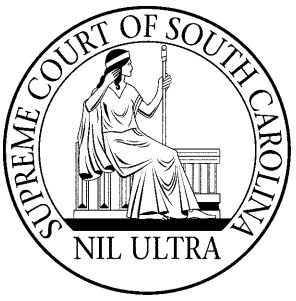

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37
September 14, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Chester County Magistrate Angel Catina Underwood, Respondent.

Appellate Case No. 2016-001420

Opinion No. 27665
Submitted August 23, 2016 – Filed September 14, 2016

PUBLIC REPRIMAND

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

Stanley Lamont Myers, Sr., Esquire, of Moore Taylor Law Firm, P.A., of West Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the agreement, respondent admits misconduct and consents to the imposition of any discipline up to a one year suspension from judicial duties. She requests that any suspension be imposed retroactively to May 8, 2015, the date of her interim suspension. We accept the agreement and impose a public reprimand. The facts as set forth in the agreement are as follows.

Facts

On May 18, 2011, respondent was appointed a magistrate. At the time, respondent's husband had retired from the South Carolina Law Enforcement Division and he did not hold any political offices. Respondent's husband later ran for and was elected Sheriff of Chester County.

South Carolina Court Administration forwarded a spreadsheet to ODC which indicated that, between July 1, 2013, and sometime in April of 2015, respondent's "judge code" was entered as having handled numerous traffic citations, arrest warrants, and bond hearings in Chester County Sheriff's Department cases. A total of 101 cases were identified with respondent's "judge code." In response to this information, Court Administration went to the Chester County Magistrate's Office and obtained a sampling of cases which corroborated respondent's involvement in cases involving the Chester County Sheriff's Department.

In mitigation, respondent states she attempted to follow the remittal of disqualification process on many of the matters, but now recognizes she did so incorrectly after having reviewed Section 3F of Canon 3 of the Code of Judicial Conduct, Rule 501, SCACR, with ODC. Respondent asserts she thought that she was complying with the remittal requirements by announcing her conflict before court and proceeding when no objections were voiced. She now recognizes that remittal requires that the disclosure be made on the record to each defendant, that each defendant be given time to consider the matter with counsel, and that the defendant's decision on the matter be placed on the record.

Respondent also incorrectly believed that when defendants requested she take their plea and/or knew her connection with the Sheriff's Department that the conflict was waived and she could take the plea. Respondent now recognizes that in these situations she was required to comply with the requirements of Section 3F of Canon 3. Respondent submits that she will comply with Section 3F at all times in the future.

In one instance, respondent mistakenly conducted a jury trial thinking that she could preside over the trial since the jury would decide the matter. Respondent now recognizes she must comply with Section 3F of Canon 3 in all jury trials.

In mitigation, respondent offers that no parties complained about the bonds that she set or the disposition of matters in question. ODC confirms it has received no complaints from the defendants in question.

Respondent now asserts she understands the requirements of Section 3F of Canon 3 and submits that she will fully comply with the requirements of Section 3F of Canon 3 in all matters in the future.

Law

Respondent admits that by her conduct she has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Section 2E of Canon 3 (judge shall disqualify herself in proceeding in which judge's impartiality might reasonably be questioned) and Section 3F of Canon 3 (judge disqualified by terms of Section 3E may disclose on record basis of judge's disqualification and may ask parties and their lawyers to consider, out of presence of judge, whether to waive disqualification. If following disclosure of basis for disqualification, parties and lawyers, without participation by judge, agree that judge should not be disqualified and judge is then willing to participate, judge may participate in the proceeding; agreement shall be incorporated in record of proceeding).

Respondent also admits that her misconduct constitutes grounds for discipline pursuant to the following Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (it shall be ground for discipline for judge to violated Code of Judicial Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for her misconduct.[1]

PUBLIC REPRIMAND.

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

[1] Respondent's interim suspension is lifted.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kristin Joseph, P.T., Thomas N. Joseph, M.D., and William G. McCarthy, M.D., Appellants,

v.

South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy, Respondents,

and

South Carolina Chapter, American Physical Therapy Association, Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA, Respondents.

Appellate Case No. 2014-001115

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

Opinion No. 27666
Heard February 19, 2015 – Filed September 14, 2016

REVERSED

M. Elizabeth Crum, of McNair Law Firm, P.A., of Columbia, for Appellants. Monteith P. Todd, of Sowell Gray Stepp & Laffitte, L.L.C., of Columbia, S. Jahue Moore and John C. Bradley, Jr., both of Moore Taylor

Law Firm, of West Columbia, N. Thomas Connally, III, of Hogan Lovells US LLP, of McLean, Virginia and John R. Devlin, Jr., of Devlin & Parkinson, P.A., of Greenville, for Respondents.

ACTING JUSTICE TOAL: This is the latest in a longstanding disagreement regarding how the practice of physical therapy should be regulated in South Carolina. The South Carolina Board of Physical Therapy (the Board) has sided with members of the profession who desire to prevent physical therapists (PTs) from providing treatment as direct employees of physicians. The Board has long sought to require PTs to provide their services directly to patients or through a practice group of PTs. However, other licensed healthcare professionals in South Carolina, such as occupational therapists, speech pathologists, and nurse practitioners may be employed by physicians. Thus, the PTs stand alone in South Carolina. Physicians' offices may not provide PT services by employing licensed PTs, and PTs may not provide services while employed by a physician or physicians' practice group.

With this background in mind, Kristin Joseph, a PT, and two orthopedic surgeons, Doctors Thomas N. Joseph and William G. McCarthy (collectively, Appellants) appeal the circuit court's order dismissing their claims challenging a 2011 position statement from the Board, which opined that within a group practice, if a PT or physical therapist assistant (PTA) provides services to a patient—at the request of another PT or PTA employed within the same practice—the act does not constitute a "referral" under section 40-45-110(A)(1) of the South Carolina Code, as construed in *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006). We overrule our decision in *Sloan*, and reverse the circuit court's order in this case.

FACTS/PROCEDURAL HISTORY

This case arises from a 2011 position statement in which the Board interpreted the fee for referral prohibition contained in section 40-45-110(A)(1) of the South Carolina Code as being inapplicable to individual PTs' or associated PT groups' employment of other PTs or PTAs. Section 40-45-110(A)(1) allows the Board to take disciplinary action against a PT who

> requests, receives, participates, or engages directly or indirectly in the dividing, transferring, assigning, rebating, or refunding of fees received for professional services or profits by means of a credit or other valuable consideration including, but not limited to, wages, an unearned commission, discount, or gratuity with a person who referred a patient, or with a relative or business associate of the referring person.

S.C. Code Ann. § 40-45-110(A)(1) (2011).

The 2011 Position Statement was the Board's second position statement interpreting section 40-45-110(A)(1). The Board first issued a position statement in 2004 (2004 Position Statement), endorsing an opinion of the South Carolina Attorney General, which concluded that a PT would violate section 40-45-110(A)(1) if he or she was employed by a physician or physician groups, and accepted wages for treatment of patients referred by the employing physician or group. *See* S.C. Atty. Gen. Op. dated March 30, 2004 (2004 WL 736934). Specifically, the Attorney General's opinion addressed two questions concerning the use of the word "person" in section 40-45-110(A)(1) as it relates to physicians. *See id.* It opined first that physicians were persons within the meaning of the statute, and that PTs could not be employed by physicians or physician groups and receive wages to treat patients referred by the physician or group for physical therapy services. *Id.*

Subsequent to the 2004 Position Statement, Dr. Allen Sloan, along with other physicians, PTs, and other medical professional associations, brought an action in circuit court seeking a declaratory judgment that a physician may lawfully employ a PT and refer patients to that PT. *Sloan*, 370 S.C. at 466, 636 S.E.2d at 605. Ultimately, the circuit court dismissed the plaintiffs' causes of actions. *Id.* On appeal, this Court affirmed the circuit court's ruling in a 3-2 decision. *Id.* at 485–86, 636 S.E.2d at 616.

The majority held that the circuit court correctly interpreted section 40-45-110(A)(1) as prohibiting in-practice referrals from a physician to a PT. *Id.* at 473, 636 S.E.2d at 609. The majority further found that the Board's formal endorsement of the Attorney General's opinion did not constitute improper rulemaking in violation of the Administrative Procedures Act (APA) because it was "nothing

more than a policy or guidance statement which does not have the force or effect of law in any individual case." *Id.* at 474, 636 S.E.2d at 610.

The majority rejected appellants' constitutional challenges to section 40-45-110(A)(1). *Id.* at 476–86, 636 S.E.2d at 611–16. The majority held that section 40-45-110(A)(1) did not violate the equal protection rights of PTs who wish to be employed by physicians who refer patients to them, because the Legislature had "a rational basis for defining the pertinent classification in this instance as the class of physical therapists [which was to avoid] overuse of physical therapy services and actual and potential conflicts of interest stemming from a physician's financial interest in the provision of therapy services." *Id.* at 481–82, 636 S.E.2d at 613–14. The majority further held that "[t]he statute prohibiting employment relationships between physicians and physical therapists bears a reasonable relationship to a legitimate interest of government, and the Legislature has not engaged in an arbitrary or wrongful act in enacting the statute." *Id.* at 484, 636 S.E.2d at 615. Finally, the majority found no procedural due process violation, as: (1) the hearing at issue was a regularly scheduled meeting during which the appellants' representatives were present to offer comments regarding their respective positions; (2) the Board voted in open session to adopt the Attorney General's opinion; and (3) the Board began enforcing the statute following a ninety-day grace period. *Id.* at 485, 636 S.E.2d at 615.

The dissent, however, would have held that the plain language of section 40-45-110(A)(1) does not prohibit all employee-employer relationships between a physician and PT. *Id.* at 486, 636 S.E.2d at 616 (Toal, C.J., dissenting). Although the dissent agreed that there had been no violation of the appellants' procedural due process rights, in the dissent's view, the majority's interpretation of the statute would result in a violation of the plaintiffs' rights to equal protection and due process. *Id.* (Toal, C.J., dissenting). Finally, the dissent would have found that the Board failed to comply with the APA in adopting the Attorney General's opinion, thereby promulgating an invalid regulation. *Id.* (Toal, C.J., dissenting).[1]

[1] Subsequent to this Court's decision in *Sloan*, two companion bills were introduced in the Legislature in an attempt to overturn the statutory prohibition on PTs working for physicians. The bills, however, were unsuccessful. *See* S.B. 1031, H.B. 4329, 118th Gen. Assemb., Reg. Session (S.C. 2010).

On May 3, 2011, Robert Carpenter, a practicing PT, wrote a letter to the Board requesting that it issue a position statement addressing whether section 40-45-110(A)(1) prohibits: (1) a physical therapist from working for pay for another PT, PTA, or group of PTs when the PT or PTA refers a patient to another PT or PTA for physical therapy services; and (2) a PT or PTA from working for pay for a professional corporation owned by one or more licensed PTs when a PT owner or employee of the corporation refers a patient to the PT for physical therapy services.

On June 2, 2011, Marilyn Swygert, the Chairman of the Board responded with a letter entitled: "Application of S.C. Code Ann. Sec. 40-45-110(A)(1) to Intra-Professional Interactions." In the letter, Swygert stated that in her view, the answer to both of Carpenter's questions was "no." During a regularly scheduled meeting on August 17, 2011, the Board voted to adopt the position stated in Swygert's letter. The Board subsequently posted a position statement (2011 Position Statement) on its website. The 2011 Position Statement provided, in pertinent part:

> In a group practice, a [PT] or [PTA] providing services to a patient of that practice should not fall within this definition of a "referral." The [PT] or [PTA] seeing a patient at the request of another [PT] in the same group does not constitute a "referral," but is rather a [PT] or [PTA] providing coverage either within the 30-day window or pursuant to the same referral from a physician or other member of the group.

Shortly thereafter, Appellants filed a declaratory judgment action against the Board and the South Carolina Department of Labor, Licensing, and Regulation (collectively, Respondents). In Appellants' first six causes of action, they challenged the 2011 Position Statement on the grounds that it: (1) is contrary to the plain language of section 40-45-110(A)(1) given that there is no distinction between a "referral" from a physician to a PT and "coverage" between PTs; (2) exceeds the agency's authority under the APA; and (3) is in violation of Appellants' state and federal constitutional rights to due process and equal protection.[2] In the alternative, Appellants argued that if the "coverage" exception is a proper interpretation of section 40-45-110(A)(1), it should be applied equally to physician and physician owned practices. Appellants' seventh through ninth causes of action

[2] U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3.

sought to argue against the precedent in *Sloan*, contending that the Court in *Sloan* incorrectly interpreted section 40-45-110(A)(1) to prohibit a physician or physician group from employing a PT and referring a patient to the PT for physical therapy services.

Respondents moved to dismiss the case, arguing: there was no justiciable controversy; Appellants lacked standing; the complaint failed to state a claim as to the seventh through ninth causes of action; the complaint stated no claim upon which relief could be granted; and Appellants' claims were not ripe for review. After a hearing, the circuit court granted Respondents' motion in part. In so ruling, the court converted Respondents' motion to one for partial summary judgment with respect to Appellants' seventh through ninth causes of action, finding that it was "bound by the Supreme Court's decision in *Sloan*" and that it had no authority to overrule *Sloan*. The circuit court denied Respondents' motion as to Appellants' causes of action one through six. The circuit court further found that Appellants had standing to bring their claims because Appellants' injury is "the infringement on their abilities to practice their chosen profession and the disparate treatment under the 2011 Position Statement in allowing PTs or PT groups to refer patients for PT services to PTs under the guise of 'coverage' and not allowing physicians or physician groups to refer patients for PT services to employed PTs under the guise of 'coverage.'" In addition, the circuit court ruled that standing could be conferred on appellants as the procedural and substantive implications of the 2011 Position Statement constituted an issue of public importance.

Subsequently, Appellants moved for summary judgment on their first through sixth causes of action, and Respondents filed cross-motions for summary judgment. The circuit court held a hearing on January 1, 2014, and on April 22, 2014, entered an order granting Respondents' motions for summary judgment and denying Appellants' motion for summary judgment.

In upholding the 2011 Position Statement, the circuit court found that the transition in treatment of patients from one PT to another PT or PTA within a group physical therapy practice was not a "referral" prohibited by section 40-45-110(A)(1), as interpreted by *Sloan*. According to the circuit court, "referrals" targeted by section 40-45-110(A)(1) are limited to "referrals of gatekeeping physicians," and not the "transition of patients from one PT to another PT within a group practice [that] normally occurs as a simple function of scheduling and patient request or convenience." The court also concluded that "a PT sending or

directing a patient to another PT (or PTA) for treatment within a group practice does not implicate the potential abuse that the Legislature sought to curtail in enacting the prohibition on self-interested 'referrals' in [section] 40-45-110(A)(1), namely overuse of physical therapy services." The court further stated that prohibiting the transition of patients from one PT to another would effectively ban the group practice of physical therapy, as PTs would be "forced to operate as solo practitioners in order to continue their practice."

The circuit court rejected Appellants' alternative argument that, even if the 2011 Position Statement properly interpreted section 40-45-110(A)(1), PTs should be able to work for referring physicians because their treatment of referred patients would merely be "coverage" for the referring physician. The court refused to "create a backdoor around *Sloan*," determining that Appellants' requested "coverage" exception would impermissibly "declare conduct lawful that *Sloan* declared unlawful." As for Appellants' argument with regard to the APA, the circuit court found that the 2011 Position Statement did not violate the APA because—similar to the 2004 Position Statement in *Sloan*—it is "not a regulation or the equivalent of a regulation."

Finally, the circuit court disagreed with Appellants' claim that the 2011 Position Statement violated their equal protection and due process rights. After noting that these claims were "foreclosed by the [this] Court's decision in *Sloan*," it stated that "both *Sloan* and the 2011 Position Statement treat all physicians the same as all other physicians, and all PTs the same as all other PTs." The court also found that the 2011 Position Statement "does not prohibit [Appellants] from doing anything, and thus does not deprive them of any property right, with or without due process."

Following the circuit court's denial of their motion to reconsider pursuant to Rule 59(e), SCRCP, Appellants appealed the circuit court's order to the court of appeals. This Court granted Appellants' motion to certify the appeal pursuant to Rule 204(b), SCACR. Subsequently, the Court granted Appellants' motion to argue against *Sloan* pursuant to Rule 217, SCACR.

STANDARD OF REVIEW

On review of an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c),

SCRCP. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); *see* Rule 56(c), SCRCP. Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Turner*, 392 S.C. at 766, 708 S.E.2d at 769. In an appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

ANALYSIS

I. Standing

As an initial matter, we address Respondents' contention that Appellants lack standing to challenge the 2011 Position Statement, and hold that Appellants have standing to bring their claims.

A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing. *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985). Standing is defined as "a personal stake in the subject matter of a lawsuit." *Sea Pines Ass'n for the Prot. Of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (citing *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999)). The United States Supreme Court has set forth the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an "injury in fact;" (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision." *Sea Pines Ass'n for Prot. of Wildlife, Inc.*, 345 S.C. at 601, 550 S.E.2d at 291 (internal citations omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992)). A party seeking to establish standing carries the burden of demonstrating each element. *Id.* (citing *Lujan*, 504 U.S. at 561).

This declaratory judgment action was initiated by a physical therapist and two orthopedic surgeons. It is difficult to conceive of individuals more impacted by this Court's decision in *Sloan* and the 2011 Position Statement from the South Carolina Board of Physical Therapy. PT Joseph has been injured by the

infringement on her ability to practice her chosen profession and by the adoption of a regulation that requires she and other PTs be treated differently from other health care professionals who may be employed by doctors. By extension, Drs. Joseph and McCarthy have been injured because they have an interest in how the PT system works and in their ability to employ PTs. Further, a causal connection exists between Appellants' injury and the Board's challenged actions, including the 2011 Position Statement, and there is a likelihood that their injuries would be redressed by a favorable decision. *See id.* at 601, 550 S.E.2d at 291.

The dissent supports its position that Appellants lack standing, in part, on the fact that "PT Joseph will not be punished or disciplined as a result of the 2011 Position Statement." Thus, under the dissent's analysis no party could *ever* achieve the requisite standing to challenge *Sloan* unless a party consciously disregarded the opinion and willfully violated the law. The only viable avenue to seek redress and access to our courts cannot be solely through disregarding our laws.

The ability to challenge precedent is a paramount principle of our judicial system. *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) ("Citizens must be afforded access to the judicial process to address alleged injustices."). This is especially true in this context where Appellants brought claims under the Declaratory Judgment Act, which affords a party the right to question the construction or validity of a statute or legal instrument that allegedly affects a right, status, or legal relationship. S.C. Code Ann. § 15-53-30 (2005); *see also Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 888–89 (Ct. App. 2002) (quoting another source) ("The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships."). Accordingly, we decline to create an insurmountable hurdle—as the dissent would have us do—for parties to gain access to our courts.

II. Overruling *Sloan*

On the merits, Appellants argue, *inter alia*, that the 2011 Position Statement violates their constitutional rights to equal protection and due process by allowing PTs to be employed by another PT or a physical therapy group and provide physical therapy services to patients referred by the employer, whereas *Sloan* does not allow PTs to be employed by a physician or physician group and provide

physical therapy services to the employer's referred patient. For the same reasons discussed in the dissent in *Sloan*, we take this opportunity to overrule that decision. *See* 370 S.C. at 486–94, 636 S.E.2d at 616–20 (Toal, C.J. dissenting).

While adherence to precedent under the rubric of *stare decisis* is commendable and provides certainty and consistency within our judicial system, adherence to precedent that is wrong serves no such laudable purpose. *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) (alteration in original) (quoting another source) ("There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right. . . . There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment."). The underpinning of *Sloan* is the assumption that physicians who refer patients to physical therapists under their employ will act in bad faith or be mired in a conflict of interest because of the financial remuneration they receive from the provision of such service. We choose to make no such assumption concerning our brothers and sisters in the medical profession.

The Equal Protection Clause provides, "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Denene, Inc. v. City of Charleston,* 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) (citation omitted). Under the rational basis test, the Court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 293-94, 737 S.E.2d 601, 608 (2013) (citing *Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Rev.,* 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003)).

In *Sloan*, this Court interpreted section 40-45-110(A)(1) of the South Carolina Code as prohibiting a PT from being employed by a physician when the physician refers patients to the PT for services. Contrary to that decision, we now find that the classification, which distinguishes PTs from other licensed health care professionals, has no rational relationship to the legislative purpose of the statute—to protect consumers and government-sponsored health care programs from conflicts of interest and potential misuse of medical services. *See id.* at 493–94, 636 S.E.2d at 619–20. Section 40-45-110(A)(1) should prevent only referral-for-

pay situations, an interpretation which comports with the clear purpose of the statute. The overarching prohibition created as a result of the Court's opinion in *Sloan* is arbitrary and not calculated to avoid the legislative purpose of prohibiting the unethical behavior of receiving or giving illegal kickbacks and participating in referral-for-pay agreements. *Id.* at 489, 636 S.E.2d at 617. To find otherwise would be arbitrary and violative of the equal protection rights of PTs.

Although, under *Sloan*, physicians may employ other healthcare professionals such as occupational therapists, speech pathologists, and nurse practitioners, they may not employ PTs. Neither the *Sloan* opinion nor Appellants have articulated any plausible reason as to why PTs are so different from other health care professionals that they must be singled out and provided disparate treatment for self-referral purposes. Accordingly, the Court's interpretation in *Sloan* constitutes an equal protection violation. In addition, the interpretation violates the substantive due process rights of physical therapists by imposing an arbitrary restriction upon physical therapists while preserving those employment relationships for all other health care providers and allied health professionals. *See Worsley Co., Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons." (citing *Anco, Inc. v. State Health & Human Services Finance Comm'n,* 300 S.C. 432, 388 S.E.2d 780 (1989)).

We now recognize that the interpretation in *Sloan* creates an absurd situation by strictly prohibiting physician-PT employment relationship without considering the resulting ethical implications or patient wellbeing. *See id.* at 489, 636 S.E.2d at 617. In fact, prohibiting physicians' employment of PTs deprives physicians of their right to practice medicine in the best interests of their patients. As interpreted in *Sloan,* section 40-45-110(A)(1) appears merely to be anti-competitive protectionist legislation intended to protect personal financial interests, which is driven by reimbursement purposes, rather than actual benefits to patients. Accordingly, we overrule *Sloan* as an unconstitutional interpretation of section 40-45-110(A)(1), and hold that the statute prohibits only referral-for-pay situations rather than prohibiting all employer-employee relationships between physicians and physical therapists.

We acknowledge that the Legislature's failure to alter a statute constitutes "evidence the Legislature agrees with this Court's interpretation" of the statute. *See McLeod*, 396 S.C. at 660, 723 S.E.2d at 205. In this case, however, it is of no

moment that the General Assembly has not acted to alter section 40-45-110(A)(1) in light of our decision in *Sloan*. It is the duty of this Court, not the legislature, to determine the constitutionality of a statute. Because we hold that the majority's construction of the statute in *Sloan* is unconstitutional, this inaction on the part of the legislature is irrelevant.

III. 2011 Position Statement

The 2011 Position Statement expands upon the harm done by the majority's interpretation of section 40-45-110(A) in *Sloan* by permitting PTs to refer patients to other PTs within the same group practice—when, under *Sloan*, physicians are not permitted to make similar self-referrals. For the reasons discussed, *infra*, and because we overrule *Sloan*, we therefore reverse the circuit court's grant of summary judgment to Respondents.

Moreover, we hold that the Board's adoption of the 2011 Position Statement violates the requirements of the APA. The circuit court found that the 2011 Position Statement "is not a regulation or the equivalent of a regulation." To the contrary, the 2011 Position Statement was adopted to protect PTs and PT groups from disciplinary action under section 40-45-110(A)(1), was intended to have the force of law, and therefore constitutes a binding norm.

Under the APA, a regulation is defined as an "agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C. Code Ann. § 1-23-10(4) (2005). Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a "binding norm." *Home Health Serv., Inc. v. S.C. Tax Com'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994). The "key inquiry" is

> the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the

> agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Sloan, 370 S.C. at 491, 636 S.E.2d 598 (Toal, C.J., dissenting) (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)). "When there is a close question whether a pronouncement is a policy statement or a regulation, the [agency] should promulgate the ruling as a regulation in compliance with the APA." *Home Health Serv., Inc. v. S.C. Tax Com'n*, 312 S.C. at 329, 440 S.E.2d at 378.

Article I, section 22 of our state's constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ... and he shall have in all such instances the right to judicial review." S.C. Const. art. I, § 22. Further, the APA specifically requires an agency to: provide public notice of a drafting period where public comments can be accepted; conduct a public hearing on the proposed regulation; possibly prepare reports about the regulation's impact on the economy, environment, and public health; and submit the regulation to the Legislature for review, modification, and approval or rejection. S.C. Code Ann. §§ 1-23-110 to -160 (2005).

The Board satisfied none of these requirements when it adopted the 2011 Position Statement. In adopting the 2011 Position Statement, the Board merely identified the consideration of Swygert's letter on its agenda as "discussion of Intra-Professional Interactions"—thus essentially providing no notice to the public of what the Board was deciding.

Moreover, the Board intended PTs and PT groups to rely on the 2011 Position Statement. The 2011 Position Statement leaves no question regarding whether a PT employed by another PT or PT group who is directed patients for physical therapy, and is paid for those services, is in violation of the referral for profit prohibition in section 40-45-110(A)(1). Based on the 2011 Position Statement, the Board is not free to exercise its discretion as to whether to follow the position set forth in the 2011 Position Statement in an individual case. In other words, the 2011 Position Statement constitutes a "binding norm," and has the effect of a regulation under the APA. The Board's process in adopting the 2011 Position Statement thus amounts to administrative overreach that attempts to end run the

legislative process. Accordingly, we hold that the Board violated the APA by adopting the 2011 Position Statement without promulgating it as a regulation.[3]

CONCLUSION

Based on the foregoing, we overrule *Sloan* and reverse the circuit court's decision granting Respondents' motion for summary judgment.

HEARN, J., concurs. KITTREDGE, J., concurring in result in a separate opinion. BEATTY, J., dissenting in a separate opinion in which PLEICONES, C.J., concurs.

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[3] We embrace completely the excellent comprehensive analysis of administrative agency rulemaking set forth in sections I, II, and III of Justice Kittredge's concurring opinion. We believe both the statutory law of South Carolina and Article I, section 22 of the South Carolina Constitution are violated by the Board's attempt to use its 2011 position statement to regulate the practice of physical therapy without submitting it to the General Assembly as a proposed agency regulation following the requirements of the South Carolina Administrative Procedures Act.

That said we adhere to the finding in the majority opinion that the Board's actions also violate the equal protection and due process protections of the United States Constitution.

JUSTICE KITTREDGE: This case brings the Court face-to-face with the leviathan known as administrative agency rule-making—the so-called Fourth Branch of government—and illustrates the danger it poses to the once sacrosanct constitutional principle of separation of powers. Therefore, I concur in the result reached by the majority, which overrules *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006), for *Sloan* allowed the State's administrative agencies to effectively ignore the rule-making requirements of the Administrative Procedures Act (APA).[4] However, I would not go as far as the majority in declaring *Sloan*'s interpretation of section 40-45-110(A)(1)[5] (the Statute) unconstitutional. I would resolve this case solely on statutory grounds, leaving the constitutional issue for a later day, when it may be considered in the context of a properly promulgated regulation. *See, e.g.*, *In re Care & Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("[I]t is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required." (citing *Fairway Ford, Inc. v. Cnty. of Greenville*, 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996))). Therefore, beyond the majority's analysis concerning standing, I would go only so far as applying then-Chief Justice Toal's analysis of the APA in *Sloan* to the facts of this case. *See Sloan*, 370 S.C. at 486, 636 S.E.2d at 616 (Toal, C.J., dissenting) (concluding that, by issuing a position statement adopting a 2004 Attorney General opinion interpreting the Statute, the South Carolina Board of Physical Therapy Examiners (the Board) ignored the APA's requirements and promulgated an invalid regulation). In my view, the Board's 2011 position statement suffers from the same infirmity as its 2004 counterpart and is likewise invalid.

I.

This case implicates far more than the practice of physical therapy in South Carolina, for it touches on an issue central to the constitutional framework of our republic. We once viewed the three branches of that government as separate, each operating in a distinct sphere within which its authority was inviolable. *See, e.g.*, *Palmetto Golf Club v. Robinson*, 143 S.C. 347, 373, 141 S.E. 610, 617 (1928) (Carter, J., concurring) ("Under the Constitution of South Carolina, the three

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[4] *See* S.C. Code Ann. §§ 1-23-10 to -300 (2005 & Supp. 2015).

[5] *Id.* § 40-45-110(A)(1) (2011).

branches of the government, legislative, judicial, and executive, have separate functions to perform, and one branch of the government must not encroach upon the other . . . ."). That division has become blurred in the area of administrative law, where executive branch agencies routinely perform functions traditionally within the sole province of the other two branches of government. *See, e.g.*, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting) (noting that administrative agencies, although part of the executive branch, "exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules"); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting) (noting that administrative agencies are often referred to as "quasi-legislative, quasi-executive[,] or quasi-judicial" and that use of the qualifier "quasi" is an implicit acknowledgment "that all recognized classifications have broken down"); *see also id.* at 487 ("[Administrative agencies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.").

The rise of administrative agencies has allowed legislatures, with the courts' blessing, to increasingly abdicate their lawmaking responsibility. *See City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting) (describing the rise of administrative agencies as the vehicle through which a "dramatic shift in power" from Congress to the executive branch has occurred over the past half century); *Fed. Power Comm'n v. New Eng. Power Co.*, 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring in result) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes . . . ."). Even as early as 1952, Justice Jackson could say that "perhaps more values today are affected by [administrative agencies'] decisions than by those of all the courts." *Ruberoid Co.*, 343 U.S. at 487 (Jackson, J., dissenting). This trend has continued over the decades and regrettably shows no signs of slowing down any time soon. *See City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting) (noting that Congress created more than fifty new agencies between 1997 and 2012 and "more are on the way"); *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, No. 14-3243, 2016 WL 3064870, at *1 (10th Cir. May 31, 2016) ("The number of formal rules [administrative] agencies have issued thanks to their delegated legislative authority has grown so exuberantly it's

hard to keep up. The Code of Federal Regulations now clocks in at over 175,000 pages. And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal or 'sub-regulatory' policy manuals, directives, and the like might be found floating around these days.").

The consolidation of power accompanying the rise of the administrative state has not gone unnoticed. Nor has this trend, which threatens to undo the Founders' deliberate weaving of separation of powers into the fabric of our government, been without its detractors. *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1254–55 (2015) (Thomas, J., concurring in judgment) (acknowledging that by failing to enforce the separation of powers mandated by the Constitution, the Court was complicit in the concentration of power "in the hands of a vast and unaccountable administrative apparatus"). In a dissenting opinion critical of courts' overly deferential treatment of administrative agencies, Chief Justice Roberts channeled James Madison, who "famously wrote that the accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting) (ellipsis in original) (citation and internal quotation marks omitted); *accord Ass'n of Am. R.Rs.*, 135 S. Ct. at 1244 (Thomas, J., concurring in judgment) (recognizing the text of the Federal Constitution, as well as the debates and writings surrounding its enactment, "reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct"). The Chief Justice went on to acknowledge the public perception of administrative agencies as faceless bureaucracies, admitting that

> the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, "in the public interest"—can perhaps be excused for thinking that it is the agency really doing the legislating. And with hundreds of federal agencies poking into every nook and cranny of daily life, that citizen might also understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching.

City of Arlington, 133 S. Ct. at 1879 (Roberts, C.J., dissenting). This observation echoed concerns expressed by Professor Charles A. Reich, who has described "the growth of the administrative, bureaucratic state" as

> the greatest single threat to the survival of the Framers' Constitution. Their tripartite scheme of legislative, executive, and judicial branches has been altered almost beyond recognition by the dominance of a Fourth Branch of government which combines in itself powers of each original branch and engages in detailed management rather than traditional limited government.

Charles A. Reich, *The Individual Sector*, 100 Yale L.J. 1409, 1430–31 (1991).

This threat is far from theoretical, of concern only to judges and academics. One need look no further than the Tenth Circuit's recent decision in *Caring Hearts* for an example of the dangers posed by an unchecked administrative state. Caring Hearts, a provider of home nursing and physical therapy services, engaged in a lengthy—and until recently, futile—battle with the Centers for Medicare and Medicaid Services (CMS), an administrative agency within the U.S. Department of Health and Human Services, over the legality of payments Caring Hearts received for services provided to Medicare participants in 2008. *See Caring Hearts*, 2016 WL 3064870, at *1–2. Caring Hearts was ultimately successful because, as the Tenth Circuit noted, the regulations upon which CMS relied did not exist when the contested services were rendered. *Id.* at *2. Not only that, but the regulations that *did* exist at the relevant times supported Caring Hearts's position, not CMS's. *See id.* at *2–6. However, until the Tenth Circuit's decision, CMS had successfully convinced every administrative and judicial tribunal the agency appeared before that Caring Hearts knowingly engaged in unlawful conduct by violating "regulations that were [at the time the conduct occurred] but figments of the rulemakers' imagination, still years away from adoption." *Id.* at *2.

The dispute between Caring Hearts and CMS began when, after an audit, CMS determined the government paid Caring Hearts approximately $800,000 for services that were not compensable under federal law, leading CMS to demand that Caring Hearts refund the payments. *Id.* at *1 (citing 42 U.S.C. §§ 1395f(a), 1395y(a)(1)(A)). Caring Hearts appealed CMS's decision, correctly contending that CMS was relying on regulations that did not exist when Caring Hearts provided the services in 2008. *See id.* at *2. Yet, at every step up the administrative ladder, CMS prevailed, with bureaucrats, an administrative law judge, and even a federal district judge all accepting CMS's claim that Caring Hearts had violated properly promulgated regulations. *See id.* at *2–6; *see also*

Caring Hearts Pers. Home Servs., Inc. v. Sebelius, No. 12-2700-CM, 2014 WL 4259151, at *1–2 (D. Kan. Aug. 28, 2014) (citations omitted) (describing Caring Hearts's journey through the administrative appeals process), *vacated sub nom. Caring Hearts Pers. Home Servs., Inc. v. Burwell*, No. 14-3243, 2016 WL 3064870 (10th Cir. May 31, 2016). Given the long-established principle "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,"[6] it is not surprising CMS was repeatedly successful in defending its actions, even when they were subjected to judicial scrutiny. *See Caring Hearts*, 2014 WL 4259151, at *2–3, *8, *14–16 (finding substantial evidence supported the agency's determination that the contested services were non-compensable). CMS's winning streak may not have ended but for the minor detail, mentioned above, that the regulations CMS contended Caring Hearts knowingly violated *did not exist* when Caring Hearts supposedly violated them. *Caring Hearts*, 2016 WL 3064870, at *2.

In rejecting CMS's bold attempt to enforce nonexistent regulations, the Tenth Circuit stated what should have been, but apparently was not, obvious when it observed that "surely one thing no agency can do is apply the wrong law to citizens who come before it, especially when the right law would appear to support the citizen and not the agency." *Id.* at *2. In its conclusion, the court again touched on the dangers posed by a single governmental body being allowed to write, enforce, and interpret the law: "[A]n agency decision," the court said, "that loses track of its own controlling regulations and applies the wrong rules in order to penalize private citizens can never stand." *Id.* at *7. Therefore, although Caring Hearts ultimately prevailed, it did so only after litigating the issue to the second-highest federal court in the United States.[7] The fact that Caring Hearts had to go to such extraordinary

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[6] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *accord Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("[O]ur deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" (quoting *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005))).

[7] The Tenth Circuit hinted that, on remand, CMS should concede its position was not "substantially justified," thus allowing Caring Hearts to recover some of its litigation expenses from the government. *Caring Hearts*, 2016 WL 3064870, at *7

lengths to challenge the agency's fiat demonstrates the wisdom of the Founders' division of power among three co-equal branches of government, and it is with this background in mind that I consider the present case.

II.

In South Carolina, to preserve some semblance of the separation of powers we once held sacred, an administrative agency may not make law without legislative oversight and approval. This legislative accountability is accomplished through the APA, which requires, with some exceptions not applicable here, the submission of proposed regulations to the General Assembly. *See* S.C. Code Ann. § 1-23-120 (Supp. 2015). If the General Assembly does not act to disapprove an agency's proposed regulation within a certain period of time, the regulation becomes effective. *Id.* § 1-23-120(D).

The question then becomes, "What constitutes a regulation, such that an agency must comply with the APA?" That question was correctly answered by the dissent in *Sloan*, which recognized that an agency creates a regulation requiring APA compliance, as opposed to "a general policy statement," which does not, when the agency's action "establishes a binding norm." *Sloan*, 370 S.C. at 491, 636 S.E.2d at 618 (Toal, C.J., dissenting) (quoting *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994)) (internal quotation marks omitted); *see also* S.C. Code Ann. § 1-23-10(4) (2005) (defining a regulation, in part, as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency").

> The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

(citation omitted).

Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir.1983), *quoted in Sloan*, 370 S.C. at 491, 636 S.E.2d at 618 (Toal, C.J., dissenting). In addition, "when there is a close question whether a pronouncement is a policy statement or regulation, the [agency] should promulgate the ruling as a regulation in compliance with the APA." *Home Health Serv., Inc.,* 312 S.C. at 329, 440 S.E.2d at 378.

Turning to the facts of this case, which Justice Toal ably recounts in the Court's opinion, it is clear the Board, in adopting the 2011 position statement interpreting the Statute, "promulgated an invalid regulation because [it] failed to comply with the rule-making provisions of the APA." *Sloan*, 370 S.C. at 491, 636 S.E.2d at 619 (Toal, C.J., dissenting). The 2011 position statement declaring intra-practice referrals among physical therapists lawful, like its 2004 predecessor declaring similar referrals between physicians and physical therapists unlawful, gives the Board no discretion to consider the facts of a particular case before it—once facts are established satisfying the position statement's criteria, the Board's hands are tied—making the position statement a quintessential regulation. *See Ryder Truck Lines, Inc.*, 716 F.2d at 1377 (noting the lack of agency discretion is the hallmark of a regulation).

In finding the 2004 position statement did not amount to a regulation, the majority in *Sloan* incorrectly held that the Statute itself "prohibit[s] a physical therapist from working as an employee of a physician when the physician refers patients to the physical therapist for services." *Sloan*, 370 S.C. at 473, 636 S.E.2d at 609. Perhaps the General Assembly would have approved a regulation promulgated by the Board to proscribe that conduct, but the language of the Statute makes it clear the legislature also could have rejected such a regulation. Section 40-45-110 provides that the Board *may* take action against a licensed physical therapist who

> requests, receives, participates, or engages directly or indirectly in the dividing, transferring, assigning, rebating, or refunding of fees received for professional services or profits by means of a credit or other valuable consideration including, but not limited to, wages, an unearned commission, discount, or gratuity with a person who referred a patient, or with a relative or business associate of the referring person.

S.C. Code Ann. § 40-45-110(A)(1) (2011).

The point is that the General Assembly, by inserting the discretionary term "may," was looking to the Board to determine, through the regulatory process, the parameters of section 40-45-110. *Compare Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."), *with State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994) ("The word 'may' ordinarily signifies permission and generally means the action spoken of is optional or discretionary." (quoting *Robertson v. State*, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981)) (internal quotation marks omitted)). Indeed, ignoring the Statute's discretionary language, as the *Sloan* majority did,[8] the Statute is broad enough to prohibit the conduct deemed permissible in the 2011 position statement—physical therapists working for and receiving referrals from other physical therapists—for on its face the Statute makes no distinction between referrals from (or employment by) physicians and referrals from (or employment by) other physical therapists. *Cf. Sloan*, 370 S.C. at 474–75, 636 S.E.2d at 610 (finding that the Board's 2004 position statement "did not implement or prescribe the law or practice requirements for physical therapists in more detail than set forth by statute"). I would not permit the Board to make these important policy decisions through the use of mere position statements; instead, I would insist on strict compliance with the APA.[9]

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[8] This same fundamental error affected the Attorney General opinion cited in *Sloan*, upon which the Board relied in issuing the 2004 position statement. *See Sloan*, 370 S.C. at 465, 636 S.E.2d at 605 (citing S.C. Code Ann. § 40-45-110(A)(1); S.C. Att'y Gen. Op. dated March 30, 2004, 2004 WL 736934). The Attorney General opinion ignored the Statute's use of "may" and the corresponding need for the Board to promulgate regulations determining the proper scope of section 40-45-110. *See* S.C. Att'y Gen. Op., 2004 WL 736934, at *1–2, 5. The Attorney General opinion therefore neglected to consider that the Statute was part of a legislative delegation of authority designed to implement a statutory scheme in conformity with the APA. Instead, the Attorney General opinion erroneously construed the Statute as mandating a particular result and took it upon itself to determine what conduct the Statute proscribed. *Id.* at *2.

[9] I hasten to add that such strict compliance is not necessary where an administrative agency is acting pursuant to valid federal regulations mandating a different procedure. *See, e.g.*, *Stogsdill v. S.C. Dep't of Health & Human Servs.*,

The possible ramifications of violating the Board's position statement further convince me of the necessity of requiring strict APA compliance. In addition to license revocation, the Board may impose civil penalties up to $10,000 for violations of the Statute. S.C. Code Ann. §§ 40-45-110(A), -120 (2011). Moreover, a violation of the Statute subjects the offender to potential criminal penalties, including imprisonment for up to ninety days. *Id.* § 40-45-200 (2011). Given that severe penalties, including criminal prosecution, are associated with a statutory violation, I would strictly construe the legislature's grant of authority to the Board.[10] Doing so, it is clear the General Assembly envisioned it would have the opportunity to review specific regulations before they became effective.

Of course, where the General Assembly hits the proverbial bulls-eye and assigns enforcement of a statute to an administrative agency with the command of "shall," then the agency shall act accordingly, free from the duplicative effort of formally promulgating a regulation.[11] *See Collins*, 352 S.C. at 470, 574 S.E.2d at 743. But

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410 S.C. 273, 280, 763 S.E.2d 638, 642 (Ct. App. 2014) (holding that in the context of Medicaid waivers, once the State's waiver application is approved by CMS, the waiver's terms carry the force and effect of federal law and need not be promulgated as regulations pursuant to the APA), *cert. dismissed*, 415 S.C. 242, 781 S.E.2d 719 (2016).

[10] *Cf. Nelson v. Ozmint*, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (noting the rule of statutory construction that penal statutes are strictly construed against the State (citing *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991))).

[11] The majority in *Sloan* expressed concern over this potential redundancy, stating that to require compliance with the APA "would lead to the absurd result that, before an agency may enforce a statute, it would have to enact a regulation explaining its interpretation and application of the statute in detail and its intention of enforcing it." *Sloan*, 370 S.C. at 475, 636 S.E.2d at 610. However, the *Sloan* majority, the Board, and the Attorney General opinion on which the Board relied misinterpreted the Statute. Nowhere does the Statute *require* the Board to do anything. As noted, the Statute speaks only in permissive terms, in anticipation of agency-crafted regulations promulgated pursuant to the APA. Thus, the *Sloan* majority's concern was misplaced.

that is far from the situation here. The Board may not, in my firm judgment, determine where to draw the line between legal and illegal conduct under the guise of issuing a "policy statement" that avoids the rigors and transparency of an APA-approved regulation.[12] Because *Sloan* has permitted the Board and the State's other administrative agencies to do just that, it must be overruled.

III.

The ever increasing reach of the so-called Fourth Branch of government presents a threat to our civil society, especially the principle of separation of powers. If the executive branch, through unelected bureaucrats and seemingly countless administrative agencies, is going to set policies having the force of law, the judicial branch must insist on clear delegation from the legislative branch and strict compliance with the APA, including submission of administrative policies having the force and effect of law to the legislature for review.

In sum, I would accord Appellants standing, declare the 2011 position statement unlawful, and overrule *Sloan*. I concur with the majority in result.

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[12] In addition to requiring proposed regulations be submitted to the General Assembly, the APA also "generally requires a state agency to give notice of a drafting period during which public comments are accepted on a proposed regulation; conduct a public hearing on the proposed regulation overseen by an administrative law judge or an agency's governing board; [and] possibly prepare reports about the [proposed] regulation's impact on the economy, environment, and public health." *Sloan*, 370 S.C. at 474, 636 S.E.2d at 609–10.

JUSTICE BEATTY: While the majority's decision is laudable, I do not believe Appellants have standing to challenge the 2011 Position Statement. Thus, I would affirm the circuit court's order pursuant to Rule 220(c) of the South Carolina Appellate Court Rules.[13]

Although Appellants raise nine arguments, they can be consolidated into two categories: (1) the propriety of this Court's decision in *Sloan*, and (2) the procedural and substantive implications of the Board's 2011 Position Statement. However, before addressing the merits of this appeal, I believe an initial determination must be made as to whether Appellants have standing to challenge the 2011 Position Statement and, in turn, petition for this Court to reconsider its decision in *Sloan*.

"Before any action can be maintained, a justiciable controversy must be present." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character." *Id*. "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." *Id.* at 547, 590 S.E.2d at 546.

A plaintiff must have standing to institute an action. *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). "To have standing, one must have a personal stake in the subject matter of the lawsuit." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res. & Cmty. Servs. Assocs.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). In other words, one must be a real party in interest. *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996). "A real party in interest is one 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." *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) (quoting *Anchor Point Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)). "Additionally, a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." *Evins v.*

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[13] Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

Richland Cnty. Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000). "However, a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance." *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999).

A party seeking to establish standing must prove the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for the Prot. of Wildlife, Inc.*, 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992)).

Cognizant of the above-outlined principles, I begin with an examination of the reason Appellants instituted the declaratory judgment action. As expressed in the jurisdictional statement of their pleadings, Appellants invoked the judicial power of the circuit court to "determine that the 2011 Position Statement adopted August 17, 2011, by the Board regarding the 'Application of 40-45-110(A)(1) to Intra-Professional Interactions' violates the provisions of the PT Act and the Constitutions of South Carolina and the United States." Thus, any basis to confer standing upon Appellants emanates from a dispute regarding the validity of the 2011 Position Statement and not, as the majority holds, from a desire to challenge *Sloan*. Unlike the majority, I believe a determination regarding standing must be strictly limited to an assessment of the 2011 Position Statement.[14] I would find Appellants have failed to prove the requisite elements to establish standing.

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[14] Interestingly, the more lenient stance enunciated by the members of the majority opinion is a marked departure from decisions they authored that strictly required those seeking standing to identify a concrete, particularized harm to a legally protected interest. *See Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res. & Cmty. Servs. Assocs.*, 345 S.C. 594, 550 S.E.2d 287 (2001) (concluding Appellants, who were comprised of wildlife organizations, did not have standing to challenge the decision by the Department of Natural Resources to issue permits to lethally reduce deer population in wildlife sanctuary because they failed to allege a particularized harm); *see also Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014) (holding that objectors, who alleged nuisance and zoning claims against cruise ship operations, lacked standing as they failed to allege a concrete, particularized harm

First, none of the Appellants have suffered or will suffer an injury that is attributable to the 2011 Position Statement. Without dispute, Drs. Joseph and McCarthy are not subject to the 2011 Position Statement because they are orthopedic surgeons and not PTs. Moreover, PT Joseph will not be punished or disciplined as a result of the 2011 Position Statement. In fact, she will actually benefit from the Board's position as she can continue to work in a group physical therapy practice where, by her own admission, she treats patients sent to her by other PTs in the group. Additionally, Appellants do not object to PTs in a group practice covering for other PTs nor do they seek to prevent this practice. Second, the injury alleged by Appellants is causally related to the 2004 Position Statement addressed in *Sloan* and not the 2011 Position Statement. Notably, Dr. McCarthy testified they were seeking for the court "[t]o grant us the ability to employ [PTs] again, like we did in past," i.e., pre-*Sloan* operations. Third, even if the Court were to declare the 2011 Position Statement void and prohibit PTs from covering for other PTs, such a favorable decision provides no discernible relief to Appellants.

Based on the foregoing, I would find that Appellants have not established standing to challenge the 2011 Position Statement. Moreover, this case does not present a question of public importance that would serve as a basis to confer standing upon Appellants. Any question of public importance was decided by the Court in *Sloan*. Because Appellants lack standing to institute a challenge to the 2011 Position Statement, I would affirm the circuit court's order dismissing Appellants' claims under Rule 220(c), SCACR.

Finally, I emphasize that all legislative attempts to overturn *Sloan* have failed. Thus, even if Appellants had standing to challenge our decision in *Sloan*, a decision to overrule *Sloan* would be contrary to the clear intent of the Legislature as section 40-45-110(A)(1) has been in effect since 1998 and has not been amended even after this Court's decision in *Sloan*. If the Legislature believes this Court's interpretation in *Sloan* is in error, it is free to correct any misinterpretation. The Legislature's failure to do so in ten years is evidence that it agrees with this Court's interpretation of section 40-45-110(A)(1). *See McLeod v. Starnes*, 396

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to a legally protected interest); *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 669 S.E.2d 337 (2008) (ruling that competitor business, which sought to challenge rezoning to a classification that would permit a cell-phone tower, lacked standing where the potential injury or prejudice alleged was only an increase in business competition).

S.C. 647, 660, 723 S.E.2d 198, 205 (2012) ("The Legislature is presumed to be aware of this Court's interpretation of its statutes." (citation omitted)); *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (recognizing that when the Legislature fails to alter a statute, "its inaction is evidence the Legislature agrees with this Court's interpretation" of the statute); *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) ("Moreover, our adherence to *stare decisis* in this case does not implicate the risk of the 'petrifying rigidity' in the law that can result from too firm an adherence to the doctrine. Because we are adhering to our earlier interpretation of a *statute,* the General Assembly is free to correct any misinterpretation on our part.").

Unlike the majority, I would hold that Appellants lack standing to institute a challenge to the 2011 Position Statement and, in turn, to petition this Court to overrule *Sloan*. In the absence of this fundamental prerequisite, I would affirm the circuit court's order dismissing Appellants' claims.

PLEICONES, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth C. Krawcheck, Respondent.

Appellate Case No. 2016-001483

Opinion No. 27667
Submitted August 18, 2016 – Filed September 14, 2016

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Kenneth C. Krawcheck, of Charleston, *Pro Se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a definite suspension of three years or disbarment. Respondent requests that the sanction be made retroactive to the date of interim suspension.[1] Respondent has agreed that within thirty days of imposition of discipline, he will enter into a payment plan with the Commission on Lawyer Conduct to (1) pay the costs incurred by ODC and the Commission in investigating and prosecuting this matter ($196); (2) pay Client C, referenced below, $5,000; (3) pay the court reporter referenced below $711.63; and (4) reimburse the Lawyers' Fund for Client Protection in the amount of $400.27. Respondent has also agreed to complete the

[1] Respondent was placed on interim suspension by order dated July 13, 2012. *In re Krawcheck*, 398 S.C. 594, 730 S.E.2d 856 (2012).

Legal Ethics and Practice Program Ethics School and Trust Account School prior to reinstatement. We accept the Agreement and suspend respondent from the practice of law in this state for three years, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

By letter dated April 4, 2011, respondent was informed by the South Carolina Commission on Continuing Legal Education and Specialization that he was suspended from the practice of law for failure to comply with the requirements of Rules 408 (compliance with continuing legal education requirements) and 419 (administrative suspension), SCACR. On April 26, 2011, respondent appeared at opposing counsel's office for the taking of three depositions. Respondent did not inform opposing counsel of his suspension. Respondent's suspension was lifted by the Commission on May 18, 2011.

Respondent admits his conduct violated Rule 5.5(a), RPC (a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction).

Matter B

In 2010, respondent contracted with a court reporter to provide services for three depositions. Respondent has not paid the court reporter. The amount due is $711.63. Respondent admits his failure to pay the court reporter constitutes misconduct. *See In re Jackson*, 365 S.C. 176, 617 S.E.2d 123 (2005)(failure to timely pay a court reporter constitutes grounds for attorney discipline).

Matter C

Client C hired respondent to handle a legal matter and paid respondent a $5,000 retainer. Respondent failed to return several messages left by Client C seeking an update on the matter. After continued limited communication, Client C terminated the representation. Respondent has not returned Client C's file or any unused portion of the retainer.

Respondent failed to provide a written response to the complaint filed by Client C, and failed to appear or provide documents in response to a subpoena and notice to appear from ODC.

Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information); Rule 1.16 (requirements upon termination of representation); and Rule 8.1 (a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority).

Matter D

The South Carolina Resolution of Fee Disputes Board issued a Certificate of Non-Compliance against respondent in the amount of $5,000 with regard to the refund owed Client C. Respondent has not paid the amount owed.

Respondent admits his conduct constitutes a ground for discipline under Rule 7(a)(10), RLDE (it shall be a ground for discipline for a lawyer to willfully fail to comply with a final decision of the Resolution of Fee Disputes Board).

Matter E

Respondent has failed to fully reimburse the Lawyers' Fund for Client Protection for funds it remitted to the attorney appointed to protect the interests of respondent's clients upon respondent's interim suspension, as ordered by this Court. Respondent has paid the Fund $100, which leaves an outstanding balance of $400.27.

Respondent admits his conduct constitutes grounds for discipline under Rules 7(a)(3) and (a)(5), RLDE (it shall be a ground for discipline for a lawyer to willfully violate a valid order of the Supreme Court or to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We hereby suspend respondent from the practice of law in this state for three years, retroactive to the date of his interim suspension. Respondent shall, within thirty days of the date of this opinion, enter into a payment plan with the Commission on Lawyer Conduct to (1) pay the costs incurred by ODC and the Commission in investigating and prosecuting this matter ($196); (2) pay Client C, referenced above, $5,000; (3) pay the court reporter referenced above $711.63; and (4) reimburse the Lawyers' Fund for Client Protection in the amount of $400.27. Respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

PLEICONES, C.J., BEATTY, HEARN AND FEW, JJ., concur.

I would accept the Agreement and disbar respondent from the practice of law.

KITTREDGE, J.

The Supreme Court of South Carolina

RE: Amendments to Appendix A, Part IV, SCACR, Rules of the Board of Law Examiners
Appellate Case No. 2014-001607

ORDER

The Board of Law Examiners requests the Court approve its proposed amendments to the Rules of the Board of Law Examiners found at Appendix A to Part IV of the South Carolina Appellate Court Rules. Pursuant to Article V, § 4 of the South Carolina Constitution, the Court approves the Board of Law Examiners' proposed amendments to the Rules of the Board of Law Examiners. Appendix A to Part IV, SCACR, shall state as follows:

RULES OF THE BOARD OF LAW EXAMINERS
(Promulgated Pursuant to Rule 402(k)(3) of the
South Carolina Appellate Court Rules (SCACR))

SPECIAL ACCOMMODATIONS FOR DISABLED APPLICANTS.

1. Policy. It is the policy of the Board of Law Examiners (the Board) of the State of South Carolina to provide reasonable accommodations for disabled applicants including persons with learning disabilities and persons with health impairments. The bar examination will be administered to all eligible applicants in a manner that does not discriminate against those applicants with disabilities.

2. Application Procedure.

(a) Persons needing special accommodations on examinations should make a written request to the Board to obtain the necessary information, procedures and written forms. Appropriate current documentation is required by the Board.

(b) Upon written request to the Board, the manner in which the examination is administered to an applicant may be modified while maintaining the security and integrity of the examination.

(c) An applicant must submit a written request for special testing accommodations on forms prescribed by the Board no later than November 1st for the February examination and April 1st for the July examination. This filing deadline may be extended upon good cause as determined by the Chairman of the Board.

(d) Applicants must submit a current medical verification prepared by a licensed professional qualified to diagnose such disability who can describe the nature and extent of the disability.

(e) The Board may require the applicant to provide additional information in support of the applicant's request. This information may include, but is not limited to, information concerning special accommodations provided during the applicant's law school education including certification from official representatives of the school where such accommodations were provided. The Board may also require the applicant to undergo a physical/psychological examination to be conducted by a licensed professional designated by the Board verifying the nature and extent of the impairment. The Board may also appoint an expert to analyze the documentation submitted by the applicant and to make a recommendation to the Board concerning appropriate accommodations.

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

provided with a complete record fully demonstrating the existence and extent of impairment.

3. General Standards and Procedures.

(a) Depending on the nature and extent of an applicant's disability, the exam may be administered to the applicant in a separate room. Applicants assigned to a separate testing room will be monitored by a proctor approved by the Secretary of the Board.

(b) At the request of a blind or sight impaired applicant, the Board may provide the examination in braille or in large print; provided, the request is made no later than November 1st for the February exam and April 1st for the July exam.

(c) The Board may allow the applicant to use the services of a special assistant. This person may not provide substantive assistance to the applicant, but may read the Multistate Performance Test (MPT), Multistate Essay Examination (MEE) and/or the Multistate Bar Examination (MBE) questions to the applicant. The special assistant may type or write the applicant's answers to the MPT and MEE questions and fill in the MBE answer sheet at the applicant's direction. If the applicant chooses to use a special assistant, the applicant must provide background information regarding the special assistant to the Board. The special assistant shall not have any legal related employment or education. The Secretary of the Board must approve the special assistant.

(d) The Board may allow a disabled applicant additional time to complete the MPT, MEE, and MBE portions of the examination. The additional time on each section of the examination shall not exceed one and one half (1 1/2) times the normal time allotted for the section. In addition, longer rest and/or lunch breaks may be permitted; however, in no event shall the entire examination extend beyond two (2) additional days.

(e) The Board shall determine the measures necessary to ensure that any special accommodations approved under this policy do not compromise the security or integrity of the examination or the integrity of the applicant's answers.

(f) The Board will notify the applicant of its decision on the request for special accommodations in writing at least thirty (30) days prior to the scheduled examination. Provided, the Chairman of the Board may approve later notification when the filing deadline is extended pursuant to Paragraph (2)(c) of these Rules.

(g) An applicant dissatisfied with the decision of the Board may appeal to the Supreme Court within ten (10) days after service of the written decision of the Board. This appeal is to be made by filing a motion with the Clerk of the Supreme Court in compliance with Rule 240, SCACR.

(h) The Secretary of the Board shall serve as the Americans with Disabilities Act coordinator for the Board and shall ensure that the provisions of this Rule are fully implemented.

These amendments shall take effect ninety (90) days from the date of this order. *See* Rule 402(k)(3), SCACR.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
September 14, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Miller Construction Company, LLC,
Respondent/Appellant,

v.

PC Construction of Greenwood, Inc. and Safeco Insurance Company of America,
Appellants/Respondents.

Appellate Case No. 2014-002749

Appeal From Greenwood County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5440
Heard May 4, 2016 – Filed September 14, 2016

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

E. Wade Mullins III and Caitlin Creswick Heyward, both of Bruner Powell Wall & Mullins, LLC, of Columbia, for Appellants/Respondents.

David J. Brousseau, of McIntosh Sherard Sullivan & Brousseau, of Anderson, for Respondent/Appellant.

MCDONALD, J.: In this breach of contract action seeking damages for failure to pay the balance due on a subcontract, Appellants/Respondents PC Construction of

Greenwood, Incorporated (PC) and Safeco Insurance Company of America (Safeco) (collectively, PC) appeal the circuit court's denial of its Rule 59(e), SCRCP, motion to alter or amend, arguing the court erred in finding PC could not recover delay damages from Respondent/Appellant Miller Construction Company (Miller Construction). PC further argues the circuit court failed to consider the overwhelming evidence that Miller Construction caused delays on the project. On cross-appeal, Miller Construction argues the court erred in denying it prejudgment interest on its recovery for breach of contract. We affirm in part, reverse in part, and remand the question of prejudgment interest to the circuit court.

FACTS AND PROCEDURAL HISTORY

This case arises from a construction project known as the Lander University Recreation, Wellness, and Sports Complex Initiative Field Construction (the Project) in Greenwood County. The Project involved the site work and construction of soccer, baseball, softball, and tennis facilities at the Lander University (Lander) Jeff May Sports Complex (the Complex). Lander put the Project out for bids and awarded it to general contractor PC pursuant to the South Carolina Consolidated Procurement Code.[1] On December 15, 2009, PC contracted to complete the work for $7,005,310.

PC subcontracted with Miller Construction[2] on December 17, 2009, for certain construction services, including but not limited to site work, grading, paving, and installation of a storm sewer for the Project (the Subcontract). Specifically, the Subcontract required Miller Construction to perform the work set forth in two specification provisions: (1) Section 31-1000 Site Clearing, Demo and Erosion Control (the Site Clearing and Demo Specification) and (2) Section 33-4100 Site Storm Drainage (the Storm Drain Specification). The Site Clearing and Demo Specification required Miller Construction to demolish and remove the existing

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[1] S.C. Code Ann. §§ 11-35-10 to -5300 (2011 & Supp. 2015).

[2] Miller Construction holds a Group 4 General Contractor's License in the grading subclassification with the Contractor's Licensing Board of the South Carolina Department of Labor, Licensing and Regulation. A contractor's license in the grading subclassification allows a licensee to perform "the soil preparation and rehabilitation of streets, roads, highways, railroad beds, building sites, parking lots, and storm sewers." S.C. Code Ann. § 40-11-410(2)(d) (2011).

storm drain system along with all other subgrade site improvements. The Storm Drain Specification set forth the requirements for Miller Construction's installation of the storm drain pipes and manholes. The original amount of the Subcontract was $492,424.

During the course of the Project, Miller Construction submitted eighty-seven change orders to PC. Change Order #40 included a request to adjust the overall cost of the project as well as the schedule (Schedule) to include additional days due to delays caused by the discovery and removal process of nearly 10,000 tons of asbestos in early 2010. PC added additional days to the Schedule to address the asbestos issue.[3] The parties later agreed the asbestos was more widespread than originally anticipated.

Throughout the project, PC paid Miller Construction upon receipt of Miller Construction's pay applications. However, upon receipt of the final pay application in November 2011, PC withheld payment. At that time, Lander had not yet made final payment to PC due to a dispute over how much Lander owed PC. In spring 2013, Lander and PC reached an agreement regarding final payment.[4] Nevertheless, PC continued to withhold final payment from Miller Construction, alleging that delay damages caused by Miller Construction exceeded the balance PC owed on the Subcontract.

Miller Construction sued PC on May 25, 2012, seeking breach of contract damages for PC's failure to pay the balance due on the Subcontract. Miller Construction also asserted a cause of action on a payment bond against Safeco. On April 23, 2013, PC filed an amended answer and counterclaim, seeking damages due to Miller Construction's alleged delay of the Project. Prior to trial, PC further amended its answer, adding an affirmative defense that Miller Construction was not properly licensed and, therefore, was barred from pursuing a claim for breach of contract. In late 2013, the circuit court denied the parties' cross-motions for summary judgment; a nonjury trial was held in November 2013.

Miller Construction's vice president, Michael Miller, testified that he understood and agreed to the terms of the Subcontract; he further acknowledged his understanding that timely completion of the Project was important and required

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[3] PC does not claim any damages against Miller Construction for this delay.

[4] Lander did not assess any damages for delays against PC.

under the Subcontract. He conceded that the Subcontract required Miller Construction to comply with the Schedule and the Schedule durations for Miller Construction's scope of work and that Miller Construction was required to provide the manpower and equipment necessary to meet the Schedule. Miller admitted the Subcontract required Miller Construction to submit a request for a change order if changed conditions required an increase in price or adjustment to the Schedule. Miller testified that by signing the Subcontract he agreed Miller Construction would be liable to PC for any damages that PC could show were a result of Miller Construction's failure to comply with any portion of the Schedule. He admitted that Miller Construction failed to notify PC at any time—other than in Change Order #40—that it was seeking additional time through a request for a change order under the terms of the Subcontract.

PC's project manager, Gary Piontek (the Project Manager), testified that after the asbestos issue was resolved, Miller Construction failed to maintain the Schedule, and PC encountered consistent and continuous problems with Miller Construction's failure to timely perform its work. The Project Manager and PC's site personnel communicated those concerns to Miller Construction throughout the Project at weekly meetings and by email. However, email correspondence from the Project Manager to Mike Miller supported Miller's contention that the delays were caused not by Miller Construction, but by PC's inability to coordinate its various subcontractors and by other issues not within Miller Construction's control.

PC's president, Randy Piontek, testified he got involved in an effort to get Miller Construction to comply with the Schedule. Randy Piontek admitted PC owed Miller Construction $51,270.08 of the claimed $53,695.08; however, PC refused payment due to alleged delay damages exceeding that figure.

The Project Manager presented a detailed accounting of the delays allegedly caused by Miller Construction and the impact of those delays on PC's ability to complete the Project. In support of those claims, the Project Manager introduced PC's Activity Duration Schedule Analysis, which included a comparison of the original activity durations for each task with the actual time it took Miller Construction to complete them. PC claimed 145 days in total delays and arrived at its delay damage claim of $137,035.15 by multiplying the 145 days by its daily rate of $945.07. PC then presented John Bahr, president of a construction consulting firm, as its expert witness on scheduling, construction management, and contract administration services. Bahr testified he was familiar with the Project because his company had been retained to assist in establishing the Schedule. Bahr

opined that Miller Construction failed to comply with its contractual obligations to perform and complete its activities in accordance with the Schedule and that the delay calculation of 145 days was reasonable. Moreover, Bahr testified as to the methodology used to calculate the daily rate, explaining that Miller Construction's lack of timely performance impacted PC's completion of the work and caused delay damages, including increased overhead, to PC.

On July 8, 2014, the circuit court issued a final order and judgment denying PC's claim for delay damages, finding PC owed Miller Construction $51,270.08, and ordering immediate payment by Safeco on the bond. The court declined to award Miller Construction prejudgment interest. Miller Construction and PC filed timely Rule 59(e), SCRCP, motions to alter or amend, which the circuit court denied.

ISSUES ON APPEAL

PC raises four issues on appeal:

I. Did the circuit court err in finding PC could not recover damages against Miller Construction pursuant to the Subcontract because Lander never assessed any liquidated damages against PC?

II. Did the circuit court err in concluding Miller Construction did not cause any delays on the Project?

III. Did the circuit court err in finding Miller Construction was properly licensed to perform the subcontract work and, thus, permitted to bring an action pursuant to section 40-11-370(C) of the South Carolina Code (2011)?

IV. Did the circuit court err in determining Miller Construction was entitled to recover on the payment bond and in ordering immediate payment from the bond to Miller Construction?

Miller Construction raises one issue on cross-appeal:

I. Did the circuit court err in failing to award Miller Construction prejudgment interest when the principle balance owed is capable of being calculated as a sum certain?

STANDARD OF REVIEW

"An action to construe a contract is an action at law reviewable under an 'any evidence' standard." *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009). "The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.* at 600, 675 S.E.2d at 415. "The rule is the same whether the judge's findings are made with or without, a reference." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The judge's findings are equivalent to a jury's findings in a law action." *Id.*

PC'S ISSUES ON APPEAL

I. Damages

PC argues the circuit court erred in finding it could not recover damages against Miller Construction under the Subcontract because Lander never assessed any liquidated damages against PC. We disagree.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* at 615, 732 S.E.2d 628. "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one." *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). "It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001).

PC argues the circuit court erred in the following finding:

> Pursuant to the subcontract, PC cannot recover any type of liquidated damages against Miller as PC was never assessed with liquidated damages or damages for delay from [O]wner. As such, taking the evidence in a light most favorable to PC, it is unable to sustain a cause of

> action for breach of contract against Miller for delay damages. Miller's motion for involuntary non-suit/directed verdict as to this cause of action is hereby granted.

PC further argues that the terms of the Subcontract are clear and unambiguous with respect to Miller Construction's obligations to timely perform its scope of work and contends the Subcontract repeatedly references that "time is of the essence" regarding performance and completion. Conversely, Miller Construction argues the circuit court properly denied PC's counterclaim for delay damages when Lander did not assess any damages against PC for delays and PC agreed to accept additional compensation from Lander due to delays not caused by PC or its subcontractors.

Miller Construction submits that Article 3 of the Subcontract is controlling as to payment by PC to Miller Construction during the progress of the Project and with respect to final payment. Article 3 provides:

> ARTICLE 3: SUBCONTRACT PRICE AND PAYMENT
>
> . . .
>
> e. CONDITIONS OF PAYMENT. Within ten (10) days after receipt by [PC] from [Lander] of monies in payment of Subcontractor's application for payment, receipt of such payment from [Lander] being an express condition precedent to [PC]'s obligation to pay Subcontractor, [PC] shall pay the same over to Subcontractor less retainage. Notwithstanding any contrary provision elsewhere in this Subcontract, **[PC] may delay payment of all or any portion of Subcontractor's application for payment in order to reasonably determine that Subcontractor's Work for which payment is requested** has been properly performed and is in place, that sufficient funds remain available to complete Subcontractor's Work, **that Subcontractor's Work will be completed as required by the Job Schedule**, that Subcontractor's application for

payment and accompanying affidavits and waivers are true and correct in fact, and that all other requirements of this Subcontract have been satisfied relative to Subcontractor's Work for which payment is sought. **When such determinations have been made to [PC]'s satisfaction, [PC] will make payment in accordance with Subcontractor's application as provided for in this Subcontract.** No such determination or payment shall relieve Subcontractor from its obligations under this subcontract, nor stop [PC] from subsequently asserting Subcontractor's failure to satisfy said obligations.

. . .

g. FINAL PAYMENT

. . .

iii. CONDITIONS OF FINAL PAYMENT. Final payment of the balance of the Subcontract Price due shall be made to Subcontractor:

1. when appropriate certification and final approval thereof have been received as provided in the Contract Documents; and

2. after receipt by [PC] of final payment from [Lander], such receipt being an express condition precedent to [PC]'s obligation to make final payment to the Subcontractor. Subcontractor's acceptance of final payment shall constitute a waiver by Subcontractor of all claims relating to Subcontractor's Work except such claims as have been previously identified and made in writing and fully and properly preserved and pursued pursuant to the terms of this Subcontract.

(emphasis added).

PC and Miller Construction agree that Article 6 is relevant as to delays and claims relating to Lander.

> ARTICLE 6: CHANGES, FIELD ORDERS, CLAIMS, AND DELAYS
>
> a. CHANGES. Without nullifying this Subcontract or any bond given pursuant to this Subcontract, [PC] may, in writing, direct the Subcontractor to make changes to the Subcontractor's Work, which changes are within the scope of this Subcontract. Within ten (10) days of [PC]'s directive or if the Contract Documents require notice to be given by [PC] to [Lander] in less than ten days, Subcontractor shall comply with the notice requirements of the Contract Documents by giving notice and a written proposal to [PC] within such time as to enable [PC] to give notice to [Lander] or to comply with any other notice requirements of the Contract Documents. FAILURE OF THE SUBCONTRACTOR TO SUBMIT A WRITTEN PROPOSAL WITHIN THE TIME PROVIDED HEREIN, OR TO PROVIDE A WRITTEN NOTICE WITHIN THE TIME REQUIRED HEREIN, SHALL CONSTITUTE A WAIVER OF THE SUBCONTRACTOR'S RIGHT TO AN ADJUSTMENT OF THE SUBCONTRACT PRICE OR JOB SCHEDULE OR, WHERE A CREDIT IS INVOLVED, SUBCONTRACTOR ACCEPTS THE AMOUNT DETERMINED BY [LANDER], ARCHITECT AND/OR [PC]. Any adjustments to the Subcontract Price or Job Schedule, if any, shall be set forth in a written Subcontract Change Order. . . . THERE WILL BE NO ADJUSTMENT TO THE SUBCONTRACT PRICE OR JOB SCHEDULE WHICH ARE NOT ORDERED IN WRITING BY [PC] AND SIGNED BY THE PROJECT MANAGER, Gary Piontek. . . .
>
> . . .

d. CLAIMS RELATING TO [LANDER]. . . . Subcontractor shall only be entitled to an adjustment to the Subcontract Price or Job Schedule, for performing and completing that portion of Subcontractor's Work associated with any claim for which [Lander] is or may be liable, upon the same terms and conditions as any extension of time or additional compensation is allowable to [PC] under the Contract Documents, and only to the extent actually allowed and paid to [PC] by [Lander], receipt of payment from [Lander] being an express condition precedent to [PC]'s obligation to pay Subcontractor. **Any decision of [Lander] or Architect with respect to such claims which, under the terms of the Contract Documents, is binding on [PC], and any decision in arbitration or litigation between [Lander] and [PC] which becomes final and binding on [PC] shall likewise be final and binding on Subcontractor.**

. . .

e. DELAY. If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the Job Schedule shall be adjusted accordingly, but only to the extent an extension of time is obtained by [PC] from [Lander] under the terms of the Contract Documents; provided that Subcontractor must give written notice of delay to [PC] within such time as to enable [PC] to give [Lander] any notices required by the Contract Documents, but in any event, no later than five (5) days after the occurrence of the event claimed to be a substantial delay, otherwise the right to such an adjustment to the Job Schedule is waived. . . . **If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against [PC], then [PC] may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by [PC]. Subcontractor shall also be liable for all**

> **additional damages [PC] may incur as a result of Subcontractor's failure to complete the Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or [PC's] extended overhead.**

(emphasis added).

PC correctly contends on appeal that the Subcontract specifically allows PC to assess delay damages, including damages for extended overhead and liquidated damages, against Miller Construction. However, the Subcontract classifies such damages as "*additional* damages." Further, the record reflects that after completion of the Project, PC and Lander were involved in a dispute regarding final payment. PC agreed to and accepted an additional payment from Lander of approximately $120,000 for "extended general conditions" or "overhead" due to roughly 120 days of delays not caused by PC or its subcontractors. Pursuant to the terms of the Subcontract, "[a]ny decision of [Lander] or Architect with respect to such claims which, under the terms of the Contract Documents, is binding on [PC], and any decision in arbitration or litigation between [Lander] and [PC] which becomes final and binding on [PC] shall likewise be final and binding on Subcontractor." Moreover, Randy Piontek acknowledged at trial that Lander never assessed any damages against PC due to delays. The following exchange occurred:

> Q: Do you have any documents, whatsoever, that say that liquidated damages were assessed by Lander University or Lander Foundation against [PC]?
>
> A: There was a letter sent by Lander that indicated that they expected liquidated damages to be assessed against the first phase of the project. As a part of our settlement, the liquidated damages were included.
>
> Q: My question though, sir, was[,] were they ever actually assessed? You stated that you expected them to be or Lander expected them to be assessed. My question was, were they actually ever assessed?
>
> A: I guess, technically no.

> Q: And under your contract, you can only assess liquidated damages against Miller if they're assessed by Lander, correct?
>
> A: Correct.

In light of Randy Piontek's testimony and the contract language itself, and under our "any evidence" standard of review, we find the circuit court properly determined that PC could not recover damages against Miller Construction pursuant to the terms of the Subcontract. *See Pruitt*, 343 S.C. at 339, 540 S.E.2d at 845 ("An action to construe a contract is an action at law reviewable under an 'any evidence' standard."); *Temple*, 381 S.C. at 599–600, 675 S.E.2d at 415 ("The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings."). Although the Subcontract specifically allowed PC to join Miller Construction as a party to any action against Lander, PC elected not to do so and then agreed to and accepted final payment from Lander without any input from Miller Construction. Significantly, the circuit court noted it "would have additionally found that PC did not meet its burden of proof on this [the delay] issue. The evidence was clear that Miller did not cause any delays on this project." Accordingly, we affirm the circuit court findings as to this issue.

II. Delays

PC argues the circuit court erred in concluding Miller Construction did not cause any delays on the project. We disagree.

Throughout the Project, PC paid Miller Construction upon its applications for payment. In January 2011, PC's Project Manager emailed Michael Miller acknowledging Miller Construction was on-site when allegedly no other contractors were. On January 27, 2011, the Project Manager communicated a work request and concluded his email with the comment, "Miller has been a great sub, [w]hich I will gladly recommend." In April 2011, the Project Manager again emailed Michael Miller, this time to confirm that Miller Construction was doing what was necessary to keep the Project on track. PC also confirmed that Lander had not charged it for liquidated damages due to any alleged delays. In other correspondence, the Project Manager communicated his timeliness concerns, but it was unclear whether these delays were the fault of Miller Construction or the general contractor's inability to coordinate the work of its various subcontractors in

light of Project setbacks caused by heavy rains and other issues which were not the fault of Miller Construction. Moreover, Bradley Grogan, Assistant Athletic Director for the Complex, and Frank Sells, II, ground superintendent at Lander, both testified that Miller Construction kept the Project running, as best it could, in accordance with the job schedule. At the completion of the Project in November 2011, PC admitted it owed Miller Construction approximately $15,000 as well as its retainage of approximately $51,000. PC again made no mention of any delays or damages at the time of Miller's final payment application.

Our review of the record reveals Miller Construction presented evidence establishing it did not cause the delays on the Project. Therefore, under our deferential "any evidence" standard of review, we hold there is evidence reasonably supporting the circuit court's findings. *See Pruitt*, 343 S.C. at 339, 540 S.E.2d at 845 ("An action to construe a contract is an action at law reviewable under an 'any evidence' standard."); *Temple*, 381 S.C. at 599–600, 675 S.E.2d at 415 ("The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings."). Accordingly, we affirm the circuit court's findings as to the Project delays.

III. Licensing

PC next contends that the circuit court erred in finding Miller Construction was properly licensed to perform the work pursuant to the Subcontract and, thus, section 40-11-370(C) of the South Carolina Code barred Miller Construction's action. We disagree.

Pursuant to section 40-11-370(C), "An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." Section 40-11-410(2) contains a "General Contractors–Highway" licensing classification which includes, in relevant part, the following subclassifications:

> (d) "Grading" which includes the **soil preparation and rehabilitation** of streets, roads, highways, railroad beds, building sites, parking lots, and **storm sewers**. This subclassification also includes work under the subclassification of Highway Incidental.

> (e) "Highway Incidental" which includes highway work for grooving, milling, rehabilitating, and installing guardrails, gutters, highway signs, pavement marking, and painting.

S.C. Code Ann. § 40-11-410(2)(d)–(e) (2011) (emphasis added).

PC argues that pursuant to section 40-11-410(3)(c), Miller was required to hold a "General Contractors–Public Utility" license—rather than a "General Contractors–Highway" license—which includes the subclassification "Water and Sewer Lines" to perform work on the Project's storm sewer system.[5]

At the outset of our analysis, we note—as the circuit court did—that "[i]t is unlawful for an owner, a construction manager, a **[general] contractor**, or another entity with contracting or hiring authority on a construction project to divide work into portions so as to avoid the financial or other requirements of this chapter as it relates to license classifications or subclassifications or license groups, or both." S.C. Code Ann. § 40-11-300(A) (2011) (emphasis added). Citing to section § 40-11-270(E) (2011), the circuit court also recognized that "[t]he licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee."

The circuit court explained that "if PC hired unlicensed subcontractors to perform work on this project[,] it would be in violation of the law. The purpose of protecting the public interest by denying enforceability does not exist when dealing with claims between contractors." *Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014); *see also Kennoy v. Graves*, 300

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[5] The "Water and Sewer Lines" subclassification includes "construction work on water mains, water service lines, water storage tanks, sewer mains, sewer lines, lift stations, pumping stations and appurtenances to water storage tanks, lift stations, pumping stations, pavement patching, backfill, and erosion control as a part of construction, and . . . includes connection at the building of all lines to the appropriate lines contained in commercial structures, **installation and repair of a project involving manholes, the laying of pipe for storm drains and sewer mains**, all necessary connections, and excavation and backfilling, and concrete work incidental thereto." S.C. Code Ann. § 40-11-410(3)(c) (2011) (emphasis added).

S.W.2d 568, 570 (Ky. Ct. App. 1957) ("The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability does not exist when persons engaged in the same business or profession are dealing at arm['s] length with each other. In the case before us, appellant was in a position to know, and did know, the qualifications of appellee. No reliance was placed upon the existence of a license, as presumptively would be the case if appellee was dealing with the general public."). Moreover, during the course of the Project, there was no claim that Miller Construction was not licensed to perform this work, and there is no evidence that any permitting agency ever attempted to stop work on the Project due to licensing issues.

Although Defendants' Exhibit 1 illustrates that the Project involved the installation of manholes and the laying of pipe for storm drains, PC's Project Manager testified that a new storm sewer system was installed and joined to an existing storm sewer system. Additionally, PC's expert testified Miller Construction's scope of work did not involve rehabilitation of the storm sewer system as contemplated in the grading classification.

However, the legislature included the term "rehabilitation" within the grading subclassification without any language excluding installation and demolition of storm sewer lines. *See* S.C. Code Ann. § 40-11-410(2)(d) (2011). "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (quoting *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). "Statutes subject to this rule include those which 'limit a claimant's right to bring suit.'" *Id.* (quoting 82 C.J.S. *Statutes* § 535).

"When confronted with an undefined term, the court must interpret it in accordance with its usual and customary meaning." *Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 646, 689 S.E.2d 638, 641 (Ct. App. 2010). "However, this court will consider the language of the particular clause in which the term appears and also its meaning in conjunction with the purpose of the whole statute." *Id.*; *see also Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 332–33, 592 S.E.2d 335, 338 (Ct. App. 2004) ("Terms must be construed in context and their meaning determined by looking at the other terms used in the statute.").

The term "rehabilitation" is not defined in the statute. Therefore, we must look to the common definition of "rehabilitate," which is "to bring (someone or something) back to a good condition." *Rehabilitate*, MERRIAM–WEBSTER.COM, http://merriam-webster.com/dictionary/rehabilitate (last visited Apr. 25, 2016). Rehabilitate is also defined as "to put back in good condition; reestablish on a firm, sound basis." *Rehabilitate*, YOURDICTIONARY.COM, http://www.yourdictionary.com/rehabilitate #websters (last visited Apr. 25, 2016).

Miller testified that Miller Construction demolished the existing storm drainage system that was previously a parking lot. "This site was one time a shopping center, so we removed it. We went back in, installed new storm drainage[, which w]e tied to some of the existing boxes that [were] there[,] and also ran new piping from there to some of existing boxes." Therefore, the evidence supports the circuit court's finding that "the legislature intended to keep such a broad term like rehabilitation within the context of the statute." Accordingly, we affirm the circuit court as to this issue.

IV. Payment Bond

PC argues the circuit court erred in determining Miller Construction was entitled to recover on its claim under the payment bond and in ordering immediate payment to Miller Construction. We find this issue is not preserved for our review.

PC contends Miller Construction erroneously argued that its suit on the payment bond was brought pursuant to section 29-5-440 of the South Carolina Code[6] and

[6] "Every person who has furnished labor, material, or rental equipment to a bonded contractor or its subcontractors in the prosecution of work provided for in any contract for construction, and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor

that the circuit court erroneously referenced the matter as brought pursuant to section 29-5-440. PC further argues that because the bond was issued for a public project and the bid process occurred in accordance with the South Carolina Procurement Code, the action on the bond could only be brought pursuant to section 11-35-3030.[7] Our review of the record reveals that PC raised this issue for the first time in its Rule 59(e), SCRCP, motion to alter or amend. Accordingly, we find this issue is not preserved for appellate review. *See Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

MILLER CONSTRUCTION'S ISSUE ON CROSS-APPEAL

I. Prejudgment Interest

Miller Construction argues the circuit court erred in failing to award prejudgment interest on its damages claim because the principle balance owed is capable of being calculated as a sum certain. We agree.

"The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time

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was done or performed by him or material or rental equipment was furnished or supplied by him for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him. . . . This section shall apply to any payment bond, whether statutory, public, common law, or private in nature, that is issued in connection with a construction project or other improvements to real property within South Carolina where such payment bonds are not otherwise required or governed by any other section of the South Carolina Code of Laws." S.C. Code § 29-5-440 (2014 & Supp. 2015).

[7] In any event, section 11-35-3030 provides in pertinent part that "written notice to the bonded contractor must generally conform to the requirements of Section 29-5-20(B) . . . ." S.C. Code § 11-35-3030 (2)(c) (Supp. 2015). Section 29-5-20(B) sets forth the required notice content for the lien of a laborer, mechanic, subcontractor, or materialman, as well as the aggregate limits on such. S.C. Code § 29-5-20 (B) (2007).

payment may be demanded either by the agreement of the parties or the operation of law." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009); *see also* S.C. Code Ann. § 34-31-20(A) (Supp. 2015) ("In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."). "Generally, prejudgment interest may not be recovered on an unliquidated claim in the absence of agreement or statute." *Historic Charleston Holdings, LLC*, 381 S.C. at 435, 673 S.E.2d at 457. "The fact that the amount due is disputed does not render the claim unliquidated for purposes of awarding prejudgment interest." *Id.* "Rather, the proper test is 'whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.'" *Id.* (quoting *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006)).

"The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable." *Butler Contracting, Inc.*, 369 S.C. at 133–34, 631 S.E.2d at 259. "A judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor's money beyond the date payment was due." *Id.* at 134, 631 S.E.2d at 259.

In *S. Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985), this court found the circuit court properly disallowed prejudgment interest in an action on an account stated, reasoning:

> Although Southern pleaded an account stated, it apparently failed to prove the elements of an account stated at trial. The essential elements of an account stated are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time. Southern proved the account was actually stated. However, in its answer K & S specifically denied the parties ever agreed it was a true account. Consequently, the burden was on Southern to prove agreement to the account as stated. In the record before us there is no evidence that K & S expressly or

> impliedly agreed there was at any specified time due to Southern the sum of money specified in the account. Likewise, we find no evidence that the parties agreed to a contract price for the repairs before they were performed. Accordingly, prejudgment interest was properly disallowed.

Id. at 164–65, 332 S.E.2d at 106 (citation omitted).

Here, Miller Construction sought damages for breach of contract for failure to pay the balance due on the Subcontract, alleging it is owed the principle balance of $53,695.08 and affirmatively sought prejudgment interest. At trial, Randy Piontek admitted the balance on the contract with Miller Construction was $51,270.08 of the $53,695.08 claimed under the contract, thus, offsetting PC's alleged delay damages. Although Miller Construction initially sought prejudgment interest of $7,586.09, it presented a revised calculation of $10,691.35 in its Rule 59(e), SCRCP, motion to alter or amend. Based on our review of the record, we find Miller Construction is entitled to prejudgment interest as it proved the essential elements of an account stated.

However, we agree with PC that there are insufficient findings in the record on appeal to determine at what point a sum certain claim accrued. Miller Construction asserts prejudgment interest began to accrue on March 29, 2012. In its final order and judgment, the circuit court found that final payment from Lander was an express condition to PC's obligation to issue final payment to Miller Construction, which occurred in spring 2013. As such, there could not have been a final sum certain until spring 2013, approximately one year after the March 29, 2012 date set forth by Miller Construction. Thus, we remand this matter to the circuit court to determine when the sum certain accrued under the contract and to assess the appropriate prejudgment interest.

CONCLUSION

Based on the foregoing analysis, we affirm the following findings: PC could not recover delay damages against Miller Construction because Lander never assessed liquidated damages against PC; PC did not meet its burden of proof on the delay issue; and Miller Construction was properly licensed and able to seek payment. PC's additional payment bond argument is not preserved for appellate review. We reverse the circuit court's decision declining to award prejudgment interest to

Miller Construction and remand this matter for the circuit court to determine when the sum certain accrued and to assess prejudgment interest.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, C.J., and WILLIAMS, J., concur.