OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Martha Geathers,	Claimant.
v.	
3V, Inc.,	Employer,
and EBI Companies and Liberty Mutual Insurance Company,	Carriers/Defendants,
of whom EBI Companies is the	Petitioner,
and Liberty Mutual Insurance Company is the	Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26254
Heard December 7, 2006 – Filed January 29, 2007

REVERSED

Kirsten L. Barr, of Trask & Howell, LLC, of Mt. Pleasant, for Petitioner.

Pope D. Johnson, III, of McCutchen, Blanton, Johnson & Barnette, LLP, of Columbia, for Respondent.

JUSTICE BURNETT: EBI Companies (EBI) argues the Court of Appeals erred in reinstating the decision of the South Carolina Workers' Compensation Commission to apportion liability between EBI and Liberty Mutual Insurance Company (Liberty) for successive injuries to Martha Geathers (Claimant). Op. No. 2004-UP-542 (S.C. Ct. App. filed October 26, 2004). We agree and reverse.

FACTUAL/PROCEDURAL BACKGROUND

In the course of Claimant's employment with 3V, Inc. (Employer), she suffered successive accidental injuries to her back and leg. Her first injury occurred on July 20, 1999. Employer's workers' compensation insurance carrier at the time of this accident was EBI. Claimant returned to work August 24, 1999. She was placed on light duty for two months before she returned to full duty. Claimant testified Dr. Wilkins released her from his care in January 2000, because she reached maximum medical improvement.

Claimant's second injury occurred on May 11, 2000. Employer's workers' compensation insurance carrier at the time of this injury was Liberty. Claimant returned to work on May 23, 2000, and assumed light duty. Employer sent Claimant home two days later because it did not have any more light duty work for her. Claimant has not worked since that time and has not applied for any other jobs.

Claimant filed for workers' compensation benefits for the first injury. Employer and EBI admitted Claimant sustained an injury, but denied benefits because she had reached maximum medical improvement. Claimant then filed a second claim for benefits for the second injury. EBI and Liberty denied benefits, maintaining Claimant's injuries were attributable to her first accident.

At the hearing before the Single Commissioner, EBI argued: (1) Claimant's injuries from the first accident were no longer compensable because she had reached maximum medical improvement; (2) Dr.

Wilkins released Claimant from his care in January 2000; and (3) Claimant's injuries from the second accident were not the same as her injuries from the first. Liberty argued Claimant never reached maximum medical improvement and EBI should share liability with Liberty for Claimant's current injuries.

Dr. Wilkins gave conflicting testimony regarding Claimant's medical condition. Claimant had no appointments with Dr. Wilkins between her January 2000 visit and her May 2000 injury. However, she did contact him to request prescriptions for pain medication. At the time of the second accident, Claimant continued to experience back pain stemming from the first accident. Although Claimant experienced the same symptoms as the first accident, she testified the symptoms were significantly worse following the second accident.

In his deposition testimony, Dr. Wilkins testified Claimant reached maximum medical improvement in January 2000 when he released her from his care with no restriction on her activity. However, Dr. Wilkins' notes did not reflect a finding of maximum medical improvement. He testified he did not see Claimant again until after her second accident when she complained of the same symptoms she experienced after the first accident.

Also in his deposition testimony, Dr. Wilkins was asked which accident he believed caused Claimant's current condition and he responded, "[T]he problem that she had from the first and from the second and today is all the same problem. The, the ideology [sic] and cause of her pain is the same…. I would consider that the second injury, per say [sic], is, was actually just an aggravation of her initial injury." When asked if Claimant's current condition "flow[ed] from the first accident," Dr. Wilkins responded, "I would say yes … if she hadn't had the original injury … I would think it'd be reasonable that she probably would not have had the second injury, which is actually aggravation."

When Dr. Wilkins testified before the Single Commissioner, he attributed Claimant's current condition to the second injury. However,

he consistently characterized the second accident as an aggravation of the first, and continually noted the symptoms and complaints were the same for both injuries. Dr. Wilkins identified the first accident as the "proximate cause of the entire thing."

The Single Commissioner found both of Claimant's injuries compensable and found Dr. Wilkins had not released Claimant from his care or given his opinion as to maximum medical improvement based on Dr. Wilkins' records. The Single Commissioner found:

> [The second injury] was intervening, but not totally independent of the [first] accidental injury and that the [second] accidental injury aggravated, exacerbated, and worsened Claimant's condition; and the two injuries from the two accidental injuries are intertwined, indistinguishable, and inseparable beginning May 11, 2000 [the date of the second accident] and remain so as of the date of the hearing.

The Single Commissioner ordered EBI to pay Claimant's benefits for the time period between the first and second accidents, and ordered EBI and Liberty to "share equally in all causally related benefits" from the date of the second accident forward. EBI appealed and the Full Commission affirmed.

EBI appealed to the circuit court which reversed, finding the rule in Gordon v. E.I. Du Pont Nemours & Co., 228 S.C. 67, 76, 88 S.E.2d 844, 848 (1955) (where a non-disabling injury is aggravated with resulting disability, such disability is compensable). The circuit court found no evidence to support the Commission's finding that Dr. Wilkins had not released Claimant as having maximum medical improvement. The circuit court also found the second accident was "clearly distinguishable" from the first accident because Claimant's need for benefits after the second accident was necessitated solely by the second accident. Consequently, Liberty was found to be solely liable for Claimant's entire benefits following the second accident.

The Court of Appeals reversed the decision of the circuit court and reinstated the Commission's decision. The Court of Appeals rejected EBI's argument that Gordon controlled because it found substantial evidence to support the Commission's finding Claimant's injuries were "intertwined, indistinguishable, and inseparable." Op. No. 2004-UP-542 (S.C. Ct. App. filed October 26, 2004). We granted Petitioner's petition for writ of certiorari to review the Court of Appeals' decision.

ISSUES

I. Does the South Carolina Workers' Compensation Commission have authority to apportion liability between EBI and Liberty for successive injuries to Claimant?

II. Did the Court of Appeals err in failing to apply the Gordon v. E.I. Du Pont Nemours & Co., 228 S.C. 67, 88 S.E.2d 844 (1955), rule to the facts of this case?

STANDARD OF REVIEW

Appellate review of workers' compensation decisions is governed by the Administrative Procedures Act. Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000); see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). The Full Commission is the ultimate fact finder. *Id*. at 455, 535 S.E.2d at 442. Under S.C. Code Ann. § 1-23-380(A)(5) (Act. No. 387, 2006 S.C. Acts 387, eff. July 1, 2006), a reviewing court determines whether the circuit court properly determined whether the full commission's findings of fact are supported by substantial evidence in the record and whether the panel's decision is affected by an error of law. Baxter v. Martin Bros., Inc., 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." McCraw v. Mary Black Hosp., 350 S.C. 229, 235, 565 S.E.2d 286, 289 (2002).

LAW/ANALYSIS

I. Authority to Apportion

EBI argues the Court of Appeals erred in finding the Commission has the authority to apportion liability for Claimant's second injury and to order EBI to pay benefits related to the second injury when EBI did not provide coverage for Employer on the date of the second injury. We agree.

A "successive-carrier problem" occurs when a worker suffers successive workplace injuries with an intervening change of employers or change of insurance carriers by the same employer. 9 Larson's Workers' Compensation Law § 153.01[1] (2005). There are two possible solutions to the successive-carrier problem.

The apportionment solution has been adopted by many jurisdictions.[1] The leading case establishing apportionment, Anderson v. Babcock & Wilcox Co., 175 N.E. 654, 655 (N.Y. 1931), explains the rationale for the approach:

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[1] See Employers' Cas. Co. v. U.S. Fid. & Guar. Co., 214 S.W.2d 774 (Ark. 1948); Argonaut Ins. Co. v. Indus. Acc. Comm'n, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628 (Cal. Ct. App. 1964); Sauer Indus. Contracting Inc. v. Ditch, 547 So.2d 276 (Fla. Dist. Ct. App. 1989); Johnson v. Bath Iron Works Corp., 551 A.2d 838 (Me. 1988); Arender v. Nat'l Sales, Inc., 193 So.2d 579 (Miss. 1967); Calabro v. Campbell Soup Co., 581 A.2d 1318 (N.J. Super. Ct. App. Div. 1990); Butts v. Ward Law France Trucking Corp., 85 A.D.2d 814 (N.Y. App. Div. 1981); Wilkerson Chevrolet, Inc. v. Mackey, 367 P.2d 162 (Okla. 1961); Merton Lumber Co. v. Indus. Comm'n, 50 N.W.2d 42 (Wis. 1951).

> Unjust it is that the second insurer should bear the entire liability when the second accident was related in large measure to the first. No less unjust it is that the first insurer should bear the entire liability if it appears that without the second accident an earlier recovery might have been had.

The problem with this approach is that it is complicated by statutes of limitations, out-of-state employers, and the difficulty of determining the proportion of liability attributable to each insurer. 9 Larson's Workers' Compensation Law at § 153.01[2]. South Carolina has neither statute nor case law authorizing the apportionment of workers' compensation benefits in successive injury cases.[2]

The second solution to the successive-carrier problem is called the "last injurious exposure rule" and it is the majority rule.[3] *Id.* at § 153.02[1]. This rule "places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to

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[2] Cf. S.C. Code Ann. § 42-13-50 (1985) (authorizing the Commission to apportion liability between employers in cases where an employee suffers ionizing radiation injury, disability, or death attributable in part to exposure received in previous employment); Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004) (apportionment allowed when claimant suffered one injury while simultaneously employed by two employers).

[3] See McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985); Carter v. Avondale Shipyards, Inc., 415 So.2d 174 (La. 1981); Aseltine v. Leto Constr. Co., 204 N.W.2d 262 (Mich. Ct. App. 1972); Jensen v. Kronick's Floor Covering Serv., 245 N.W.2d 230 (Minn. 1976); Collett Elec. v. Dubovik, 911 P.2d 1192 (Nev. 1996); Rose City Van & Storage v. McGuire, 811 P.2d 1387 (Or. Ct. App. 1991); Novak v. C.J. Grossenberg & Son, 232 N.W.2d 463 (S.D. 1975); Bennett v. Howard Johnsons Motor Lodge, 714 S.W.2d 273 (Tenn. 1986); Davine Brown Chevrolet Co. v. Indus. Comm'n, 511 P.2d 743 (Utah 1973).

the disability." *Id*. Consistent with the rule that an employer takes its employee as it finds her, the last injurious exposure rule makes the insurer at risk at the time of the second injury liable even if the second injury would have been much less severe in the absence of the prior condition and even if the prior injury significantly contributed to the final condition. *Id*. at § 153.02[2]. However, if the second injury is merely a recurrence of the first injury, then the insurer on the risk at the time of the original injury remains liable for the second. *Id*. at § 153.02[4]. The benefit of the last injurious exposure rule is it "provides a reasonably equitable approach to compensation problems in the multi-employer context which is simple, easy to administer, and avoids the difficulties associated with apportionment." 82 Am.Jur.2d Workers' Compensation § 200 (2003).

While South Carolina has not expressly adopted the last injurious exposure rule, both statutory and case law favor adopting the rule rather than the apportionment solution. First, S.C. Code Ann. § 42-9-430 (1985) favors placing sole liability on a single insurer. It states:

> Whenever a dispute arises between two or more parties as to which party is liable for the payment of workers' compensation benefits to an injured employee pursuant to the provisions of this title and there is no genuine issue of material fact as to the employee's employment, his average weekly wage, the occurrence of an injury, the extent of the injury, and the fact that the injury arose out of and in the scope of the employment, the hearing commissioner may, in his discretion, require the disputing parties involved to pay benefits immediately to the employee and to share equally in the payment of those benefits until it is determined which party is solely liable, at which time the liable party must reimburse all other parties for the benefits they have paid to the employee ….

Second, 25A S.C. Code Ann. Regs. 67-409 (1976) instructs the Commission to presume the policy with the later effective date is in force "when duplicate or dual coverage exists by reason of two different insurance carriers issuing two policies to the same employer

securing the same liability." Finally, a number of cases have applied a version of the last injurious exposure rule and declined to follow the apportionment rule when dealing with occupational diseases. See Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 112 S.E.2d 711 (1960); Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985); Hargrove, 360 S.C. 276, 599 S.E.2d 604.

Since South Carolina has adopted neither the apportionment rule nor the last injurious exposure rule, this case presents a novel issue of law. In the absence of authority permitting apportionment and because existing statutory authority expresses a preference for holding a single insurer liable rather than apportioning liability among multiple insurers, we adopt the last injurious exposure rule. Applying this rule, we find the Court of Appeals erred in apportioning liability for Claimant's second injury.[4]

II. The Gordon Rule

EBI argues the Court of Appeals erred in failing to apply the principle espoused in Gordon, that aggravation of a pre-existing condition is compensable. In Gordon, this Court held:

> The rule is well established that where a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated or accelerated or activated, with resulting disability, such disability is compensable. The same principle is equally applicable where the latent, but not disabling, condition has resulted from a prior accidental injury. If the disability is proximately caused by the subsequent accidental injury, compensability is referable to that, and not the earlier one.

[4] The Single Commissioner erred in finding apportionment to be a factual finding. Because of the legal analysis required, it is a legal conclusion.

Id. at 76, 88 S.E.2d at 848 (internal citations omitted). The Court of Appeals declined to follow Gordon because of the "factual-driven nature of the Gordon decision." On the contrary, the Gordon rule is "well established"[5] and the Court of Appeals erred in limiting Gordon to its facts.

The Court of Appeals distinguished Claimant's situation because her injuries were not separate and distinct but "intertwined, indistinguishable, and inseparable." Gordon, according to the Court of Appeals, did not apply because it dealt with separate and distinct injuries. The Court of Appeals was correct in determining the Commission's finding of inseparability was supported by substantial evidence. However, such a finding does not preclude the application of Gordon because Gordon is not limited to its particular facts. Gordon applies to the instant case because: (1) Claimant suffered a non-disabling back injury during a workplace accident; (2) Claimant's disability was caused by the second accident; and (3) the second injury "aggravated or accelerated or activated" the pre-existing condition.

Not only does the Gordon rule apply to this case, but it also reflects the essence of the last injurious exposure rule which is to hold the insurer on the risk at the time of the second injury solely liable when the second injury aggravates the first injury.

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[5] The rule is based on five published opinions and American Jurisprudence: Cole v. State Highway Dep't, 190 S.C. 142, 2 S.E.2d 490 (1939); Green v. City of Bennettsville, 197 S.C. 313, 15 S.E.2d 334 (1941); Ferguson v. State Highway Dep't, 197 S.C. 520, 15 S.E.2d 775 (1941); Cromer v. Newberry Cotton Mills, 201 S.C. 349, 23 S.E.2d 19 (1942); Ducker v. Duncan Mills, 218 S.C. 465, 63 S.E.2d 314 (1951); 58 Am.Jur. Workmen's Compensation § 278 (1948). It has also been cited three times by this Court: Kearse v. S.C. Wildlife Res. Dep't, 236 S.C. 540, 115 S.E.2d 183 (1960); Arnold v. Benjamin Booth Co., 257 S.C. 337, 185 S.E.2d 830 (1971); Wright v. Graniteville Co., 266 S.C. 88, 221 S.E.2d 777 (1976).

CONCLUSION

For the foregoing reasons, we reverse the Court of Appeals and reinstate the decision of the circuit court finding Liberty solely liable for Claimant's benefits following her second injury.

REVERSED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lee County School District
Board of Trustees, Appellant,

v.

MLD Charter School Academy
Planning Committee, Respondent.

Appeal From Lee County
Thomas W. Cooper, Circuit Court Judge

Opinion No. 26255
Heard September 20, 2006 – Filed January 29, 2007

AFFIRMED AS MODIFIED

Charles J. Boykin and Karla McLawhorn Hawkins, of Boykin, Davis, Hawkins & Caldwell, L.L.C., of Columbia, for Appellant.

Cathy Hoefer McCabe, of Spartanburg, for Respondent.

Kenneth L. Childs, William F. Halligan, John M. Reagle, Allison Aiken Hanna, all of Childs & Halligan, of Columbia, for Amicus Curiae Laurens County School Districts 55 & 56.

JUSTICE BURNETT: Respondent MLD Charter School Academy Planning Committee (the Academy) appealed the decision of Appellant Lee County School District Board of Trustees (Lee Board) denying its application for a charter school. The State Board of Education (State Board) reversed the decision of the Lee Board and the circuit court affirmed. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

The Lee Board is a duly-elected local school board of trustees which manages and controls the Lee County School District. The Lee Board's duties include evaluating applications to form charter schools pursuant to the South Carolina Charter Schools Act, S.C. Code Ann. §§ 59-40-10 to 210 (2004). The Academy is a charter school which has been operating in Lee County since the fall of 2005. The Academy submitted an application to the Charter School Advisory Committee (Advisory Committee), which was established by the State Board to review and determine the compliance of a charter school application with the requirements of the Charter Schools Act. See S.C. Code Ann. § 59-40-70(A).

After the Academy met with the Lee Board and the Advisory Committee on several occasions, the Advisory Committee voted to certify the application. The Advisory Committee forwarded the Lee Board a certified application and notified the Lee Board of its decision in a letter. At a public hearing, the Lee Board voted to deny the Academy's application. In its Notice of Denial, the Lee Board stated that the application was not compliant with the requirements of the Charter Schools Act in at least seven areas. The Lee Board also expressed its belief that approving the application would adversely impact other students in Lee County.

The Academy appealed the decision of the Lee Board to the State Board arguing, among other things, that the Lee Board's only concerns were financial in nature and that its bases for denial of the application were erroneous. The State Board reversed the decision of the Lee

Board and, in effect, granted a charter to the Academy. The State Board found the order of the Lee Board lacked specificity because it did not base its findings of fact or conclusions of law on substantial evidence on the whole record. Although the State Board determined it could reverse on this basis alone, it also found the Academy met the statutory requirements in ten areas found deficient by the Lee Board.

The Lee Board appealed the order of the State Board. The Circuit Court affirmed. We certified the appeal from the Court of Appeals pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the circuit court err in finding no conflict existed between S.C. Code Ann. § 59-40-70(A)(6) (2004), which requires all applications to be completed by the State Board's published deadline, and 24 S.C. Code Ann. Reg. 43-601(I)(C) (Supp. 2005), which permits the Advisory Committee to request and consider additional application materials after the deadline has passed?

II. Did the circuit court err in applying a more stringent notification requirement upon the Lee Board than set forth in S.C. Code Ann. § 59-40-70(C) (2004)?

III. Did the circuit court err in affirming the State Board's reversal of the Lee Board based solely on the contents of the Notice of Denial?

STANDARD OF REVIEW

The circuit court reviews the order of the State Board under the Administrative Procedures Act (APA), S.C. Code Ann. § 1-23-380(A)(6) (2005), which provides for reversal only if its findings are:

a) in violation of constitutional or statutory provisions;

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

This Court reviews the order of the circuit court to determine whether it properly applied the APA standard of review. Beaufort County Bd. of Educ. v. Lighthouse Charter Sch., 335 S.C. 230, 516 S.E.2d 655 (1999). Although under the APA, the Court may not substitute its judgment for that of a state agency as to the weight of the evidence on questions of fact, it may reverse or modify decisions which are clearly erroneous in view of the substantial evidence on the whole record. Welch Moving and Storage Co., Inc. v. Public Serv. Comm'n of South Carolina, 301 S.C. 259, 391 S.E.2d 556 (1990).

LAW/ANALYSIS

I. Conflict between Statute and Regulation

The Lee Board argues the circuit court erred in finding no conflict existed between S.C. Code Ann. § 59-40-70(A)(6), which requires all applications to be completed by the State Board's published deadline, and 24 S.C. Code Ann. Reg. 43-601(I)(C), which permits the Advisory Committee to request and consider additional application materials after the deadline has passed. The Lee Board failed to raise this argument to the State Board and, therefore, failed to preserve this issue for appellate review. This Court has a limited scope of review and cannot consider issues that were not raised to and ruled on by the administrative agency. Kiawah Resort Assoc. v. South Carolina Tax Comm'n, 318 S.C. 502, 458 S.E.2d 542 (1995).

However, in the interest of judicial economy, we conclude there is no conflict between S.C. Code Ann. § 59-40-70(A)(6) and 24 S.C.

Code Ann. Reg. 43-601(I)(C). Section 59-40-70(A)(6) instructs the Advisory Committee: "If the [charter school] application is in noncompliance, it must be returned to the applicant with deficiencies noted." We do not interpret this provision as mandatory. Regulation 43-601(I)(C) allows the Advisory Committee to "request clarification or additional information from the applicant" and gives the Committee "the authority to incorporate this additional information into the application." The regulation is a proper and reasonable exercise of authority and, therefore, does not conflict with the statute.

II. The Notification Requirement

The Lee Board argues the State Board erroneously applied a more stringent notification requirement upon the Lee Board than that provided in S.C. Code Ann. § 59-40-70(C), which requires local school boards to provide a written explanation of the reasons for denial with correlating statutory standards. We disagree.

The Lee Board failed to meet the statutory requirements set forth in Section 59-40-70(C) which states:

> A local school board of trustees shall only deny an application if the application does not meet the requirements specified in Section 59-40-50 or 59-40-60, fails to meet the spirit and intent of this chapter, or adversely affects, as defined in regulation, the other students in the district. It shall provide, within 10 days, a written explanation of the reasons for denial, citing specific standards related to provisions of Section[s] 59-40-50 or 59-40-60 that the application violates.

Instead of providing a "written explanation for the reasons for denial, citing specific standards," the Lee Board spoke only in generalized terms in its Notice of Denial. Section 59-40-70(C) clearly sets forth the requirements the Lee Board must follow, and the Lee Board failed to meet these requirements in its Notice of Denial. The circuit court was,

therefore, correct in affirming the State Board's decision to reverse the Lee Board.

III. The Notice of Denial

The Lee Board argues the State Board erroneously based its decision solely on the contents of the Lee Board's Notice of Denial instead of the entire record, which purportedly contained evidence that supported the decision of the Lee Board to deny the charter school application. We disagree.

The State Board properly based its decision on the Lee Board's Notice of Denial. Porter v. South Carolina Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998),[1] established the requirement for administrative agencies when presenting their findings:

> An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. Where material facts are in dispute, the administrative body must make specific, express findings of fact. An administrative agency is not required to present its findings of fact and reasoning in any particular format, although the better practice is to present them in an organized and regimented manner …. We occasionally have upheld [administrative] orders which were conclusory in nature. We did so in years past because no statute explicitly required an administrative agency to make specific findings of fact or state its reasoning as a predicate for judicial review – although we have long believed that is the better practice …. [S]tatutes and our precedent require an administrative agency to make specific

[1] Although Porter addresses the Public Service Commission, we find it applicable to all administrative agencies, including local school boards.

> findings of fact and explain its rationale in sufficient detail to afford judicial review.

Porter, 333 S.C. at 21-22 n. 3, 507 S.E.2d at 332-333 n.3 (citations omitted).

Porter also explained that courts will not *sua sponte* search the record for substantial evidence supporting a decision when an administrative agency's order inadequately sets forth the agency's findings of fact and reasoning. *Id*.

The Lee Board's decision is embodied in its Notice of Denial. Neither the State Board, the circuit court, nor this Court is obligated to search the entire record for information that should have been contained in the Notice of Denial. Because the Lee Board failed to support its findings in the Notice of Denial with sufficient detail, the circuit court did not err in affirming the State Board's reversal of the Lee Board.

CONCLUSION

The Lee Board failed to provide the requisite specificity in its Notice of Denial and failed to comply with the requirements of S.C. Code Ann. § 59-40-70(C). We affirm the circuit court's decision to affirm the State Board's reversal of the Lee Board. Our disposition of these issues makes it unnecessary to address the Lee Board's remaining issues. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (an appellate court need not address remaining issues when resolution of prior issues is dispositive).

AFFIRMED.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and, as explained below, would vacate the circuit court's order and remand the matter to that court for reconsideration.

The majority holds that "[t]he circuit court reviews the order of the State Board under the Administrative Procedures Act (APA)…." I disagree,[2] and would hold that the charter school appeal process for cases such as this which commenced before July 1, 2000, lies entirely outside the APA. In my opinion, the confusion that has resulted from the misapplication of the APA by the circuit court renders the order before us incapable of intelligent review such that a remand is required.

In 1996, the General Assembly enacted the "South Carolina Charter Schools Act of 1996 (the Act)," [3] codified at S.C. Code Ann. §§ 59-40-10 *et seq*. Pursuant to the Act, if the local board denies an application "the charter applicant may appeal the denial to the State Board of Education pursuant to Section 59-40-90." This section establishes the procedure for these appeals, and allows the State Board to affirm or reverse the local board's action. § 59-40-90(C). Under the Act, the State Board acts as an appellate body in reviewing the local board's decision. The State Board's scope of review and standard of review in this appellate process in found in 24 S.C. Regs. 43-600(1)(D) and (E).[4]

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[2] I also disagree with Part III of the majority's opinion which analyzes the sufficiency of the Lee Board's Notice of Determination under an APA standard. A local school board is not an agency within the meaning of the APA, S.C. Code Ann. § 1-23-310(2) (2005): in my opinion, the expansion of this definition to include local institutions intrudes on the Legislature's prerogative, and is unduly burdensome to those entities.

[3] 1996 Act No. 447, § 2, as amended by 2002 Act No. 341, § 1.

[4] Among other things, this regulation requires the State Board when acting in its appellate capacity under the Act to apply standards very similar to those used by a circuit court when reviewing an APA appeal.

Under the version of the Act in effect at the time this case arose, the "final decision of the state board may be appealed by any party to the circuit court for the county in which the proposed charter school is or was to have located [sic]." § 59-40-90(D). This right to appeal to the circuit court exists pursuant to the Act, not the APA. As an appeal outside the ambit of the APA, the circuit court's jurisdiction is founded on S.C. Code Ann. § 18-7-10 (1985) and its scope of review is governed by S.C. Code Ann. §§ 18-7-170 through -190 (1985). In my view, the conclusion that this appeal lies outside the APA is confirmed by 2006 Act No. 274. This act, effective July 1, 2006, amends § 59-40-90 to provide that charter school appeals from the state board are now made to the Administrative Law Court.

The circuit court reviewed this appeal under the APA rather than under the Title 18 standards. As a result, this Court cannot perform its appellate function with any degree of certainty. I would therefore vacate the circuit court order and remand for reconsideration under the Title 18 standard. See Karl Sitte Plumbing Co., Inc. v. Darby Dev. Co. of Columbia, Inc., 295 S.C. 70, 367 S.E.2d 162 (Ct. App. 1988) (circuit court order applying wrong standard of review reversed and remanded for redetermination).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Hall Cannon, Petitioner,

v.

South Carolina Department of Probation, Parole and Pardon Services, Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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

Opinion No. 26256
Heard November 2, 2006 – Filed January 29, 2007

REVERSED

Richard A. Harpootlian and Graham L. Newman, of Richard A. Harpootlian, P.A., of Columbia, for petitioner.

Deputy Director for Legal Services Teresa A. Knox,

Assistant Chief Legal Counsel J. Benjamin Aplin,
and Legal Counsel Tommy Evans, Jr., of Columbia,
for respondent.

ACTING CHIEF JUSTICE MOORE: Petitioner instituted a declaratory judgment action to determine whether the South Carolina Deoxyribonucleic Acid (DNA) Identification Record Database Act[1] (the Act) required him, as a condition of his parole, to submit a DNA sample to the state's database. The trial court held the Act applied to petitioner and required him to submit a sample. The court further held the Act did not violate the *ex post facto* clause. The Court of Appeals affirmed. Cannon v. S.C. Dep't of Prob., Parole and Pardon Servs., 361 S.C. 425, 604 S.E.2d 709 (Ct. App. 2004). We reverse.

ISSUE

Did the Court of Appeals err by finding petitioner was required to submit a DNA sample for inclusion in the State's DNA database as a condition of his parole?

DISCUSSION

Petitioner was convicted of murder in 1972, and was sentenced to life imprisonment. His conviction and sentence were affirmed on direct appeal.[2] He subsequently pled guilty to two additional counts of murder and unlawfully carrying a pistol and received concurrent life sentences. All three counts arose from the same event.

After serving over eleven years on the concurrent life sentences,

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[1]S.C. Code Ann. §§ 23-3-600 through 700 (Supp. 2000).

[2]State v. Cannon, 260 S.C. 537, 197 S.E.2d 678, *cert. denied*, 414 U.S. 1067 (1973).

petitioner was paroled on October 12, 1983. He was to remain on parole for the rest of his life. The conditions of his supervised release did not call for submitting any type of sample, but he was required to "carry out all instructions [his parole agent] gives."

In 1995, South Carolina enacted the Act, requiring a person "currently paroled and remaining under supervision of the State" to provide a DNA sample as a condition of parole. S.C. Code Ann. § 23-3-620(C) (Supp. 1995). The Act was subsequently amended in July 2000, to require a sample from someone "convicted or adjudicated delinquent before July 1, 2000, who is serving a probated sentence or is paroled on or after July 1, 2000." S.C. Code Ann. § 23-3-620(E)(1) (Supp. 2000).[3]

In 2001, respondent informed petitioner he was required to provide a DNA sample as a condition of his parole and his failure to do so would constitute a parole violation. Petitioner instituted this action, asking whether the Act requires him to submit a DNA sample. Petitioner's motion for a temporary restraining order was granted and respondent was enjoined from requiring petitioner to provide a sample of his DNA pending the outcome of this action.

The statute at issue, § 23-3-620(E)(1) (Supp. 2000), states:

> (E) At such time as possible and before release from confinement or release from the agency's jurisdiction, a suitable sample from which DNA may be obtained for inclusion in the State DNA Database must be provided <u>as a condition of probation or parole</u> by:

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[3]Since petitioner filed this action, the Act was amended again in 2004. The only amendment to the phrase in question is a change in date, and the statute states a sample is a condition of parole for "a person convicted or adjudicated delinquent before July 1, 2004, who is serving a probated sentence or is paroled on or after July 1, 2004." S.C. Code Ann. § 23-3-620(E)(1) (Supp. 2005).

> (1)A person convicted . . . before July 1, 2000, who is serving a probated sentence or is paroled on or after July 1, 2000, for: [one or more enumerated crimes];[4] and
>
> (2) any criminal offender ordered by the court who was convicted . . . before July 1, 2000, and who is serving a probated sentence or is paroled on or after July 1, 2000.

Petitioner argued to the trial court that the word "paroled" refers to an individual who is "released to parole" on or after July 1, 2000, and that because he was released to parole prior to that day, the Act does not apply to him. The court found that such a construction of the word "paroled" would limit the statute's operation and would be destructive of its intent. The court found it was the intent of the legislature to include all individuals currently paroled in the database. Therefore, the court held that petitioner must provide a sample as a condition of his parole. The Court of Appeals affirmed.

We find the Act is inapplicable to petitioner because the Legislature's act of amending the statute in 2000 shows that a departure from the original law was intended. *See* Kerr v. State, 345 S.C. 183, 547 S.E.2d 494 (2001) (adoption of amendment which materially changes statute's terminology raises presumption that departure from original law was intended). It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law. Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964). *See also* Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (it must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something); Stuckey v. State Budget and Control Bd., 339 S.C.

[4]A person convicted of a violent crime is subject to the Act. A violent crime is defined in S.C. Code Ann. § 16-1-60 (Supp. 2005) and includes the crime of murder.

397, 529 S.E.2d 706 (2000) (subsequent statutory amendment may be interpreted as clarifying original legislative intent). Accordingly, as petitioner contends, we find the plain wording of the statute indicates the word "paroled" refers to an individual who is "released to parole" on or after July 1, 2000. *See* Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992) (words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation); Burns v. State Farm Mut. Auto Ins. Co., 297 S.C. 520, 377 S.E.2d 569 (1989) (cardinal rule of statutory construction is to ascertain and effectuate Legislature's intent).

Our disposition of this issue makes it unnecessary to address petitioner's *ex post facto* argument. *See* Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive). Accordingly, the decision of the Court of Appeals is
REVERSED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Edward W. Miller, concur.

The Supreme Court of South Carolina

In the Matter of Miles L. Green, Jr., Respondent.

O R D E R

On January 8, 2007, Respondent was suspended from the practice of law for a period of six months, retroactive to April 26, 2005. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY: s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

January 22, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

South Carolina Department of Health and Environmental Control, Appellant.

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

Opinion No. 4186
Heard October 11, 2006 – Filed December 18, 2006
Withdrawn, Substituted and Refiled January 23, 2007

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

Our review of the circuit court, which constitutes the third appellate review, is also governed by section 1-23-380(A)(6). Accordingly, this court may reverse the ALJ's decision if substantial rights of the appellant have been prejudiced and the findings, inferences, conclusions or decisions (1) violate constitutional or statutory provisions, (2) exceed the statutory authority of the agency, (3) are based upon unlawful procedure, (4) are

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

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

affected by other error of law, (5) are clearly erroneous in light of the reliable, probative and substantial evidence on the entire record, or (6) are either arbitrary, capricious, or reflect abuse of discretion or the obvious unwarranted exercise of discretion. § 1-23-380(A)(6); Weaver v. S.C. Coastal Council, 309 S.C. 368, 374, 423 S.E.2d 340, 343 (1992).

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

III.

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

IV.

DHEC alleges the circuit court erred in rejecting the Board's interpretation of the "0.1 Rule" and finding the rule may only be applied during the months in which a natural depression in dissolved oxygen levels is

demonstrated. DHEC argues the regulation is ambiguous and, therefore, the Board's interpretation is entitled to deference. We agree.

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

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

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

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

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

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

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

There is support for DHEC's position in the record before us. Larry Turner, manager of the Water Quality Modeling section for DHEC, testified that DHEC developed loadings that are protective and conservative. He explained that during the four winter months (not at issue), DHEC determined less restrictive limits are required based on a number of factors including the cold weather and the increased ability of the system to absorb a pollutant without violating the standard during that period of the year. For the remainder of the year, DHEC applied the "0.1 Rule" as a protective measure given that the four summer months have a clearly demonstrated need for the "0.1 Rule."

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

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

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

We find the Board's interpretation of the "0.1 Rule"—the statute and regulation it is charged with enforcing—is reasonable and in line with its overall statutory mandate. We hold the circuit court erred in reversing the Board and adopt the Board's finding that when natural conditions cause a depression of dissolved oxygen in a waterbody at some point during the year the "0.1 Rule" may be applied.

V.

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

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

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

VI.

DHEC alleges the circuit court erred in finding DHEC does not have the authority to impose flow limits in an NPDES permit. We decline to address this legal issue because any ruling issued by this court would be merely advisory.

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

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

[7] Our decision not to address this issue is further supported by the uncertain circumstances surrounding it. If DHEC has the authority to impose flow limits in NPDES permits, as it contends, DHEC has done nothing required to promulgate this authority into a regulation. See S.C. Code Ann. § 48-1-30 (1987) (providing that DHEC is required to promulgate regulations to implement the SCPCA); see also Sloan v. S.C. Bd. of Physical Therapy Exam'rs, Op. No. 26209 (S.C. Sup. Ct. Filed Sept. 25, 2006) (Shearouse Ad. Sh. No. 36 at 46) ("In order to promulgate a regulation, the APA generally requires a state agency to give notice of a drafting period during which public comments are accepted on a proposed regulation; conduct a public hearing on the proposed regulation overseen by an administrative law judge or an agency's governing board; possibly prepare reports about the regulation's impact on the economy, environment, and public health; and submit the regulation to the Legislature for review, modification, and approval or rejection.") (citing S.C. Code Ann. §§ 1-23-110 to -160 (2005 and Supp. 2005)). Conversely, DHEC argues it can apply flow limits as it chooses

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

VII.

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

The decision of the circuit court is accordingly

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

STILWELL and BEATTY, JJ., concur.

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because its action does not establish a "binding norm." Yet, DHEC has provided this court with no standard setting forth the conditions under which DHEC will impose the flow limits.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy E. Keane and Karen L. Keane, Respondents,

v.

Lowcountry Pediatrics, P.A.; Beaufort Pediatrics, P.A.; Francis E. Rushton, Jr.; Joseph H. Floyd; Lawrence R. Coleman, and Christine T. Chiaviello, Appellants.

Appeal From Beaufort County
Curtis L. Coltrane, Master-in-Equity and Special Circuit Court Judge

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Opinion No. 4199
Heard October 11, 2006 – Filed January 29, 2007

REVERSED

James S. Gibson, Jr. and Mary B. Lohr, both of Beaufort, and William L. Howard, Sr., of Charleston, for Appellants.

Robert V. Mathison, Jr. of Hilton Head Island,
for Respondents.

HEARN, C.J.: In this legal and equitable action, Lowcountry Pediatrics, P.A., and Drs. Francis E. Rushton, Joseph H. Floyd, and Lawrence R. Coleman (collectively "Lowcountry"), appeal the trial court's order awarding damages to Drs. Timothy and Karen Keane. Lowcountry contends the trial court erred in: (1) including goodwill in its valuation of Lowcountry; (2) awarding prejudgment interest; and (3) awarding punitive damages. We reverse.

FACTS

On September 1, 1986, Dr. Rushton and Dr. Floyd organized Lowcountry Pediatrics. Rushton and Floyd later added Dr. Coleman to the practice, and the three became the senior physicians and shareholders of Lowcountry. Eventually, the Keanes and Dr. Christine Chiavello joined the practice, and all three became shareholders of Lowcountry.[1]

Upon the admission of each new member into Lowcountry, the doctors amended the shareholder agreement to reflect the current value of a withdrawing shareholder's stock. The shareholder agreement provided that upon a shareholder's withdrawal from the practice that shareholder's shares of stock would be bought back by Lowcountry at an agreed upon price. The shareholder agreement indicated the purchase price for the withdrawing shareholder's stock would remain in effect until a new value was agreed upon, in writing, following the end of each fiscal year. Between 1989 and 1998, the doctors amended the shareholder agreement on three different occasions, and each amendment occurred after Lowcountry received an appraisal to calculate its fair market value. The 1998 amendment was the final

[1] The Keanes, along with the other doctors, signed employment contracts. These contracts provided for a one-year term of employment and contained a non-compete clause.

amendment prior to this controversy. Article 3.1 of the 1998 revision to the shareholder agreement stated:

> Value of shares of stock: For the purpose of this Third Amendment to Shareholders Agreement, the value of each share of issued stock . . . of the Agreement . . . is $15.30. This value has been agreed upon by the shareholders as representing the fair value of each share of stock, including goodwill of the Association.

According to this amendment to the shareholder agreement, the Keanes owned a combined thirty percent of the shares in Lowcountry.[2]

Some time after the third amendment to the shareholder agreement, the senior physicians began to contemplate the end of Lowcountry, complaining about the lack of physical space in the office as well as their differing views with the Keanes about the proper management of the practice. As a result, on December 20, 1999, the senior physicians sent a letter to the Keanes notifying them of their desire to "split up Lowcountry Pediatrics." The Keanes, however, had no desire to dissolve the practice, and despite the senior physicians' repeated attempts to discuss dissolution, the Keanes declined to withdraw from the practice.

Because no agreement could be reached to "split-up" Lowcountry, the senior physicians called a shareholder meeting. At the shareholder meeting, the doctors were to vote on, among other items, removing the non-complete agreement and obtaining an appraisal to value the shares of Lowcountry in order to effectuate the buy-out of the Keanes and Chiaviello.[3] At the meeting, the senior physicians voted in

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[2] The Keanes collectively owned 3,000 of the 10,000 shares of Lowcountry.

[3] Chiaviello voluntarily resigned from the practice at this time. Chiaviello's resignation was accepted at the shareholders meeting.

favor of removing the non-compete clause from the employment agreement. The Keanes and the senior physicians disagreed on the appraisal. The Keanes wanted the individual physicians' goodwill included in the valuation of Lowcountry, but the senior physicians did not. As a result of this disagreement, the senior physicians and Chiaviello voted to obtain an appraisal of Lowcountry by Webster, Rogers and Company with the Keanes abstaining from the vote. A "draft" appraisal was subsequently undertaken, and the appraisal indicated a value of $22.95 per share for the Lowcountry stock, excluding the individual physicians' goodwill, with a total value of stockholders' equity of $229,500.

Based on this valuation, the senior physicians offered to purchase the Keanes' shares for $68,850. Alternatively, the senior physicians gave notice of their intentions to withdraw from Lowcountry, offering to sell their shares to the Keanes for the same per share price. The senior physicians provided the Keanes with sixty days to respond or Lowcountry would be dissolved pursuant to the shareholder agreement. In June of 2000, the senior physicians increased their purchase offer to $100,000 for the Keanes' interest in Lowcountry. The Keanes, however, continued to refuse to withdraw from the practice. Lowcountry continued operating as a practice until July 24, 2000, sixty days after which the offer to buy or sell the senior physicians' shares had expired.

At this time, the senior physicians filed the articles of dissolution; changed the locks on the building; and opened their own practice, Beaufort Pediatrics, at the same location.[4] All of the assets of Lowcountry, including the equipment, supplies, patient records, and bank accounts were utilized by Beaufort Pediatrics. However, the accounts receivable of Lowcountry had been collected and distributed to the Keanes in proportion to their interest in Lowcountry. The senior physicians also paid Lowcountry for the use of the fixed assets, rent,

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[4] The Secretary of State eventually returned the articles of dissolution to Lowcountry.

and supplies. This money was also placed into the account for Lowcountry and distributed according to the interest of the shareholders, including the Keanes.

On September 22, 2000, the Keanes brought this action against Lowcountry alleging numerous causes of action, including a derivative action, a declaratory judgment action, and a claim pursuant to sections 33-14-310 and 320 of the South Carolina Code (Supp. 2000) to determine the fair market value of Lowcountry. To this end, the Keanes obtained an appraisal of Lowcountry performed by Louis Fleishman.[5] Using the discounted future cash flow method, which included the individual physicians' goodwill, Fleishman valued Lowcountry at $1,319,200. Fleishman valued the tangible assets at a total of $401,344, with $42,344 in fixed assets, $18,000 for supplies, and $341,000 for accounts receivable. He valued the general intangibles, including the individual physicians' goodwill, at $917,856.

The master-in-equity: (1) determined the value of Lowcountry was $1,319,200; (2) found the Keanes were only entitled to thirty percent of the $917,856 intangible value of Lowcountry as they had already received their thirty percent interest in the tangible assets of Lowcountry; (3) awarded the Keanes $275,296 for their thirty percent interest in Lowcountry; (4) ordered prejudgment interest on the $275,296 award; (5) found the senior physicians had willfully and wantonly violated their fiduciary duties to the Keanes; and (6) awarded $50,000 in punitive damages to the Keanes.[6] This appeal followed.

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[5] Fleishman previously prepared an appraisal valuing Lowcountry in 1995, utilizing the "discounted cash flow method," which included goodwill.

[6] After receiving post-trial motions, the master issued an amended order correcting some computational errors but provided no substantive changes.

STANDARD OF REVIEW

This appeal involves both equitable and legal causes of action. When both equitable and legal causes of action are maintained in one suit, each must be analyzed separately according to its own identity as legal or equitable. Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005); Future Group, II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996).

A corporate dissolution is an action in equity. Jordan, 362 S.C. at 205, 608 S.E.2d at 131. An action for shareholder oppression is also one in equity. McDuffie v. O'Neal, 324 S.C. 297, 303, 476 S.E.2d 702, 705 (Ct. App. 1996). In addition, an action to determine the fair market value of stocks owned by a dissenting shareholder constitutes a proceeding in equity to be tried by a judge without a jury. Defender Props., Inc, v. Doby, 307 S.C. 336, 338, 415 S.E.2d 383, 384 (1992). In an action in equity referred to a master, the appellate court may view the evidence to determine facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the master. Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995).

The determination of the appropriateness of an award of pre-judgment interest, on the other hand, is a question of law because the right to relief is entirely statutory. See, e.g., Harvey v. S.C. Dep't of Corrections, 338 S.C. 500, 507, 527 S.E.2d 765, 769 (Ct. App. 2000) (finding "where the relief sought is entirely statutory . . . the action is one at law."). Likewise, an action for punitive damages arising from a breach of fiduciary duty is a question of law. Jordan, 362 S.C. at 205, 608 S.E.2d at 131. "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. Calculation of Fair Market Value

Lowcountry argues the trial court erred in including the value of the physicians' individual professional goodwill in the calculation of the fair market value of the association. We agree.

While both parties correctly point out that no South Carolina authority specifically addresses the propriety of the inclusion of the physicians' individual professional goodwill in the context of a dissolution of a professional association, we believe the cases of Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989), and Weinberg v. Wallace, 314 S.C. 183, 442 S.E.2d 211 (Ct. App. 1994), are illustrative.

In Donahue, Wife sought an interest in Husband's professional dental practice as part of the equitable distribution of the marital estate. 299 S.C. at 358, 384 S.E.2d at 744. The family court's valuation of the professional practice included Husband's professional goodwill, and Husband appealed. Id. In considering Husband's arguments, the supreme court reasoned that "the very nature of a professional practice is that it is totally dependent upon the professional." Id. at 360, 384 S.E.2d at 745. Moreover, the supreme court recognized the speculative nature of professional goodwill because its valuation is based on the doctor's future earnings, which are totally dependent upon the professional. Id. at 359, 384 S.E.2d at 745 (citing Casey v. Casey, 293 S.C. 503, 362 S.E.2d 6 (1987) (acknowledging the speculative nature of goodwill being dependent upon future earnings)). The supreme court reasoned that professional goodwill:

> [A]ttaches to the person of the professional man or woman as a result of confidence in his or her skill and ability. It does not possess value or constitute an asset separate and apart from the professional's person, or from his individual ability to practice his profession. It

> would be extinguished in the event of the professional's death, retirement or disablement.

Id. at 359, 384 S.E.2d at 745 (citations omitted). As a result, the supreme court held it was error to include professional goodwill in valuing Husband's dental practice. Id. at 360, 384 S.E.2d at 745.

The view of professional goodwill attaching solely to the professional, not to the association, has been expanded outside of the family court arena. In Weinberg v. Wallace, the court of appeals addressed whether Weinberg was allowed to recover for an alleged conversion of goodwill associated with a family business that was operated by Wallace. 314 S.C. at 185, 442 S.E.2d at 212. The court of appeals, citing the Donahue analysis, reasoned:

> If the business is a professional practice, then [goodwill] attaches solely to the person of the professional man or woman as a result of confidence in his or her skill and ability and does not possess value or constitute an asset separate and apart from the professional's person.

Id. at 187, 442 S.E.2d at 213 (internal quotations omitted).

The testimony of the Keanes' expert, Fleishman, echoes the decisions in Donahue and Weinberg regarding the speculative nature of valuing the physicians' individual goodwill as well as its personal nature. When Fleishman testified, he conceded that an element of the intangible value of Lowcountry is the "physicians (sic) and their individual reputation." Further, when asked hypothetically on cross-examination what the intangible value of a practice would be if three physicians were to quit the practice, Fleishman responded: "If they truly go away, and no longer practice then a large portion of the intangible value would go away," but that value would "be hard to arrive at." He continued:

> I would have to look and speculate and say what, what else is going to remain the same . . . Well, I don't think I could say, you know, put a specific—well, that we'll take away half the intangibles or twenty percent or eight percent. There's no specific formula attached to that.

Further, Fleishman testified the speculation required to determine the value remaining with the practice once a physician leaves is due to its intangible nature, and that determining what Lowcountry is worth is "not entirely scientific."

The Donahue and Weinberg courts clearly held that South Carolina courts should not, in valuing a professional association, include the goodwill of the professional because of its speculative nature and the fact that goodwill "attaches solely to the person of the professional man or woman as a result of confidence in his or her skill and ability and does not possess value or constitute an asset separate and apart from the professional's person." See Donahue, 314 S.C. at 187, 442 S.E.2d at 213. Fleishman's own testimony only reinforces that holding. As a result, the Keanes are not entitled to the $275,296 awarded by the master, which represented their thirty percent interest in the intangible value of Lowcountry.

We do not intend for this opinion to be interpreted as barring parties from contractually agreeing to include personal goodwill in the valuation of a shareholder's interest upon dissolution. However, that theory was never advanced by the Keanes, either at trial or in their brief before this court, as the basis for their position.[7] Accordingly, we do not believe it is appropriate to use it as an additional sustaining ground.

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[7] Moreover, if the Keanes believed the terms of the shareholder agreement controlled, they should have been eager to accept the $68,850—not to mention the $100,000—offered by the senior physicians for their thirty percent interest in Lowcountry, as that offer exceeded by $22,950 the $45,900 the Keanes would have been entitled to under the shareholder agreement.

See I'on, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716 (2000) (holding, in the context of an appellate court's authority to affirm for any reason appearing in the record, that "[a] respondent may abandon an additional sustaining ground . . . by failing to raise it in an appellate brief.") Moreover, even if we believed this argument was available as a basis for affirming, we do not agree that the language of the shareholder agreement controls this issue. The agreement states that the value of $15.30 per share "has been agreed upon by the shareholders as representing the fair value of each of stock, including goodwill of the Association." We do not perceive the language "goodwill of the Association" to be synonymous with the inclusion of individual physician's goodwill upon a dissolution of the practice, and absent specific language that individual goodwill should be used to value a shareholder's interest upon dissolution, we believe this issue is controlled by Donahue and Weinberg.

Next, Lowcountry argues that should we find the trial court incorrectly included the physicians' professional goodwill in the valuation of the Keanes' interest, we should use the value in its May 2000 appraisal to value the Keanes' interest. We agree in part and disagree in part.

While we agree that the trial court erred in including the value of the goodwill of the individual physicians in the calculation of Lowcountry's fair market value, we disagree that the May 2000 appraisal is the appropriate gauge of Lowcountry's value. Lowcountry's May 2000 appraisal was merely a "draft," and the appraiser who prepared it did not testify at trial. Additionally, Lowcountry provided no other evidence of valuation of the corporate stock during the hearing. Therefore, we believe the best evidence regarding the tangible value for Lowcountry remains the Keanes' appraisal prepared by Fleishman, less the amount attributed to the individual goodwill of the physicians. Using the Keanes' own appraisal, we find, as did the trial court, that the fixed assets, supplies, and accounts receivable of Lowcountry were worth $401,344.

In its amended order, the trial court found that "the money from the accounts receivable, rent and supplies purchases were placed into the Lowcountry account and distributed in accordance with the respective percentages of ownership." The trial court also found that the Keanes neither argued that the disbursements had been made, nor did the Keanes dispute that they had received their thirty percent of the tangible assets. As a result, the trial court determined that the $401,344 of accounts receivable, rent, and supplies had already been distributed to, and received by, the Keanes according to their respective thirty percent interest in Lowcountry.[8] Pursuant to our holding that the trial court incorrectly included the physicians' individual professional goodwill in valuing the Keanes' interest in Lowcountry, the Keanes are only entitled to their thirty percent of the tangible assets of the association. Because the Keanes have already received their entire thirty percent interest in the fair market value of Lowcountry, they are entitled to no additional distributions.

II. Award of Prejudgment Interest

Lowcountry Pediatrics next contends the trial court erred in awarding prejudgment interest to the Keanes. We agree.

Section 34-31-20 of the South Carolina Code (2005) provides that "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." Such prejudgment interest, however, is allowed on an obligation to pay money "from the time when, either by agreement of the parties or operation of the law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). In other words, an award of prejudgment interest is not proper

[8] The Keanes do not appeal from this finding of the trial court. It is, therefore, the law of the case. See Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (holding an unappealed ruling, right or wrong, is the law of the case.).

if the measure of recovery is not fixed by conditions existing at the time the claim arose. Id.

In this matter, the trial court awarded $275,296 in actual damages to the Keanes pursuant to their claim for breach of fiduciary duty. At oral argument, however, the Keanes' attorney conceded these actual damages were based solely on the valuation of Lowcountry's stock, which is an equitable cause of action. In other words, the trial court found the damages under the legal and equitable causes of action to be one in the same. This award equaled the Keanes' thirty percent interest in the practice based on the Fleishman appraisal, which included goodwill. Pursuant to our holding that the trial court incorrectly included the physicians' individual professional goodwill in valuing the Keanes' interest in Lowcountry, we find the Keanes are not entitled to the $275,296 awarded to them by the trial court. Therefore, no award of actual damages exists upon which prejudgment interest can be awarded.[9]

III. Punitive Damages

Lowcountry Pediatrics contends the trial court erred in ordering punitive damages to the Keanes on their claim for breach of fiduciary duty. We agree.

"Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." Austin v. Specialty Transp. Serv., 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). Punitive damages, however, may only be

[9] In so holding we do not disregard our standard of review for the breach of fiduciary duty cause of action, which is a legal claim. Rather, we merely hold there are no damages to be awarded under the breach of fiduciary duty cause of action pursuant to our holding that the trial court incorrectly included the physicians' individual professional goodwill in valuing the Keanes' interest in Lowcountry's stock. The Keanes' concession at oral argument supports this view.

awarded upon an underlying finding of actual damages. Dowling v. Home Buyers Warranty Corp., 311 S.C. 233, 236, 428 S.E.2d 709, 711 (1993).

In this matter, the trial court awarded $275,296 in actual damages to the Keanes pursuant to their claim for breach of fiduciary duty. This award equaled the Keanes' thirty percent interest in the goodwill amount as included in the Fleishman appraisal. As mentioned previously, the Keanes' attorney conceded during oral argument these actual damages were tied solely to the equitable valuation of Lowcountry's stock. Pursuant to our holding that the trial court incorrectly included the physicians' individual professional goodwill in valuing the Keanes' interest in Lowcountry's stock, we have removed the underlying award of actual damages on which the circuit court based the award of punitive damages. Therefore, the award of punitive damages cannot prevail without a finding of actual damages, and accordingly, the award of punitive damages is reversed.[10] See Dowling, 311 S.C. at 236, 428 S.E.2d at 711 (holding punitive damages may only be awarded upon an underlying finding of actual damages).

[10] The Keanes' reliance on Cook v. Atlantic Coast Line R. Co., 183 S.C. 279, 190 S.E. 923 (1934) is misplaced. The Keanes rely on Cook for the proposition that an award of punitive damages may be allowed to stand despite no finding of actual damages. That is not the import of Cook, however. The holding in Cook is that an award for punitive damages may be allowed to stand if "it is clearly shown that legal right has been willfully or recklessly invaded and that *nominal actual damages* were merged in the verdict for punitive damages." Id. at ___, 190 S.E. at 924 (emphasis added). Here, we have removed the award of punitive damages in its entirety, and accordingly, there is no award of actual damages to merge with the award of punitive damages. Therefore, Cook is inapplicable because that case requires, at a minimum, an award of nominal actual damages before an award of punitive damages may be upheld.

CONCLUSION

Based on the foregoing, the order of the circuit court is hereby

REVERSED.[11]

STILWELL, J., concurs.

KITTREDGE, J., dissents in a separate opinion.

KITTREDGE, J., dissenting in part and concurring in part:

I dissent in part and concur in part. I respectfully dissent from the reversal of the master's award of actual and punitive damages to the Keanes. I agree with the majority opinion that the master's award of prejudgment interest to the Keanes should be reversed.

The first issue to address is our standard of review. Although the Keanes prevailed on multiple theories (legal and equitable), the majority focuses exclusively on the equitable corporate dissolution claim. By excluding consideration of the legal claim, the court easily segues to an equitable standard of review and determines its own view of the facts. The result is a factual recitation in a light most favorable to Appellants. I would not ignore the legal claim and the more deferential scope of review that flows from it.

The master found that Appellants breached their fiduciary duty to the Keanes. This finding has not been appealed and is the law of this case. See Dreher v. Dreher, 370 S.C. 75, __ n.1, 634 S.E.2d 646, 647 n.1(2006) ("[A]n unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal[.]") (citing In re

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[11] In light of our disposition of this case, we need not address the Keanes' remaining issue regarding the two-issue rule. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (stating appellate court need not address remaining issues when resolution of prior issue is dispositive).

Morrison, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996)). A fair reading of the master's order indicates the award of actual damages (for all causes of action) represented his judgment of the value of the Keanes's interest in Lowcountry Pediatrics. The majority so acknowledges in observing that "the trial court awarded $275,296 in actual damages to the Keanes pursuant to their claim for breach of fiduciary duty."

An action for breach of fiduciary duty is an action at law. As such, we are constrained to uphold the master's findings if supported by any evidence. See Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) ("[A] claim of breach of fiduciary duty is an action at law and the trial judge's findings will be upheld unless without evidentiary support."). The master, who was in a better position to assess witness credibility and demeanor, viewed the evidence in a light less favorable to Appellants. I would hold there is evidence in the record to support the master's findings.

There is another reason I would not focus the analysis on corporate dissolution law. There was *no* corporate dissolution (or "winding up") of the medical practice. Articles of dissolution were prepared and Appellants represented to the Keanes that the medical practice would be dissolved; the articles of dissolution, however, were not filed with the South Carolina Secretary of State's office. More to the point, Appellants conceded at trial that there was no dissolution[12] and that Lowcountry Pediatrics should be "considered a going concern."[13] After Appellants' initial efforts to force the Keanes from the medical practice failed (using the ploy of dissolution and

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[12] I would not permit Appellants to resurrect in this court an argument abandoned at trial.

[13] Appellants had the medical practice appraised as a going concern in 1995 when Beaufort Memorial Hospital was considering purchasing Lowcountry Pediatrics. That value, obtained by and for Appellants, included goodwill and was "approximately $145,300 to $860,000."

otherwise), Appellants changed the locks to the office while the Keanes were on vacation. The medical practice continued without missing a beat, as Appellants simply replaced the sign for "Lowcountry Pediatrics" with "Beaufort Pediatrics" and carried on using Lowcountry's office equipment and phone number.

I would honor Appellants' trial stipulation to value the medical practice as a going concern. I would not, as the majority does, value "goodwill in the context of a dissolution of a professional association." There was no dissolution.

I now turn to the majority's rejection of goodwill as a component of the value of the medical practice. As pointed out by the majority, Article 3.1 of the April 22, 1998 amendments to the shareholder agreement made no change in the requirement to include the goodwill of Lowcountry Pediatrics in determining "the fair value of each share of stock." In my view, South Carolina law does not forbid parties from contracting to include goodwill as a component of value.[14] I see nothing in the Donahue v. Donahue[15] line of cases precluding consideration of goodwill when the parties so contract. Donahue and other cases cited by the majority do not address the issue before us: whether parties may contractually bind themselves to include goodwill in the value of a professional association. It may be difficult to place a value on goodwill, but contracting to include goodwill is neither illegal nor contrary to public policy.

Because the shareholder agreement provides a basis for including goodwill in the value of the medical practice, it may appear that the master should have similarly embraced the $15.30 price per share of stock as set forth in the April 1998 amended shareholder

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[14] Perhaps the shareholder agreement, by its terms, may be applied only in the case of a "withdrawing" shareholder, but such an argument was never made by Appellants.

[15] 299 S.C. 353, 384 S.E.2d 741 (1989).

agreement. There are two fundamental reasons why the master did not value the stock at $15.30 per share. First, Appellants have never relied on this figure, neither in the trial court nor this court. Second, when the parties' dispute came to a head in early 2000, Appellants commissioned a new appraisal of the practice—Appellants did not rely on the April 1998 assigned value of $15.30 per share. The result was a "draft" appraisal of $229,500 for the medical practice, or $22.95 per share. Appellants concede this "draft" appraisal "did not include good will [sic]." (Appellants' final brief, 11). Finally, beyond Appellants' "draft" appraisal, as the majority points out, Appellants "provided no other evidence of valuation of the corporate stock during the hearing."

The holding of the majority rests on the principle that "individual professional goodwill" is not a proper component of the value "in the context of a dissolution" of a professional practice. I do not necessarily oppose this principle. To reach this conclusion, however, we must ignore basic rules of issue preservation. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review). I have already noted that Appellants conceded at trial there was no dissolution and that the medical practice should be valued as a going concern.[16] The result the court reaches today (while ostensibly sound in the abstract) rests on issues and arguments that were never presented in the trial. We end up with a different case than the one tried before the master. I would honor our basic issue preservation rules and not permit Appellants to try a different case than was presented in the trial court. I would not punish the Keanes—the Respondents—for failing to rebut in the trial court issues that were conceded and arguments that were never made at trial.[17]

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[16] Appellate counsel did not represent Appellants at trial.

[17] While this court "may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal," Rule 220(c), SCACR, I know of no basis to reverse the trial court when the ground does not appear in the record.

The majority further finds that the Keanes never advanced the theory that they were entitled to goodwill because of its inclusion in the shareholder agreement "either at trial or in their brief before this court." This is not so. The Keanes did, in fact, rely on the agreement's inclusion of goodwill at trial and in brief to this court. For example, Dr. Timothy Keane testified about the shareholder agreement and answered affirmatively when asked if the agreement included "an allocation of Good Will [sic]." The record contains many references to the shareholder agreement and goodwill. In their brief to this court, the Keanes again relied on the language of the agreement, noting it "expressly included good will [sic]." (Respondents' final brief, 7). If it appears the agreement's inclusion of goodwill was not a focus at trial, it should not inure to Appellants' benefit on general issue preservation principles.

The bottom line is that in valuing the Keanes's interest in Lowcountry Pediatrics as a going concern and assessing damages, under the "any evidence" standard of review, there is evidence supporting the master's inclusion of goodwill in the value of the medical practice. Because there is some evidence to support the master's determination of value and award of actual damages, I would affirm the award.

I would also affirm the master's award of punitive damages to the Keanes. My analysis begins with this court's standard of review. We should affirm if there is any evidence in the record to support the master's finding that Appellants' misconduct was willful, wanton, or in reckless disregard of the Keanes's rights. See Jordan, 362 S.C. at 207, 608 S.E.2d at 132 ("[Appellate courts] must affirm the trial court's finding of punitive damages if any evidence reasonably supports the judge's factual findings."). I would find there is evidence in the record to support the master's finding.

Finally, I concur with the majority in result that the master's award of prejudgment interest to the Keanes should be reversed. "The proper test for determining whether prejudgment interest may be

awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, __, 631 S.E.2d 252, 259 (2006). An award of prejudgment interest in this case would be improper because the measure of recovery was "not fixed by conditions existing at the time the claim arose." While the parties understood goodwill was to be included in the value, the varying approaches to goodwill valuation is at odds with the idea of a liquidated claim and a fixed measure of recovery.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Samuel Brownlee and Richard Jolly, Appellants,

v.

South Carolina Department of Health and Environmental Control, Respondent.

Appeal From Charleston County
Mikell R. Scarborough, Special Circuit Court Judge

Opinion No. 4200
Heard September 27, 2006 – Filed January 29, 2007

REVERSED

Christopher M. Holmes, of Mt. Pleasant, for Appellants.

Leslie S. Riley, of Charleston, for Respondent.

KEMMERLIN, Acting Judge: Samuel Brownlee and Richard Jolly (Landowners) appeal from an order of the circuit court affirming

the Coastal Zone Management Appellate Panel's denial of permits to extend docks from their respective properties, across a tributary, to the Bohicket River. In the alternative, Landowners argue the circuit court should have ordered a neighboring dock be moved. We reverse.

PROCEDURAL HISTORY

This case reaches us through a contorted appellate process. It arises from a decision of the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) denying the Landowners permission to build or to extend private recreational docks from their lots to the Bohicket River, sometimes called Bohicket Creek.

The Landowners sought review by the Administrative Law Division (ALJ) where the case was assigned to the Honorable Ralph King Anderson, III. Judge Anderson allowed Edward Mappus to intervene *pro se* and heard the case on November 5, 2002, taking testimony and other evidence. By Orders of March 7, 2003, and April 23, 2003, Judge Anderson overruled the OCRM's determination and directed that permits be issued to Landowners.

On Appeal, The Coastal Zone Management Appellate Panel (CZMAP) reversed the decision of the ALJ and the Landowners appealed to the Court of Common Pleas for Charleston County. There the case was heard by the Honorable Mikell Scarborough, Circuit Judge, who affirmed the CZMAP in an opinion dated October 25, 2004. This appeal by the Landowners followed.

FACTS

The South Carolina Coastal Council in 1989 issued to David and Melissa Case a permit to build from their property to the Bohicket River a seven-hundred-foot walkway across an intertidal mud flat. The Cases thereafter sold their lot and assigned their permit to Lawrence Atkinson who in 1991 built a walkway and dock to the Bohicket River; however, the dock did not comply with the Coastal Council's permit. It

is one hundred thirty feet longer than permitted, and it does not reach the Bohicket at the point allowed by the permit. Instead, the pierhead extends into the main run (the deepest part) of the swash referred to in the record below as a "tributary" of the Bohicket.[1]

Atkinson's dock builder applied for "as built" approval, but in September of 1991, the Coastal Council's Permit Coordinator noted that the dock was not where it should be and that it "was obstructing navigation of [the] tributary."[2] An enforcement action against Atkinson was brought, and in November of 1991, the South Carolina Coastal Council issued its Order providing:

> [T]he 'as built' dock is not in compliance with the issued permit in that it is longer than permitted and is not constructed in the permitted location. The dock extends well channelward of the permitted extension. This extension is not reasonable for the intended use under R.30-12(c). The constructed dock also impedes navigation into the adjoining tributary . . . .

Atkinson failed to comply with the Order, and the dock still stands in defiance of the Order of the Coastal Council, the predecessor of OCRM. Moreover, OCRM has not enforced the removal Order.

Samuel Brownlee and Richard Jolly, the Landowners, are the contiguous owners of property abutting on the tributary. In 2001 they sought permits to build a dock seven hundred fifty feet across the marsh to the Bohicket. To do this, they had to pass over the tributary. OCRM, as the successor to the Coastal Council in permitting

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[1] This body of water actually contributed nothing: it only returned at low tide the water it had received from the Bohicket at high tide. But because the word "tributary" was used in the record, we will call it that.

[2] The walkway was one hundred thirty feet longer than permitted and the pierhead blocked the tributary as hereafter described.

activities,[3] denied the issuance of permits on April 19, 2002, the denial being stated by the Agency in a letter that read in pertinent part:

> OCRM staff has determined that authorizing the dock extension over the tributary would be counter to Regulations. OCRM Regulations specifically state "docks shall not impede navigation and they can only extend to the first navigable creek as evidenced by a significant change in grade." OCRM staff performed a boat trip and found that the creek exhibits significant width (50') and change in grade at your dock that excludes the very nature of a waterbody that is navigable. Furthermore, the creek has an established history of public use as evidenced by the four (4) docks that currently access this creek.

When the case reached Judge Anderson, he tried it and issued his all important decision—all important because in the long history of the case his was the only tribunal where the witnesses actually appeared and gave testimony and offered other evidence. At trial Richard Chinnis, an employee of OCRM, testified that in 1991 he was the Permit coordinator and in that connection was aware of the Atkinson permit and the enforcement action against Atkinson. When shown a plat which depicted the Atkinson dock, the following colloquy appears in the trial transcript:

> Q: And can you identify it on there the tributary that the . . . [Landowners lots] . . . are upon?
>
> A: Well, he's [the maker of the plat] showing what's labeled a nonvegetative intertidal mud flat to the—if you're on the high ground looking at the Bohicket to the immediate right

[3] Under Act 123 of the 1977 General Assembly.

> of the walkway. This is not exactly the configuration of the creek that Mr. Combos has his dock permit on, but I guess that's the creek he's talking about even thought it's labeled . . . [as an] . . . intertidal mud flat, not a creek . . . .[4]

After he visited the site, he wrote Atkinson in 1991, advising him that the dock as built was a hazard to navigation.

Chuck Dawley, a registered land surveyor qualified as an expert in surveying tidal areas, testified that the Atkinson walkway and pierhead crossed the main run of the tributary at its mouth and that on the day of his survey, a windy day, the boat he occupied was "actually being propelled into the Atkinson dock." He stated that a boat once within the tributary could be used when the tide was up, but that there was difficulty in getting in and out of the tributary.

Steven Combos, the owner of a lot which abuts the tributary and the holder of a U.S. Coast Guard certificate to operate fifty gross ton size vessels, was qualified as an expert on safety and navigation and testified that the Atkinson dock obstructs navigation and also presents a hazard to navigation in this area. He testified:

> Well, when you try to traverse, coming or going, from the inlet and you have a north wind or you have an outgoing tide, you have to hug the pilings that are on that dog leg well before you get to his fixed pier because if you don't you'll be on the sandbar to the opposite site, and I've hit the pilings and I've hit that oyster mound plenty of times. Now, in ideal conditions, you know, when you have basically a high tide or no wind, I mean, you know, it is

[4] The insignificance of the tributary is implied by this testimony. It was not sufficiently different from the mud flat crossed as to cause the maker of the plat to chart it.

> possible to get by it. But, like I say, it's my experience that it's far and few between that those opportune times are there.

He stated that it is particularly hazardous because after the Atkinson dock was built, an oyster bank and a sandbar at the mouth of the tributary have grown "tremendously." When Mr. Combos approached OCRM staff, he was told that he and the Landowners would be permitted to build their docks over the tributary to Bohicket Creek, but Edward Mappus, the *pro se* intervener in this case and owner of a lot on the tributary objected. Mr. Combos, who owns the lot next to Mr. Mappus, offered to elevate any portion of his dock and walkway over the tributary and to let Mr. Mappus use his dock, but Mappus would not consent to allowing the proposed walkway and dock to reach the Bohicket River. Judge Anderson found that the Atkinson dock "presents a significant impediment to navigation in the tributary," and he ruled that OCRM must either direct removal of the Atkinson dock or issue the requested permits to the Landowners.

On appeal, OCRM called Mr. Curtis Joyner, its Manager of Critical Area Permitting. He testified that he also visited the site by boat. He made various measurements at a three-quarter tide. He asserted that at that stage of the tide he had no trouble entering the tributary. His visit to the tributary, unlike that of Mr. Dawley, the Registered Land Surveyor, did not occur on a windy day. The substance of his testimony was that he did not feel that the building of the Atkinson dock in the main run of the tributary and the build up of a bar and oyster bank since the dock was placed had made the tributary not-navigable. OCRM reversed the ALJ, finding he erred in his interpretation of 23A S.C. Code Ann. Regs. 30-12(A)(2)(n). This appeal followed.

STANDARD OF REVIEW

Under the Administrative Procedures Act (APA),[5] an Administrative Law Judge presides as the fact finder. See S.C. Code Ann. § 1-23-600(B) (Supp. 2005); Brown v. South Carolina Dept. of Health & Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). A proceeding before the ALJ is in the nature of a de novo hearing, including the presentation of evidence and testimony, rather than an appellate proceeding. See Brown, 348 S.C. at 512, 560 S.E. 2d at 413.

The Appellate Panel reviews the decision of the Administrative Judge in an appellate capacity pursuant to section 1-23-610(D) of the South Carolina Code. S.C. Code Ann § 1-23-610(D) (2005).[6] The Appellate Panel's review is confined to the record before it. The circuit court's review is the same as this Court's under section 1-23-380(A)(6)(2006) of the South Carolina Code. See S.C. Code Ann. § 1-23-380(A)(6)(2005);[7] Brown, 348 S.C. at 512, 560 S.E. 2d at 413. It may reverse a decision of an administrative agency if the agency's findings or conclusions are:

> (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on

[5] S.C. Code Ann. §§ 1-23-10 to -660 (2005 & supp. 2005).

[6] This section was amended by 2006 South Carolina Laws Act 387 (H.B. 3285); however, the applicable language at all times pertinent to the present appeal is found in section 1-23-610(D) (2005).

[7] This section was also amended by 2006 South Carolina Laws Act 387 (H.B. 3285); however, similar to the above, the applicable language all times pertinent to the present appeal is found in section 1-23-380(A)(6)(2005).

> the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(6)(2005); see also Weaver v. South Carolina Coastal Council, 309 S.C. 368, 374, 423 S.E.2d 340, 343 (1992).

LAW/ANALYSIS

In reviewing the final decision of the ALJ pursuant to section 1-23-610(D), the Appellate Panel sits as a quasi-judicial tribunal and is not entitled to make findings of fact. See Brown, 348 S.C. at 520, 560 S.E. 2d at 417. "The [Appellate] Panel can validly reverse the ALJ based on an error of law . . . or if his findings are not supported by substantial evidence." Dorman v. South Carolina Dept of Health & Envt. Control, 350 S.C. 159, 165, 565 S.E.2d 199, 122 (Ct. App. 2002).

Here there is no error of law by the ALJ and his findings are supported by the required substantial evidence. The Appellate Panel found the ALJ misinterpreted what constitutes a navigable waterway under Regulation 30-12(A)(2)(n) and reversed the ALJ's ruling. Specifically, the Appellate Panel determined the ALJ erred in concluding "in order for a waterway to be legally navigable under Regulation 30-12(A)2(2)(n), the navigation of the waterway must not be so impeded as to create a frequent hazard" and in concluding that the tributary "currently is not a navigable waterway." We find this was error.

OCRM took the position that *as a matter of law* the creek was navigable. If that was true, the Landowners could not prevail. But navigability here is a matter of fact, and the facts as found by the ALJ were adverse to OCRM. OCRM claimed the creek was navigable; the Landowners claimed it was not. Although the testimony is in dispute, the facts as found by the ALJ are supported by the evidence. In the words of the ALJ:

> In this case, the area of the tributary in front of the Petitioners' property is currently a defined channel, as evidence by a significant change in grade with the surrounding marsh. However, the mere existence of a defined channel is not enough to satisfy the provisions of Regulation 30-12A(2)(n). Rather, the regulation requires that the waterway also be navigable. Though the tributary itself may be capable of floating watercraft at mid-tide, the facts establish that the mouth of the tributary cannot be consistently navigated safely at the ordinary stages of the tides because of the Atkinson dock. Therefore, I find that it currently is not a navigable waterway.

Further, the ALJ held:

> While the tributary itself can be navigated at mid-tide and higher, the "thread" of the stream goes underneath the Atkinson dock and is an impediment to boaters attempting to enter or exit the tributary. Though it is possible to easily navigate around the dock, as reflected by the experience of the OCRM staff, that ease of navigation is dependant upon unpredictable winds and currents. Therefore, I find that the Atkinson dock as it is currently situated presents a frequent hazard to safe navigation in and out of the tributary at the ordinary tides due to the location of the channel of the tributary under the Atkinson dock, the existence of the sand bar/mud flat on the side of the mouth opposite

> the Atkinson dock, and the prevailing winds and currents.

The ALJ concluded the decision as follows:

> I conclude that in order for a waterway to be legally navigable under Regulation 30-12A(2)(n), the navigation of the waterway must not be so impeded as to create a frequent hazard. Therefore, though the docks would cross a defined channel, they would not cross a navigable waterway and thus would not impede reasonable navigation in the tributary to the detriment of the public and an adjacent property owner . . . [T]he determination that the tributary is not navigable is due to a man-made impediment. If the Atkinson dock is removed from its location in the mouth of the tributary, the impediment would no longer exist and the tributary would be a navigable stream.

This factual finding is consistent with a prior determination of OCRM's predecessor. The Coastal Council, in its Order of November 1991, found that the Atkinson dock as built "impedes navigation." The dock remains to this day in the same place, still impeding navigation.

CZMAP failed to state how the ALJ erred in his interpretation of 23A S.C. Code Ann. Regs. 30-12(A)(2)(n). Rather, the order simply states that the ALJ erred where he concluded: "in order for a waterway to be legally navigable under Regulation 20-12(A)(2)(n), the navigation of the waterway must not be so impeded as to create a frequent hazard," and "the facts establish that the mouth of the tributary cannot be consistently navigated safely at the ordinary stages of the tides because of the Atkinson dock. . . ." Absent explanation of this legal conclusion, or of how the facts in the record supported a finding of "navigability" under the regulation, we can see no error of law meriting

reversal of the ALJ. Further, the ALJ's findings of fact were supported by substantial evidence on the record.

Here OCRM finds itself in the position of trying to pull its chestnuts from a fire it set. It would not face the problem it now faces if it and its predecessor, the Coastal Council, had proceeded to enforce the removal Order directed to Atkinson.

CONCLUSION

Based on the foregoing, we reverse the circuit court's order which affirmed OCRM's denial of the landowner's dock permit. We reinstate the ALJ's order, which remanded the case so OCRM could either remove the Atkinson dock or approve the Landowners' dock permits.

REVERSED.

HEARN, C.J., concurs.

GOOLSBY, J., dissents in a separate opinion.

GOOLSBY, J.: I respectfully dissent.

Samuel Brownlee and Richard Jolly (collectively, "Landowners") brought this action against the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("OCRM"), after it denied their requests for construction permits to extend two private docks to a nearby river. Upon review, an Administrative Law Judge ("ALJ") ordered OCRM to issue the permits. On appeal, the Coastal Zone Management Appellate Panel (the "Appellate Panel") reversed the ALJ and reinstated the denial of the permits. The circuit court affirmed. Landowners appeal. I would affirm.

FACTS

Landowners have residential property on Johns Island that is adjacent to an unnamed tributary of the Bohicket River in Charleston County, South Carolina. Landowners' ground is separated from the Bohicket River by the tributary and an expanse of marsh. Brownlee has a partially constructed dock that was originally permitted to the tributary, but which has not been completed. Jolly has a complete dock that extends to the tributary. This case arises out of Landowners' desire to cross the tributary in order to reach the Bohicket River.

Landowners submitted permit applications to OCRM in 2001 requesting permission to extend their existing docks across the adjacent tributary and into the Bohicket River. Landowners' applications were submitted along with applications filed by two other similarly situated neighbors.

The basis for the permits was Landowners' belief that the location of a neighbor's dock, owned by Lawrence Atkinson and constructed in 1991, was situated near the mouth of the tributary in such a way that the creek was no longer safely navigable.[8] An

[8] By letter dated September 4, 1991, the South Carolina Coastal Council, the predecessor to OCRM, denied an "as-built" permit sought by Atkinson. The Coastal Council explained, "[T]he location of the dock is substantially different from that shown on the original permit" and "this location presents a hazard to navigation both in its proximity to the mouth of the tributary and in its channelward extension." Atkinson was advised in the letter that an enforcement action would be commenced to bring the dock into compliance. On November 22, 1991, the Coastal Council issued an Administrative Order finding the Atkinson dock was not in compliance with the permit and instructing Atkinson to relocate the dock within thirty days. The record does not reflect that any enforcement action was ever taken and the location of the dock has not changed.

upstream neighbor of the Landowners, Edward Mappus, objected to Landowners' applications on the ground extension of the docks would create a barrier to his use of the tributary. Mappus stated he navigates in and out of the tributary for recreational purposes about thirty times per year.

OCRM determined authorization to extend the docks over the tributary would be counter to existing regulations and denied the applications. In letters sent in April 2002 informing Landowners of its decision, OCRM explained:

> OCRM Regulations specifically state, "docks shall not impede navigation and they can only extend to the first navigable creek as evidenced by a significant change in grade." OCRM staff performed a boat trip and found that the creek exhibits significant width (50') and change in grade at your dock that exudes the very nature of a waterbody that is navigable. Furthermore, the creek has an established history of public use as evidenced by the 4 docks that currently access this creek.

OCRM cited several regulations, including former 23A S.C. Code Ann. Regs. 30-12(A)(2)(n) (Supp. 2001),[9] to support the denial of Landowners' applications.

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[9] OCRM cited former Regulation 30-12(A)(2)(n) as follows:

> Docks must extend to the first navigable creek with a defined channel as evidenced by a significant change in grade with the surrounding marsh. Such creeks cannot be bridged in order to obtain access to deeper water. However, pierheads must rest over open water and floating docks which rest upon the

Landowners sought review of OCRM's decision by the South Carolina Administrative Law Judge Division (now the South Carolina Administrative Law Court).[10] A contested case hearing was held in November 2002. In his order dated March 7, 2003, the ALJ "conclude[d] that in order for a waterway to be legally navigable under Regulation 30-12A(2)(n), the navigation of the waterway must not be so impeded as to create a frequent hazard." The ALJ determined the tributary is not a navigable waterway under Regulation 30-12(A)(2)(n) "due to a man-made impediment" – i.e., the Atkinson dock. The ALJ noted, however, that "[i]f the Atkinson dock is removed from its location in the mouth of the tributary, the impediment would no longer exist and the tributary would be navigable." The ALJ reversed the decision of OCRM and remanded the case to OCRM to "either have the Atkinson dock removed from its current location and constructed as it was originally permitted or approve [Landowners'] permits to the Bohicket River."

The ALJ subsequently amended his order on April 23, 2003, after OCRM filed a motion to alter or amend, clarifying that, "[t]hough the waters of the tributary in front of the [Landowners'] property are navigable, the waterway itself is not navigable because the mouth of the tributary cannot safely be entered at the ordinary stages of the tide."

> bottom at normal low tide will not normally be permitted.

The version of the regulation cited by OCRM was in effect at the time the permit applications were considered. The regulation was subsequently amended, however, and is found in its current form at Regulation 30-12(A)(1)(n). See 23A S.C. Code Ann. Regs. 30-12(A)(1)(n) (Supp. 2005).

[10] The name was changed by Act No. 202, effective April 26, 2004. See Civil Action No.: #2001-CP-32-0711 Carolina Water Serv., Inc. v. Lexington County Joint Mun. Water & Sewer Comm'n, 367 S.C. 141, 625 S.E.2d 227 (Ct. App. 2006), overruled on other grounds by Edwards v. SunCom, 369 S.C. 91, 631 S.E.2d 529 (2006).

The judge directed OCRM to grant Landowners' application for permits to extend their docks to the Bohicket River.

OCRM appealed the ALJ's ruling to the Appellate Panel, which reversed the ALJ, finding the judge erred in his conclusions of law. Specifically, the Appellate Panel found the ALJ "erred in his interpretation of 23A S.C. Code Ann. Regs. 30-12(A)(2)(n)" in determining what constituted a navigable waterway.

Landowners thereafter appealed to the circuit court, which affirmed the Appellate Panel. The circuit court concluded the Appellate Panel was "within the scope of [its] authority [in] setting forth [its] own interpretation of the regulations" and noted it "agree[s] with [the Appellate Panel's] interpretation that Reg. 30-12 prohibits the crossing of navigable waterways unless there is an obstruction, which prohibits navigation at most stages of the tide cycle." This appeal followed.

STANDARD OF REVIEW

This case has had a contested case hearing as well as several levels of appellate review. Under the Administrative Procedures Act (APA),[11] the ALJ presided as the fact finder. See S.C. Code Ann. § 1-23-600(B) (Supp. 2005); Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). The proceeding before the ALJ was in the nature of a de novo hearing, including the presentation of evidence and testimony, rather than an appellate proceeding. See Brown, 348 S.C. at 512, 560 S.E.2d at 413.

The Appellate Panel reviewed the decision of the ALJ in an appellate capacity pursuant to section 1-23-610(D) of the South

[11] S.C. Code Ann. §§ 1-23-10 to -660 (2005 & Supp. 2005).

Carolina Code. S.C. Code Ann. § 1-23-610(D) (2005).[12] The Appellate Panel's review was confined to the record before it. Id.

The circuit court's review is the same as this Court's under section 1-23-380(A)(6) of the South Carolina Code. See S.C. Code Ann. § 1-23-380(A)(6) (2005)[13]; Brown, 348 S.C. at 512, 560 S.E.2d at 413. This Court may reverse a decision of an administrative agency if the agency's findings or conclusions are "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(A)(6) (2005); see also Weaver v. South Carolina Coastal Council, 309 S.C. 368, 374, 423 S.E.2d 340, 343 (1992).

LAW/ANALYSIS

I. Independent Fact Finding

Landowners contend the circuit court erred by failing to reverse the Appellate Panel for improperly engaging in independent fact finding and for characterizing the alleged fact finding as the correction of "legal error."

In reviewing the final decision of the ALJ pursuant to section 1-23-610(D), the Appellate Panel sits as a quasi-judicial tribunal and is

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[12] This section was amended by 2006 South Carolina Laws Act 387 (H.B. 3285); however, the applicable language at all times pertinent to the present appeal is found in section 1-23-610(D) (2005).

[13] This section was also amended by 2006 South Carolina Laws Act 387 (H.B. 3285); however, similar to the above, the applicable language at all times pertinent to the present appeal is found in section 1-23-380(A)(6) (2005).

not entitled to make findings of fact. See Brown, 348 S.C. at 520, 560 S.E.2d at 417. Under this standard, "[t]he [Appellate] Panel can validly reverse the ALJ based on an error of law . . . or if his findings are not supported by substantial evidence." Dorman v. South Carolina Dep't of Health & Envtl. Control, 350 S.C. 159, 165, 565 S.E.2d 119, 122 (Ct. App. 2002).

The evidence presented at the contested case hearing before the ALJ indicates navigation between the tributary and the Bohicket River was possible, but made more difficult by the Atkinson dock and other dangerous conditions. Based on this evidence, the ALJ initially found the tributary was not navigable, although the tributary would be navigable if the Atkinson dock were removed. In his final order upon OCRM's motion to alter or amend, the ALJ found: "Though the waters of the tributary in front of the [Landowners'] property are navigable, the waterway itself is not navigable because the mouth of the tributary cannot safely be entered at the ordinary stages of the tide." The ALJ ordered OCRM to issue the permits.

The Appellate Panel found the ALJ misinterpreted what constitutes a navigable waterway under Regulation 30-12(A)(2)(n) and reversed the ALJ's ruling. Specifically, the Appellate Panel determined the ALJ erred in concluding "in order for a waterway to be legally navigable under Regulation 30-12(A)(2)(n), the navigation of the waterway must not be so impeded as to create a frequent hazard" and in concluding the tributary "currently is not a navigable waterway" based on the fact "that the mouth of the tributary cannot be consistently navigated safely at the ordinary stages of the tides because of the Atkinson dock."

I agree with the Appellate Panel's determination that the ALJ erred in his interpretation of what constitutes a navigable waterway under the aforementioned regulation. The mere fact that an artificial structure, such as Atkinson's dock, impedes navigation does not make the waterway nonnavigable. I find no compelling reason to reverse the agency's interpretation of its own regulation. Accordingly, the circuit court did not err in upholding the Appellate Panel's decision. See

South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."); Dorman, 350 S.C. at 163-65, 565 S.E.2d at 121-22 (holding the portion of the Appellate Panel's order "on OCRM policy underlying navigation and construing its regulation was proper"; the Appellate Panel had found the ALJ misinterpreted "navigation" in the agency regulations to include disputes between neighbors or conflict with nearby docks, whereas OCRM had interpreted its own regulations and determined that any navigational issues between docks is a private property owner issue); 65 C.J.S. Navigable Waters § 8 (2000) ("As a general rule a stream or other body of water is not rendered nonnavigable because of occasional difficulties attending navigation. . . . So, a stream may be navigable despite the obstruction of falls, rapids, sand bars, carries, or shifting currents. Artificial obstructions which are capable of being abated by the due exercise of public authority do not prevent a stream from being regarded as navigable . . . ." (footnotes omitted)).

II. Equal Protection

Landowners additionally assert the circuit court erred in failing to find OCRM's failure to grant their application for dock permits denied them equal protection under the law. See U.S. Const. Amend. 14, § 1; S.C. Const. Art. 1, § 3. Landowners maintain other similarly situated persons in the vicinity and elsewhere have been granted the relief they seek.

"In reviewing the final decision of an administrative agency, the circuit court sits as an appellate court." Brown, 348 S.C. at 519, 560 S.E.2d at 417. "Consequently, issues not raised to and ruled on by the agency are not preserved for judicial consideration." Id. "Likewise, issues not raised to and ruled on by the ALJ are not preserved for appellate consideration." Id. "While it is true that ALJs cannot rule on a facial challenge to the constitutionality of a regulation or statute,

ALJs can rule on whether a law as applied violates constitutional rights." Dorman, 350 S.C. at 171, 565 S.E.2d at 126.

In this case, the ALJ did not make a specific finding in his original order as to whether OCRM's denial of the dock permits constituted a violation of Landowners' equal protection rights. Moreover, this issue was neither raised in a post-trial motion nor considered in the ALJ's post-trial order. In addition, this issue was neither raised to nor ruled upon by the Appellate Panel. In fact, the record indicates that the issue concerning the violation of Landowners' equal protection rights was expressly raised for the first time to the circuit court. The issue, therefore, of whether Landowners' equal protection rights were violated is not preserved for appellate review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 424-25, 604 S.E.2d 704, 709 (Ct. App. 2004) (determining an equal protection claim not raised to and ruled upon by the ALJ was not preserved for appellate review); see also State v. Sowell, 370 S.C. 330, 635 S.E.2d 81 (2006) (holding the appellate court erred in deciding an issue not raised to and ruled upon by the trial judge); Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (stating an issue not expressly ruled upon by the circuit court was not properly before the appellate court).

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Estate of Monty Austin Adair, by his Personal Representative, Joyce Ann Kephart-Adair, and Joyce Ann Kephart-Adair, personally, Appellant,

v.

L-J, Inc., a South Carolina Corporation, and David Neal Jordan, Respondents.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 4201
Submitted January 1, 2007 – Filed January 29, 2007

AFFIRMED

Walter Bilbro, Jr., of Charleston, for Appellant.

Elizabeth F. Bailey, Stephen E. Darling, and Anne L. Ross, all of Charleston, for Respondents.

KITTREDGE, J.: On the night of June 8, 2001, Monty Austin Adair and three friends purchased beer at a local convenience store. The group proceeded in Adair's Jeep to a large tract of undeveloped commercial property known as the "Sand Pits" to go "mudding" (off-road driving). The Sand Pits is owned by L-J, Inc. and David Neal Jordan ("Respondents"). While on the Sand Pits, Adair decided to drive the Jeep up a steep embankment. When Adair attempted to maneuver the Jeep down the embankment, an accident occurred, resulting in Adair's death. Adair had a blood-alcohol level of .252%.

Adair's Estate brought a wrongful death suit against Respondents, claiming Respondents—as owners of the Sand Pits—were responsible for Adair's death. Respondents moved the circuit court for summary judgment, which the circuit court granted, holding Adair was a trespasser on Respondents' property. The Estate appeals. We affirm.[1]

I.

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the circuit court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). On appeal, when factual matters are in dispute, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. Id.

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

II.

Before the accident at issue in this case, Respondents were unrelenting in their efforts to stop trespasser incursions onto their property. On the perimeter of the Sand Pits, Respondents posted "no trespassing signs." At the entrances to the Sand Pits, Respondents dug ditches, built berms, and erected gates. Respondents also enlisted local law enforcement to assist them in their efforts to keep trespassers off the Sand Pits. Despite these efforts, however, trespassers continued to come onto the Sand Pits to dump trash or, as in this case, go joyriding.

On the night of June 8, 2001, Adair and three friends—Mark Cook, Michael Martin, and Duane Sweat—purchased beer and entered Respondents' property to go "mudding" in Adair's Jeep. In the Sand Pits' interior, the men took a path that "grew smaller and smaller" until they encountered a steep embankment. Although Adair's friends did not think the Jeep could get up the embankment, Adair, undeterred, resolved to drive the Jeep to the top. At this point, Adair's friends got out of the Jeep and Cook illuminated the way up the embankment with a flashlight.

Adair successfully negotiated the embankment and, once there, exited the Jeep and spoke with his friends. Adair then decided to press onward, this time with Martin and Sweat as passengers. Cook walked in front of the Jeep with a flashlight. As Adair tried to maneuver the Jeep on the steep embankment, it rolled over, tumbled down the embankment, hit a tree, and caught fire. Martin and Sweat escaped, but Adair was not so fortunate; he was pinned inside the Jeep and died later that night. As noted, an analysis revealed that Adair had a blood alcohol level of .252%, a level well beyond the concentration necessary for an inference that Adair was under the influence of alcohol at the time of the accident. See S.C. Code Ann. § 56-5-2950(b)(3) (Supp. 2001).

III.

Although the Estate raises numerous issues on appeal, the determinative issue is whether Adair was a trespasser on Respondents' property. We find Adair was a trespasser as a matter of law, and affirm the circuit court's order.

A.

"South Carolina recognizes four general classifications of persons who come on premises: adult trespassers, invitees, licensees, and children." Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). An adult trespasser is "a person whose presence is neither invited nor suffered" while a licensee is "a person not invited, but whose presence is suffered." Id.

Adair's presence on Respondents' property was neither invited nor suffered: Respondents did not give Adair permission to go "mudding" on their property nor did they suffer his presence. Although Respondents knew trespassers came onto the Sand Pits—as the area was known for off-roading and other unwelcomed activities, like trash-dumping—Respondents did everything they reasonably could to keep trespassers off their property. The record is replete with Respondents' longstanding and unrelenting efforts to keep trespassers like Adair off their property.

Respondents posted "no trespassing" signs on the perimeter of their property.[2] When Respondents learned that "no trespassing" signs had been

[2] It is unclear whether a "no trespassing" sign was posted on the night of Adair's death. Even assuming trespassers removed the "no trespassing" signage prior to the evening of June 8, 2001, that fact would in no manner create a *genuine* issue of material fact precluding the entry of summary judgment in this case. We recognize that whether a person's presence on the property of another is "invited" or "suffered" may often present a jury

removed, they posted new signs. Respondents also blocked off entranceways to their property with gates, ditches, and dirt berms.

Respondents also implored local law enforcement to help keep trespassers off their property. In April 2001, just a few months before Adair's death, Respondents wrote the following letter to the North Charleston Police Department:

> [W]e would appreciate your staff arresting and prosecuting anyone trespassing on [the Sand Pits]. We put up ["]no trespassing["] signs approximately twice a year, and generally within one to three months they are torn down. After the signs have been placed people continue to trespass and dump debris on this property. We have also placed gates and dug ditches to try to keep people out, but as you probably know, nothing seems to help. Please let us know if we can help you in any way to keep these people and dumpers off this property.

Respondents even hired a caretaker to live on the Sand Pits for the purpose of preventing and deterring trespassers. The City of North Charleston objected, however, because the caretaker's residence violated a zoning ordinance. In a letter addressed to Respondents and dated May 10, 2001 (less than a month before Adair's death), the City of North Charleston threatened Respondents with "legal action," noting "[i]t has come to [our] attention that a letter was sent to you in 1999 advising you that no one is allowed to live on this property." Respondents' reply, dated May 15, 2001, illustrates their diligence (and exasperation) in preventing and deterring trespassers:

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question. In this case, however, the evidence points unmistakably to one conclusion—the landowners did not invite Adair on their property nor did they suffer his presence or any other trespasser's presence. If Respondents' actions are not sufficient as a matter of law, the law would likely provide no landowner protection from such claims.

> I don't know if you are familiar with all of the problems we have had on [the Sand Pits], such as people trespassing, dumping debris, stripping and burning stolen vehicles, joy ridding [sic] and parking on the property. This has been going on for years. Every time we put up gates and/or no trespassing signs, they are torn down. Enclosed you will find a copy of a letter to [the North Charleston Police Department] concerning the problems with this property.
>
> At the present time, we have an employee of this company who lives on the property and acts as a caretaker of the property . . . trying to keep people out. I am afraid that if this person is removed from the property the dumping and trespassing will only get worse. This is my dilemma and it's a catch 22, darn if I do and darn if I don't.
>
> I would appreciate you advising me on what to do in this situation. I realize what the law is, but how do I keep people from dumping on my property[?] This is especially difficult, since I am [an] absentee owner[;] our office is in Columbia, S.C.

(ellipsis in original).

In light of Respondents' persistent and diligent efforts to keep trespassers from coming onto their property, the trial court correctly held that as a matter of law Respondents did not suffer or acquiesce to the presence of trespassers on their property.[3] Adair was a trespasser as a matter of law.

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[3] We reject the Estate's argument, citing Jones v. Atlanta-Charlotte Air Line Railway Company, 218 S.C. 537, 63 S.E.2d 476 (1951), that Adair was an imputed licensee rather than a trespasser. In Jones, the supreme court noted

Because Adair was a trespasser, Respondents owed him no duty except the duty not to do him willful or wanton injury. Nettles v. Your Ice Co., 191 S.C. 429, 436, 4 S.E.2d 797, 799 (1939) (holding a landowner "owes no duty to a trespasser . . . except to do him no willful or wanton injury."). In a light most favorable to the Estate, there is no evidence in the record indicating Respondents willfully or wantonly tried to injure Adair or any other trespasser on their property. Accordingly, the circuit court correctly held Respondents did not breach a duty of care it owed Adair.

B.

The balance of the Estate's assignments of error are either not prejudicial to the Estate or manifestly without merit. Owners Ins. Co. v. Clayton, 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005) ("Error without prejudice does not warrant reversal."); Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

IV.

We join the circuit court in holding as a matter of law that Adair and his friends were trespassers. In the light most favorable to the Estate, the evidence demonstrates Respondents neither invited nor suffered Adair's or any other trespasser's presence on their property. In fact, the only reasonable inference that can be gleaned from the record is that Respondents persistently

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"the uncontradicted evidence showed that there were well defined paths leading down to and along defendant's tracks, and that for more than twenty years the public at large had been accustomed to use these paths for pedestrian purposes, with the acquiescence of the defendants." Id. at 541, 63 S.E.2d at 477. Here, Respondents did not in any way acquiescence to the presence of the public on their property; rather, Respondents took repeated affirmative steps to prevent the public from coming onto their property. Thus, the circuit court did not err in finding Adair was not an imputed licensee.

and diligently tried to keep trespassers off their property. It is difficult to imagine what else Respondents could have done to deter trespassers. The order of the trial court granting Respondents' summary judgment is

AFFIRMED.

HEARN, C.J., and WILLIAMS, J., concur.