all** parties to this action. [Elizabeth] will receive her interest of the escrowed funds and will not have to

> incur additional attorneys' fees, costs and inconvenience associated with the trial of this case."
>
> (5) The Bank "will know [its] liability before trial." (Emphasis in original.)

The Bank's motion to sever was heard by Judge Thomas W. Cooper, Jr. Judge Cooper granted the severance motion by order dated July 25, 2005. Judge Cooper's reasoning tracked the grounds asserted in the Bank's May 12 motion, as the order emphasized factors such as convenience of parties, convenience of witnesses, judicial economy, and the "separate" and "independent" nature of Cody's legal claims and Elizabeth's "equitable claim as to a portion of the escrowed funds." At the hearing before Judge Cooper, the Bank acknowledged that neither the Bank "nor any of the co-conservators or anyone else is claiming any ownership of those funds. It's only how much belongs to [Cody and] how much belongs to [Elizabeth]. That's it."

The hearing to apportion the escrowed funds was scheduled to begin December 20, 2005 before Judge King. According to the record, Cody and Elizabeth reached an agreement on the eve of the hearing concerning the apportionment of the escrowed funds. Subject to court review and approval, Cody and Elizabeth agreed to apportion the funds 56% to 44%, respectively. The Bank objected to the settlement as it, in hopes of minimizing Cody's ultimate damage claim, advocated for Cody receiving a greater share of the funds. Elizabeth contended that the Bank did not have an interest in the funds, noting that she and Cody "have an absolute unfettered right to settle."

The issue of apportionment of the funds proceeded to a contested hearing, with the Bank taking a prominent role ostensibly on Cody's behalf. Judge King apportioned the funds, which then totaled $197,596.44, giving 56% to Cody ($110,654) and 44% to Elizabeth ($86,942.44), the same as the settlement agreement. The cross-appeals followed.

II.

APPEAL OF ELIZABETH POWELL

Elizabeth argues the Bank has no interest in the subject matter of the apportionment of the escrowed funds. We agree and dismiss the Bank's appeal.

We conclude the Bank has no interest in the subject matter of the apportionment of the escrowed funds and therefore lacks standing. As a consequence of its lack of interest in the escrowed funds, the Bank is not an aggrieved party under Rule 201 of the South Carolina Appellate Court Rules. The Bank is a party only to Cody's underlying damage claims. The Bank has never been a party to the severed equitable claim of Elizabeth. As Judge Cooper correctly noted in severing the legal and equitable claims, "[t]here is **no** overlapping evidence in these *two separate cases brought by separate parties.*" (Second emphasis added.)

Standing refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1413 (7th ed. 1999). "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." 1A C.J.S. Actions § 101 (2005). It concerns an individual's "sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." Id.

Standing is comprised of three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal

> connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Smiley v. South Carolina Dep't of Health & Envt'l Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (alteration in original)). "The party seeking to establish standing carries the burden of demonstrating each of the three elements." Sea Pines Ass'n for the Protection of Wildlife, Inc. v. South Carolina Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

"As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation." Ex parte Morris, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006). "One must be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." Id.

The Bank admits it has no ownership interest in the interpleaded funds. The Bank posits two grounds to support its claim of standing: (1) it is in Cody's best interest to receive all of the interpleaded funds; and (2) by allocating all of the interpleaded funds to Cody, the Bank reduces Cody's damages, thereby reducing the Bank's potential liability.

First, we reject as transparently thin the Bank's argument that it is seeking to protect Cody's best interest. We are unaware of any law (and the Bank has cited none) supporting the idea that one party may acquire standing by asserting the interest of an adverse party. The familiar principle that courts must zealously guard the rights of minors certainly does not give the Bank a pass on standing requirements. Second, while we understand the Bank's desire to limit its potential exposure in Cody's underlying action, this

practical concern falls far short of the "injury in fact" standing requirement. Not every practical concern equates to the legal interest required for standing. The Bank denies any liability to Cody, and its interest in maximizing Cody's share of the interpleaded funds is therefore speculative and contingent.

We find instructive the supreme court's recent decision in Ex Parte Government Employee's Insurance Co., 373 S.C. 132, 644 S.E.2d 699 (2007), in which the court addressed the sufficiency of a party's potential liability in relation to joinder and standing. Ronnie Cooper was injured in a motor vehicle accident. Id. at 134, 644 S.E.2d at 700. Cooper, claiming the status of a Class I insured, sought to stack underinsured motorist coverage provided by Government Employee's Insurance Co. (GEICO) to Yolanda Goethe. Id. According to Cooper, he and Goethe had a common law marriage. Id. GEICO denied the common law marriage claim and Cooper's stacking claim. Id. GEICO brought a declaratory judgment action against Cooper to determine the parties' rights pursuant to the policy issued to Goethe. Id. Cooper responded by filing a family court action seeking an order recognizing the purported common law marriage. Id. Because the family court's decision on the common law marriage issue would impact GEICO's ability to protect its interest in the circuit court declaratory judgment action, GIECO moved to join the family court action. Id. at 134-35, 644 S.E.2d at 700.

Finding that GEICO was not a necessary party for joinder and did not have standing to intervene, the family court denied GEICO's motion. Id. at 135, 644 S.E.2d at 700. The supreme court affirmed, referring to GEICO's interest in the common law marriage determination as "insufficient," "merely tangential," and "merely peripheral." Id. at 136-37, 644 S.E.2d at 701-02. The supreme court, while well aware that "the existence of a common law marriage may impact GEICO's liability to Cooper," id. at 136, 644 S.E.2d at 701, concluded that "GEICO's interest is in the *financial implications* of the family court's decision, which is peripheral to the subject matter before the court." Id. at 138-39, 644 S.E.2d at 702 (emphasis added).

GEICO presented a stronger case for standing than does the Bank. The Bank's interest in the allocation of the interpleaded funds falls far short of conferring standing. The Bank's potential and speculative liability to Cody is tangential and peripheral to the precise allocation of the interpleaded funds between Cody and Elizabeth. As with GEICO, the Bank's interest is merely in the "financial implications" of the trial court's decision allocating the interpleaded funds.

We now turn to Elizabeth's specific assignments of error concerning the Bank's lack of standing. Elizabeth first claims the trial court erred in allowing the Bank to prevent her and Cody from settling the matter of the allocation of escrowed funds. As noted, Elizabeth and Cody reached an agreement concerning their respective ownership interest of the funds. When the Bank objected to the proposed settlement, Elizabeth challenged the Bank's standing to do so. The trial court erred. Yet the error, by itself, would not warrant reversal, for the trial court ultimately apportioned the funds in the same manner as the parties had proposed in their settlement. Consequently, Elizabeth was not prejudiced by the trial court's ruling. See Brown v. Pearson, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997) (stating "[a]n error not shown to be prejudicial does not constitute grounds for reversal"); McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize . . . an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter.").

Elizabeth finally challenges the Bank's status as an "aggrieved party" for appeal purposes. There is no material distinction in general standing principles juxtaposed to the ability of an "aggrieved party" to appeal pursuant to Rule 201(b) of the South Carolina Appellate Court Rules. See Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 301-03, 551 S.E.2d 588-89, 589 (Ct. App. 2001) (conducting an analysis under both Rule 201 and general standing principles in addressing whether a party had standing to appeal).

In considering the Bank's ability to appeal from the order apportioning the escrowed funds, the Bank is neither a "party" nor "aggrieved." As noted earlier, the Bank has never been a party to the severed equitable action.

Judge Cooper specifically stated in his order granting the motion for a severance that this matter involves "two separate cases brought by separate parties." In addition, Elizabeth's counsel pointed out at a subsequent hearing that the Bank was never made a party to the equitable action.

Rule 201(b) limits the ability to appeal to "[o]nly a party aggrieved by an order, judgment . . . or decision . . . ." Rule 201(b), SCACR. This court has previously explained that under Rule 201(b), "[t]he word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." Beaufort Realty Co., 346 S.C. at 301, 551 S.E.2d at 589. "A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." Id. In light of Ex Parte Government Employee's Insurance Co., the Bank may not properly claim that the trial court's apportionment of the escrowed funds affects its property rights or otherwise bears on its interest.

Because the Bank has no interest in the escrowed funds, the Bank is not aggrieved by the trial court's apportionment of the funds between Cody and Elizabeth. We dismiss the Bank's appeal.

Elizabeth conceded at oral argument that the dismissal of the Bank's appeal renders the balance of her appeal moot. We therefore decline to address the balance of her appeal.

APPEAL DISMISSED.

ANDERSON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bruce and Barbara Olson, Appellants,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Costal Resources Management, Jack L. Sims, John McCown and Molly Ball, Respondents.

Appeal From Richland County
Ray N. Stevens, Administrative Law Court Judge

Opinion No. 4416
Heard June 3, 2008 – Filed June 20, 2008

AFFIRMED

C. C.Harness, III, and Melinda Adelle Lucka of Mt. Pleasant; for Appellants.

Carlisle Roberts, Jr., Evander Whitehead, and Leslie S. Riley all of Columbia, Elizabeth Dieck and

William A. Scott, both of Charleston, for Respondent.

HUFF, J.: This is an appeal by Bruce and Barbara Olson from an Administrative Law Court (ALC) order finding a permit issued by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (hereinafter OCRM) and subsequently transferred to the Olson's adjoining landowner, Jack L. Sims, was not a joint-use permit for Sims' lot 55 and the Olsons' lot 56. The Olsons also appeal the denial by OCRM of an independent permit for a dock from their property to the Intracoastal Waterway. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The Olsons own lot 56 in the Romain Retreat subdivision. Sims is the owner of lot 55, which is adjacent to the Olsons' property. John McCown owns lot 54, which is adjacent to Sims' lot 55. Molly Ball is the owner of lot 61, located across a drainage ditch easement from the Olsons. The Olsons' property is situated such that the extension of their property lines result in their lot bordering the drainage ditch, across from which is the backyard of the Ball property. [1] The Ball property lines extend out over a marsh and toward the Intracoastal Waterway, as do the Sims and McCown properties.[2]

[1] While the Olsons asserted a portion of their property bordered a "finger of water," there is evidence of record the area around there is "hardly ever wet" and there is no cove area to the property as asserted by the Olsons.

[2] Sims and Ball also testified to their ownership of lots 55A and 61A, respectively, which is marshland between their land lots 55 and 61 and the Intracoastal Waterway. McCown also testified to his ownership of the marsh between his lot 54 and the Waterway. While the Olsons contest the validity of their ownership of this marshland, we need not address the matter as it is unnecessary for our determination.

The Olsons' lot was previously owned by Ann Graves, and the Sims lot was previously owned by Ann's son, Stephen Graves. In 1996, William Blume entered into two contracts to purchase lot 55 and lot 56 from Stephen Graves and Ann Graves. Prior to finalizing the purchase, Blume applied for a permit for a dock located on lot 55, noting the property was under contract to purchase. On July 3, 1997, OCRM issued a permit to Blume, but included with the permit the special condition that "this is the only dock permitted for lots 55 & 56." Prior to issuance of the permit, in April 1997, Blume informed Ann and Stephen Graves he was exercising his right to terminate the contract as he was unable to obtain a dock permit that was satisfactory to him.[3] Shortly thereafter, on July 8, 1997, Stephen Graves applied for a permit to construct a private dock from lot 55. On August 25, 1997, OCRM issued the permit, which again included the special condition that it was the "only dock permitted for lots 55 and 56."

In 1998, Sims purchased lot 55 from Stephen Graves. In 2001, the Olsons purchased lot 56 from Ann Graves. In August, 2002, Stephen Graves transferred his dock permit to Sims. After discovering the Sims property was being surveyed for the construction of a dock, the Olson family approached Sims about the possibility of a joint-use dock with Sims, which Sims declined. In October 2003, Sims and McCown, who held his own permit for a private dock on his lot 54, applied for an amended permit allowing the two landowners to build one walkway down their property line leading to two pier heads. OCRM approved the amended permit for Sims and McCown in February 2004. In March 2004, the Olsons appealed the approval of the Sims/McCown amended permit for a joint-use dock and requested a contested hearing before the ALC. Thereafter, the Olsons submitted an application for their own private dock from lot 56 to the Intracoastal Waterway. On September 3, 2004, OCRM denied the Olsons' permit application. The Olsons challenged this decision by OCRM as well, and the two matters were consolidated for consideration by the ALC.

[3] Stephen Graves testified that there was a dock contingency clause in the contract on his lot and Blume used a "docking pole" to the side of lot 61's dock (the Ball dock) to get out of the contract, claiming the pole interfered with his proposed dock.

Following a hearing on the matter, the ALC judge issued his order concluding the Olsons' permit was properly denied and the Sims/McCown joint-use permit was properly issued. Specifically, the judge affirmed the denial of the Olsons' permit based on (1) the impact the proposed Olson dock would have on the adjacent property owners' value and enjoyment and (2) "the extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." He further determined, based on the evidence before him, the permit originally issued to Stephen Graves did not create a joint dock permit for lot 55 and lot 56. The ALC judge also concluded the Olsons' due process rights were not violated, and found no deprivation of the Olsons' equal protection rights as well. This appeal followed.[4]

STANDARD OF REVIEW

In contested permitting cases, the ALC serves as the finder of fact. Neal v. Brown, 374 S.C. 641, 648, 649 S.E.2d 164, 167 (Ct. App. 2007); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). Judicial review of the ALC judge's order is governed by section 1-23-610(C) of the South Carolina Code which provides as follows:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the

[4] OCRM raises the issue of jurisdiction to this court. Because the Olsons' appeal was pending before the Appellate Panel, not the ALC or the circuit court, on the effective date of Act 387 (codified at S.C. Code Ann. § 1-23-610 (Supp. 2007)), we find jurisdiction is proper in this court pursuant to our supreme court's recent decision in Chem-Nuclear Sys., LLC v. S.C. Board of Health & Envtl. Control, 374 S.C. 201, 648 S.E.2d 601 (2007).

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

S.C. Code Ann. § 1-23-610(C) (Supp. 2007). Thus, this court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion. The ALC's findings are supported by substantial evidence if, looking at the record as a whole, there is evidence from which reasonable minds could reach the same conclusion the administrative agency reached. Neal, 374 S.C. at 648, 649 S.E.2d at 167. The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004).

LAW/ANALYSIS

I. Joint Dock Permit

The Olsons first argue the ALC erred in finding the permit issued to Graves did not create a joint dock permit for lots 55 and 56. In particular, the Olsons point to evidence that the dock permit in question contained the provision that it was the only permit for lots 55 and 56, and that one of OCRM's internal documents on the application noted the permit type as "joint." We find substantial evidence in the record supports the ALC decision.

While the application by Stephen Graves did result in a notation on the Agency's DBASE IV information sheet that the "Permit Type" was "joint," Richard Chinnis, director of regulatory programs with OCRM, explained this language did not indicate it was an application for a joint-use permit, but designated it was a joint application with OCRM and the Corps of Engineers. We find absolutely no merit to the Olsons' assertion that Chinnis did not participate in the Blume or Graves permitting process and therefore did not "understand the dynamics of the whole process" sufficient enough to accurately describe the meaning of the condition or the notes in the file. The record clearly reflects Chinnis participated in the permitting decision for both the Blume and Graves applications. Further, the Olsons called Chinnis as their own witness, and it was the Olsons who elicited information on the meaning of the term "joint" in the internal document from Chinnis.

As to the special condition of the permit providing "this is the only dock permitted for lots 55 and 56," we find this language insufficient to transform the permit into a joint-use permit for lots 55 and 56. Chinnis testified the condition was placed on the Blume permit because at the time Blume was in the process of acquiring both lots 55 and 56, and this was a notice to him that he need not apply for a dock permit for lot 56 as one would not be issued. Chinnis further stated he was under the assumption that Stephen Graves owned both lots 55 and 56 when he applied for the dock permit, and looking at it as they did the Blume application with one owner of

both lots, the special condition was an advisement to the applicant that lot 56 was not going to receive a dock permit. Chinnis indicated there was never any mention nor documentation of any agreement between Stephen Graves and Ann Graves for a joint-use dock.[5] As noted above, we find no merit to the Olsons' assertion that Chinnis lacked knowledge on the subject.

Further, the evidence here clearly shows the dock permit for lot 55 issued to Stephen Graves and subsequently transferred to Sims did not include the owner of lot 56 as an applicant. Rather, the application shows a single-use permit for a private dock was sought for lot 55, with no mention of a joint-use dock. Additionally, the property identified on the application corresponded with the property description of lot 55 and the application clearly shows the dock was solely located within the boundaries of lot 55. The public notice for the Graves permit application made no reference to any joint-use dock for lots 55 and 56, but indicated only it was for construction of a private dock located at lot 55. The permit issued to Stephen Graves by OCRM stated the purpose of the permit was "for the property owner's private recreational use." Accordingly, substantial evidence exists to support the ALC judge's decision that no joint-use dock permit existed for lot 55 and 56.

Additionally, as noted by the ALC judge, there is no evidence the Olsons have secured any easement rights to cross Sims' property to reach the dock located on lot 55. In fact, the Olsons admitted they had no written agreement for a joint-use dock with Sims, nor an easement across Sims' property. Issuance of a joint-use permit for lots 55 and 56 by OCRM could not convey any right for the owners of lot 56 to cross the land of lot 55. See 23A S.C. Code Ann. Regs. § 30-4(E) (Supp. 2007) ("No permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located."). Thus, the Olsons would have no access to the dock as originally permitted from the Graves application. This lack of

[5] Stephen Graves testified he was involved with the sale of lot 56 to the Olsons and that he never told the Olsons they had a joint-use dock with Sims. He specifically informed the Olsons that lot 56 did not have a dock permit and informed Mr. Olson "a number of times" that he did not have a right to a dock for that property.

access further indicates the Graves permit was not a joint-use permit for lots 55 and 56.

II. Independent Dock Permit

The Olsons next maintain lot 56 is entitled to its own dock and their application should have resulted in the issuance of a permit. We disagree.

In asserting their right to an independent dock permit, the Olsons challenge several of the bases cited by OCRM in its letter denying the Olsons permit request. However, this court is concerned with whether the ALC judge's decision was supported by substantial evidence. While the ALC judge agreed with the Olsons that several of OCRM's reasons were insufficient as a basis for denial, he concluded that there were two separate bases which warranted denial of the permit. We find substantial evidence in the record to support the ALC judge's decision.

In determining whether to approve or deny a permit application the Department is to base its decision on the individual merits of each application, the policies specified in South Carolina Code sections 48-39-20 and 48-39-30, and specified statutory general considerations, including "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. § 48-39-150(A)(10) (2008). "After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, <u>if the department finds that the application is not contrary to the policies specified in this chapter</u>, it shall issue to the applicant a permit." S.C. Code Ann. § 48-39-150(B) (2008) (emphasis added). South Carolina Code of Regulations section 30-11(B) includes the same general considerations as South Carolina Code Annotated section 48-39-150, with section 30-11(B)(10) of the Regulations likewise providing the Department must consider "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." 23A S.C. Code Ann. Regs. § 30-11(B)(10) (Supp. 2007). The Regulations further provide that in fulfilling its responsibility under section 48-39-150, the Department must also be guided in part by "[t]he extent to which long-range, cumulative effects of the project may result within the

context of other possible development and the general character of the area." 23A S.C. Code Ann. Regs. § 30-11(C)(1) (Supp. 2007). The ALC judge determined both the impact on adjacent owners and the long-range cumulative effects of the project warranted denial of the permit.

In the present case, there is evidence that the dock as proposed by the Olsons would have to come through some trees and run down the drainage ditch easement border between the Olson and Ball property lines, and that there was no cove or other such area as depicted in the Olsons' permit application.[6] The dock would then have to "bend" at a right angle to head out toward the water. Additionally, the Olsons' proposed dock and pier would be in very close proximity to existing docks and piers. Specifically, the proposed Olson dock would have to run between the Ball dock and Sims/McCown dock and would be as close as seven feet from the Ball dock and forty-four feet from the Sims floating dock. Further, there is an existing piling[7] that is used for mooring and as an area for swimming between the Ball and Sims floating docks, and that piling would have to be removed for construction of the dock as proposed by the Olsons. McCown testified to safety issues with swimming off the docks that would be created by the proposed new dock. Sims also testified to safety concerns with boat navigation if another dock were allowed in that area. Sims maintained an attempt to place another dock between the two existing docks would also lower his property value because of the close proximity. Ball likewise testified to the decreased value of her property from the proposed Olson dock, stating it would "clog up the whole view," make it impossible to navigate, impair their ability to swim, kayak and fish from their dock, and impede the ability to tie boats up to the side of her dock. Accordingly, there is substantial evidence to support the ALC judge's finding concerning the effect on the adjacent owners' value and enjoyment.

[6] Stephen Graves testified the Olsons' lot "does touch salt marsh on the corner" but it then "becomes the ditch that runs down the property line and all the way through the main drainage trunk."

[7] This piling appears to be the same "docking pole" Stephen Graves referred to that Blume used as a reason to get out of his contract to purchase lot 55.

There is also evidence of record that the proposed Olson dock would have long-range, cumulative effects within the context of other possible development and the general character of the area. McCown testified allowing the Olsons to build a dock there would open it up to others being able to build a dock down any ditch that runs to the Intracoastal Waterway. Sims expressed concern that building a dock in that location could block the easement and jeopardize maintenance of the ditch. Richard Chinnis testified placement of a dock down the drainage easement could inhibit the maintenance of the area. He further stated that a permit for the proposed Olson dock would violate the definition of waterfront property in the Regulations and, assuming adequate room existed to build the dock as proposed, the cumulative impact of permitting docks on non-waterfront property would cause material harm to the policies of the Act governing the permitting process. Thus, there is substantial evidence.

III. Due Process

The Olsons next assert they were not afforded procedural due process. Specifically, they maintain they were entitled to direct notice of the Sims/McCown dock permit amendment and were not afforded the same.

When Sims and McCown applied to amend their permits to build a joint-use dock, no direct notice was sent to the Olsons as adjoining property owners. However, public notice for the request was published in the Post and Courier on January 10, 2004. The amended permit actually reduced the overall square footage of the two pier heads, and changed the number of walkways from two to only one. Richard Chinnis testified no public notice was required for an amended permit if the size of the project was smaller and there was no change in use. However, he later acknowledged, generally speaking, if it involves combining two permits, "it should go on public notice." It was never clarified whether the newspaper notice sufficed as "public notice."

Assuming arguendo the Olsons were entitled to direct notice of the amended application, we find no violation of the Olsons' due process rights. "Procedural due process imposes constraints on governmental decisions

which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). Procedural due process requirements are not technical, and no particular form of procedure is necessary. Sloan v. S.C. Bd. Of Physical Therapy Exam'rs, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. Id. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. S.C. Dep't. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). To prevail on a claim of denial of due process, there must be a showing of substantial prejudice. Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984).

The amended permit for the Sims/McCown joint-use dock was issued in February 2004 and the Olson's appealed the approval of the amendment the following month. A full hearing was held on the matter before the ALC, where the Olsons challenged the joint-use dock permit approved for Sims and McCown. As noted by the ALC judge, the Olsons participated extensively in the hearing by eliciting testimony, presenting evidence, and confronting witnesses. Thus, the Olsons received an opportunity to be heard at a meaningful time and in a meaningful manner. Furthermore, no prejudice resulted because the Olsons received sufficient notice of the actions of OCRM such that they were able to obtain a hearing before the ALC providing them the opportunities required by due process. We also agree with the ALC judge the fact that Sims and McCown continued construction of the joint-use dock did not violate the Olsons' due process rights since, had the Olsons been successful in contesting the matter, the ALC could have ordered the removal of the dock. Accordingly, we find no denial of the Olsons' due process rights.

IV. Equal Protection

Finally, the Olsons maintain they were deprived of their right to equal protection because Sims' lot 55 is "identically situated" to their lot 56, and the denial of the right to a dock to them is therefore "patently unequal treatment." We disagree.

Under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, "a state may not 'deny to any person within its jurisdiction the equal protection of the laws.'" Town of Iva ex rel. Zoning Adm'r v. Holley, 374 S.C. 537, 540-41, 649 S.E.2d 108, 110 (Ct. App. 2007) (citing U.S. Const. amend. XIV, § 1). "The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). The Olsons claim similarity between lots 55 and 56, summarily arguing they "have angled lines in the highwater, both would fail to reach water before either extended property line reached other land, and both got an interest in the Graves permit." The Olsons fail, however, to cite any evidence of record that support these assertions. Further, as previously determined, the Olsons' lot has no interest in the dock permit originally issued to Graves and transferred to Sims.

At any rate, a review of the record reveals substantial differences in the two properties. First, the shape and location of the Olsons' lot requires the dock's walkway to be placed along a drainage ditch. The Sims/McCown dock does not run along the drainage ditch, but runs down their common property line. Additionally, an aerial photograph showing the existing Ball and Sims/McCown docks submitted into evidence, and used to demonstrate the position of the proposed Olson dock, reflects that the Sims/McCown dock runs straight out over the marsh and into the Intracoastal Waterway, while the Olson dock would have to make a dogleg bend at a right angle to head out toward the water. Chinnis testified that OCRM "generally [does not] let people build sharply angled like that off a non-waterfront property." Accordingly, the Olsons failed to meet their burden of demonstrating they were treated differently from other similarly situated landowners and we find no equal protection violation.

Based on the foregoing, the decision of the ALC is

AFFIRMED.

ANDERSON and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Power Products and Services Company, Inc., Appellant,

v.

Robert A. Kozma, Longdrive Partners, Ltd., Cheryl C. Ferguson, James V. Hobbs, Lakeland Engineering Corporation, Timothy H. Montgomery, individually and d/b/a River Technologies, LLC, Respondents.

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

Opinion No. 4417
Heard May 6, 2008 – Filed June 20, 2008

AFFIRMED

Richard C. Detwiler and Ian D. McVey, both of Columbia, for Appellant.

David J. Mills, of Georgetown; and Robert L. Widener, of Columbia, for Respondents.

HUFF, J.: Power Products and Services Company, Inc., (Power Products) appeals the trial court's grant of Respondents'[1] motion to dismiss for lack of personal jurisdiction. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Power Products is a Virginia corporation, formed in 1983, which moved its principal place of business to Georgetown, South Carolina in 1998. Power Products provides radiological control and decontamination equipment to the nuclear industry. The individual Respondents all had some form of working relationship with Power Products as employees and/or independent contractors, and had ceased their relationship with Power Products at the time this action was initiated. Subsequent to this termination of their working relationships, Kozma, Ferguson, Hobbs, and Montgomery formed an entity to distribute products in the nuclear power industry and in May 2004 submitted documents to the Virginia State Corporation Commission to form River Technologies, LLC. River Technologies resells products produced by a manufacturer named Norclean. These products are used for the removal of radiological and environmental waste. Power Products contends Kozma and Ferguson misappropriated trade secrets during their working relationship with Power Products and conspired with the other individual respondents to use the misappropriated trade secrets.

[1] Robert A. Kozma (Kozma), Longdrive Partners, Ltd. (Longdrive), Cheryl C. Ferguson (Ferguson), James V. Hobbs (Hobbs), Lakeland Engineering Corporation (Lakeland), Timothy H. Montgomery (Montgomery), individually and d/b/a River Technologies, LLC (River Technologies), hereinafter Respondents, collectively.

Power Products sued Respondents, alleging six causes of action: violation of the South Carolina Trade Secrets Act, breach of employee's duty of loyalty and fidelity, breach of employment agreement, breach of contract (specific to Hobbs), breach of the duty of good faith and fair dealing, and civil conspiracy. In its complaint, Power Products alleged: (1) Kozma resides in Georgetown County and was formerly employed by Power Products; (2) Longdrive exists under South Carolina laws, has a principal place of business in South Carolina, and is the alter-ego of Kozma; (3) Ferguson is a citizen of Virginia and committed the acts complained of while employed by Power Products in South Carolina; (4) Hobbs is a citizen of Maryland and was a former associate of Power Products, acting as an independent contractor; (5) Lakeland is a Maryland corporation and the alter-ego of Hobbs; (6) Montgomery is a Virginia citizen and was formerly employed by Power Products; (7) River technologies is a de facto partnership of one or more defendants; and (8) the complained of acts occurred in South Carolina. In particular, Power Products alleged that Kozma and Ferguson were terminated in or around July 2003 and, "on information and belief had already misappropriated all of the Trade Secrets of Power Products with a plan toward opening a competitive business."

Respondents moved to dismiss based on a lack of personal jurisdiction, asserting each were citizens or corporate citizens of a state other than South Carolina and there was an insufficient nexus from their actions to support jurisdiction in this state. Respondents submitted affidavits in support of their motion to dismiss. Ferguson's affidavit shows she is a citizen and resident of Virginia and was employed with Power Products from July 1992 through July 2003. She worked solely in Virginia from 1992 until 1999, at which time she began to commute to South Carolina to work during the week, but maintained her residency in Virginia, continued to perform some of her work duties from her home in Virginia, and filed for unemployment in Virginia following her termination from Power Products in July 2003. Kozma filed an affidavit averring that he is a citizen and resident of Virginia and has been since September 2003. From November 1993 to March 1994 and from November 2001 to September 2003, Kozma performed services for Power Products in his capacity as an employee of Longdrive, a New York corporation that served as a marketing and sales consultant for Power

Products. Hobbs' affidavit indicates he is a citizen and resident of Maryland and has never been a resident of South Carolina. He was associated with Power Products as an independent contractor through Lakeland, a Maryland corporation that performed certain engineering services for Power Products. Lakeland last performed services for Power Products in May 2003. Finally, Montgomery's affidavit indicates he is a citizen and resident of Virginia, never having resided in South Carolina. He was formerly employed by Power Products in a sales capacity from 1986 to 1994, during which time he was always based in Virginia. South Carolina was never included in his sales territory. Power Products terminated his employment in 1994 after Montgomery suffered a back injury, and he has had no contact with Power Products since that time.

Power Products maintained jurisdiction was proper in South Carolina because (1) many of Respondents' tortious actions occurred while Respondents were in South Carolina and (2) the respondents have minimum contacts with South Carolina because they were current or former residents of this state, they committed numerous torts in this state, and they are using the misappropriated trade secrets to sell or attempt to sell their products in this state. Power Products submitted the affidavits of Al Burns and Jeffrey R. Rogers to support its contention Respondents were misappropriating Power Products' trade secrets and conducting business in South Carolina. Power Products further included within its filings a printout of River Technologies' website, to show River Technologies was currently doing business or attempting to do business in South Carolina. Lastly, Power Products submitted a decree of divorce showing Kozma had lived with his wife in South Carolina until their separation in July 2003.

The trial court granted Respondents' motion to dismiss for lack of personal jurisdiction. The court found "all Defendants are out-of-state residents and have so resided at all times pertinent to this litigation" and the "entities named as Defendants are likewise corporate citizens of other states." Further, the court found Power Products is a corporation organized and registered in Virginia. Additionally, the trial court stated:

> [Power Products] argues that if [Respondents] are competing in the nuclear industry, they must be doing so using trade secrets taken from [Power Products]. However, this Court finds such conclusory statements an insufficient basis for the assertion of in personam jurisdiction. The record establishes that fewer than seventy-two (72) nuclear power facilities exist in the United States, and the existence of these facilities (and their purchasing departments) are in no way "secret" or "confidential." The record further reflects that there are presently four or five businesses which compete with [Power Products] in the nuclear market. The Court thus rejects [Power Products'] argument that all nuclear industry sites are "its customers" and any contact with them constitutes evidence that these [Respondents] misappropriated trade secrets. Moreover, [Power Products] did not submit any evidence that the "off the shelf" products re-sold by the [Respondents] were products developed pursuant to anything "taken" from [Power Products].

The trial court held Power Products' "conclusory allegations fail to establish the contacts necessary to invoke personal jurisdiction over these [Respondents] either generally or specifically." After analyzing the matter under South Carolina's Long-Arm Statute and under due process requirements, the court concluded Power Products failed to establish the necessary requisites to confer jurisdiction pursuant to both this state's Long-Arm Statute and the minimum contacts required to afford due process. This appeal follows.

STANDARD OF REVIEW

Personal jurisdiction over a nonresident defendant is a question to be resolved upon the facts of each particular case. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by error of law." Id. The party seeking to invoke personal

jurisdiction over a non-resident defendant by using South Carolina's long-arm statute bears the burden of establishing jurisdiction. S. Plastics Co. v. S. Commerce Bank, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." Moosally v. W.W. Norton & Co., 358 S.C. 320, 328, 594 S.E.2d 878, 882 (Ct. App. 2004). When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction. Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007).

LAW/ANALYSIS

Power Products maintains the trial court erred in finding it lacked personal jurisdiction over the Respondents. We disagree.

Traditionally, our courts have employed a two-step analysis in determining whether it is proper to exercise personal jurisdiction over a nonresident defendant. S. Plastics Co. v. S. Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992). First, the trial court must determine that the South Carolina long-arm statute applies. Second, the trial court must determine that the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. Id. However, both this court and our Supreme Court have noted our long-arm statute, which affords broad power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005); Moosally v. W.W. Norton & Co., 358 S.C. 320, 329, 594 S.E.2d 878, 883 (Ct. App. 2004). Accordingly, our courts have held, because we treat our long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process. Id. See also Sonoco Prods. Co. v. Inteplast Corp., 867 F.Supp. 352, 354 (D.S.C. 1994) (holding our long-arm statute has been interpreted to reach the limits of

due process and therefore the determination of personal jurisdiction in South Carolina compresses into a due process assessment of minimum contacts and fair play). Whether employing the traditional two-step analysis, or following the more recent determination that the analysis is compressed into a due process assessment alone, it is clear that personal jurisdiction over a non-resident defendant may be invoked only if the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. Because we agree with the trial court that Power Products failed to meet its burden of proving personal jurisdiction under the strictures of due process, we affirm.

Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Cockrell, 363 S.C. at 491, 611 S.E.2d at 508. Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there. Id. at 491-92, 611 S.E.2d at 508.

In determining whether due process minimum contacts exist between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice, a two pronged analysis is applied. S. Plastics Co., 310 S.C. at 260, 423 S.E.2d at 131. The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the "power" to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair. Id. "If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process." Id.

> Under the power prong, a minimum contacts analysis requires a court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Without minimum contacts, the court does not have the "power" to adjudicate the action. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections

> of its laws. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case.

Moosally, 358 S.C. at 331-332, 594 S.E.2d at 884-885 (internal citations omitted).

In order to determine whether the exercise of jurisdiction over a foreign defendant meets the fairness prong, the court must consider the following: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. Cockrell, 363 S.C. at 492, 611 S.E.2d at 508. A single act that causes harm in this State may create sufficient minimum contacts to confer jurisdiction where the harm arises out of or relates to that act. S. Plastics Co., 310 S.C. at 260-61, 423 S.E.2d at 131. However, that single act must create a "substantial connection" with the forum to give rise to jurisdiction. Moosally, 358 S.C. at 331, 594 S.E.2d at 884.

A. Power Prong

Power Products asserts it showed the requisite minimum contacts under the power prong. It contends the majority of Respondents' tortious acts occurred in South Carolina and the alleged duration and frequency of the acts were sufficient to satisfy due process. Power Products further maintains it presented evidence Respondents were doing business in South Carolina. We disagree.

As to the assertion the tortious acts occurred in South Carolina, the trial court found Power Products failed to allege specific facts to support its conclusory allegation that Respondents took the trade secrets in South Carolina, and further found the Respondents' affidavits actually support the opposite conclusion. In particular, the court noted Ferguson's affidavit

shows she was unexpectedly terminated on a Sunday and was not allowed to return to Power Products' facility. Because she did not anticipate being fired, she had no opportunity to take anything from the company. While Power Products contends that Kozma and Ferguson had already misappropriated the trade secrets of Power Products with a plan toward opening a competitive business prior to their termination, we find absolutely no support for this conclusory assertion. Further, as did the trial court, we find the case of Drayton Enters., L.L.C. v. Dunker, 142 F.Supp.2d 1177 (D.N.D. 2001) particularly instructive and applicable.

In Drayton, the United States District Court for the District of North Dakota analyzed a similar personal jurisdiction issue. There, defendants were Value-Added Products (VAP), an Oklahoma cooperative based in Oklahoma, and VAP's employee, Dunker, who was a former employee of Drayton. Id. at 1180. Drayton, a North Dakota based company, initiated litigation alleging Dunker had disclosed trade secrets to VAP and VAP had wrongfully obtained the trade secrets. Id. Drayton alleged that Dunker revealed its trade secrets to VAP and VAP hired him with the secrets in mind. The court found there seemed to be no argument that if Dunker did reveal any secrets to VAP, he did so in Oklahoma after he was hired by VAP. Id. at 1184. Thus, the only direct connection between the litigation and the defendants' actions was the injury caused by the alleged tort to be felt in North Dakota. Id. The court held the tort was allegedly committed in Oklahoma, not North Dakota, because until Dunker revealed the information and VAP used it, no tort had been committed. Id. In the case at hand, Respondents' affidavits establish that the concept to form a business entity to do business in the nuclear field did not occur until well after all of the Respondents had severed their working relationships with Power Products and the individual defendants all resided in states other than South Carolina. While Kozma and/or Ferguson may have received such information during their work for Power Products in South Carolina, they could only have misappropriated it for use in the new company after their working relationships with Power Products were terminated and their connections to South Carolina severed. There is no specific allegation or showing that Ferguson and/or Kozma revealed, and River Technologies used, the allegedly

misappropriated trade secrets prior to their termination of employment with Power Products.

Power Products relies on the printout of River Technologies' website, to show River Technologies was currently doing business or attempting to do business in South Carolina. In particular, it points to language on the website which states, "Our relationships extend to every commercial nuclear plant in the United States and Canada, a majority of US Government DOE and DOD sites, and several large industrial manufacturers. . . ." However, as noted by the trial court, Power Products failed to make any allegations or produce any evidence a South Carolina resident purchased any product from or because of River Technologies' website, or that the website was particularly directed at South Carolinians. See Brown v. Geha-Werke GmbH, 69 F.Supp.2d 770, 777-78 (D.S.C. 1999) (holding the critical inquiry in such a matter is the nature and quality of commercial activity conducted by an entity over the Internet in the forum state, and where the record failed to reflect any commercial activity over the Internet in South Carolina and plaintiff failed to submit evidence any South Carolina resident, other than the staff of plaintiff's attorney's law firm, visited the entity's website or purchased any product over or because of the website, or that the website was directed at South Carolina any more than any other place, the entity's website did not provide the basis for an assertion of personal jurisdiction).

Power Products also relies on the affidavit of Al Burns, the former director of the Planning Commission for Economic Development in Georgetown County. In his affidavit, Mr. Burns states that Kozma informed him in August 2004 he had opened a new company in Virginia that would be in the same business as Power Products "and that he might be looking at moving the company down to Georgetown." (emphasis added). Mr. Burns further stated Kozma informed him he was interested in playing in an annual golf tournament "as a prospective new industrial client representing his new Virginia business." At most, this affidavit merely suggests Respondents considered doing business in South Carolina, not that they actually did business in South Carolina. Accordingly, Power Products failed to meet its burden of establishing Respondents directed activities to residents of South

Carolina and that the cause of action arises out of or relates to those activities, and therefore failed to meet the requirements of the "power prong."

B. Fairness Prong

Power Products contends the court may properly exercise jurisdiction under the fairness prong. It argues it has its principal place of business in South Carolina and that much of the evidence and many of the witnesses are located in South Carolina. Power Products further maintains Respondents are all either former residents of the state or have lived and/or worked in this state for extended periods of time.

As noted by the trial court, River Technologies' principal place of business is in Virginia. It does not have offices or employees in South Carolina, and there is no evidence it has any customers in this state. None of the Respondent entities are corporations of this state and none of the individual Respondents are residents or citizens of South Carolina. While Ferguson worked for Power Products in South Carolina for approximately four years out of her eleven year employment with Power Products, she continued to maintain her residency in Virginia the entire time. Both Hobbs' and Montgomery's affidavits show they have never been residents of South Carolina. Montgomery lives in Virginia and Hobbs lives in Maryland. Only Kozma resided in South Carolina, and his affidavit shows he became a citizen of Virginia in early September 2003. We agree with the trial court that the Respondents' limited working relationship with Power Products is not a sufficient nexus to satisfy due process. We also agree with the trial court that the mere fact that the alleged injury may be felt in South Carolina is insufficient to support jurisdiction under the facts of this case. As noted, the alleged tortious conduct of the Respondents could not have occurred until after Ferguson and Kozma's relationships were severed with Power Products and they revealed, and River Technologies used, the allegedly misappropriated trade secrets. At this time, their connections to South Carolina had been severed. Further, it is uncontested that Power Products, despite the fact that it maintains its principal place of business in South Carolina, is still a Virginia corporation, organized and existing pursuant to Virginia law. Accordingly, under the facts of this case, we do not believe this

state's exercise of jurisdiction over the Respondents would be reasonable or fair.

CONCLUSION

We hold Power Products failed to establish sufficient minimum contacts of any of the Respondents' to indicate purposeful availment of the privilege of conducting activities within this state such that they should be haled into court in this state. Nor did Power Products meet its burden of showing Respondents' had such minimum contacts that exercise of jurisdiction is reasonable or fair. Consequently, the evidence supports the trial court's findings that Power Products did not establish facts sufficient to confer jurisdiction over Respondents. For the foregoing reasons, we find the trial court did not err by dismissing Power Products' action for lack of personal jurisdiction. Accordingly, the trial court is

AFFIRMED.

ANDERSON and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Yoko Kim Melton, Respondent,

v.

Chong Olenik a/k/a Chong Son Kim, Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4418
Heard April 16, 2008 – Filed June 20, 2008

REVERSED IN PART AND REMANDED

David Christopher Shea and Rebecca Guental Fulmer, both of Columbia, for Appellant.

Stephen D. Schusterman, of Rock Hill, for Respondent.

PIEPER, J.: Chong Son Kim (Kim) appeals the circuit court's order denying her motion to set aside entry of default and denying relief from default judgment. We reverse in part and remand for further proceedings.

FACTS

Yoko Kim Melton (Melton) and Kim entered into an agreement in which Melton would purchase a one-half interest in Kim's massage therapy business, "Our Place."[1] The agreement, signed by both parties on January 9, 2002, indicates a purchase price of $30,000, due in full within one year of the date of the agreement.[2] Melton was to work in the business and learn the operations for one year at which point Kim would turn over the one-half interest to Melton.[3] However, at the end of the year, Kim did not turn over the one-half interest to Melton.

Melton filed a summons and complaint and served Kim on November 30, 2005. Kim failed to answer.[4] On March 1, 2006, Melton filed a motion seeking entry of default and a default judgment in the amount of $50,000. Default was entered against Kim on June 6, 2006, but the court continued the damages hearing, expressing concern that Kim had not been properly served

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[1] There is some discrepancy as to what business Melton was purchasing. Melton describes the business as being located in Columbia, South Carolina, whereas Kim's Answer indicates the business was located in Augusta, Georgia.

[2] Melton's complaint and motion for default with attached affidavit allege a purchase price of $50,000. Further, at trial Melton testified she was owed $50,000, but did not explain the discrepancy between the alleged $50,000 purchase price and the $30,000 purchase price indicated in the agreement.

[3] Again, there is some confusion as to what interest Melton agreed to purchase. The agreement indicates Melton was to receive a one-half interest in the business, whereas Melton's affidavit indicates she was to receive full ownership of the business.

[4] Kim acknowledged receiving and signing for an envelope in November 2005, as she was on her way out of town to visit her ailing sister. She recalled placing the envelope in her purse which she alleged was subsequently stolen from her son's car. She further explained she failed to look at the contents of the envelope before it was stolen.

with notice of the hearing. A damages hearing was scheduled for July 19, 2006, and Kim was served notice of the damages hearing. Kim filed a motion to set aside default and, with Melton's consent, the damages hearing was continued. Kim moved to set aside default for good cause, inadvertence, and excusable neglect on the grounds that: (a) she had only recently become aware of the suit against her and no hearing on damages had been held; (b) she had a meritorious defense; and (c) there would be no prejudice to Melton.

A hearing on Kim's motion was held on November 13, 2006. The court denied the motion to set aside the entry of default and immediately proceeded to hear Melton's testimony in support of her motion for default judgment. Melton and Kim are Korean and they both have a limited proficiency in the English language. As such, Melton requested the use of an interpreter she brought with her to the hearing. Kim objected to the use of that particular interpreter and requested the use of a joint court interpreter.[5] The court performed a voir dire of the interpreter to determine her experience. After the voir dire, the court asked if there was any objection. Kim objected to the interpreter and requested a South Carolina court certified interpreter. The court commenced the hearing without any interpreter.

On the basis of Melton's testimony, the court found Melton was entitled to a default judgment in the amount of $50,000. Kim filed a Rule 59(e) motion, arguing default should be set aside, or in the alternative, the default judgment should be vacated and she should be granted a new hearing on damages with a qualified interpreter. The court summarily denied the motion. This appeal follows.[6]

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[5] Melton agreed to the use of a joint court interpreter.

[6] Kim did not actually seek relief under Rule 60, SCRCP, to set aside default judgment, as opposed to the entry of default under SCRCP 55(c). However, Kim raised the same grounds in a Rule 59 motion as would be raised under Rule 60. Notwithstanding, we need not resolve any issue raised by this pleading distinction since Kim actually appeared at the damages hearing and preserved her grounds for appeal as to the interpreter. Moreover, Kim filed an earlier Rule 55(c) motion which was denied by the court. Since the Rule

LAW/ANALYSIS

Kim argues the circuit court erred in denying relief from the default judgment. We agree.

The power to set aside a default judgment is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion. Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support. Goodson v. Am. Bankers Ins. Co. of Fla., 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988).

In the present case, Kim asserts the court erred in denying the motion to set aside the default judgment on the grounds that: (1) the evidence presented of Kim's inadvertence and excusable neglect justified relief under Rule 60(b)(1), SCRCP; (2) the court relied upon incompetent parol evidence and the court's subsequent award of damages is without evidentiary support and was controlled by an error of law; and (3) the court□s refusal to accommodate her request for a qualified court interpreter violated statutory law and deprived her of equal access to justice and to the court proceedings.

59(e) motion properly requested the court to address its lack of findings pursuant to the interpreter statute, it was the proper procedural mechanism to use. The remainder of the Rule 59 motion pertaining to the default issue was more properly characterized as a Rule 60(b) motion, SCRCP. We are free to treat the motion based upon its substance and effect as opposed to how it was captioned. See Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970). While recharacterization could be problematic as to the timeliness of an appeal since Rule 60 does not toll the filing of an appeal, we do not see any jurisdictional bar where part of the relief requested is proper pursuant to Rule 59. In any event, the appellant asserts she did not receive notice of the entry of judgment until January 8, 2007. Since the appeal was filed on February 6, 2007, we find the appeal is timely regardless of how the motion is characterized.

We first address the issue on appeal as to the request for an interpreter. Pursuant to Section 15-27-155(A) of the South Carolina Code (2005):

> [W]henever a party or witness to a civil legal proceeding does not sufficiently speak the English language to testify, the court may appoint a qualified interpreter to interpret the proceedings and the testimony of the party or witness. However, the court may waive the use of a qualified interpreter if the court finds that it is not necessary for the fulfillment of justice. The court must first make a finding on the record that the waiver of a qualified interpreter is in the best interest of the party or witness and that this action is in the best interest of justice.

(Emphasis added). In this case, both parties have limited English proficiency and expressed concern with a possible language barrier before the hearing. When Kim objected to the use of the interpreter Melton brought to the hearing, Melton agreed to an alternate qualified court interpreter. The court performed a voir dire of the interpreter to determine her experience and abilities, after which Kim renewed the objection to the use of that particular interpreter. Kim requested a South Carolina qualified court interpreter but the court refused that request. Rather than proceeding with the interpreter Melton provided, the court held the damages hearing without the use of any interpreter. Before proceeding to the hearing, the court failed to make any findings under the statute that waiver of the use of a qualified interpreter was in the best interest of the party, or witness, or that it was in the best interest of justice. We find the court's decision to proceed without the use of a qualified interpreter without making any findings on the record that it was in the best interest of the party, witness, or justice was legal error.

Further, we find proceeding without the use of an interpreter prejudiced Kim. At the hearing, Melton attempted to explain the transaction and exchange of money. However, the testimony is confusing and at times

incoherent, such that both attorneys and the judge often sought further clarification of Melton's statements. For example:

Q. (Melton's Attorney) You gave her $50,000?
A. (Melton): Yes
Q. Okay. And what were you supposed to get for that 50,000? What were you getting?
A. She go – she go sign the $30,000 contract promissory, and she gave me two check, two checks. One each check is $25, $25 a total of $50,000. She gave me check.
Q. Okay. Why did she give you two checks for $25,000 if you paid her 50,000?
A. Because we help a partner asked – she wanted $50,000. Then I'm thinking $50,000, she going to promise a contract. But she go lawyer office. She say $30,000. Why? I ask you, why $30,000? I don't trust her. That's why I want your check. Give it to me. Any time you don't give me help, partner, I want my money back.
Q. Okay. So that was in case you didn't get your half, if she didn't let you have your half?
A. She don't give it to me. She no money back, too.
Q. How did you give her the $50,000?
A. She – I give her money. She give me check, two checks. Mh-hmm (affirmative)
Q. Okay.
THE COURT: I don't think she understood the question.
Q. Okay.
THE COURT: Because I have the same question.

. . .

Q. You paid her $50,000?
A. Yes, sir.
Q. How did you give her the money? Was it in cash? Or was it a check? How did you give it to her?

A. Oh. I got something in the – the bank check and cash it, too. But she want, everything wanted cash. That's why I don't trust her, is I go to a lawyer office. It's a notarizer and helping making sure. That's why I want two checks, 25,000, 25,000, two checks. I needed this. Then she gave it to me.

At the close of Melton's direct examination her attorney states, "[y]our Honor, I don't – I – it may be that we need to get a translator if – I don't know if the Court is following what's going on. I don't know that I can get any more detail because of the language barrier."

The following testimony was elicited during cross-examination of Melton:

Q. (Kim's Attorney) Yeah. What proof do you have that you gave her $50,000?
A. (Melton) They have a – it's a – I have a contract promise to pay her for that.
Q. Where is that?
A. Where is that? Okay. And two checks. And there is – one of them is $30,000. One year. It's a contract promise. And I give her 50,000. That's why, you know, she don't – she give – she – she a liar. So I don't trust her. I need the two check, $50,000. Mm-hmm (affirmative).
Q. You gave her a check for $50,000?
A. (Shakes head negatively).
Q. Did you give her cash?
A. No. She give me two check. Mm-hmm (affirmative).

The following testimony was further elicited:

Q. (Kim's Attorney) Okay. Well, ma'am, it goes back to my original question of, do you have any proof whatsoever that you actually gave her $50,000?
A. Because she wanted to have to share $50,000. Mm-hmm (affirmative).

THE COURT: Ma'am, let me – did you give her $50,000?
A. Yes, sir.
THE COURT: Cash?
A. She wanted cash. But it's a -- everything had to prove money. Mm-hmm (affirmative).
THE COURT: Did you give her cash?
A. Yes. She wanted cash.
THE COURT: You gave her cash?
A. Yes.
Q. (Kim's Attorney) Ma'am, do you have any sort of withdrawal slip from your bank showing that you took out $50,000?
A. But I don't give her $50,000. She don't sign anything. She don't give me check.

. . .

Q. Do you have any way to prove that you gave her $50,000 in cash?
A. Yes, sir.
Q. What is that proof?
A. I have to talk?
Q. You're telling us that's your proof?
A. Yes. But I don't – I don't have to talk to you. Mm-hmm (affirmative).

Notwithstanding the contradictory statements and incoherent testimony of Melton and the lack of an interpreter to assist with the language barrier, the court ultimately ordered default judgment against Kim for $50,000. We find Melton's inability to convey the facts of the transaction during the hearing, due to her limited English proficiency and the lack of an interpreter, prejudiced Kim and affected her ability to contest the damages.

Therefore, we find the court committed an error of law and thus abused its discretion in regard to the interpreter issue. We reverse and remand for a new damages hearing at which time the court shall direct that a qualified

interpreter must be present or alternatively, the court must make the necessary findings of waiver under the statute.[7]

Kim also argues the circuit court erred in failing to set aside the entry of default as provided under Rule 55(c), SCRCP. Since we have already determined a remand is appropriate due to the interpreter issue, we also find a remand as to this issue is appropriate.

Under Rule 55(c) of the South Carolina Rules of Civil Procedure, a default may be set aside "for good cause shown." Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits." Bage v. Southeastern Roofing Co. of Spartanburg, Inc., 373 S.C. 457, 471, 646 S.E.2d 153, 160 (Ct. App. 2007), cert. granted (Mar. 20, 2008). The decision whether to grant relief from an entry of default is solely within the sound discretion of the trial court. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). On appeal, this court cannot substitute its judgment for that of the trial judge and will not

[7] We recognize that counsel in civil cases will often arrange for an interpreter to be present. The trial court has the authority to direct that a litigant, especially a non-indigent litigant as found herein, provide for and compensate an interpreter. Moreover, the court is not limited to qualification only of an interpreter of choice by either one of the parties. The court may exercise its discretion in the management of a trial or hearing in such a manner as to proceed without multiple interpreters if fairness allows it to do so and no prejudice will arise. We leave these decisions to the trial court. Notwithstanding, absent a determination that an interpreter is not necessary, the court must make findings on waiver as required by the statute. The record herein indicates that an interpreter was necessary. The court did not base its decision on the failure of counsel to arrange for an interpreter or upon a finding that an interpreter was not necessary. Accordingly, the trial court should have either qualified the interpreter present and proceeded with that interpreter if qualified, or continued the proceeding with instructions to the parties to make the necessary arrangements; alternatively, the court should have made the findings provided by the statute as to waiver if the court determined the requirements for waiver were met.

disturb the trial court's decision absent a clear showing of abuse of discretion. Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). An abuse of discretion arises when the judge's decision was controlled by some error of law or lacks evidentiary support. Boland v. S.C. Public Service Authority, 281 S.C. 293, 295, 315 S.E.2d 143, 145 (Ct. App. 1984).

In deciding whether to set aside an entry of default, the court should consider the following factors: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Wham, 298 S.C. at 465, 381 S.E.2d at 501-02. Kim argues the court failed to weigh the Wham factors relevant to her motion. Specifically, Kim contends the only factor the court relied upon and cited was the timing of the motion for relief.

"[I]t is not necessary for the trial judge to make specific findings in regard to the factors enumerated in Wham. This court has held '[t]he trial judge will not be reversed for failing to make specific findings of fact on the record for each factor if there is sufficient evidentiary support in the record for the finding of the lack of good cause.'" Bage, 373 S.C. at 472, 646 S.E.2d at 161 (citing Dixon v. Besco Engineering, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995)).

Arguably, in this case, over seven months elapsed between the time Kim was served with the summons and complaint and when she moved for relief. As indicated, Kim acknowledged the receipt of the envelope in November 2005, but never looked at the papers served upon her and claimed the envelope was placed in her purse and was subsequently stolen. On the other hand, Kim filed her motion a little over one month from being notified of the entry of default. We recognize both of these time periods are relevant to the consideration of the motion to set aside the entry of default. The trial judge cited in his order that "the defendant failed to file a motion for relief from the entry of default until some five (5) months after said entry and more than thirty (30) days after she received notification for the damages hearing." This factual finding is clearly erroneous based upon the record. Default was entered on June 6, 2006, and mailed to the parties on June 7, 2006. The motion to set aside the entry of default was filed on July 17, 2006. We

recognize this statement may have been a clerical error on the part of the court.

Although we review this matter under an abuse of discretion standard, we find a remand is appropriate to allow the court an opportunity to clarify or reconsider any findings on the motion to set aside the entry of default in light of the court's erroneous factual finding or clerical error. We simply cannot determine whether the trial court, in the exercise of its discretion, relied solely on an erroneous factual finding or whether that finding was merely a clerical error on the issue of delay and the court relied on the other Wham factors. Although we recognize the court is not required to make findings as to each factor, we find it problematic to determine here whether the judge properly exercised the discretion afforded under the law since the other Wham factors were not discussed. Since we already have determined a remand is appropriate as to the default judgment damages hearing due to the interpreter issue, we think fairness suggests that the judge also be afforded an opportunity to clarify or revisit this matter on remand since the judge is vested with the discretionary review in the first instance. The judge, upon making that determination, shall proceed in accordance with that determination as well as in accordance with the opinion herein.

Due to our disposition of these issues, we need not address the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We respectfully find the court's decision to proceed without the use of a qualified interpreter without making any findings on the record that it was in the best interest of the party, witness, or justice was legal error and we therefore reverse and remand as to this issue since we find prejudice to the appellant. We also remand for further proceedings on the motion to set aside the entry of default due to the court's reliance on either an erroneous factual finding or a clerical error so that the court may be afforded the initial

opportunity to exercise its discretion without consideration of this erroneous finding or clerical error. Once a redetermination of the motion to set aside the entry of default is made, the court shall proceed based on that determination and in accordance with our opinion. The decision of the circuit court is accordingly

REVERSED IN PART AND REMANDED.

HEARN, C.J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cleveland Sanders, Appellant,

v.

S.C. Department of Corrections, Respondent.

Appeal From Richland County
James R. Barber, Circuit Court Judge

Opinion No. 4419
Submitted May 1, 2008 – Filed June 20, 2008

AFFIRMED

Cleveland Sanders, of Columbia, for Appellant.

Andrew F. Lindemann and Christopher M. Coy, both of Columbia, for Respondent.

PIEPER, J.: This appeal arises from inmate Cleveland Sanders' challenge of the manner by which payment of a two hundred and fifty dollar

DNA processing fee ("fee"), required by statute, was deducted from his E.H. Cooper Trust Fund account ("Account"). We affirm.[1]

FACTS

In 1994, the South Carolina Legislature created the State Deoxyribonucleic Acid Identification Record Database Act ("DNA Act"), §23-3-600 through §23-3-700 of the South Carolina Code of Laws, requiring certain inmates to provide DNA samples. The DNA Act lists the classes of offenders who are required to give a sample and states when the sample is to be taken. In addition, it provides all inmates required to submit a sample must pay the fee. This fee is mandatory and may not be waived by a court.

In August 2004, Sanders, an inmate at the Tuberville Correctional Institution ("Tuberville"), signed a "DNA Notice & Payment Procedures" form ("Payment Form") indicating three options for payment of the fee: Sanders could choose to pay the fee from his Account by completing a Form 15-1, "Cooper Trust Fund Withdrawal;" he could have a non-incarcerated family member pay the fee by money order; or, he could have the money deducted from his inmate wages at a rate of 5% when receiving more than $5.00 for the bi-weekly pay period. Sanders did not sign the Form 15-1 authorizing a deduction from his Account, but did sign the form authorizing a 5% deduction from his wages each pay period.

At some point after Sanders signed the Payment Form, an administrative decision was made to change the fee collection procedure in order to facilitate the recovery of the fees and to provide a more equitable system where wage-earning inmates were not the only inmates required to pay the fee. Under the new policy, inmates receiving non-wage deposits into their Account would automatically have 10% of those deposits retained to pay the fee. On August 18, Acting Director of Operations for the South Carolina Department of Corrections ("the Department"), Robert Ward, disseminated a memorandum to all wardens regarding the new procedure. The memorandum stated the new procedure would begin September 13,

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

2004, and requested all wardens notify the inmate population of the change in policy.

In late 2004, Sanders noticed several deductions listed on his Account statement for payment of the fee.[2] The deductions were made from monies directly deposited into his Account from family members and friends and were in addition to the 5% deductions taken from his wages. Sanders filed a Step 1 Inmate Grievance claiming the DNA Act did not allow the Department to withdraw non-wage related funds to cover the fee. He further argued the DNA Act, as applied to him, was an ex post facto violation which enhanced his sentence by assessing additional fees after his punishment was adjudicated. Sanders requested "the $24.50 (plus another $30 taken from a recent $300 deposit) be credited back to my account and future deposits to me from outside sources not be tampered with, unless, of course, the law is changed to reflect this practice no longer illegal."

The request was denied and Sanders filed an appeal to the Administrative Law Judge ("ALJ"). The ALJ found Sanders had a property interest in non-wage funds deposited into his Account, but he was provided notice of the change in procedure in a manner that satisfied the requirements of minimal due process. Additionally, the ALJ refused to hear Sanders' ex post facto claim finding that it lacked jurisdiction to hear the matter. Sanders appealed the decision to the circuit court. The circuit court found sufficient evidence to support the ALJ and affirmed the decision. This appeal follows.

STANDARD OF REVIEW

In an appeal of the final decision of an administrative agency, the standard of appellate review is whether the ALJ's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(C) (Supp. 2007). Although this court shall not substitute its judgment for that of the ALJ as to findings of

[2] Sanders received monthly statements indicating all Account activity. The statement included wages earned working in the prison library, monies directly deposited from family members and friends, and monies withdrawn by Sanders for canteen purchases.

fact, we may reverse or modify decisions which are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole. Id. In determining whether the ALJ's decision was supported by substantial evidence, this court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALJ reached. Durant v. S.C. Dept. of Health and Environmental Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Id. at 420, 604 S.E.2d at 707.

LAW/ANALYSIS

Initially, we note the Department claims the circuit court erred in affirming the ALJ's initial finding Sanders had a property interest in his non-wage funds deposited in his Account. We do not address this issue because the Department failed to cross appeal the ALJ's finding. Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999) (holding a lower court's finding was the law of the case because respondent failed to cross appeal the issue); Rule 203(c), SCACR (detailing the proper procedure for filing a cross appeal). Therefore, the ALJ's finding that Sanders maintained a property interest in non-wage funds deposited into his Account is the law of the case and we find the circuit court did not err in affirming the ALJ on this issue. See Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (finding an unappealed ruling, right or wrong, is the law of the case).[3]

Accordingly, we next determine whether the notice provided Sanders met the minimal requirements of due process. Sanders alleges the circuit court erred in finding the ALJ properly construed the DNA Act so as to allow

[3] Our holding the ALJ's unappealed finding that Sanders maintained a property interest is the law of the case should in no way be interpreted as this court's resolution of this issue. We need not do so under the posture of this case.

the Department to recover non-wages in payment of the fee. The DNA Act provides:

> **Processing fee; payment by person providing sample.**
> (A) A person who is required to provide a sample pursuant to this article must pay a two hundred and fifty dollar processing fee which may not be waived by the court. If the person is incarcerated, the fee must be paid before the person is paroled or released from confinement and may be garnished from wages the person earns while incarcerated. If the person is not sentenced to a term of confinement, payment of the fee must be a condition of the person's sentence and may be paid in installments if so ordered by the court.

S.C. Code Ann. § 23-3-670 (Supp. 2007). Sanders claims the statute provides the fee may only be paid from wages earned by inmates. While the statute provides the fee may be "garnished from wages," we find it does not restrict the Department from recovering the fee from non-wages voluntarily deposited in the inmate's Account subsequent to notice of the deduction procedure.

We also find the circuit court properly affirmed the ALJ's finding that the notice provided of the change in the fee collection procedure met the minimal requirements of due process. When the DNA Act was first enacted, the Department adopted a procedure whereby all funds in an inmate's Account in excess of the recognized indigency level were automatically deducted until the fee was fully paid. Sprouse v. Sanford, No. 0:04-22477-RBH (D.S.C. Jan. 22, 2008). The Department subsequently changed its procedure to automatically deduct the fee from inmate wages only. Id. This meant that any non-wage deposits were not subject to an automatic deduction. Id. This procedure was in place at the time Sanders signed the Payment Form in August 2004. Under this procedure, inmates who received funds from outside sources avoided payment of the fee while inmates participating in work programs faced deductions from their accounts for the fee.

Consequently, the Department changed its procedure so as to automatically deduct 10% of all non-wage deposits into an Account until the fee was paid in full. Id. The manner by which deductions were made from inmate wages remained the same. The new procedure was outlined in an August memorandum sent to all wardens within the state. The memorandum also indicated inmates were to be notified of the change in the procedure prior to September 13, 2004. Michael Sheedy, the warden at Tuberville in August 2004, stated in his affidavit that the memorandum was posted in each housing unit on August 19, 2004. Further, Sheedy stated he notified the Inmate Relations Council about the information so that it could assist in disseminating the memorandum.

The ALJ found sufficient factual evidence that the memorandum was sent to Sheedy on August 18, 2004, and that Sheedy provided notice to all inmates. The ALJ concluded that such notice met the demands of minimal due process and therefore any funds deducted from the Account which were deposited after notice were properly deducted. The circuit court found sufficient evidence to support the ALJ's finding. The circuit court's review of the ALJ order must be confined to the record. S.C. Code Ann. § 1-23-610(C) (Supp. 2007). The circuit court may reverse or modify the decision based on errors of law, but may only reverse or modify an ALJ's findings of fact if they are clearly erroneous. Id. Further, neither the circuit court nor this court may substitute its judgment for that of the ALJ on questions of fact when the facts are supported by substantial evidence. Id.; see also Al-Shabazz v. State, 338 S.C. 354, 380, 527 S.E.2d 742, 756 (2000).

We find Sanders had notice. Prior to the change in procedure, he knew he was required to submit a DNA sample, pay a two hundred and fifty dollar fee, and knew that the fee was automatically going to be deducted from his wages as he signed a form notifying him of this procedure as to wages. Further, we find substantial evidence in the record to support the ALJ's finding that the memorandum was sent to and received by Sheedy and that he provided notice to all inmates regarding the change in the fee collection procedure as to non-wages. Therefore, we find there was sufficient evidence that the posting of the fee collection procedure provided notice and did not violate Sanders' due process rights; accordingly, the circuit court did not err

in affirming the ALJ's decision.[4] Additionally, we note that once Sanders was provided notice of the change in procedure, the deposit of any money, beyond wages, into the Account by Sanders or his family and friends was completely voluntary.[5]

Lastly, Sanders argues the circuit court erred in affirming the ALJ's conclusion it lacked jurisdiction to hear his ex post facto claim. We agree.

An ALJ has jurisdiction to hear appeals from the final decision of the Department in non-collateral or administrative matters. Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750. "An ex post facto violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime." Jernigan v. State, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000). Ex post facto violation claims are non-collateral matters. Id. at 260, 531 S.E.2d at 509. Therefore, we find the ALJ did have jurisdiction to hear Sanders' ex post facto claim. However, for purposes of judicial economy, we address Sanders' ex post facto claim.

A law violates the Ex Post Facto Clauses of the United States and South Carolina Constitutions if it 1) applies to events that occurred before its enactment, and 2) the offender of the law is disadvantaged by the law. State v. Walls, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002); see also Cooper v. S.C. Dept. of Probation, Parole, and Pardon Servs., Op. No. 26480 (S.C. Sup. Ct. filed May 5, 2008) (Shearouse Adv. Sh. No. 17 at 34) (citing State v. Walls for the proposition that the above stated elements must be present for a

[4] On appeal, Sanders also finds error in the ALJ's acceptance of two arguments made by the Department. The Department claimed Sanders' non-wage monies were subject to garnishment because 1) he gave consent by signing a Form 1815 and 2) wage and non-wage monies were comingled and there was no way to differentiate wages from non-wages. Since, the ALJ did not rely on either argument in his order, we find no error.

[5] Likewise, we note that the new procedure for deducting the fee was not applied to any funds previously deposited into Sanders' Account. The new procedure was applied only to those monies deposited into his Account after September 13, 2004.

law to fall within the prohibition). Further, "for the [E]x [P]ost [F]acto [C]lause to be applicable, the statute or the provision in question must be criminal or penal in nature." Id.

A determination of whether a statute is civil or criminal in nature is primarily a question of statutory construction, which begins by reference to the act's text and legislative history. In re Matthews, 345 S.C. 638, 648, 550 S.E.2d 311, 316 (2001). "Where the legislature has manifested its intent that the legislation is civil in nature, the party challenging that classification must provide 'the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the [legislature's] intention.'" Id. (quoting Seling v. Young, 531 U.S. 250 (2001)).

In Cannon v. S.C. Dep't of Prob., Parole and Pardon Servs., 361 S.C. 425, 604 S.E.2d 709 (Ct. App. 2004), rev'd on other grounds, 371 S.C. 581, 641 S.E.2d 429 (2007), this court found the DNA Act to be civil in nature. "Because the South Carolina legislature's intent appears to have been to protect the public, and not to punish those individuals who commit or have committed the specified crimes, South Carolina's DNA Act is non-punitive and does not constitute a criminal penalty." Id. at 433, 604 S.E.2d at 714. Further, this court found the plaintiff had failed to prove the DNA Act was so punitive in either purpose or effect as to negate the legislature's intention. Id.

While the supreme court has since reversed Cannon, it did so based upon the statutory construction regarding the meaning of the word "paroled" as it applied to Cannon. The court did not address the finding by this court that the DNA Act was civil, not penal, or the finding that the Act did not violate the Ex Post Facto Clause. While not controlling due to its ultimate disposition on appeal, we find the statutory construction of the DNA Act and the reasoning provided by this court in Cannon nonetheless persuasive[6].

[6] In a recent decision upholding the processing fee requirement of the DNA Act, the federal district court in South Carolina specifically held that the requirement of payment of a processing fee is civil, not criminal or penal. In re DNA Ex Post Facto Issues, No. 2:99-CV-5555-RBH (D.S.C. Oct. 19, 2007). In arriving at its determination, the district court relied on the

We simply are not convinced that the DNA Act makes an act which was innocent before the law, criminal thereafter and now punishes said act. Moreover, the DNA Act does not impose a subsequent greater punishment than that which existed at the time the act was committed, nor does it make a crime more aggravated than it was when committed before the change in law. Finally, the DNA Act does not alter in any way the nature of the proof or evidence necessary for a crime at the time of the commission of the offense. See Stogner v. California, 539 U.S. 607 (2003); Weaver v. Graham, 450 U.S. 24 (1981); Calder v. Bull, 3 U.S. 386 (1798); see also Jones v. Murray, 962 F.2d 302, 309 (4th Cir. 1992).

Thus, we find the Ex Post Facto Clause is not applicable in this case because the DNA Act is civil, not criminal or penal, in nature. Further, having found that any deposits made into Sanders' Account after September 13, 2004, were voluntarily made with notice of the fee collection procedure, we can find no way in which the DNA Act is so punitive in either purpose or effect as to negate the legislature's intent. Had Sanders told family members and friends not to deposit monies into his Account, he could have avoided any deduction about which he had been provided advance notice. Quite simply, we decline to find a punitive effect because Sanders had notice of the consequences and the contributions were voluntarily made.

CONCLUSION

We find the DNA Act does not restrict the Department from recovering the fee from non-wages voluntarily deposited into the inmate's Account. Furthermore, we find there was sufficient evidence that the posting of the fee collection procedure provided notice and did not violate Sanders' due process rights; therefore, we conclude the circuit court did not err in affirming the ALJ's decision. Lastly, we find the ALJ did have jurisdiction to hear Sanders' ex post facto claim; however, we hold the Ex Post Facto Clause is

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legislative intent of the statute stating "it is clear that the intent of the state legislature was not to punish inmates by imposition of the fee but rather to provide funds for the implementation and operation of the database." Id. at 5.

not applicable in this case because the DNA Act is civil, not criminal or penal, in nature. Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and GOOLSBY, A.J., concur.