The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

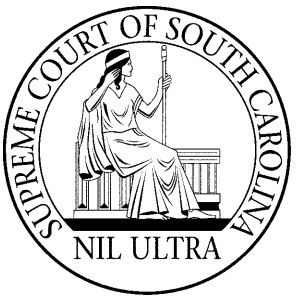
ORDER

South Carolina Code Ann. § 34-31-20 (B) (2020) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 2, 2020, the first edition after January 1, 2020, listed the prime rate as 4.75%. Therefore, for the period January 15, 2020, through January 14, 2021, the legal rate of interest for judgments and money decrees is 8.75% compounded annually.

s/ Donald W. Beatty C. J.
FOR THE COURT

Columbia, South Carolina
January 6, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2
January 8, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chris Katina McCord, Christopher McCord, Janice Sherfield, and Jerry Sherfield, Appellants,

v.

Laurens County Health Care System and Greenville Health System, Respondents.

Appellate Case No. 2017-001064

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

Opinion No. 5705
Heard October 22, 2019 – Filed January 8, 2020

AFFIRMED

Joseph Grady Wright, III, and Jay Franklin Wright, both of McGowan Hood & Felder, LLC, of Greenville, for Appellants.

H. Sam Mabry, III, J. Ben Alexander, and Kenneth Norman Shaw, all of Haynsworth Sinkler Boyd, PA, of Greenville, for Respondents.

HILL, J.: This appeal presents the question of whether a hospital, by virtue of either the language in its admission contract or an alleged special relationship with its patients, owes a duty to ensure a doctor practicing at the hospital maintains

malpractice insurance coverage. Because we hold under these specific facts that Laurens County Health Care System and its successor Greenville Health System (collectively, Hospital) had no such duty to Appellants in contract or tort, we affirm the trial court's grant of summary judgment to Hospital.

I.

Mrs. McCord and Mrs. Sherfield suffered complications following surgeries performed by Dr. Byron Brown, a local OB/GYN, at Hospital between December 2008 and May 2009. Concerns about Dr. Brown's competency arose when another of his surgical patients was re-admitted to Hospital with complications in October 2009. Hospital medical staff reviewed charts of Dr. Brown's patients in early December 2009, and Dr. Brown relinquished some surgical privileges on December 15, 2009. The Hospital suspended him in January 2010, and he relinquished all privileges in May 2011.

In 2014, Mrs. McCord and Mrs. Sherfield obtained default judgments against Dr. Brown for malpractice for $1,740,692.75 and $1,468,580, respectively; their spouses, Mr. McCord and Mr. Sherfield, obtained default judgments against Dr. Brown for loss of consortium for $58,789.04 and $50,000, respectively. Hospital was not a party to those actions. Appellants were unable to collect their judgments because there was no insurance covering their claims and Dr. Brown had moved to New Zealand. At the time of Mrs. McCord and Mrs. Sherfield's surgeries, Dr. Brown had a "claims-made" medical malpractice insurance policy through Joint Underwriting Association (JUA) with coverage limits of $200,000 per claim and $600,000 annual aggregate coverage, and excess coverage. In July 2009, Dr. Brown switched his medical malpractice insurance from JUA to MAG Mutual, but he declined to purchase either "prior acts" coverage from MAG or "tail" coverage from JUA that would have covered claims based on acts or omissions occurring before the effective date of the MAG policy.

Before their surgeries, Mrs. McCord and Mrs. Sherfield signed a form entitled "Conditions of Admission" (the Admission Contract), which provided, "The undersigned agrees he signs as agent or as patient that in consideration of the *services to be rendered* to that patient, he hereby individually obligates himself to pay the account of the hospital, in accordance with the regular rates and terms of the hospital." (emphasis added). The Admission Contract also provided, "[T]he hospital is not responsible for any act or omission of the physicians. . . . The

undersigned recognizes that most medical staff members furnishing services to the patient, including the radiologists, pathologist, anesthesiologists, and the like (are) independent contractors and not employees of the hospital."

Hospital's medical staff bylaws (the Bylaws) provided medical staff "shall maintain valid professional liability insurance coverage in the amounts deemed necessary by the Board from time to time and shall provide a current certificate of insurance as recommended."

Based on Hospital's interest in having OB/GYNs practicing locally, Hospital subsidized Dr. Brown's practice, though he was free to admit patients at other hospitals. The Subsidy Contract between Hospital and Dr. Brown provided:

> The physician shall furnish to the Hospital proof of insurance. Said policy shall cover professional liability in a minimum amount of $1,000,000 per claim/$3,000,000 aggregate or JUA/PCF coverage. Physician shall furnish to the Hospital evidence that the premium on said policy is prepaid and that said policy is in full force and effect. Further, Physician shall notify his insurance company that if said policy is canceled for any reason, notice of cancellation shall be provided by insurance company to the C.E.O. of the Hospital.

Appellants alleged in their complaint Hospital breached the Admission Contract when it failed to ensure Dr. Brown complied with the Bylaws and Subsidy Contract by maintaining medical malpractice insurance to cover their claims, which Appellants contend was part of the "services to be rendered" to them as patients. Appellants also alleged Hospital failed to exercise due care in its "special relationship" with Appellants by failing to ensure Dr. Brown complied with the Bylaws and Subsidy Contract requiring him to maintain medical malpractice insurance to cover their claims.

In granting summary judgment to Hospital, the trial court found the meaning of "services to be rendered" in the Admission Contract was unambiguous and referred "to those services that the Hospital actually provides and bills for, such as room charges, medications, and meals, not ensuring that an independent physician has medical malpractice insurance."

As to Appellants' negligence cause of action, the trial court found that even assuming there was a special relationship between the parties, Hospital had no duty to ensure Dr. Brown had medical malpractice insurance to cover Appellants' claims because (1) there was no evidence Dr. Brown failed to comply with the requirements of the Bylaws or Subsidy Contract, as it was undisputed he had the required insurance at the time of Appellants' surgeries, and (2) even if Dr. Brown were required to purchase tail or other coverage, Appellants were not the intended beneficiaries of such a requirement.

This appeal followed.

II.

In reviewing a grant of summary judgment, we apply the same standard as the trial court under Rule 56(c), SCRCP: we view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Gibson v. Epting*, 426 S.C. 346, 350, 827 S.E.2d 178, 180 (Ct. App. 2019). The moving party is entitled to summary judgment only if "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. However, a genuine issue of material fact exists—and summary judgment must be denied—if the non-moving party submits at least a scintilla of evidence supporting each element of its claim. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "[A] scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows." *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181.

III. Breach of Contract

To prove a breach of contract, the burden is on the plaintiff to establish the contract, its breach, and proximate damages. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). Our role in interpreting a contract is to enforce the parties' intent. We look first to the language of the contract. If that language is clear and unambiguous, "the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." *Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). In such instances, we must enforce the language as written, for it is the objective expression of what the parties meant to agree upon when they made their contract, not the secret, subjective meaning one party later reveals. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917–18 (2017).

"Ambiguity of a contract is a question of law, which we review de novo." *Gibson*, 426 S.C. at 351, 827 S.E.2d at 181. To be ambiguous, contract language must be susceptible to two different but plausible meanings. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). "[U]nambiguous terms of a written contract may not be altered by parol evidence." *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181.

The term at issue—"services to be rendered"—is not defined by the Admission Contract. It appears under the heading "Financial Agreement." Hospital interprets the phrase to mean tangible services it provides and bills for, such as room charges, medications, and meals. Appellants argue an equally reasonable interpretation is that the "services" Hospital agreed to provide included a guarantee the treating physicians would be covered by malpractice insurance sufficient to pay for any medical negligence committed during Appellants' treatment.

Appellants also say the term "services to be rendered" may be reasonably interpreted to include a promise by Hospital that doctors it credentialed and privileged were in compliance with the Bylaws and the Subsidy Contract. Appellants point to South Carolina Department of Health and Environmental Control (DHEC) regulations requiring hospitals to have an organized medical staff that operates pursuant to bylaws. S.C. Code Ann. Regs. 61-16 § 504 (Supp. 2019) ("The hospital shall have a medical staff organized in accordance with the facility's by-laws and accountable to the governing body including, but not limited to the quality of professional services provided by individuals with clinical privileges."). In essence, Appellants contend that because statutory law is implicitly incorporated into every contract, the Bylaws became part of Hospital's contracts with Appellants. *Inabinet v. Royal Exch. Assur. of London*, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932) ("Every contract entered into in this state embodies in its terms all applicable laws of the state just as completely as if the contract expressly so stipulated."). The Bylaws required Dr. Brown to "maintain" malpractice coverage to keep his privileges. Appellants claim the term "maintain" is ambiguous and can reasonably be understood as requiring Dr. Brown to keep coverage in place adequate to respond to his patients' loss, regardless of when the malpractice occurred. Therefore, according to Appellants, a jury issue existed as to the meaning of "maintain," precluding summary judgment.

Accepting Appellants' argument would require us to discover two material ambiguities: one as to the meaning of "services to be rendered"; another as to the meaning of "maintain." We cannot follow Appellants to where their argument leads. Even if the DHEC regulations became part of the Admission Contract by operation of law, Appellants are asking us to go several steps further and not only incorporate the specific terms of the Bylaws themselves into the Admission Contract but also the terms of a contract authorized by the Bylaws.

This is a bridge too far. We conclude as a matter of law that the phrase "services to be rendered" was plain and unambiguous. No reasonable contracting party would contemplate that "services to be rendered" by a hospital would include the monitoring of the treating doctors' compliance with malpractice insurance requirements imposed by the hospital and the board. The plausibility of such a reading dwindles further when it is remembered the parties agreed that Hospital was "not responsible for any act or omission of the physicians." And the Admission Contract never references the Bylaws or the Subsidy Contract.

Because the Admission Contract was unambiguous, the parties' intentions must be determined from the contract language itself. *See Beaufort Cty. Sch. Dist*, 392 S.C. at 516, 709 S.E.2d at 90. Considering the phrase "services to be rendered" in its plain, ordinary, and popular sense, we conclude it meant tangible services Hospital billed for, such as medical care, room charges, and medications. Although Mrs. McCord and Mrs. Sherfield assert their subjective intent when executing the Admission Contract was for Hospital to require Dr. Brown to have medical malpractice insurance covering their claims, no language in the Admission Contract resembled such a requirement. *See Rodarte*, 419 S.C. at 603, 799 S.E.2d at 917–18.

Appellants deny they are seeking to be third party beneficiaries of Hospital's Bylaws and the Subsidy Contract. Instead they insist their theory is a "direct" action based on the Admission Contract. Accordingly, because that language is not ambiguous, we affirm summary judgment.

IV. Tort Duty Based on Special Relationship/Hospital Corporate Negligence

We next address Appellants' argument that their status as patients imposed a duty on Hospital to use due care in granting and monitoring hospital privileges. Appellants assert Hospital breached this duty by continuing to grant Dr. Brown privileges when they knew or should have known he had declined prior acts and tail coverage that

would have covered claims based on malpractice occurring before July 2009 and by failing to require Dr. Brown to purchase the coverage. Appellants note Hospital knew of Dr. Brown's competency issues before January 2010, when it could have purchased these coverages directly from the insurer.

The threshold problem we see with this argument is that South Carolina law does not require a physician to carry malpractice insurance. Appellants in essence believe Hospital's duty of care extended to forcing Dr. Brown to purchase or be covered by tail or other malpractice insurance sufficient to cover medical negligence claims for all treatment he administered at Hospital, regardless of when a claim is made. Appellants are not asking us to hold a hospital, by virtue of its special relationship with its patients, has a duty to ensure physicians practicing at hospital facilities be insured for malpractice; they are asking us to hold that because Hospital granted Dr. Brown privileges in return for his promise to carry malpractice insurance while practicing and comply with Hospital Bylaws, Hospital had a duty to ensure the insurance coverage extended to their loss. Hospital responds that Dr. Brown's contractual obligation only went as far as requiring him to be insured at the time of the treatment, and it is undisputed he was. Appellants counter that this proves Hospital's negligence, for a reasonable hospital would have known the vagaries of malpractice policy language, claims practice, and coverage, and made sure physicians practicing in their facilities had adequate insurance to cover any malpractice committed regardless of when the claim arose or was made. They point to evidence in the record demonstrating the Hospital employee overseeing the insurance verification was ignorant of basic insurance principles. While Appellants' argument is creative, we cannot create liability against Hospital under the circumstances here, as sympathetic as we are to Appellants' loss.

In tort law, the existence of a duty is a question of law. *See Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010). Even if a party acts negligently and injures another, he will not be liable under the law of negligence unless his actions violated a specific legal duty owed to the other party. *See Brown v. S.C. Ins. Co.*, 284 S.C. 47, 51, 324 S.E.2d 641, 644 (Ct. App. 1984) ("Negligent conduct becomes actionable only when it violates some specific legal duty owed to the plaintiff."), *overruled on other grounds by Charleston Cty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). In general, our common law recognizes no affirmative duty to control the conduct of another or to warn a third person of danger. *See Johnson v. Jackson*, 401 S.C. 152, 160, 735 S.E.2d 664, 668 (Ct. App. 2012) ("Under South Carolina common law, there is no

general duty to control the conduct of another or to warn a third person or potential victim of danger"); Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* at 106 (4th ed. 2011) ("Although there is no general duty to aid or protect others, such a duty does exist where the defendant has a special relationship to the victim."); *see also* William L. Prosser & W. Page Keeton, *The Law of Torts*, § 56 at 384 (5th ed. 1984) (discussing special relationship doctrine and noting a hospital "may be liable for permitting an unqualified doctor to treat a patient on its premises"). "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or other special circumstance." *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656–57 (2006); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) (engineer owed special duty in tort to contractor based on engineer's professional duties despite lack of contract between engineer and contractor).

Here, Appellants claim they have a special relationship with Hospital, as the providing of health care entails more than a mere economic transaction. By entrusting their health care to Hospital, Appellants contend Hospital implicitly assumed a duty of due care toward them to allow hospital privileges only to doctors who could financially respond to any damages.

What Appellants are urging us to do is extend the special relationship concept and recognize the theory of hospital corporate negligence, a doctrine accepted in numerous states, that imposes a duty of due care on hospitals based on the reality of their responsibility for patient safety and well-being, despite whatever intricate personnel structures and contractual barriers hospitals may have created. *See, e.g., Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164–65 (Wis. 1981) (collecting cases and discussing corporate negligence doctrine).

We have considered the corporate negligence doctrine for hospitals before but passed on the invitation to recognize it. *See Strickland v. Madden*, 323 S.C. 63, 71–72, 448 S.E.2d 581, 586 (Ct. App. 1994). There, a patient injured by Dr. Madden's medical negligence sought to hold the hospital liable for negligently failing to revoke Dr. Madden's hospital privileges given nurses' reports that they had twice smelled alcohol on Dr. Madden's breath. *Id.* at 72, 448 S.E.2d at 586. We affirmed the grant of summary judgment to the hospital, declining to recognize the hospital owed a duty based on a corporate negligence theory, reasoning the plaintiff failed to provide a proposed standard of care that had been breached and, further, that no evidence

indicated Dr. Madden's patient care had been compromised. *Id.* Likewise, in *Foster v. Greenville County Medical Society*, we refused to hold a medical society that knew of a physician member's probable alcohol abuse owed a duty to warn the doctor's patients. 295 S.C. 190, 193–94, 367 S.E.2d 468, 470 (Ct. App. 1988). We noted the society had no role in determining hospital privileges or disciplining doctors and had no agreement with the hospital to provide information about the society's members or their competence. *Id.* at 194, 367 S.E.2d at 470.

Other courts have rejected attempts to saddle hospitals with a duty to verify its treating physicians are covered by adequate malpractice insurance. In Florida, where by statute doctors are required to be financially able to pay malpractice claims, the supreme court has held hospitals have no affirmative duty to condition the grant of staff privileges on the doctor's proof of compliance with the financial responsibility statute. *Horowitz v. Plantation Gen. Hosp. Ltd. P'ship*, 959 So. 2d 176, 186–87 (Fla. 2007).

We decline to find Hospital owed such a duty under the specific circumstances here. Even if we were inclined to agree with the hospital corporate negligence doctrine, such a declaration of public policy is the function of the legislature or perhaps our supreme court. We therefore affirm summary judgment to Hospital.

AFFIRMED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Jamie Lee Simpson, Respondent.

Appellate Case No. 2016-002210

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5706
Heard April 9, 2019 – Filed January 8, 2020

REVERSED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., of Columbia, both for Appellant.

Appellate Defender Susan Barber Hackett, of Columbia, for Respondent.

MCDONALD, J.: The State appealed Jamie Lee Simpson's sentence following his guilty plea to four counts of second degree sexual exploitation of a minor, arguing the circuit court erred in permitting home detention in lieu of the minimum two years' imprisonment mandated by section 16-15-405 of the South Carolina Code. We reverse.

Facts and Procedural History

On February 19, 2014, Special Investigator Lucinda McKellar of the South Carolina Attorney General's Office conducted an online investigation using file sharing programs to identify individuals distributing child pornography. McKellar was able to download and receive five files containing child pornography from a user later identified as Simpson. The videos were explicit and disturbing, containing images of children being forced to perform sexual acts and sexual assaults against children as young as six.

During a second investigation in March 2014, McKellar was again able to download explicit child pornography from Simpson. After obtaining subscriber information, McKellar identified Simpson's Richland County residence as the location from which the child pornography was being shared.

The Richland County Sheriff's Office executed a search warrant on Simpson's home on January 9, 2015, and seized several computers. Simpson admitted to police that he searched and downloaded child pornography using a file sharing network. A forensic examination revealed child pornography or the remnants and artifacts of child pornography on multiple seized devices, with file dates from 2006 through 2014. The Sheriff's Office arrested Simpson on January 13, 2015, charging him with sexual exploitation of a minor in the second degree.

On November 4, 2015, Dr. Thomas Martin of Martin Psychiatric Services conducted a comprehensive psychosexual evaluation of Simpson, which included a full interview and the review of discovery and investigative reports provided by the State. Dr. Martin concluded Simpson was not a pedophile, a psychopath, or a sexual predator. Following the evaluation, Simpson attended group therapy sessions with Dr. Martin twice a month. According to Dr. Martin, Simpson actively participated in the sessions, showing he was motivated for treatment, and cooperated in Dr. Martin's medication regimen, which included treatment for depression, post-traumatic stress disorder, and other combat-related issues. Additionally, Dr. Martin opined Simpson is "a very low risk to sexually reoffend."

In January 2016, the Richland County Grand Jury indicted Simpson on four counts of sexual exploitation of a minor in the second degree under section 16-15-405(A)

of the South Carolina Code (2015).[1] Simpson pled guilty to all counts on October 18, 2016.

Second degree sexual exploitation of a minor is classified as a violent felony,[2] and § 16-15-405 mandates that upon conviction a person "must be imprisoned not less than two years nor more than ten years. *No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence*." S.C. Code Ann. § 16-15-405(D) (2015) (emphasis added).

At sentencing, Simpson requested to serve the two-year, mandatory minimum sentence on home detention. Simpson argued serving his sentence on home detention would satisfy both the Legislature's penological concerns as well as any community safety concerns. Emphasizing his military service and lack of a prior criminal history, Simpson argued home detention would protect the public and deter future criminal conduct. Additionally, Simpson noted if he were to be incarcerated for more than sixty days, he would lose his military benefits and retirement pay, causing great financial hardship to his family and the likely loss of their home. Concerning his rehabilitation, Simpson argued incarceration "would provide no needed treatment or vocational training" and his "continued access to private counseling and treatment with Dr. Thomas Martin [would] be far more effective to maintain his mental health than the correctional environment of a prison."

After reviewing § 24-13-1530, which addresses home detention programs as an alternative to incarceration, the plea court stated, "based on the testimony that was heard from Dr. Martin, apparently [Simpson] is a low risk [for reoffending]. The question really comes down to the non-violent adult offenders." Acknowledging "[t]his particular crime has been classified as violent under the statute," the circuit court expressed concern as to whether or not the home detention program "is

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[1] "An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he . . . distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation." § 16-15-405(A).

[2] S.C. Code Ann. § 16-1-60 (Supp. 2019).

available." However, the court found Simpson "would be a good candidate for home detention" and opined that despite the Legislature's classification of second degree sexual exploitation of a minor as a "violent offense," "it is not [typically] what we consider [a] violent offense."

Over the State's objection, the plea court sentenced Simpson to four years' imprisonment, suspended upon his service of two years' home detention and two years' probation. The court imposed restrictions on the home detention, including restricting Simpson to his residence except for work and medical treatment. The court ordered electronic monitoring and mandatory continued counseling, prohibited Simpson from having access to a personal computer, and required that Simpson register as a sex offender.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). A sentence will not be overturned absent an abuse of discretion; an abuse of discretion occurs "when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). "A trial judge has broad discretion in sentencing within statutory limits." *Id.* "A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant." *Id.*

Law and Analysis

I. Threshold Mootness Question[3]

Simpson argues this case is moot as he has already served the two years of home detention, which he argues is the "imprisonment" portion of his sentence. *See Hayes v. State*, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015) (explaining an

[3] On October 26, 2018, Simpson moved to dismiss this appeal as moot because he had completed his home detention sentence. This court denied Simpson's motion by order dated November 19, 2018. On December 6, 2018, Simpson moved to amend his final briefs to address the mootness question. The court declined to require the parties to amend their briefs, but requested that the parties submit supplemental memoranda addressing mootness.

individual's completion of a sentence renders an appeal on the propriety of that sentence moot); *McClam v. State*, 386 S.C. 49, 55, 686 S.E.2d 203, 206 (Ct. App. 2009) (dismissing appeal as moot where the State appealed an order releasing an individual after the individual completed the SVP program and was released from confinement); *In the Interest of Kaundra C.*, 318 S.C. 484, 486, 458 S.E.2d 443, 444 (Ct. App. 1995) (holding a juvenile's appeal of her sentence was moot because she had already served the determinate sentence). "However, 'an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review.'" *Hayes*, 413 S.C. at 558–59, 777 S.E.2d at 9 (quoting *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596).

The State has argued persuasively that the sentencing question raised here is capable of repetition yet generally evades review in that the suspension of mandatory minimum sentences continues to occur in circuit court, but due to the duration of the home detention or probationary portions of such sentences, the question presented here generally evades review. At oral argument, the State referenced another case involving the suspension of a mandatory minimum sentence to home detention pending in this court as well as our prior unpublished case, *State v. Williams*, No. 2014-001886, 2016 WL 6471974 (S.C. Ct. App. Nov. 2, 2016). Accordingly, while we find the question of Simpson's own sentence moot due to his completion of the determinate home detention portion of the sentence, we find this home detention sentencing issue is capable of repetition yet generally evades review. Thus, we will address the merits. *See Nelson v. Ozmint*, 390 S.C. 432, 433–34, 702 S.E.2d 369, 370 (2010) (addressing moot issue of the Department's calculation of the prisoner's sentence as not including good time credits or earned work credits because it was an issue that was capable of repetition, yet it would usually evade review); *Hayes*, 413 S.C. at 558, 777 S.E.2d at 9 (taking jurisdiction, despite mootness, because the issue raised was capable of repetition but evading review).

II. Statutory Considerations

The State argues the circuit court erred in interpreting § 24-13-1530(A) to allow two years of home detention as an alternative to §16-15-405's mandatory minimum term of two-years' imprisonment because the plain language of § 24-13-1530(A) limits its application to "low risk, nonviolent adult and juvenile offenders." We agree.

Section 24-13-1530(A) of the South Carolina Code (2018) provides:

> (A) Notwithstanding another provision of law which requires mandatory incarceration, electronic and nonelectronic home detention programs may be used as an alternative to incarceration for low risk, nonviolent adult and juvenile offenders as selected by the court if there is a home detention program available in the jurisdiction. Applications by offenders for home detention may be made to the court as an alternative to the following correctional programs:
>
> (1) pretrial or preadjudicatory detention;
> (2) probation (intensive supervision);
> (3) community corrections (diversion);
> (4) parole (early release);
> (5) work release;
> (6) institutional furlough;
> (7) jail diversion; or
> (8) shock incarceration.

S.C. Code Ann. § 24-13-1530(A). Simpson pled guilty to four counts of sexual exploitation of a minor in the second degree under § 16-15-405. The sentencing provision of § 16-15-405 mandates:

> (D) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not less than two years nor more than ten years. No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence.

Second degree sexual exploitation of a minor is a violent crime. *See* S.C. Code Ann. § 16-1-60 (Supp. 2019) (stating "[f]or purposes of definition under South Carolina law, a violent crime includes the offenses of . . . sexual exploitation of a minor second degree (Section 16-15-405)."

"The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "As such, a court must abide by the plain meaning of the words of a statute." *Id.* "When interpreting

the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." *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." *Id.* (quoting *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent." *Id.* at 587, 713 S.E.2d at 622–23 (quoting *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581). "Although it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning." *Id.* at 587, 713 S.E.2d at 623.

In accepting the plea, the circuit court expressed its concern that the home detention statute might be inapplicable to Simpson, noting home detention programs are available only to "nonviolent" offenders—and Simpson was pleading to charges statutorily defined as "violent." *Compare* § 16-1-60 (defining violent crimes) *with* S.C. Code Ann. § 16-1-70 (2015) (defining "nonviolent crimes" as "all offenses not specifically enumerated in Section 16-1-60."). By its own terms, § 24-13-1530(A) applies only to "nonviolent" offenders.[4]

We are unable to reconcile that the Legislature would consider the crime of sexual exploitation of a minor in the second degree so serious as to enact a minimum sentence of not less than two years imprisonment—and require that no portion of such minimum sentence may be suspended—with the circuit court's decision to allow Simpson to serve the minimum two-year sentence in the same home where he participated in the file sharing of child pornography. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory

[4] In an unpublished opinion, *Williams*, *supra*, this court found the plea court abused its discretion in sentencing Williams to one year of house arrest "because the home detention statute does not apply to trafficking in marijuana, ten to one hundred pounds, first offense." *Id.* at *3. Declining to find the matter moot, the panel reversed and remanded for resentencing. *Id.* at *1–2. This court found the plea court erred in interpreting § 24-13-1530 to allow a sentence of house arrest for a violent crime "when the plain language of the statute unambiguously states it only applies to "low risk, nonviolent adult and juvenile offenders." *Id.* at *1.

interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. A statute should be construed so that no word, clause, sentence, provision, or part shall be rendered surplusage, or superfluous.") (internal citations omitted). We find the only reasonable interpretation of § 24-13-1530 is that the Legislature did not intend a person convicted of a "violent offense" as classified in § 16-1-60 be considered a "nonviolent offender" for purposes of substituting home detention for a mandatory minimum term of imprisonment.[5]

Conclusion

For offenses classified as "violent" under § 16-1-60 of the South Carolina Code, § 24-13-1530 does not authorize the substitution of home detention for a statutory mandatory minimum term of imprisonment.

REVERSED.

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

[5] Moreover, the nature of the material Simpson sought out and viewed—along with the fact that he repeatedly accessed the material over several years—foreclosed any finding that he was a "low risk, nonviolent" offender.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pickens County, Appellant,

v.

South Carolina Department of Health and Environmental Control and MRR Pickens, LLC, Respondents.

Appellate Case No. 2017-000066

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

Opinion No. 5707
Heard May 6, 2019 – Filed January 8, 2020

REVERSED AND REMANDED

Gary W. Poliakoff, of Poliakoff & Assoc., PA, of Spartanburg, Amy Elizabeth Armstrong, of S.C. Environmental Law Project, of Pawleys Island, and Michael Gary Corley, of S.C. Environmental Law Project, of Greenville, all for Appellant.

Robert Fredrick Goings and Jessica Lee Gooding, of Goings Law Firm, LLC, of Columbia, and Jessica James Orrick King, of Williams Mullen, of Columbia, all for Respondent MRR Pickens, LLC; Etta R. Linen and Karen Christine Ratigan, of Columbia, both for Respondent South Carolina Department of Health and Environmental Control.

MCDONALD, J.: Pickens County (the County) appeals an Administrative Law Court (ALC) order dismissing its challenges to an unnoticed permit modification issued to MRR Pickens, LLC (MRR) by the South Carolina Department of Health and Environmental Control (DHEC). The County argues the ALC erred in (1) dismissing the County's challenge to DHEC's permitting decision as untimely without considering whether DHEC complied with statutory and regulatory notice requirements; (2) dismissing based on the County's purported failure to exhaust administrative remedies; (3) granting MRR and DHEC's (collectively, Respondents) motions to dismiss based on evidence beyond the pleadings while denying the County the opportunity to conduct discovery; and (4) dismissing the case as untimely without resolving the status of the proposed intervenors. We reverse and remand.

Facts and Procedural History

In early 2007, MRR was involved in negotiations with the County regarding the construction of a Class Two Landfill at 2180 Greenville Highway in the town of Liberty.[1] MRR and the County entered into a Development Agreement and Host Agreement (collectively, the Agreements) for the Class Two Landfill in March 2007.[2] The Agreements specify MRR "shall construct and operate a Long-term Construction and Demolition and Land-Clearing Debris Landfill" and that the County will serve as the host local government for such operation.

On September 19, 2008, DHEC issued a draft permit for the Class Two Landfill. DHEC publicly noticed the draft permit in two local newspapers, the Easley Progress and The Pickens Sentinel, on September 24, 2008. DHEC also sent notice to adjacent landowners, the County, and others on its mailing list. After the public comment period expired, DHEC issued Solid Waste Permit LF2-00003 to

[1] DHEC classifies landfills that accept Construction and Demolition (C&D) waste as Class Two landfills. *See* S.C. Code Ann. Regs. 61-107.19.IV (outlining requirements for this classification).

[2] Although the Host Agreement included in the record is not signed, it is incorporated by reference in the signed Development Agreement.

MRR for the Class Two Landfill[3] on November 3, 2008.[4] The 2008 Permit contained the following special condition as to the nature of waste authorized for disposal: "This permit is limited solely to the disposal of items listed in Appendix I of R. 61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill." Regulatory Appendix I, as referenced in the special condition, lists "acceptable waste for class two landfills" and contains materials typically associated with land clearing, yard work, and construction, such as: brush and limbs, logs, rock, masonry, paint cans, glass, pipes, and plaster.

The County's Solid Waste Management Plan (SWMP), a local planning document required by state law,[5] prohibits "special waste" from being deposited in the County and states "[t]here are no operating Class Three Landfills in Pickens County."[6] The SWMP specifies "[a] Class Three Landfill is one designed to receive wastes such as household waste, sludge, incinerator ash[,] and certain industrial waste."

In 2014 and 2015, MRR and DHEC conducted a series of meetings and discussions regarding modifications to the landfill design approved in the 2008 Permit.[7] While MRR was designing its modifications and communicating with DHEC, MRR misrepresented to the County and the Pickens County Planning Commission the nature of its plan for the landfill facility and operation. Dan

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[3] The County did not request final review by the DHEC Board on the decision to issue the 2008 Permit or ask to be notified of any future decisions relating to the 2008 Class II Permit as issued.

[4] The permit's effective date is November 18, 2008.

[5] *See* S.C. Code Ann. § 44-96-80 (setting forth the requirements for county or regional solid waste management plans).

[6] DHEC classifies landfills accepting municipal solid waste as Class Three landfills. *See* S.C. Code Ann. Regs. 61-107.19.V (outlining requirements for this classification).

[7] From 2008 through 2014, MRR requested and obtained permit extensions, informing DHEC each year that the economic downturn warranted postponement of development of the landfill.

Moore of MRR appeared before the Planning Commission on January 12, 2015, for the purpose of securing a land use approval, and stated there were "no changes" from the Class Two Landfill design approved in 2008. He made no mention of MRR's ongoing meetings with DHEC, certain engineering reports related to the permit modification MRR was discussing in the meetings with DHEC, or coal ash. When questioned about a landfill liner, Moore represented no liner would be required.

On March 30, 2015, MRR applied to DHEC for a "minor modification" of the 2008 Permit, requesting an option to install a liner and associated leachate collection system for a portion of the Highway 93 Class Two Landfill.[8]

After determining MRR's application to modify the 2008 Permit met the regulatory definition of a "minor" permit modification, DHEC issued a permit modification (the Permit Modification) on August 10, 2015. This "minor modification" authorized the following changes from the 2008 Permit:

> • The addition of a landfill liner, a characteristic of Class Three Landfills not present in any other Class Two landfill in the state;

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[8] DHEC's landfill regulations define the term "modification" to include changes to a solid waste landfill as follows:

> a. "Minor modification" means a change that keeps the permit current with routine changes to the facility or its operations, or an administrative change; and,
>
> b. "Major modification" means a change that substantially alters the facility or its operations, e.g., tonnage increase above 25%, any volumetric capacity increase, alternate designs that vary from the design prescribed in this regulation.

S.C. Code Ann. Regs. 61-107.19, Part I, 48. A major permit modification requires public review and comment while a minor permit modification does not. R.61-107.19, Part IV, 1.2; Part I, D.2.c.

> • Design changes from Class Two to Class Three characteristics, including changes to the final landfill cover;
>
> • Elimination of language prohibiting "all other wastes" and replacement with language authorizing "any other waste approved by the Department"; and
>
> • Allowance for disposal of "special wastes," defined as "nonresidential or commercial solid wastes, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at municipal solid waste landfills."[9]

Notably, the requested modifications to the 2008 Permit did not seek to change the existing permitted landfill classification from a Class Two (construction and demolition debris) to Class Three (municipal solid waste) landfill. And because DHEC labeled this action as only a minor permit modification, DHEC deemed public notice and comment unnecessary under its solid waste regulations. Rather, DHEC determined it was only required to provide notice to MRR and to any affected persons who had requested in writing to be notified.[10]

The County did not receive notice of these modifications prior to DHEC's issuance of the Permit Modification. During this time period, MRR's engineering consultant submitted several engineering drawings and reports to DHEC reflecting a plan to convert the 2008 Permit to allow modification from Class Two Landfill

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[9] *See* S.C. Code Ann. § 44-96-390 (setting out the approval procedures for landfills accepting special wastes).

[10] *See* S.C. Code Ann. § 44-1-60(E)(1) ("Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified. Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail. Notice of staff decisions for which a department decision is not required pursuant to subsection (D) must be provided by mail, delivery, or other appropriate means to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.").

characteristics to those of a Class Three Landfill. These reports note the following observation from MRR's consultant: "During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of Regulation R.61.107.19 Part V Class Three Landfills would require a minor permit modification."

Months after the Permit Modification had been issued, the County learned MRR might be changing the design of the Highway 93 Landfill to prepare it to accept coal ash. Gerald Wilson, Public Works Director for the County, then submitted a Freedom of Information Act request and sought a meeting with DHEC regarding the Highway 93 Landfill. On December 15, 2015, DHEC staff met with County officials, including Wilson, and informed them the 2008 Permit had been modified in August 2015. On January 11, 2016, DHEC emailed a copy of the Permit Modification to Wilson. On March 23, 2106, the County submitted a request for administrative review to DHEC. On April 21, 2016, DHEC declined to conduct a final review conference.

On February 1, 2016, MRR filed a lawsuit (*MRR Pickens, LLC v. Pickens County, et al.*, civil action number 2016-CP-39-100) against the County and members of the Planning Commission. This provided the County with the opportunity to depose Kent Coleman, then director of the Division of Mining and Solid Waste Management at DHEC, who signed both the 2008 Permit as well as the 2015 Permit Modification. Regarding the distinction between minor and major permit modifications, Coleman

> • Admitted the definition of major modification in the relevant regulation includes alternate designs.
>
> • Admitted the definition of minor modification does **not** include alternate designs.
>
> • Admitted that in an August 10, 2015 letter accompanying the Permit Modification, he characterized the Permit Modification as an "alternate liner design" and "design change."
>
> • Admitted that when DHEC determines a proposed landfill change to be a major modification, DHEC

follows "our normal process, which would include [notice to] adjacent owners, concerned parties, local governments."

Coleman later engaged in the following exchange:

Q. In answers to Ms. King's questions one time today, you said this was a "new design for the landfill." Is that a fair statement?

A. Yeah, I mean it is.

Q. Okay.

A. It was a new design.

Q. And I wrote down also a quote earlier today when your answer to Ms. King's questions that this was "essentially the same design as a Class Three."

A. Yes, I recall saying that, yes.

Q. Alright. And that is basically the change from the [2008 Permit] to the 2015 [Permit] [M]odification was essentially the same design as a Class Three. Is that right?

A. Yes, uh-huh.

Q. So in other words, what we're doing is changing a Class Two by adding Class Three features. It became essentially the same design as a Class Three.

(objection)

A. The design became very similar to a Class Three, yes.

Coleman also testified regarding the wastes that could be disposed of in MRR's proposed landfill under the Permit Modification, admitting that:

> • Construction and Demolitions (C&D) landfills are not required to have liners.
>
> • MRR's landfill would be the first commercial Class Two landfill in South Carolina to have a liner.
>
> • Coleman knew MRR was considering placing coal ash into this landfill when it applied for the Permit Modification.
>
> • Coal ash would not have been allowed or accepted under the 2008 Permit.[11]
>
> • The Permit Modification application requested to accept "certain special wastes" into this landfill, even though such wastes, by statute, must be placed in Class Three Landfills.
>
> • MRR submitted stability calculations that would be appropriate for coal ash, in addition to stability

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[11] Coal ash requires special handling due to its propensity to create dust, contain toxic substances (such as mercury, lead, and arsenic), and contaminate groundwater and surface water. As such, coal ash qualifies as a "special waste" under South Carolina law and is generally unsuitable for disposal in a Class Two landfill. *See, e.g.*, S.C. Code. Ann. § 58-27-255 (providing "coal combustion residuals that result from an electrical utility, an electric cooperative, a governmental entity, a corporation, or an individual producing electricity for sale or distribution by burning coal must be placed in a commercial Class 3 solid waste management landfill, unless the coal combustion residuals are: (1) located contiguous with the electric generating unit; (2) intended to be beneficially reused; (3) placed into beneficial reuse; or (4) placed in an appropriate landfill which meets the standards of the Department of Health and Environmental Control Regulation 61-107, and that is owned or operated by the entity that produced the electricity which resulted in the coal combustion residuals").

> calculations for C&D waste, so it was clear to DHEC that MRR was planning to put both types of waste in the modified landfill.

On May 19, 2016, the County filed a request for a contested case hearing with the ALC. DHEC moved to dismiss. Subsequently, MRR filed motions to dismiss and to stay discovery. On August 18, 2016, the County, filed a motion to intervene on behalf of various County property owners (Neighboring Property Owners). On September 7, 2016, the ALC held a telephone conference with the parties, and granted MRR's motion to stay discovery. The ALC held the motion to intervene in abeyance pending the court's decision on the motions to dismiss. Following a hearing on the motions to dismiss, the ALC granted the motions in a December 12, 2016 order, finding the County did not timely fulfill the procedural requirements for bringing a contested case before the ALC. The ALC further found the County's failure to file a timely request for final review and participate in the Department's review process foreclosed any contested case action before the ALC. Regarding the County's request for final review to the DHEC Board, the ALC stated "the County's request was filed 226 days after the staff decision was issued, ninety-nine days after the meeting where the decision was discussed with the County, and seventy-two days after the decision was emailed to the County." The ALC held the County did not state a legally valid or compelling reason for its failure to timely file a request for review and, therefore, the case did not warrant the application of equitable tolling.

The County appealed on January 11, 2017. On March 29, 2017, the Neighboring Property Owners moved to intervene as parties to the appeal. This court denied the motion to intervene.

Standard of Review

The Administrative Procedures Act (APA) provides the standard for judicial review of cases decided by the ALC. S.C. Code Ann. § 1-23-610(C); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 380 S.C. 349, 360, 669 S.E.2d 899, 904 (Ct. App. 2008), *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246 (2010). An appellate court "may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). The question of subject matter jurisdiction is a

question of law for the court. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E. 2d 524, 528 (Ct. App. 2009).

Law and Analysis

I. Notice

The County argues the ALC erred in dismissing its challenge to the DHEC permitting decision as untimely prior to resolving whether DHEC had complied with the statutory and regulatory notice procedures applicable to its decision. We agree.

The ALC found the County failed to timely comply with the filing requirements set forth in section 44-1-60 of the South Carolina Code, which sets out the procedure through which DHEC staff decisions may be appealed through DHEC and to the ALC in the form of a contested case. The notice and filing provisions applicable to the County's appeal include:

> The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person.

S.C. Code Ann. § 44-1-60(E)(2).

> No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the [ALC]. The department shall set the place,

> date, and time for the conference; give the applicant and affected persons at least ten calendar days' written notice of the conference; and advise the applicant that evidence may be presented at the conference.

S.C. Code Ann. § 44-1-60(F).

> An applicant, permittee, licensee, or affected person may file a request with the [ALC] for a contested case hearing within thirty calendar days after: (1) notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or (2) the sixty calendar day deadline to hold the final review conference lapses and no conference has been held; or (3) the final agency decision resulting from the final review conference is received by the parties.

S.C. Code Ann. § 44-1-60(G).

The ALC concluded the County's appeal was untimely because it did not appeal the DHEC staff decision on the "minor" permit modification to the DHEC Board within fifteen days, as required by § 44-1-60. Thus, according to the ALC, the County failed to exhaust its administrative remedies, necessitating dismissal. On cursory review, this rationale may seem logical; however, it is problematic here because the ALC failed to undertake the prerequisite analysis of whether these time restraints apply at all here due to DHEC's misclassification of the permit modification as "minor." In so classifying the modification, DHEC has effectively permitted a Class III landfill without the required statutory notices by simply labeling the action as a "minor" modification of a "Class II" permit—despite the proposed landfill's actual design characteristics and the wastes its operators intend to accept.

As previously stated, the public notice requirements for major modifications differ substantially from those for minor modifications of an existing permit. *See* S.C. Code Ann. Regs. 61-107.19, Part IV, 1.2; Part I, D.2.c. (stating a major permit modification requires public review and comment while a minor permit modification does not). The pertinent regulatory language addressing DHEC's notice obligations provides:

(1) Notice of all applications submitted to the Department *for the initial construction and major modifications of Class Two and Class Three landfills* shall be published by the applicant once in a newspaper of general circulation in the area of the proposed landfill project. Notice for Class Two landfill application shall be published as provided in Part IV, Section H.3. Notice for new Class Three landfills that accept municipal solid waste shall be published as provided in S.C. Code Section 44-96-470 and Part V, Subpart H.3.a. of this regulation within 15 days of filing the permit application. Notice for all other new Class Three landfills shall be published as provided in Part V, Subpart H.3.b.

(2) All notices shall contain the following:

(a) Name and address of the applicant;

(b) The location of the proposed activity to include the county, roads and crossroads. (Class Three landfills shall provide a location map of the proposed site);

(c) The nature of the proposed activity;

(d) *A description of the proposed site or a description of the proposed major modification*;

(e) An explanation of the type(s) of waste that will be accepted;

(f) Department locations (Central Office and appropriate Regional Office) where a copy of the permit application or draft permit, as appropriate, can be viewed during normal working hours;

(g) The Department's address and contact name for submittal of comments and inquires;

(h) The approximate tonnage/year expected for disposal at the landfill; and,

(i) The proposed life of the landfill.

(3) *The Department will send a notice of receipt of the permit application by regular mail to all adjoining landowners of the proposed landfill.*

Part I. General Requirements, SC ADC 61-107.19 Part I (emphasis added).

The filing deadlines of § 44-1-60 are contingent upon DHEC's compliance with the procedural and notice requirements of its own regulations. *See* e.g., S.C. Code Ann. § 44-1-60(B) ("The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings."). Our supreme court reiterated this in *South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010), in which the Coastal Conservation League sought review of a critical area permitting decision more than fifteen days after DHEC issued the staff decision. DHEC failed to notify the Coastal Conservation League as required by statute; thus, the time limitations for review did not start to run until DHEC corrected its notice error. *Id.* at 430, 702 S.E.2d at 253. The plain language of § 44-1-60(A) supports this conclusion here as well: "All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits . . . shall be made using the procedures set forth in this section." The procedures in § 44-1-60 particularly emphasize public notification, as reflected in § 44-1-60(B). Only after DHEC issues a staff decision in compliance with the procedural and notice dictates of its own regulations and of § 44-1-60 subsections (A) through (E), does subsection (E)(1) trigger the fifteen day deadline for an appeal of the decision to the DHEC Board. *See also Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 143 n.14, 530 S.E.2d 643, 657 n.14 (Ct. App. 2000) ("DHEC's failure to provide adequate notice that the

financial assurance regulations were still being considered excused Sierra Club from requesting a hearing [on those regulations].").

The ALC relied on the fact that the County received actual notice of the permit modification months after it was issued, yet did not take action on this notice within the fifteen day period prescribed by § 44-1-60(E)(2). However, nothing in § 44-1-60 suggests the fifteen day period for appealing a DHEC staff decision begins to run upon a party's simply learning of a permit action. To the contrary, the time period begins to run only after DHEC issues a staff decision in compliance with applicable statutory and regulatory notice safeguards.

DHEC argues it had no obligation to notify the County of the "minor" modification to the 2008 Permit because the County never requested to be notified as an "affected person" with respect to any DHEC staff decision regarding the Highway 93 Class Two Landfill. Although the County does not dispute that it never formally requested to be notified as an affected person, the County argues the relevant consideration here is whether the Modified Permit involved a major or minor modification. For a "major modification" request—which the County asserts has occurred here—DHEC was required to publish notice of the Permit Modification and mail notice (by regular mail) to adjoining landowners. DHEC's own representative has admitted the Permit Modification meets the regulatory definition of a major modification. Thus, we find DHEC's labeling of the Permit Modification as minor denied contemporaneous notice and participation opportunities that DHEC's own regulations required be provided to both the public and the adjacent Neighboring Property Owners. Accordingly, the ALC erred in dismissing the County's challenge to the DHEC permitting decision as untimely because DHEC failed to comply with the notice procedures applicable to its decision to, in reality, permit a Class III landfill.[12]

II. Discovery

Next, the County argues the ALC improperly accepted evidence from outside the pleadings against the County while denying the County the right to undertake

[12] This analysis applies to the ALC's dismissal on exhaustion grounds as well. Until DHEC complies with its own regulatory requirements for the requested major modification, no exhaustion requirement is triggered.

discovery.[13] The County further asserts the ALC erred in resolving conflicting evidence in Respondents' favor. We agree.

The ALC failed to notify the parties it would consider affidavits and extra-pleading evidence but accepted such evidence in considering Respondents' Rule 12 motions. Our appellate courts have held repeatedly that a trial court's failure to "fairly apprise" a plaintiff that the court would consider material outside the pleadings in resolving a motion to dismiss is grounds for reversal. *See*, *e.g., Baird*, 333 S.C. at 528, 511 S.E.2d at 74 ("The first indication that County's 12(b)(6) motions would be converted to summary judgment motions was the trial court's order of dismissal. Under these facts, the trial court erred in converting County's 12(b)(6) motions into motions for summary judgment."); *Higgins v. MUSC*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (holding the plaintiffs had not been "fairly apprised" that the trial court would consider material outside the pleadings in support of the defendant's 12(b)(6) motion). Our ruling on the motions to dismiss resolves the ALC's need to stay discovery.[14]

Conclusion

Based on the foregoing, the ALC's order dismissing the County's challenge to the permit modification is reversed and this matter is remanded to the Administrative Law Court for further proceedings.

REVERSED AND REMANDED.

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

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[13] Although the County served discovery requests and deposition notices prior to dismissal, MRR moved to stay all discovery during the pendency of the ALC's consideration of the motions to dismiss. The ALC granted MRR's motion to stay discovery.

[14] On remand, in addition to lifting the discovery stay, the ALC will also be able to address the concerns of the Neighboring Property Owners. DHEC's own notice regulation "for the initial construction and major modifications of Class II and Class III landfills" mandates "(3) [t]he Department will send a notice of receipt of the permit application by regular mail to all adjoining landowners of the proposed landfill."