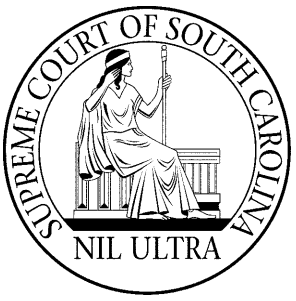

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 28, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Utilities Services of South Carolina, Inc., Appellant,

v.

The South Carolina Office of Regulatory Staff, Respondent.

Appeal from the Public Service Commission of South Carolina

Opinion No. 26952
Heard November 4, 2010 – Filed March 28, 2011

REVERSED AND REMANDED

Mitchell Willoughby, John M. S. Hoefer, and Benjamin P. Mustian, all of Willoughby & Hoefer, of Columbia, for Appellant.

Florence P. Belser, Jeffrey M. Nelson, and Nanette S. Edwards, all of Columbia, for Respondent.

JUSTICE KITTREDGE: This appeal from the denial of an application for a rate increase presents us with several questions about the proper role of the Public Service Commission ("PSC") following 2004 statutory amendments altering the structure and operation of the PSC. Of particular significance are the respective roles and responsibilities of the PSC and the Office of Regulatory Staff ("ORS"), which was created by the 2004 amendments. We hold the PSC retains its fundamental role as fact-finder. In this case, the PSC acted well within its rights in requesting additional information regarding Appellant's expenditures, even when those expenditures were not initially challenged by ORS. Nevertheless, because we find the PSC's evaluation of Appellant's rate application was affected by several errors of law, we reverse and remand for further proceedings.[1]

I.

Appellant Utilities Services of South Carolina, Inc. ("Utility") was established in 2002 as a wholly owned subsidiary of Utilities, Inc. ("UI"). Utility supplies water to over 6,800 customers in eighty-one South Carolina neighborhoods and wastewater services to over 370 customers in four neighborhoods. In some of these neighborhoods, Utility supplies water that it purchases in bulk from other water systems. Customers in these neighborhoods are known as "distribution-only" customers.

In January 2006, the PSC approved an increase to Utility's rates. This rate schedule distinguished between regular residential customers and distribution-only customers. Distribution-only customers were charged a basic facilities charge, a "commodity charge" that varied based on usage, and a pro rata portion of the cost to Utility for its purchase of bulk water. The regular residential customers were charged a basic facilities charge and a higher commodity charge.

[1] ORS is nominally the Respondent, but it joins Appellant in seeking a reversal. The actions of the PSC have not been defended on appeal.

In August 2007, Utility again applied for a rate increase. Utility requested the PSC use the "rate of return on rate base"[2] method to determine the reasonableness of its proposed rates. Utility claimed it had invested three million dollars in "plant additions"[3] since its previous rate case, resulting in a rate base of approximately 9.7 million dollars.[4] To achieve its desired rate of return on rate base, Utility requested an increase to the basic facilities charge and to the commodity charge for both regular residential and distribution-only customers.

The PSC held public hearings regarding the 2007 application in York, Anderson, and Richland Counties. At the public hearings, Utility customers from seven neighborhoods testified to various problems with the quality of their water. The main complaints were that Utility's water tasted and/or smelled bad, caused damage to fixtures and appliances, and did not adequately clean clothes. One customer testified she had received notice from Utility that the water system in her neighborhood contained elevated levels of lead. Several customers testified that, because of the poor quality of Utility's water, they invested in water softeners and water filters or drank bottled water.

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[2] "The 'rate base' is the amount of investment on which a regulated public utility is entitled to an opportunity to earn a fair and reasonable return." Southern Bell Telephone & Telegraph Co. v. Public Service Comm'n of S.C., 270 S.C. 590, 600, 244 S.E.2d 278, 283 (1978). It "represents the total investment in, or the fair value of, the used and useful property which it necessarily devotes to rendering the regulated services." Id. The rate of return on rate base is "[d]etermined by dividing the net income for return by the rate base." Heater of Seabrook, Inc. v. Public Service Comm'n of S.C. (Heater of Seabrook II), 332 S.C. 20, 24 n.2, 503 S.E.2d 739, 741 n.2 (1998).

[3] In the context of water services, the term "plant" means "[a]ll facilities owned by the utility for the collection, production, purification, storage, transmission, metering, and distribution of potable water." 26 S.C. Code Ann. Regs. 103-702.16 (1976 & Supp. 2010). In the context of sewerage services, the term "plant" includes a plant and any other property owned by a utility and "used in its business operations of providing sewerage collection and/or sewerage disposal service to its customers." 26 S.C. Code Ann. Regs. 103-502.13 (1976 & Supp. 2010).

[4] Utility presented testimony that its current rate of return on rate base is 1.59%. The rate of return on rate base approved in Utility's 2006 rate case was 8.37%.

In light of these concerns, one customer questioned the fairness of Utility's request for an increase to its basic facilities charge. She noted that, because the basic facilities charge was a flat rate charge, Utility's revenues would increase even if its customers avoided using its water.

In addition, customers from eleven neighborhoods testified they had not seen any capital improvements and/or improvements in water quality since the last rate increase. In fact, one customer testified the quality of Utility's water service had declined.

Bruce T. Haas, regional director of operations for UI, testified that Utility has a "capital improvements program" and "ongoing operational programs such as routine testing and periodic water main flushing to improve water quality." Haas listed the types of capital improvements Utility had made since it acquired its water systems in 2002, but he did not specify which of these improvements had occurred since the last rate increase.

The PSC asked Haas whether Utility planned any capital improvements in the neighborhoods the customers complained about. Haas was able to name some programs in one neighborhood, but he did not provide specific information about any other neighborhood. Rather, he reiterated the general types of upgrades Utility had implemented "since [it] took over," and stated Utility upgraded "nearly every single facility that [it] had."[5]

In addition to its questions regarding capital improvements, the PSC asked Utility about the reasonableness of payments Utility made to its affiliate, Bio-Tech. Bio-Tech is a wholly owned subsidiary of UI that provides sludge hauling services, wastewater plant maintenance, and construction services. A Utility witness testified that Bio-Tech charged the same price to all of its customers, regardless of whether they were affiliates.

[5] Haas also commented that customers might not be aware of the improvements Utility made in their neighborhoods. We note, however, that Haas testified Utility had "an automatic message delivery system" that provided "specific information to customers in a particular geographic area or subdivision, advising them of upgrades or repairs being done to their system."

Thus, she contended, Bio-Tech's prices were market rates. However, she was unable to provide the PSC with information about whether Utility had compared Bio-Tech's prices to the prices of Bio-Tech's competitors.

Representatives of ORS then testified, and they verified that Utility had made at least some capital improvements following its last rate case. However, ORS also suggested several adjustments to Utility's figures. Thus, ORS recommended the PSC find Utility had a rate base of 9.14 million dollars.[6]

The PSC denied Utility's application for a rate increase. It found the customer complaints "raise[d] questions as to where the capital improvements and on-going operations programs testified to by the Company witness were implemented, and whether they were effective." It concluded that "[w]ithout more specificity on the part of the Company," it could not "credit the Company with the capital improvements and on-going operations that it purports to have made." Moreover, it found that because Utility "failed to identify for the most part where the [claimed] expenditures were made, or how such expenditures contributed to improved service[,]" it could not determine whether those expenditures "were appropriate and whether [they] justified the imposition of a rate increase." In addition, the PSC found Utility "failed to provide required information regarding affiliate transactions with . . . Bio-Tech." Utility appeals.

II.

The PSC's ratemaking decisions are entitled to deference, and will be affirmed if supported by substantial evidence. S.C. Energy Users Comm. v. S.C. Public Service Comm'n, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010). "Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." Porter v. S.C. Public Service Comm'n, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). "We will not substitute our judgment for that of the PSC where there is room for a difference of intelligent opinion." Kiawah Property

[6] ORS calculated Utility's current rate of return on rate base as 2.85%.

Owners Group v. Public Service Comm'n of S.C., 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004). However, we "may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the [PSC's] findings, inferences, conclusions, or decisions are: . . . (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; [or] (d) affected by other error of law." S.C. Code Ann. § 1-23-380(5) (2005 & Supp. 2010).

III.

A fundamental question presented by both Utility and ORS is this: can the PSC determine that a regulated utility has failed to meet its burden to prove expenditures when ORS has not challenged the expenditures? The answer to this question requires us to examine the nature of the PSC.

Prior to 2004, the PSC was empowered to "supervise and regulate the rates and service of every public utility . . . and to fix just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed or observed and followed by every public utility in this State." S.C. Code Ann. § 58-3-140 (1976). In addition, the PSC was empowered to "upon its own motion, institute an inquiry into any subject matter within its jurisdiction." S.C. Code Ann. § 58-5-280 (1976). The PSC could request detailed reports from any public utility regarding its "business affairs or any matter pertaining thereto" and conduct "examination[s] of the books, papers, accounts and records" of utilities if "necessary to procure the information required." S.C. Code Ann. § 58-3-190 (1976); S.C. Code Ann. § 58-3-210 (1976). When a utility sought to change its rates, the PSC could "make such investigations as in its opinion the public interest require[d]." S.C. Code Ann. § 58-5-250 (1976). The PSC could "employ . . . technical, administrative or clerical staff or other aid" to assist in carrying out these duties. S.C. Code Ann. § 58-3-60 (1976). In short, the PSC performed both investigative and adjudicative functions.

In 2004, the General Assembly eliminated the PSC from the roles of investigator and auditor, and it reassigned these roles to a newly-created

agency, ORS. S.C. Code Ann. § 58-3-60(D) (1976 & Supp. 2010) ("The commission shall not inspect, audit, or examine public utilities. The inspection, auditing, and examination of public utilities is solely the responsibility of the Office of Regulatory Staff."). ORS now has the power to review and investigate rate applications, and to make recommendations to the PSC. See S.C. Code Ann. § 58-4-50(A)(1) (Supp. 2010). ORS also has the duty to "represent the public interest in commission proceedings . . . ." Id. § 58-4-50(A)(4).

The PSC's powers with regard to ratemaking were not eliminated, however. The PSC retained its powers "to supervise and regulate" rates and service and "to fix just and reasonable standards, classifications, regulations, practices, and measurements of service." S.C. Code Ann. § 58-3-140(A) (1976 & Supp. 2010). Pursuant to these powers, the PSC is entitled to create incentives for utilities to improve their business practices. Accordingly, the PSC may determine that some portion of an expense actually incurred by a utility should not be passed on to consumers. Patton v. S.C. Public Service Comm'n, 280 S.C. 288, 292, 312 S.E.2d 257, 259-60 (1984); see Southern Bell Telephone, 270 S.C. at 599, 244 S.E.2d at 283 (finding it was not improper for the PSC to consider whether a utility could undertake measures to cut costs and improve efficiency).

When presiding over a ratemaking proceeding, the PSC takes on a quasi-judicial role. See S.C. Code Ann. § 58-3-30(B) (1976 & Supp. 2010) ("The commissioners . . . are bound by the Code of Judicial Conduct . . . ."); S.C. Code Ann. § 58-3-260 (Supp. 2010) (limiting *ex parte* communications between the PSC and any party to a "matter to be adjudicated, decided, or arbitrated" by the PSC). Nevertheless, it may request ORS conduct an investigation of a rate application:

> The commission has the authority to **initiate inspections, audits, and examinations** of all persons and entities subject to its jurisdiction. . . . Notwithstanding any other provision of law, the

> commission **must not conduct** such inspections, audits, and examinations itself, but must request that they be conducted by the Office of Regulatory Staff pursuant to Section 58-4-50(A)(2).

S.C. Code Ann. § 58-3-200 (1976 & Supp. 2010) (emphasis added). South Carolina Code section 58-4-50(A)(2) provides:

> [W]hen considered necessary by the Executive Director of [ORS] and in the public interest, [ORS has the duty and responsibility to] make inspections, audits, and examinations of public utilities regarding matters within the jurisdiction of the commission. **The regulatory staff has sole responsibility for this duty but shall also make such inspections, audits, or examinations of public utilities as requested by the commission**.

(Emphasis added). See also S.C. Code Ann. § 58-4-50(B) (providing, in relevant part, that "upon request, the Executive Director of [ORS] must employ the resources of the regulatory staff to furnish to the commission . . . such information and reports . . . and provide other assistance as may reasonably be required in order to supervise and control the public utilities of the State . . . .").

Thus, the PSC's new role in ratemaking proceedings conforms to the general principle that the roles of investigator and adjudicator should be performed by separate persons. Cf. S.C. Const. art I, § 22 ("[N]or shall [a person] be subject to the same person for both prosecution and adjudication . . . ."); Ross v. Medical University of S.C., 328 S.C. 51, 69-70, 492 S.E.2d 62, 72 (1997) (explaining that article 1, section 22 aims to prevent an adjudicator from becoming impartial by gathering "*ex parte* information as a result of prior investigation").

Considering these authorities together, we hold the PSC is the ultimate fact-finder in a ratemaking application. It has the power to independently determine whether an applicant has met its burden of proof. The PSC is not bound by ORS's determination that an expenditure was reasonable and proper

for inclusion in a rate application. The PSC may determine—independent of any party—that an expenditure is suspect and requires further scrutiny. To accept the contention that the PSC is bound by the recommendations of ORS would place ORS in the same untenable dual investigative–adjudicative role that challenged the PSC prior to the 2004 amendments.

Having established that the PSC was entitled to make an independent determination about whether Utility met its burden of proof, we turn now to a discussion of the contours of that burden.

IV.

Utility has argued the PSC acted arbitrarily and in conflict with its prior practice when it required neighborhood-by-neighborhood data in response to customer complaints. In addition, Utility argues the PSC erred in requiring additional data to support its payments to Bio-Tech. As explained above, the PSC was entitled to request more information about Utility's expenditures before ruling on whether those expenditures were properly included in the rate application.[7]

Nevertheless, we hold the PSC committed three errors of law in determining Utility failed to meet its burden of proof. First, we hold the PSC was required to provide Utility with a meaningful opportunity to supplement its application with the information the PSC requested. Second, we hold the PSC erred in failing to accord Utility the presumption of reasonableness applicable to its expenses. Finally, we hold the PSC erred in denying the rate application as a whole where only *some* of Utility's expenditures were brought into question.

[7] In addition, we reject Utility's argument that a request for neighborhood-by-neighborhood data was unprecedented. See In re Carolina Water Service, Inc., No. 2006-92-WS, 2007 WL 4944726, at *2 (S.C.P.S.C. Nov. 19, 2007) (in which the PSC requested a UI affiliate provide "a listing of each subdivision served . . . and complete financial data for its individual systems").

A. Meaningful Opportunity to Respond

Consistent with its obligation to provide Utility an opportunity to achieve a reasonable return,[8] the PSC was obligated to accord Utility a meaningful opportunity to rebut the evidence presented in opposition to its proposed rates. Cf. 26 S.C. Code Ann. Regs. 103-845(C) (Supp. 2010) ("[T]he Commission shall require any party and the Office of Regulatory Staff to file copies of testimony and exhibits and serve them on all other parties of record within a specified time in advance of the hearing."). Here, the PSC denied Utility's application for a rate increase on the ground that Utility failed to meet its burden of proof. However, Utility supplied the information expressly required by the PSC's regulations, and the PSC did not give Utility a meaningful opportunity to provide the additional information the PSC determined was necessary. This was an error of law.

The information an applicant must provide in support of its proposed rate increase is set forth by regulation. These regulations do not explicitly require neighborhood-by-neighborhood data, nor do they require any particular type of data regarding the reasonableness of payments to an affiliated entity. See 26 S.C. Code Ann. Regs. 103-512.4(A) (1976 & Supp. 2010) (requirements for wastewater utilities seeking an increase in existing rate); 26 S.C. Code Ann. Regs. 103-712(4)(A) (1976 & Supp. 2010) (requirements for water utilities seeking an increase in existing rates); 26 S.C. Code Ann. Regs. 103-823 (Supp. 2010) (applications in general).

Consequently, Utility had no notice the PSC would require additional information about specific neighborhoods until the PSC requested that

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[8] Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of W. Va., 262 U.S. 679, 690 (1923) (explaining that where the rates charged by a public utility company "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service . . . their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment"); Southern Bell Telephone, 270 S.C. at 595-97, 600, 244 S.E.2d at 281, 283 (recognizing a regulated public utility is entitled to "an opportunity to earn a fair and reasonable return" on its investments).

information at a public hearing. Under those circumstances, Utility was able to give only generalized answers and answers from memory, rather than the targeted and specific data the PSC seems to have desired. Similarly, while Utility could expect the PSC to examine the reasonableness of its transactions with an affiliate,[9] it had no notice prior to its hearing that the PSC would require information about the prices charged by Bio-Tech's competitors.

The PSC was entitled to request this information pursuant to its role as fact-finder and pursuant to regulation. See 26 S.C. Code Ann. Regs. 103-512.4(A)(16) (requiring an applicant for a rate increase to include with its application "[a]ny other pertinent or relevant information determined necessary by the commission."); 26 S.C. Code Ann. Regs. 103-712(4)(A)(16) (same). Nevertheless, where the PSC seeks additional information beyond that which its regulations explicitly require, it must give an applicant an appropriate opportunity to gather data in response.

Because the PSC did not give Utility a fair opportunity to respond in this case, we reverse and remand for further proceedings. Cf. Hilton Head Plantation Utilities, Inc. v. Public Service Comm'n of S.C., 312 S.C. 448, 449-52, 441 S.E.2d 321, 322-23 (1994) (after finding the PSC did not err in denying a rate increase based on the lack of evidence before it, remanding to provide the utility "an ample opportunity to explain its expenditures and justify them").

[9] See Kiawah Property Owners Group v. Public Service Comm'n of S.C., 338 S.C. 92, 95, 525 S.E.2d 863, 864 (1999) (holding the PSC is required to "review and analyze . . . intercompany dealings and determine if they are reasonable" but that such dealings are not required to "meet a level of review stricter than the other analysis done by the PSC.").

B. Presumption of Reasonableness

Utility contends that it could satisfy its burden of proof simply by comparing its current test year[10] expenses with the expenses from the test year for its previous rate case. We disagree.

Utility is correct that it was entitled to a presumption that its expenditures were reasonable and incurred in good faith, and therefore, a showing that its expenses had increased since its last rate case *could* satisfy its burden of proof. Nevertheless, the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. In those circumstances, the burden remains on the utility to demonstrate the reasonableness of its costs. It seems to us that Utility wants the presumption of reasonableness to be dispositive. In Hamm, 309 S.C. at 286-87, 422 S.E.2d at 112-13, we stated:

> Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith. This presumption does not shift the burden of persuasion but shifts the burden of production **on to the Commission or other contesting party** to demonstrate a tenable basis for raising the specter of imprudence. This evidence may be provided . . . through the Commission's broad investigatory powers. **The ultimate burden of showing every reasonable effort to minimize . . . costs remains on the utility**.

(Emphasis added) (citations omitted). Hamm was decided prior to the creation of ORS and the accompanying change in the role of the PSC. It holds true, however, that an investigation by ORS might "rais[e] the specter

[10] A "test year" is used to provide a "forecast of [a] utility's rate base . . . and expenses [for] the near future." Hamm v. S.C. Public Service Comm'n, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992). The assets, revenues, and expenses in the test year are adjusted to reflect any "known and measureable changes" at the time of the hearing. Southern Bell Telephone, 270 S.C. at 602, 244 S.E.2d at 284.

of imprudence." And, as we have discussed, the PSC may initiate an ORS investigation. Thus, if an investigation initiated by ORS *or* by the PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures.

Utility next argues, based on Hamm, that testimony by **non-party** customers cannot overcome the presumption of reasonableness.[11] Non-party members of the public (also known as "protestants") are entitled to voice an objection to proposed rates by providing sworn testimony at a public hearing, and this sworn testimony becomes part of the formal record before the PSC. 26 S.C. Code Ann. Regs. 103-804(E), (R) (1976 & Supp. 2010); 26 S.C. Code Ann. Regs. 103-827 (Supp. 2010). Protestants are permitted to object "on the ground of private or public interest." 26 S.C. Code Ann. Regs. 103-804(R).

In Hilton Head, 312 S.C. at 449-51, 441 S.E.2d at 322-23, we upheld the PSC's decision to deny a rate increase on the ground that a non-party protestant had questioned whether the utility's transactions with its corporate parent were conducted at arm's length, and the utility had failed to provide an adequate response. Though Hilton Head concerned affiliate expenses, and therefore, no presumption of reasonableness applied,[12] our opinion did not so limit the PSC's ability to consider non-party testimony. Rather, we held the PSC "had the duty to believe or disbelieve [the] evidence submitted." Id. at 451, 441 S.E.2d at 323.

Because the PSC is both entitled and required to consider the evidence presented to it on the formal record, we hold the PSC is entitled to rely on

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[11] Because the customers who testified at the public hearings did not move to intervene, they were not parties.

[12] Id. at 450-51, 441 S.E.2d at 323 ("[W]hen payments are made to an affiliate, a mere showing of actual payment does not establish a *prima facie* case of reasonableness. Charges arising out of intercompany relationships between affiliated companies should be scrutinized with care, and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained . . . allowance is properly refused." (citations omitted)).

sworn testimony presented by non-party protestants to overcome the presumption of reasonableness. Accordingly, we hold the PSC could consider customer testimony that Utility's water quality had not improved and that capital improvements had not been made when determining whether to credit Utility with the expenditures for capital improvement that it claimed.[13]

Nevertheless, the customer testimony in this case could only have "rais[ed] the specter of imprudence" as to expenditures that Utility claimed to have incurred in neighborhoods where customers alleged no improvements were made. These customers could offer no insight into whether Utility made capital improvements in other neighborhoods. Thus, as discussed below, we hold the PSC erred in failing to accord Utility the presumption of reasonableness as to expenditures that were not called into question by customer testimony or by any other source.

C. Unchallenged Expenditures

While we recognize the PSC was entitled to determine Utility should not be credited with *some* of the expenditures it claimed, Utility argues, and we agree, that the concerns raised at the public hearings were not sufficient to overcome the presumption of reasonableness as to *all* of Utility's claimed expenditures. Thus, rather than denying Utility's rate application in its entirety, the PSC should have adjusted Utility's application to reflect only those expenditures the PSC determined should be passed on to consumers. See Patton, 280 S.C. at 292, 312 S.E.2d at 259-60 (finding the PSC could refuse to pass a portion of an expense on to ratepayers, in the interest of promoting good business practices).

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[13] Utility also argues that, even if the PSC could consider non-party testimony, it could not consider testimony that was unsubstantiated by scientific or quantifiable data. We reject this argument and hold that the substantiation (or lack thereof) of customer testimony goes to its weight, not its admissibility. See 26 S.C. Code Ann. Regs. 103-846(A) (Supp. 2010) ("The rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed" in ratemaking proceedings); Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or other rules promulgated by the Supreme Court of South Carolina.").

ORS investigated Utility's expenditures and made adjustments where it found they were necessary, thereby reducing Utility's claimed rate base by more than $550,000. Customer testimony regarding water quality and the lack of capital improvements brought the prudence of certain other expenditures into question. However, the customers who testified represented only a small portion of the eighty-one neighborhoods in which Utility provides water service. Utility, on the other hand, testified it made improvements to almost every water system it owned. The PSC was required to consider whether, even putting aside the expenditures it found questionable, Utility was entitled to some increase in its rates.

Likewise, because Utility's payments to its affiliate accounted for only a small portion of Utility's budget, a decision to exclude those expenses from Utility's rate application could not justify an outright denial of the rate increase.

In sum, we find the PSC could rely on non-party testimony, or on any other relevant evidence, to determine that the presumption of reasonableness had been overcome as to a particular expense. Nevertheless, the PSC should have credited Utility with the expenses that were not challenged. Accordingly, on remand, and after giving Utility the opportunity to meaningfully respond to the evidence challenging the rate increase recommended by ORS, the PSC must determine whether, even excluding any expenses it finds imprudent, Utility's expenses have increased since its last rate application such that it might be entitled to an increase in its rates.

V.

Utility has raised two other ways in which it contends the PSC erred as a matter of law. First, Utility argues the PSC may not consider notions of fairness when evaluating a rate application. Second, Utility argues the PSC may not consider the fact that Utility received a rate increase in the recent past. We address these arguments in turn.

A. Fairness of a Rate Increase

Distribution-only customers from nine subdivisions testified the price of Utility's service was unreasonable by comparison to the prices charged by the water systems from which Utility purchased its water. In addition, distribution-only customers testified that, because they are charged a pro rata portion of the total water purchased by Utility from its suppliers, they are made to pay for water that leaks when Utility equipment fails. This concern was corroborated by ORS. Accordingly, ORS recommended a change to Utility's rate structure: it recommended the PSC place a "cap" on the amount of unaccounted for water that may be charged to Utility's distribution-only customers.

The PSC found customer testimony about the rates charged by Utility versus by its suppliers raised "questions of fairness with regard to [Utility's] price." The PSC stated that "[i]f the difference in rates is justifiable, the customers deserve to know why." Moreover, the PSC stated it could not find evidence in the record supporting an increase in the distribution-only customers' rates.

Utility now argues the concept of fairness, unaccompanied by objective criteria, is an arbitrary standard improper for consideration by the PSC in ratemaking proceedings. We agree.

We have held the PSC's duty to fix "just and reasonable" rates includes a duty to "**distribute fairly** the revenue requirements [of the utility], considering the price at which the company's service is rendered and the quality of that service." Seabrook Island Property Owners Ass'n v. S.C. Public Service Comm'n, 303 S.C. 493, 499, 401 S.E.2d 672, 675 (1991) (emphasis added). The PSC retained its duty to fix "just and reasonable" rates following the 2004 amendments to its role in ratemaking. Accordingly, the PSC is not precluded from considering fairness, provided it does so in the context of an objective and measurable framework.

Nevertheless, to the extent the PSC questioned the fairness of Utility's distribution-only rates solely because those rates were higher than the rates charged by neighboring entities, the PSC erred as a matter of law. We have held on several occasions that it is improper for the PSC to draw comparisons with other entities without stating its basis for finding the entities sufficiently similar for comparison purposes. E.g., Heater of Seabrook II, 332 S.C. at 26, 503 S.E.2d at 742 ("[T]he order refers to Carolina Water Service . . . as the comparison standard. However, there is no evidence whatsoever in the record giving any information about Carolina Water Service. . . . [I]t would be impossible for an appellate court to afford meaningful review to any comparison findings regarding this utility.").

On remand, the PSC may consider whether the structure of the requested rate increase is unfair, such that a different method of raising the necessary revenues might be preferable. See Seabrook Island Property Owners, 303 S.C. at 499, 401 S.E.2d at 675 (stating the PSC had a duty to "distribute fairly the revenue requirements [of the utility]"). It may not, however, require Utility to explain as a general matter why its rates are higher than the rates charged by other entities, absent a showing that those entities are sufficiently similar to the applicant to allow a meaningful comparison.

B. Recent Rate Increase

A utility may file an application for a rate increase no more than once per year. S.C. Code Ann. § 58-5-240(F) (1976 & Supp. 2010). Our case law suggests that a previous rate increase may provide a baseline for the PSC to use in determining whether a utility has incurred additional expenses requiring additional revenue. Cf. Heater of Seabrook, Inc. v. Public Service Comm'n of S.C. (Heater of Seabrook I), 324 S.C. 56, 61, 478 S.E.2d 826, 828 (1996) ("To show that its expenses have increased, Heater need only introduce data comparing the expenses from the test year used in the previous rate case with those from the test year in this case . . . .").

Utility argues, however, that the PSC used Utility's recent rate increase as part of its justification for denying the current rate application. To the extent the PSC did so, this was error. Cf. Heater of Seabrook II, 332 S.C. at 29, 503 S.E.2d at 743 (finding it was "inappropriate" for the PSC to rely in a 1997 order on its reasoning in a 1992 order granting an increase to the same company because "this order . . . was based on evidence, and a prior test year, completely different from [the utility's] financial condition at the time of the current application."). The PSC must not use the simple fact of a recent rate increase as a reason to deny a utility's rate application. An application for a rate increase must stand or fall on its own merits. A recent rate increase provides only a starting point for determining whether a utility's rate base or expenses have increased, such that additional revenues are required.

VI.

Utility and ORS have presented us with a dispute about the fundamental role of the PSC in ratemaking decisions post-2004. We hold the PSC has retained its role as the ultimate fact-finder. As such, it may consider all evidence before it and it does not serve as a "rubber stamp" for ORS's recommendations. The PSC's powers are tempered, however, by its obligation to give a utility a meaningful opportunity to present additional evidence in support of its application. Moreover, the PSC must not deny an application in its entirety when only a small portion of the expenditures claimed by the utility have been called into question. Rather, the PSC must determine whether, even excluding the questioned expenditures, the utility is entitled to a rate increase.

Because we find the PSC's evaluation of Utility's rate application was affected by several errors of law, we reverse and remand for further proceedings.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John and Charlene Turner, Petitioners,

v.

Douglas A. Milliman, Consumer Benefits of America, NIA Corporation, MidAmerica Life Insurance Co., World Service Life Insurance Co., Provident American Life and Health Insurance Co., Provident Indemnity Life Insurance Co., and Central Reserve Life Insurance Co., Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26953
Heard February 1, 2011 – Filed March 28, 2011

AFFIRMED IN PART; REVERSED IN PART

John W. Carrigg, Jr., of Irmo, for Petitioners.

Jonathan Matthew Harvey, of Columbia; Lawrence B. Orr, of Orr & Ervin, of Florence; Stephanie G. Flynn and Phillip E. Reeves, both of Gallivan, White & Boyd, of Greenville, for Respondents.

CHIEF JUSTICE TOAL: John and Charlene Turner (Petitioners) brought an action against Douglas A. Milliman (Milliman), Consumer Benefits of America (CBA), NIA Corporation, MidAmerica Life Insurance Co. (MidAmerica), World Service Life Insurance Co., Provident American Life and Health Insurance Co. (Provident American), Provident Indemnity Life Insurance Co. (Provident Indemnity), and Central Reserve Life Insurance Co. (Central Reserve) (collectively, Respondents)[1] for fraud, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA). This Court granted Petitioners' request for a writ of certiorari to review the court of appeals' decision in *Turner v. Milliman*, 381 S.C. 101, 671 S.E.2d 636 (Ct. App. 2009) that affirmed as modified the trial court's grant of summary judgment in favor of Respondents.

FACTS/PROCEDURAL HISTORY

In November 1996, John Turner (Turner) was employed at his family's radiator service business and was in need of health insurance coverage for himself and his son. Petitioners contacted Milliman, a local insurance agent,

[1] Of these, Milliman, CBA, MidAmerica, Provident American, Provident Indemnity, and Central Reserve are the Respondents.

to inquire about purchasing health insurance coverage. Petitioners and Milliman discussed Turner's health insurance options.

Turner alleged Milliman represented to him that a group policy with CBA would be a good option because the future premiums would not increase as dramatically as the premiums with individual insurance plans. Turner also contended Milliman represented to him that group health insurance would be beneficial because of the following: (1) Turner was at an age when he could start developing medical problems and group coverage would allow him to keep his coverage; (2) companies writing individual insurance policies were going out of business and the prices of those policies were skyrocketing; (3) group health insurance premiums would not drastically change or dramatically increase; and (4) the only way people could afford insurance was to get group health insurance coverage. Turner stated he was also told CBA would monitor the insurance industry and offer its members better coverage when better coverage was available. Based on these alleged representations, Turner purchased health insurance through CBA.

MidAmerica issued the coverage to Turner, and the coverage was concurrently assumed and reinsured by Provident Indemnity.[2] The following represents the increases in Turner's monthly premium:

November 1996:	$101.70[3]
June 1997:	$109.70
June 1998:	$143.38
December 1998:	$194.50
June 1999	$230.90
December 1999	$271.95
June 2000	$331.81

[2] In May 1997, this policy was terminated and assumed by Provident American.

[3] This is the original monthly premium paid by Turner.

December 2000	$456.21
June 2001	$646.19[4]
July 2001	$799.61[5]

Turner attested he anticipated increasing premiums, but by the end of 1999 he thought the increases were getting out of hand.

In June 2001, Provident American notified Turner his policy would be terminated on September 30, 2001. Turner was offered a different policy for the same premium, $799.61, but with fewer benefits. Also in June 2001, the South Carolina Department of Insurance responded to an inquiry made by Petitioners. The Department of Insurance informed Petitioners that Turner purchased a group association policy which was not subject to rate approval by the Department. Turner testified he attempted to find alternate healthcare coverage, but due to the onset of diabetes, no insurance company would insure him.[6] Despite not obtaining other coverage, Turner declined the replacement coverage and has been without health insurance since September 2001.

The circuit court granted summary judgment to Respondents, finding that (1) Petitioners' claims were barred by the three year statute of limitations, (2) Milliman's statements as to future events were not actionable, (3) allegations of unfair and deceptive practices in the context of insurance are not actionable pursuant to SCUTPA, and (4) Charlotte Turner was not a proper party plaintiff. The court of appeals reversed the grant of summary judgment in relation to the three year statute of limitations, finding it was a jury issue as to when Petitioners should have known of any potential claims.

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[4] CBA informed Turner that this increase was due to increased research and development healthcare costs.

[5] CBA informed Turner that this increase was due to rising healthcare costs as well as substantial losses sustained by Provident American.

[6] Turner developed diabetes in June 1997.

Turner, 381 S.C. at 111, 671 S.E.2d at 642. However, the court of appeals affirmed the grant of summary judgment regarding Milliman's alleged representations, finding they were not actionable as mere statements of unfulfilled promises or statements as to future events and no evidence was presented to show Milliman made the statements only to induce Petitioners to procure the policy. *Id.* at 113, 671 S.E.2d at 643.[7]

ISSUE

Did the court of appeals err in holding that summary judgment was properly based upon the finding that Milliman's statements regarding the insurance were mere unfulfilled promises or statements as to future events?

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860 (citation omitted). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the

[7] The court of appeals did not address the remaining issues on appeal because disposition of this issue was dispositive of the appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (citation omitted) (finding appellate court need not review remaining issues when determination of a prior issue is dispositive).

non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. *Id.* at 330–31, 673 S.E.2d at 803.

LAW/ANALYSIS

Petitioners argue the court of appeals erred in affirming the circuit court's grant of summary judgment because Milliman's statements were false statements of fact, which would support their fraud and negligent misrepresentation claims. Specifically, Petitioners contend the representation by Milliman that the policy was a group policy presents a genuine issue of material fact such that the grant of summary judgment by the circuit court was improper. We agree.

In order to establish a claim for fraud in the inducement to enter a contract, a party must establish the following by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *M.B. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980).

To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010); *McLaughlin v. Williams*, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008) (noting the elements of negligent misrepresentation must be

established by a preponderance of the evidence). "'Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation.'" *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (*quoting Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 443, 339 S.E.2d 142, 147 (Ct. App. 1985)).

Ordinarily, to be actionable, a statement must relate to a present or pre-existing fact, and cannot be predicated on unfulfilled promises or statements as to future events. *Davis v. Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967).[8] "However, where one promises to do a certain thing, having at the time no intention of keeping his agreement, it is a fraudulent misrepresentation of a fact, and actionable as such." *Id.* (citation omitted). "[E]ntering into an agreement, with no intention of keeping such agreement, constitutes fraudulent misrepresentation; however, mere breach of contract does not constitute fraud." *Adams v. G.J. Creel and Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). A future promise is not fraudulent unless such promise was part of a general design or plan, existing at the time, to induce a party to enter into a contract or act as he or she otherwise would not have acted, to his or her injury. *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 527, 455 S.E.2d 183, 187 (Ct. App. 1995) (*quoting Coleman v. Stevens*, 124 S.C. 8, 16, 117 S.E. 305, 307 (1923)). "Evidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform." *Woods v. State*, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993) (citation omitted). An inference of a lack of intent to perform a promise can only be made when nonobservance of a promise is coupled with other evidence. *Id.* (citation omitted).

Under the elements for both fraud and negligent misrepresentation, the representation at issue must be false. *See Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993) ("To be actionable, the representation must relate to a present or pre-existing fact and be false when made."). Respondents argue the health insurance policy sold to Turner was a group health insurance policy. The Certificate of Insurance of both the

[8] *See Sauner*, 354 S.C. at 408, 581 S.E.2d at 167 (2003) (applying the same rule to negligent misrepresentation cases).

MidAmerica and Provident American insurance policies states, "This certificate summarizes the provisions of the Group Policy that are important to you . . . . The Group Policy, alone, constitutes the entire contract under which rights and benefits are provided." Moreover, Dr. Tim Ryles, an expert in insurance regulation, testified the insurance coverage purchased by Petitioners was a group insurance policy. Respondents also contend Petitioners' belief that the policy was not a group policy is based on a misunderstanding about how coverage is issued under the policy. At all times when Turner's health insurance was in effect, CBA was identified as the policyholder to which the master group policy of insurance was issued. Within that framework, Turner completed an individual application, a term specifically defined within the group policy, to obtain coverage under the group policy.

Petitioners point to a certificate issued November 6, 2001 by Provident Indemnity which states the coverage issued was individual coverage. Petitioners note this correspondence stands in sharp contrast to other correspondence from the same company stating the product was group coverage. Petitioners also point to a letter from Continental General Insurance Company dated July 18, 2001 stating Turner was not eligible for insurance coverage because he was trying to replace an individual policy. We find this evidence meets the scintilla of evidence standard such that a grant of summary judgment as to the negligent misrepresentation claim was inappropriate. However, the fraud claim requires proof by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment. *See Hancock*, 381 S.C. at 330–31, 673 S.E.2d at 803. Due to the heightened standard of review applied to fraud claims, we find the grant of summary judgment on the fraud claim appropriate.

CONCLUSION

Petitioners have presented at least a scintilla of evidence that the policy issued was an individual policy, not a group policy. Hence, the grant of summary judgment on the negligent misrepresentation claim is reversed.

However, due to the heightened standard of review regarding fraud, the grant of summary judgment on the fraud claim is affirmed.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brian P. Menezes, Respondent,

v.

WL Ross & Co. LLC, Wilbur L. Ross, Jr., Michael J. Gibbons, David H. Storper, David L. Wax, Joseph L. Gorga, Stephen B. Duerk, WLR Recovery Fund II, L.P., WLR Recovery Fund III, L.P., WLR Recovery Associates II LLC, and WLR Recovery Associates III LLC, Appellants.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 4810
Heard October 6, 2010 – Filed March 23, 2011

REVERSED AND REMANDED

H. Sam Mabry, III, Charles M. Sprinkle, III, and James Derrick Quattlebaum, all of Greenville; Michael J. McConnell and Joseph E. Finley, of Atlanta, Georgia and N. Scott Fletcher, of Houston, Texas, for Appellants.

William D. Herlong, of Greenville, for Respondent.

KONDUROS, J: W.L. Ross & Co., LLC (WLR) and several of its board members (Appellants)[1] appeal the circuit court's striking of two of their defenses and dismissal of their counterclaim in the direct shareholder lawsuit filed by Brian Menezes. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Safety Components International, Inc. (SCI) was a publicly traded Delaware corporation with its headquarters in South Carolina. SCI was in the business of designing and manufacturing airbag fabric and airbag cushions. From 1999 to 2006, Menezes was employed by SCI as Chief Financial Officer, and for a time, interim Chief Executive Officer. He was terminated from his employment with SCI in June of 2006 but remained a shareholder. Menezes sued SCI to recover additional severance pay he alleged he was due and a "change of control" bonus included in his employment contract.

While Menezes's employment lawsuit was proceeding, SCI entered into discussions with the former International Textile Group, Inc. (FITG), a privately held Delaware corporation headquartered in North Carolina, about a

[1] Stephen B. Duerk was not a member of the board but was president of SCI and executed the merger agreement on its behalf.

possible merger.[2] WLR, an investment firm, owned shares in both SCI and FITG, either directly or indirectly through affiliate entities.

On August 29, 2006, the SCI board of directors approved the merger agreement between SCI and FITG. The merger agreement provided that FITG would merge into SCI and that SCI's certificate of incorporation would be amended to reflect the new combined entity. FITG shareholders would receive one share of SCI stock for every 1.4379 shares of FITG stock surrendered.[3] The terms of the merger were made public via a press release and the filing of a Form 8-K with the Securities and Exchange Commission (SEC) on August 30 and again on September 1, when a preliminary Joint Proxy Statement/Prospectus was filed with the SEC. A final Proxy Statement was mailed to stockholders on September 25, 2006. According to the Proxy Statement, FITG stockholders needed to take no action to effect the merger as a majority of stockholders had approved it in writing contemporaneous with the signing of the merger agreement. The Proxy Statement also indicated "no action by the stockholders of SCI is required to approve the merger agreement or to consummate the merger." SCI stockholders did need to satisfy a condition precedent by agreeing to amend the certificate of incorporation to reflect the existence of the newly formed entity and by re-electing five of the current board members. However, according to the Proxy Statement, "stockholders of SCI holding approximately 75.6% of SCI's outstanding common stock have indicated that they intend to vote to adopt the amended and re-instated certificate of incorporation and to elect the directors nominated for re-election. Approval of the matters to be voted on at the 2006 Annual Meeting is therefore assured."

On September 28, 2006, in exchange for payments totaling approximately $575,000, Menezes signed a Settlement Agreement and

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[2] FITG refers to International Textile Group prior to the merger with SCI. After the merger, the newly formed entity took the name International Textile Group.

[3] According to Menezes's complaint, this exchange ratio had the effect of significantly diluting SCI stockholders' ownership in the newly formed entity.

Release of All Claims (the Release) to settle the employment lawsuit. The Release stated Menezes agreed to "release, acquit and forever discharge" defendants of:

> Any and all manner of actions, causes of action, suits, claims, setoffs, debts, compensation, salary, benefits, sums of money, accounts, covenants, trespasses, damages, judgments and demands whatsoever, in law or in equity, whether known or unknown, liquidated, contingent, absolute, or otherwise, which plaintiff either has had or now has against the Released Parties for or related to any matter or thing whatsoever from the beginning of time up to and including the date of execution hereof. It is [p]laintiff's intention to release all rights and claims that he may lawfully release.

The Release specifically barred Menezes from bringing "any claim based upon or as an owner of any stock or interest . . . arising prior to the execution" of the Release and from pursuing any claims "made or which may have been made" in the employment lawsuit.[4] On October 20, 2006, the merger between SCI and FITG was completed in that all pre-conditions were either satisfied or waived.

Menezes brought this lawsuit in 2008 alleging breaches of fiduciary duties on the part of the Appellants in the following particulars:

> (a) by proposing the [m]erger and then allowing it to close notwithstanding the financial condition of FITG;

[4] Appellants argued to the circuit court that Menezes could have brought his shareholder claim in the employment lawsuit. Menezes provided opposing counsel with a draft amended complaint in the employment lawsuit. That amended complaint contains an allegation, although stricken through, that the proposed merger agreement was made on unfair terms.

> (b) by approving the [m]erger on terms which gave 65% ownership to the FITG stockholders and diluted the minority shareholders to 35%, or at all [sic];
> (c) by not providing accurate and complete information regarding FITG . . . or ensuring that such information was provided to them;
> (d) to the extent any one of them was not aware of the financial situation of FITG, by failing to learn of the financial situation of FITG and failing to take it into account or see that it was taken into account with regard to the [m]erger;
> (e) by failing to ensure that proper due diligence was conducted on behalf of SCI or FITG;
> (f) by allowing the representation at the [m]erger closing that MAC[5] Clause condition was satisfied;
> (g) by failing to call off or renegotiate the [m]erger (or cause it to be called off or renegotiated) because of the financial condition of FITG;
> (i)[sic] by allowing the debt previously held by FITG to be transferred to Combined Company and/or by allowing that debt to be converted into preferred stock;
> (j)[sic] by allowing or causing the renegotiation [of] the SCI's credit facility and/or obtaining $100 million of additional preferred stock in connection therewith; and/or
> (k)[sic] by otherwise failing to protect the interests of the minority stockholders of SCI.

Appellants answered, relying on the Release as an affirmative defense to Menezes's claims and counterclaiming for breach of the Release.[6]

[5] MAC stands for materially adverse changes.

Appellants also moved to dismiss Menezes's complaint or in the alternative for summary judgment arguing the Release barred the claims as a matter of law. Menezes filed a motion to dismiss Appellants' counterclaims. The circuit court concluded Menezes's breach of fiduciary duty claim accrued at the time the merger was completed in October 2006, meaning the claims in this lawsuit were not barred by the Release. The circuit court therefore denied Appellants' motion to dismiss or for summary judgment, dismissed Appellants' counterclaim, and struck Appellants' defenses related to the Release. Appellants filed a motion to reconsider with the circuit court and that motion was denied. This appeal followed.[7]

LAW/ANALYSIS

Appellants contend the circuit court erred in dismissing their counterclaim and striking their affirmative defenses relating to the Release because Menezes's claim could not have accrued prior to the closing of the merger. They argue the circuit court's reliance on certain Delaware cases is misplaced in light of more recent case law and the facts of this case. We agree.

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[6] Stephen Duerk filed an individual answer but asserts the same positions as all Appellants.

[7] Appellants then filed an appeal with this court requesting review of the entire circuit court's order. Menezes filed a motion to dismiss the appeal arguing the order was interlocutory. A single judge denied the motion but limited appellate review to the dismissal of Appellants' counterclaims and the striking of their affirmative defenses citing section 14-3-330(2)(c) of the South Carolina Code (1977). Appellants filed a petition for rehearing of this ruling, arguing the single issue on appeal (accrual of the breach of fiduciary duty claim) would determine all the points addressed in the circuit court's order. Ultimately a three-judge panel of this court affirmed the single judge's ruling limiting appellate review to the circuit court's dismissal of Appellants' counterclaims and the striking of Appellants' defenses. Therefore, we limit our discussion to those issues.

"[U]pon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. "The question [on a motion to dismiss a counterclaim] is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief." Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001).

The circuit court's order frames the question before us narrowly: Could Menezes's claim have only accrued after completion of the merger? Neither party has disputed that Delaware law controls the question of the accrual date as claims concerning the fiduciary duties of corporate officers is governed by the state of incorporation. See Restatement (First) of Conflicts of Laws § 187 (1934) ("[T]he existence and extent of the liability of shareholders, officers, or directors of a corporation . . . is determined by the law of the state of incorporation."). "Generally, the rights and obligations of stockholders, including the relative rights of stockholders as respects the corporation itself, are determined and controlled by the law of the state of incorporation." 18 Am. Jur. 2d Corporations § 21. South Carolina courts generally follow the traditional choice of law rules as stated in the Restatement of Conflicts of Laws. See McDaniel v. McDaniel, 243 S.C. 286, 292, 133 S.E.2d 809, 813 (1963).

The circuit court cites four Delaware cases in its order for the proposition that the claim accrued no earlier than the closing of the merger.[8]

[8] Appellants raised to the circuit court at the hearing and in their motion for reconsideration whether Menezes's claim "may have been made" (under sub-paragraph 8 of the Release) in the employment lawsuit. The circuit court does not specifically address this point in its order. However, whether or not the claim may have been brought would seem to turn on whether or not the claim had accrued. Therefore, we believe that argument is subsumed in the accrual analysis.

The first case cited is Kaufman v. Albin, 447 A.2d 761 (Del. Ch. 1982). In Kaufman, a shareholder filed a derivative suit alleging waste of corporate assets by the corporation's board of directors. Id. at 761-62. On August 22, 1977, the board voted to accept and recommend a tender offer by another business to purchase a majority of the corporation's stock. Id. at 762. The defendants argued their alleged misdeeds relating to the transaction all occurred prior to September 1, 1977, when a statute affecting service of corporate officers took effect. Id. at 763. If the claim accrued before September 1, the complaint would be dismissed for ineffective service; if afterwards, the claims would go forward. In determining the plaintiff's claims accrued after September 1, the court noted:

> After August 22, the tender offer still had to be commenced and [the corporation's] stockholders had to be advised that the directors . . . recommended that the tender offer be accepted. This was done on September 12, 1977. [The purchasing company] also had available many options which would have enabled it to terminate the tender offer if certain events took place before October 3, 1977. Even more importantly, the tender offer was contingent upon it being accepted by the tendering of at least 52% of the outstanding shares of stock.

Id. at 763-64.

The court then quoted from the preeminent treatise in Delaware corporate law. "In Folk, The Delaware General Corporation Law, 487 (1967) it is stated: 'Accordingly, the circumstances of the case will determine whether the transaction is executed or continuing. If the action complained of requires stockholder approval, the transaction is not considered complete until the stockholders have approved it.'" Kaufman, 447 A.2d at 764.

The Kaufman court further relied on the case of Lavine v. Gulf Coast Leaseholds, Inc., 122 A.2d 550 (Del. 1956), for the proposition that when

"exchanges of stock are contingent upon shareholder approval, the transaction is not completed until the shareholder vote takes place."[9] Kaufman, 447 A.2d at 764. The court concluded the transaction in Kaufman commenced on August 22, but was not consummated until the close of the tender offer on October 3. Id. "The alleged wrong was therefore a continuing wrong and any cause of action attacking it arose or accrued" after September 1, 1977. Id.

However, more recent case law suggests in a standing to sue case, the courts are looking to the date of the wrong for purposes of determining accrual as opposed to the date of shareholder approval. See Dieter v. Prime Computer, Inc., 681 A.2d 1068, 1072 (Del. Ch. 1996) (finding plaintiff lacked standing to be class representative because "[t]he challenged transaction is [the Board's] approval of the Merger. The alleged breach of fiduciary duty occurred at the time the Board approved the Merger Agreement . . . . It is not the Merger that constitutes the wrongful act of which Plaintiffs complain; it is the 'fixing of the terms of the transaction.'") (quoting Brown v. Automated Mktg. Sys., Inc., No. 6715, 1982 WL 8782 at *2 (Del. Ch. 1982)); see also In re Beatrice Co., Nos. 155 and 156, 1987 WL 36708 at *3 (Del. 1987) ("In the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged."); FMC Corp. v. R.P. Scherer Corp., No. 6889, 1982 WL 17888 at *2 (Del. Ch. 1982) (relying on Brown to find plaintiff lacked standing to sue when she purchased stock after board's approval of supermajority anti-takeover provisions and announcement of merger terms but before shareholder approval of those provisions).

[9] Lavine was a shareholder standing case as are many of the cases discussed herein. In Lavine, the issue was whether the plaintiff had standing to sue for breach of fiduciary duty relating to a merger when plaintiff purchased shares after the board's approval of the merger and the announcement of its terms but before the final shareholder vote. Id. at 550-51.

Additionally, Kaufman relies on Folk as it read in 1967. As Appellants point out, Folk has been amended, and the relevant section now states:

> Generally, the determinative issue is when the specific acts of alleged wrong doing occurred, and not when their effect is felt. Therefore, the circumstances of the case will determine whether the transaction is executed or continuing. For instance, an offer made by the corporation to certain of its stockholders to exchange one class of stock for another, which was specifically conditioned on approval by the corporation's other stockholders, was held not be completed until stockholder approval was obtained. On the other hand, both a proposed merger and a proposed supermajority voting provision have been held to be consummated when their terms were fixed and announced by the board of directors, and not to be continuing transaction up to the time of stockholder approval.

2 Edward P. Welch et al., Folk on the Delaware General Corporation Law: Fundamentals § 327.3.2 (2010) (footnotes omitted).

The next case relied upon by the circuit court is Dofflemyer v. W.F. Hall Printing Co., 558 F.Supp. 372 (D. Del. 1983). In Dofflemyer, the plaintiffs, former shareholders, filed a derivative action alleging various directors breached their fiduciary duties in relation to orchestrating a merger. Id. at 375. The plaintiffs alleged the directors procured a faulty investment opinion, maneuvered to avoid a supermajority provision in the by-laws, and issued a false and misleading proxy statement. Id. at 379. The court, in determining when the statute of limitations began to run on these claims stated: "The plaintiffs could not have sued for damages until the merger was actually accomplished – until that time, they had suffered no injury by the defendants' acts." Id. The court relied primarily on Kaufman in its analysis, but nowhere in Kaufman is the issue of money damages discussed.

More recent cases that address the requirement of damages prior to bringing suit seem out of step with Dofflemeyer. In Albert v. Alex Brown Management Services, Inc., No. 672-N, 2005 WL 1594085, *18 (Del. Ch. 2005),[10] plaintiffs, limited partners in an investment fund, sued managers for various breaches of fiduciary duties including "unhedging" their funds and exposing them to more financial risk. The plaintiffs waited to sue while the stocks were rising and then sued for damages upon their fall. In finding plaintiffs' complaints were untimely, the court stated:

> The law in Delaware is crystal clear that a claim accrues as soon as the wrongful act occurs. This is so because the plaintiffs were harmed as soon as the alleged wrongful acts occurred. Whether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief.

Id.

This reasoning is evident in other cases as well. See In re SunGard Data Sys., Inc., No. 1221-N, 2005 WL 1653975 at *2 (Del. Ch. 2005) ("[T]he optimal time to bring a disclosure claim in connection with a proposed merger, or in a like context where the company requests shareholder action or approval is before the stockholder vote is taken and the deal closes."); Kahn v. Seaboard Corp., 625 A.2d 269, 271 (Del. Ch. 1993) ("Any such wrong occurred at the time that enforceable legal rights against Seaboard were created. Suit could have been brought immediately thereafter to rescind the contract and for nominal damages which are traditionally available in contract actions. Complete and adequate relief, if justified, could be shaped immediately or at any point thereafter."); see also Seidel v. Lee, 954 F. Supp. 810, 816 (D. Del. 1996) (citing Dofflemeyer parenthetically for the

[10] Albert is a statute of limitations case.

proposition "fiduciary duty claim accrues when [the] breach is accomplished").

We next turn our attention to Baron v. Allied Artists Pictures Corp., 717 F.2d 105 (3rd Cir. 1983), also cited by the circuit court. Baron involved the statute of limitations relating to a violation of SEC regulations for issuing a misleading proxy statement. Id. at 106. There, the court concluded the plaintiff's cause of action for damages resulting from a breach of fiduciary duty/misleading proxy statement did not accrue until the merger was accomplished and a suit for damages could be successfully maintained. Id. at 108-09. However, the reasoning in that case has been superseded by statute and now is arguably in favor of finding a cause of action accrues at the time of the wrongdoing, not a the time the merger closes. See In re Exxon Mobil Corp., 387 F. Supp.2d 407, 421 (D.N.J. 2005) ("Baron pre-dates [the] Sarbanes-Oxley [Act of 2002] and the decisions of the courts in this Circuit which have held that actions under Sections 10(b) and 14(a) arise on the date that the allegedly false or misleading statement underlying the claims was made.").

Finally, we examine In re Coca-Cola Enterprises, Inc., No. 1927-CC, 2007 WL 3122370 (Del. Ch. 2007), aff'd, International Brotherhood Teamsters v. Coca-Cola, No. 1927-cc, 2008 WL 2484587 (Del. 2008). In that case, disgruntled shareholders of Coca-Cola's biggest bottler claimed breach of fiduciary duty by its board members. Id. at *1. The plaintiffs claimed Coca-Cola was essentially controlling plaintiffs' business, for Coca-Cola's profit and to plaintiffs' detriment, and plaintiffs' board was allowing this to happen. Id. The parties had entered into a contract in 1986 that gave Coca-Cola the authority to do the offensive acts. Id. Plaintiffs brought suit in 2006, alleging damages from specific acts that occurred under the contract in 2002 and 2004. Id. at *5. The court, in determining whether plaintiffs' claims were barred by the statute of limitations or laches concluded: "Under Delaware law, a plaintiff's cause of action accrues at the moment of the wrongful act – not when the harmful effects of the act are felt – even if the plaintiff is unaware of the wrong." Id. Plaintiffs' claims were dismissed as

time-barred because "[t]he actions challenged in the amended complaint represent the manifestation of the bargain struck in 1986 . . . ." Id. at *6.

In reaching this conclusion, the Coca-Cola court relied on Kahn wherein the plaintiff filed a derivative action against directors and the corporation relating to transactions carried out under the terms of a time charter agreement. The court stated: "[T]he 'continuing wrong' is performance of a contract. . . . So long as the time charter is not rescinded, the payments it calls for are legal obligations, not wrongs." Kahn, 625 A.2d at 272. Any wrong occurred at the time "enforceable legal rights against Seaboard were created." Id. at 271.

Another oft-cited case is Elster v. American Airlines, 100 A.2d 219 (Del. Ch. 1953). Presented with a similar situation, the court explained:

> Assuming that the individual defendants did wrong to the Corporation by entering into the contract, it does not follow that they committed any wrong in carrying out the contract once it had been made. Indeed, had they not done so, the corporation would presumably have been subject to liability for breach of contract.

Id. at 224 (quoting Levitan v. Stout, 97 F. Supp. 105, 119 (W.D. Ky. 1951)).

After reviewing the facts of the case sub judice and all the relevant case law, we conclude the circuit court's reliance on the four cases cited above was misplaced.

Kaufman relies heavily on Lavine, which was a case involving the plaintiff's standing to bring suit. As discussed, more recent standing cases indicate a claim accrues at the time of the wrongdoing by the fiduciary, not necessarily at the time a merger closes. Furthermore, Kaufman did not involve a merger but a tender offer and the court indicated a claim does not accrue until shareholders approve the action if shareholder approval is required. In Menezes's case, according to the Proxy Statement, FITG

stockholders needed to take no action to effect the merger as a majority of stockholders had approved it in writing contemporaneous with the signing of the merger agreement. Notably, the Proxy Statement also said "no action by the stockholders of SCI is required to approve the merger agreement or to consummate the merger." (emphasis added). SCI stockholders did need to satisfy a condition precedent by agreeing to amend the certificate of incorporation to reflect the existence of the newly formed entity and by re-electing five of the current board members. However, according to the Proxy Statement, "stockholders of SCI holding approximately 75.6% of SCI's outstanding common stock have indicated that they intend to vote to adopt the amended and re-instated certificate of incorporation and to elect the directors nominated for re-election. Approval of the matters to be voted on at the 2006 Annual Meeting is therefore assured." Menezes acknowledged in his complaint that the closing of the merger was "merely a formality." In light of recent case law indicating the date of the wrong is the relevant time and because Kaufman is not factually on all fours with this case, Kaufman does not dictate a finding Menezes's claim could have accrued only at the time of the merger's consummation.

Dofflemeyer seems out of step with more recent case law on fiduciary duty claims because those cases indicate a claim may be brought prior to the incurring of money damages in the form of a request for injunctive relief. Menezes could have brought a claim for injunctive relief prior to the signing of the Release, and this thought was at least contemplated as evidenced by the inclusion of such an allegation in his draft amended complaint given to opposing counsel in the employment litigation. Menezes's remedy, money damages, may have been different, but the claim, breach of fiduciary duty, would be the same.

Finally, we do not believe the "legally enforceable rights" language in Kahn and Coca-Cola necessitate a finding that Menezes's claim accrued after the merger. Once the merger agreement was signed, SCI and FITG had legally enforceable rights against each other to proceed with all aspects of the merger agreement in good faith. If they did not, they would be in breach of the agreement and subject to suit. More importantly, once the merger

agreement was signed, Menezes, as a shareholder, had a legally enforceable right to enjoin the merger from being consummated.

For all of the foregoing reasons, the circuit court's reliance on the cited cases was erroneous. Because Menezes's claim could have arisen prior to the closing of the merger, the Appellants' defenses relating to the Release were not insufficient. Additionally, their counterclaim arising out of the Release does not, resolving all doubts in their favor, fail to state a valid claim for relief. Consequently, it was error for the circuit court to dismiss Appellants' defenses and counterclaim relating to the Release. The decision of the circuit court is therefore

REVERSED AND REMANDED.

WILLIAMS, J., concurs.

PIEPER, J., concurs in a separate opinion.

I concur in the decision to reverse and remand. However, I write separately because I would like to address the combination of Menezes's ten claims for breach of fiduciary duty into one claim by the circuit court.

Menezes brought this lawsuit in 2008 alleging breach of fiduciary duty on the part of the Appellants in all of the following particulars:

> (a) by proposing the [m]erger and then allowing it to close notwithstanding the financial condition of FITG;
> (b) by approving the [m]erger on terms which gave 65% ownership to the FITG stockholders and diluted the minority shareholders to 35%, or at all [sic];

> (c) by not providing accurate and complete information regarding FITG . . . or ensuring that such information was provided to them;
> (d) to the extent any one of them was not aware of the financial situation of FITG, by failing to learn of the financial situation of FITG and failing to take it into account or see that it was taken into account with regard to the [m]erger;
> (e) by failing to ensure that proper due diligence was conducted on behalf of SCI or FITG;
> (f) by allowing the representation at the [m]erger closing that MAC Clause condition was satisfied;
> (g) by failing to call off or renegotiate the [m]erger (or cause it to be called off or renegotiated) because of the financial condition of FITG;
> (i) [sic] by allowing the debt previously held by FITG to be transferred to Combined Company and/or by allowing that debt to be converted into preferred stock;
> (j) [sic] by allowing or causing the renegotiation [of] the SCI's credit facility and/or obtaining $100 million of additional preferred stock in connection therewith; and/or
> (k) [sic] by otherwise failing to protect the interests of the minority stockholders of SCI.

The circuit court ruled that the breach of fiduciary duty claims could not have arisen prior to the closing of the merger. Appellants neither argued that the claims should be considered separately, nor asked the court to alter or amend its ruling on the issue. Thus, I would find the question of whether or not the court erred in considering Menezes's claims in combination is not preserved for appellate review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76-77, 497 S.E.2d 731, 733-34 (1998) (finding an issue must have been raised to the trial court in order to be preserved for appellate review and holding post

trial motions are necessary to preserve issues that were raised to the trial court but not ruled upon).

Despite this preservation concern, and in light of the reversal and remand of the case by the majority opinion, I note some of the claims could have arisen prior to the closing of the merger and others could have arisen after the closing of the merger. On August 29, 2006, the SCI board of directors approved the merger agreement between SCI and FITG. On September 28, 2006, in exchange for payments totaling approximately $575,000, Menezes signed a Settlement Agreement and Release of All Claims to settle the claims involved in the employment lawsuit. Finally, on October 20, 2006, the merger between SCI and FITG was completed and all preconditions were either satisfied or waived. Importantly, we should recognize the fact that any claims arising between the signing of the release on September 28, 2006, and the finalizing of the merger on October 20, 2006, were valid claims. Furthermore, by analyzing each of Menezes's claims independently of one another, as opposed to combining them, some of the claims may be barred by Menezes's release whereas others may not be barred. Although I agree with the majority in distinguishing the cases relied upon by the circuit court, I would find the cases nonetheless shed some light on the limiting nature of combining Menezes's ten claims for breach of fiduciary duty into one claim. Therefore, on remand, even though the court did not do so initially, I would urge the court to break down the acts alleged by Menezes separately, as one or more acts could be deemed a separate breach of fiduciary duty based on when each act occurred.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Danny R. Prince, Respondent,

v.

Beaufort Memorial Hospital and its Employees, Servants and Agents, Appellants.

Appeal From Beaufort County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4811
Heard June 23, 2010 –Filed March 23, 2011

REVERSED

James S. Gibson, Jr., and Mary Bass Lohr, both of Beaufort, for Appellants.

T. Wayne Yarbrough, of Bluffton, for Respondent.

CURETON, A.J.: Beaufort Memorial Hospital (Hospital) appeals from the trial court's decision declaring certain contents of its Quality Assurance Committee (QAC) file discoverable and ordering a new trial. We reverse.

FACTS

In February 1999, Danny R. Prince was admitted to Hospital's care after suffering a work-related injury. On February 17, 1999, Prince was discovered after falling to the roof of the hospital building, one floor below his room's window. Prince sustained additional injuries but did not remember the incident. Hospital's QAC investigated the incident and maintained a file of the information it assembled.

Prince sued Hospital under the Tort Claims Act for his injuries and sought disclosure of the QAC file. Hospital claimed the contents of the file were confidential pursuant to sections 40-71-10 and -20 of the South Carolina Code (2001 & Supp. 2004), and the trial court agreed.[1] On January 8, 2004, a jury returned a verdict in favor of Hospital. Prince appealed (Prince's Appeal), seeking disclosure of the QAC file and a new trial. This court remanded the matter to the trial court for an in camera review of the QAC file and a determination whether its contents were indeed confidential under section 40-71-20.[2] See Prince v. Beaufort Mem. Hosp., Op. No. 2005-UP-602 (S.C. Ct. App. refiled Apr. 11, 2006).

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[1] According to Judge Alexander S. Macaulay's order dated November 22, 2008, Judges Jackson V. Gregory and Curtis L. Coltrane declared documents from the QAC file confidential in five separate orders. Judge Macaulay authored the orders from which appeal was taken in this case.

[2] In 2005, the General Assembly enacted section 40-71-30 of the South Carolina Code, which provides for the trial court to conduct an in camera review of any documents a party claims are confidential under section 40-71-10 and -20.

Upon remand from Prince's Appeal, the trial court reviewed the QAC file in camera and found it "manifestly clear" that Hospital had used some contents of the file to answer Prince's interrogatories. The trial court found both Hospital's answers to interrogatories and the "small portions of the witness statement summaries" that were not repeated in those answers were relevant to the dispute. In its analysis, the trial court compared hospital-patient confidentiality to the attorney-client privilege, finding the client alone has the power to waive the privilege. Furthermore, the trial court observed a client's voluntary disclosure of one privileged communication waives the privilege as to all attorney-client communications on the same subject. Relying on the attorney-client privilege and the Rule of Completeness,[3] the trial court ordered the entire QAC file be unsealed and provided to Prince.

Hospital appealed (Hospital's First Appeal), arguing Prince had failed to preserve his argument that Hospital had waived confidentiality and the trial court had exceeded its authority by ruling on the issue of waiver. This court agreed with Hospital and again remanded the matter to the trial court, instructing the trial court to "set forth the specific portions of the [QAC] file that are subject to discovery as well as the reasons these portions are not confidential under section 40-71-20." See Prince v. Beaufort Mem. Hosp., Op. No. 2008-UP-139 (S.C. Ct. App. filed Mar. 3, 2008).

Upon remand from Hospital's First Appeal, the trial court reviewed the contents of the QAC file and found most documents in the file were

[3] The trial court cited to State v. Cabrera-Pena, 361 S.C. 372, 378, 605 S.E.2d 522, 525 (2004) (recognizing introduction of defendant's incriminating statements to police officer required that defendant's remaining statements be considered for purposes of explanation or qualification). In addition, the trial court pointed to Rule 106, SCRE (permitting an adverse party, upon introduction of a writing or statement, to require introduction of any other writing that should "in fairness . . . be considered contemporaneously with it"), and Rule 32(a)(4), SCRCP (permitting introduction of additional deposition testimony at trial to ensure fairness when a party initially offers only part of the testimony).

discoverable under the statute because the information in them was otherwise available from the original sources. The trial court found one document[4] particularly problematic because the information in it differed from other evidence obtained from the same nurse. The trial court reasoned: "When deposition and trial testimony varies from, or is inconsistent with, that given to the committee, the statutory protection should not be inimical to safeguarding the integrity of the fact finding process." Furthermore, the trial court found that because Prince had no memory of the incident, Hospital and its investigators were "the only source of information as to what occurred the night of the subject incident." As a result, the trial court ordered both the original and the copy of the QAC file,[5] except for two attorney-client privileged items, unsealed and produced to Prince. Hospital filed a motion for reconsideration, which the trial court denied. Hospital appealed, arguing the trial court erred by misinterpreting the scope of its review and by misapplying section 40-71-20.

Following oral arguments in June 2010, this court instructed the parties to brief the following issues:

> 1. Whether on remand, the trial court had the authority, pursuant to this court's remand orders to consider any conflict between Jennifer Emerick's deposition or trial testimony, the hospital's answers to interrogatories and the QAC file?
>
> 2. Did any conflict between Jennifer Emerick's deposition or trial testimony, the hospital's

[4] The trial court identified the document as Item 15, "Handwritten Notes: (Mary Dent, Jennifer Emerick, chronology of that night)[2 pages]." In its order dated November 22, 2008, the trial court enumerated and described the twenty-two documents contained in the QAC file.

[5] The trial court's clerk's office misplaced the original QAC file, and Hospital replaced it with a copy. Later, the trial court located the original QAC file.

> answers to interrogatories and the QAC file or the failure to disclose it to the court or opposing counsel warrant a new trial?

The parties submitted supplemental briefs, a new record on appeal, and a supplemental record on appeal.

STANDARD OF REVIEW

The decision whether to grant or deny a new trial rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 569, 658 S.E.2d 80, 93 (2008). A trial court abuses its discretion by issuing a decision that is either controlled by an error of law or unsupported by the evidence. Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 350, 683 S.E.2d 818, 821 (Ct. App. 2009).

LAW/ANALYSIS

I. Trial Court's Review

A. Authority under Remand Order

Hospital argues the trial court erred by exceeding its authority under this court's remand order. We agree.

"[A] trial court has no authority to exceed the mandate of the appellate court on remand." S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250-51, 551 S.E.2d 274, 279 (Ct. App. 2001) (citing 5 Am. Jur. 2d Appellate Review § 784, at 453 (1995)). The mandate of the appellate court is jurisdictional. Id. The trial court has a duty to follow the appellate court's directions. Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996).

We reverse the trial court's order requiring Hospital to release the contents of the QAC file to Prince. When we remand a case, the trial court has only the jurisdiction and authority mandated by this court. Basnight, 346 S.C. at 250-51, 551 S.E.2d at 279. Upon remand following the Hospital's First Appeal, this court instructed the trial court to "set forth the specific portions of the [QAC] file that are subject to discovery as well as the reasons these portions are not confidential under section 40-71-20." Prince v. Beaufort Mem. Hosp., Op. No. 2008-UP-139 (S.C. Ct. App. filed Mar. 3, 2008). As a result, the trial court's jurisdiction extended only to a review of each document contained in the QAC file in light of the statute.

Instead of reviewing the documents in the QAC file solely in light of the statutory provisions, the trial court based its decision to unseal the QAC file on three factors: (1) the availability of some information from original sources, (2) the conflict of information in Item 15 with Nurse Emerick's trial testimony, and (3) Hospital's apparent use of certain confidential documents in preparing its responses to discovery. We address the trial court's first factor separately below. The trial court's second factor, a conflict between trial testimony and information in the QAC file, was beyond the scope of the trial court's authority on remand. See Basnight, 346 S.C. at 250-51, 551 S.E.2d at 279 ("[A] trial court has no authority to exceed the mandate of the appellate court on remand."). Following Hospital's First Appeal, this court instructed the trial court to "set forth the evidence in the [QAC] file that is subject to discovery and . . . explain why, consistent with the language in this Court's prior opinion, this evidence 'is not protected by the confidentiality statute.'" Prince, Op. No. 2008-UP-139 (S.C. Ct. App. filed Mar. 3, 2008). By comparing documents in the QAC file with trial testimony, the trial court impermissibly exceeded the scope of its authority.

Furthermore, Prince's arguments to the contrary are unpersuasive. A court may not, as he argues, exceed its authority and assume the role of a second jury. Rather, the appellate court's instructions circumscribe the trial court's authority on remand. Basnight, 346 S.C. at 250-51, 551 S.E.2d at 279. The trial court's duty is to follow the instructions it received from the appellate court. Ackerman, 324 S.C. at 443, 477 S.E.2d at 268.

The trial court's third factor, Hospital's apparent use of documents from the QAC file in answering discovery, was not properly before the trial court on remand. "Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form." Id. In essence, the trial court found Hospital waived any statutory confidentiality by utilizing these documents to prepare discovery responses. However, in Hospital's First Appeal, this court found no issue regarding waiver had been preserved and appealed. Prince, Op. No. 2008-UP-139 (S.C. Ct. App. filed Mar. 3, 2008). Specifically, our opinion expressly disagreed with the trial court's holding that the issue of waiver was necessarily so intertwined with the issue of confidentiality as to require concurrent consideration. Instead, we held that "the remand instructions did not authorize the trial court to consider whether Hospital had waived its right to assert the file was confidential." Prince did not seek review of this finding by our supreme court, and the boundaries of the trial court's authority on remand did not permit it to contemplate waiver arguments. See Ables v. Gladden, 378 S.C. 558, 569, 664 S.E.2d 442, 448 (2008) (holding an unappealed ruling is the law of the case). Accordingly, the trial court erred in considering Prince's waiver argument.

B. Analysis of the QAC File's Contents in Light of the Statute

On remand following Hospital's First Appeal, this court directed the trial court to determine whether and, if so, why any documents in the QAC file were discoverable under section 40-71-20. The trial court based the first factor it used in reviewing the contents of the QAC file on section 40-71-20. Hospital originally argued on appeal that the trial court erred by misapplying section 40-71-20. We agree.

Hospital medical staff on a committee conducting peer reviews of patient medical and health records are protected from tort liability for their work if they "act[] without malice, [make] a reasonable effort to obtain the facts relating to the matter under consideration, and act[] in the belief that the action [they take] is warranted by the facts known to [them]." S.C. Code

Ann. § 40-71-10(B) (Supp. 2009). Both the information they collect and any investigative documents they generate are confidential:

> All proceedings of and all data and information acquired by the committee referred to in [s]ection 40-71-10 in the exercise of its duties are confidential unless a respondent in the proceeding requests in writing that they be made public. These proceedings and documents are not subject to discovery, subpoena, or introduction into evidence in any civil action except upon appeal from the committee action. Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented during the committee proceedings, nor shall any complainant or witness before the committee be prevented from testifying in a civil action as to matters of which he has knowledge apart from the committee proceedings or revealing such matters to third persons.

S.C. Code Ann. § 40-71-20(A) (Supp. 2009).[6] Our supreme court has examined this statute and found the General Assembly intended it to:

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[6] The current version of subsection (A) differs little from the entirety of the statute in effect at the time of trial. The amendments do not affect the disposition of this appeal. The version in effect at trial, S.C. Code Ann. § 40-71-20 (Supp. 2004), provided:

> All proceedings of and all data and information acquired by the committee referred to in [s]ection 40-71-10 in the exercise of its duties are confidential unless a respondent in the proceeding requests in writing that they be made public. These proceedings and documents are not subject to discovery,

> [E]ncourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process. . . . We find that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source.

McGee v. Bruce Hosp. Sys., 312 S.C. 58, 61-62, 439 S.E.2d 257, 259-260 (1993) (internal citations omitted); accord Durham v. Vinson, 360 S.C. 639, 646, 602 S.E.2d 760, 763 (2004).

> subpoena, or introduction into evidence in any civil action except upon appeal from the committee action. Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented during the committee proceedings nor shall any complainant or witness before the committee be prevented from testifying in a civil action as to matters of which he has knowledge apart from the committee proceedings or revealing such matters to third persons. Confidentiality provisions do not prevent committees appointed by the Department of Health and Environmental Control from issuing reports containing solely nonidentifying data and information.

The trial court's misconstruction of this law supports our decision to reverse as well. Following Prince's Appeal, this court instructed the trial court to "conduct an in camera review of the [QAC] file . . . [and] decide whether the file warrants confidentiality." Prince v. Beaufort Mem. Hosp., Op. No. 2005-UP-602 (S.C. Ct. App. refiled Apr. 11, 2006). Following Hospital's First Appeal, this court instructed the trial court "to set forth the evidence in the [QAC] file that is subject to discovery and to explain why, consistent with the language in this Court's prior opinion, this evidence 'is not protected by the confidentiality statute.'" Prince v. Beaufort Mem. Hosp., Op. No. 2008-UP-139 (S.C. Ct. App. filed Mar. 3, 2008). In each case, this court predicated the trial court's order of a new trial upon its findings concerning confidentiality and the relevance of any QAC information deemed not confidential.

This court found that the QAC met the qualifications for protection under section 40-71-10 and that "Prince failed to appeal the trial court's refusal to consider his argument that Hospital had waived its protection under section 40-71-20." See id. Neither party appealed these rulings. Therefore, these determinations are the law of the case. See Ables, 378 S.C. at 569, 664 S.E.2d at 448 (holding an unappealed ruling is the law of the case). Section 40-71-10 establishes ground rules for the conduct of the QAC members in performing their duties. Section 40-71-20 confers confidentiality upon information gathered by the QAC "in the exercise of its duties."

Despite this court's instructions upon remand, the trial court omitted any evaluation of Hospital's claims of confidentiality in light of these provisions. The trial court failed to make any finding of fact whether the QAC had acquired the documents in its file "in the exercise of its duties." See § 40-71-20(A). Neither did the trial court evaluate whether, in assembling the information in this file, the QAC members "act[ed] without malice, [] made a reasonable effort to obtain the facts relating to the matter under consideration, and act[ed] in the belief that the action [they took was] warranted by the facts known to [them]." See § 40-71-10(B). Accordingly, the trial court erred by failing to conduct the analysis directed by this court prior to unsealing the QAC file and ordering a new trial.

The trial court's first factor represents a misapplication of section 40-71-20(A). Section 40-71-20(A) establishes confidentiality for information gathered by the QAC in the performance of its duties. However, it excepts from this coverage information that is "otherwise available from original sources." In examining this provision, our supreme court stated: "the statute does not protect information if obtained from alternative sources. Hence, the plaintiff seeking discovery cannot obtain documents which are available from the original source directly from the hospital committee, but may seek them from alternative sources." McGee, 312 S.C. at 62-63, 439 S.E.2d at 260 (emphasis added). Here, the trial court held the documents within the QAC file were not confidential because Prince could obtain the information within them from the original sources. According to our supreme court, this interpretation is incorrect. While documents prepared by the QAC remain confidential, Prince is free to obtain the information within them from the original sources. To the extent the QAC obtained documents from other sources during the course of its investigation, Prince may seek copies of those documents from the original sources but not from the QAC file. See id. Consequently, the trial court misinterpreted and misapplied section 40-71-20.

In summary, the trial court based its ruling upon a comparison of evidence beyond the scope of its authority on remand, an argument this court previously held was not properly before the trial court, and a misconstruction of section 40-71-20. Accordingly, we find the trial court abused its discretion in ordering the QAC file disclosed.

II. New Trial

Hospital next argues the trial court erred in granting a new trial based upon a conflict in evidence. We decline to reach this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). The trial court's decision to disclose the QAC file was the sole basis for granting a new

trial. Our reversal herein of the trial court's decision to disclose the QAC file removes that basis.

III. Prince's Remaining Arguments

Prince advances a number of arguments in his Supplemental Brief and, in a prayer for relief contained in the conclusion of that brief, seeks additional sanctions against Hospital. For the reasons outlined below, we decline to address these arguments and requests.

We decline to address Prince's request for his costs on appeal as premature. See Rule 222(d), SCACR (requiring a party seeking costs to file his motion for costs within fifteen days of the issuance of the remittitur). Consequently, this request is not properly before the court.

We decline to address Prince's remaining issues, including attorney's fees for work performed at the trial level, as unpreserved. "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." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Because Prince failed to procure a ruling from the trial court on any of these issues, they are unpreserved for appellate review.

CONCLUSION

For the foregoing reasons, we reverse the trial court's decision disclosing the QAC file and granting Prince a new trial. We reinstate the decision of Judge Gregory.

REVERSED.

THOMAS, J., concurs.

FEW, C.J., concurring: I concur in the majority's reasoning and conclusion that the QAC file meets the criteria for confidentiality under the

peer-review privilege found in sections 40-71-10 and -20. That question is resolved, and no further inquiry into the QAC file's confidentiality under these sections is necessary.

However, this third appeal brings before our court for the first time a document contained in the QAC file, item 15. Item 15 is a series of notes made by the Hospital risk manager from interviews with Nurse Jennifer Emerick and others, including the statements that Nurse Emerick was afraid of Prince and thought he was at risk for elopement.[7] While the document on which the statements are recorded is protected from disclosure under the peer-review privilege, the statements themselves are not. McGee v. Bruce Hosp. Sys., 312 S.C. 58, 62, 439 S.E.2d 257, 260 (1993) (holding peer-review "statute does not protect information if obtained from alternative sources").

I have substantial concerns about what should be done with this newly discovered evidence. The statements, which were revealed to the trial court only after remand from Prince's appeal, served as the basis for the trial court's June 22, 2006 order that the peer-review privilege had been waived. However, the order did not contain the content of item 15.[8] The record on the appeal from that order also did not contain the content of item 15. Therefore, this court did not know what the trial court knew when we reversed the finding of waiver and remanded again for the trial court to examine the validity of the peer-review privilege. The trial court's December 1, 2008 order, however, does reveal the content of item 15. The order demonstrates that the reason the trial court exceeded the mandate from this court was the

[7] "Elopement," as the trial court noted in a footnote to its December 1, 2008 order, is defined as an "attempt to exit a facility unaccompanied." Kelly J. Taylor, RN, JD, "Resident Elopement: Managing the Liability Risks of Wandering," Carefully Speaking, Winter 2002, Volume 7, Issue 1.

[8] This court noted in its opinion on Hospital's First Appeal that the June 22, 2006 order "does not describe the evidence . . . ."

trial court's concern over how to handle the troubling revelation of item 15. Because I share the trial court's concern, I write separately to address it.

The central issue in this case is whether Hospital knew or reasonably should have known that Prince posed a danger to himself, and in particular whether Hospital was on notice of any reasonable likelihood of elopement. Nurse Emerick's statements recorded in item 15 relate directly to that central issue. In pretrial discovery, Prince served Hospital with an interrogatory almost identical to the standard interrogatory set forth in Rule 33(b)(7), SCRCP. In response to the interrogatory, Hospital gave a detailed account of Nurse Emerick's involvement with and her observations of Prince. The interrogatory answer does not mention Nurse Emerick being afraid of Prince nor any thought that he was at risk for elopement.[9] Prince later took Nurse

[9] The interrogatory and answer read:

> 3. For each person known to the parties or counsel to be a witness concerning the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.
>
> Answer: . . .
>
> Jennifer Emerick was the nurse providing care for Mr. Prince on the evening of the occurrence. She noted around 8:30 that he was shaking and weak, and she suspected that the patient may have DTs. At 9:30 Mr. Prince called and asked for his temperature to be taken; it was 100.9. She established that somewhere between 9:45 and 10:00 that Dr. McNeil saw the patient and advised Ms. Emerick that the patient looked fine. Around 10:30, she noticed that the patient was shaking visibly and exhibiting strange behavior. She had ordered medications for the

Emerick's deposition, which was published at trial, in which counsel asked her a series of questions about her observations of Prince and what concerns she had for his safety in the hours leading up to his fall. The questions repeatedly put Nurse Emerick to the task of explaining what she observed and what conclusions she reached in relation to the risk that Prince might harm himself by leaving the hospital room without authorization. In response to these questions, Nurse Emerick did not disclose that she was afraid of Prince or that she thought he was at risk for elopement. In fact, she specifically stated "he wasn't threatening himself or the staff," and "he was not a threat to me or my staff and himself." During the portion of the deposition in which counsel for Hospital questioned Nurse Emerick, which also was published at trial, the following exchange occurred:

> Q: And you testified earlier that if you thought that he was a danger to you or the staff or anybody else, then you would have called security?
>
> A: Yes.
>
> Q: If nothing else, for your own protection?
>
> A: Right.
>
> * * *

> patient that had not come up from the pharmacy. At 11:15 when the patients' med arrived, Jennifer Emerick went into the room to administer them to the patient, and the patient was gone, the IV pump was running and she noticed the window was open; she glanced out the window, but did not see the patient. She was going to report to security when she was notified that there was a patient on the roof of the third floor.

> Q: Did you think he was a danger to himself or others when you left the room – I'm sorry. You didn't think that he was a danger to himself or others, and so you left the room?
>
> A: Correct.

Nurse Emerick's answers to these questions are not consistent with the statement she previously gave to the Hospital risk manager, as recorded in item 15: "Was a little afraid of him. Thought he was at risk for elopement." In the December 1, 2008 order, the trial court called the inconsistency "most troubling." The trial court went on to explain:

> Never was the Plaintiff made aware that the note the Risk Manager . . . [made] from her interview, indicated that Nurse Emerick: "Was a little afraid of him. Thought he was at risk for elopement." Nevertheless, everything else addressed in that note was disclosed to the Plaintiff in the defendants' Answers to Interrogatories . . . .

After referring to several authorities on the importance of the disclosure of information relating to witness credibility, the trial court stated:

> The instant case is not one where it is just "the litigant's need for information from the *most convenient source*," McGee v. Bruce Hosp., supra (emphasis supplied). As the Court of Appeals recognized, "Prince had no memory of the incident, and the only investigative body was the Hospital, a naturally biased entity."[10] Therefore, the Hospital and its investigators – who "acquired" the

[10] The trial court is quoting this court's opinion in Prince v. Beaufort Mem. Hosp., Op. No. 2008-UP-139 at 6 (S.C. Ct. App. filed March 3, 2008).

> information and have sought the protection of the statutory privilege – are the only source of information as to what occurred the night of the subject incident.

I share the trial court's concern. The peer-review privilege under sections 40-71-10 and -20 protects only the documents in the peer-review file. The existence of a valid privilege does not permit counsel to remain silent when the privilege has protected from disclosure the only evidence available that a witness has testified untruthfully. The peer-review privilege was never intended to allow a party to conceal that a witness has testified untruthfully on the central issue in a case.

The issue before this court in this third appeal is a narrow one. The panel has determined that the legal consequences of the newly discovered evidence I have discussed above, and in particular the answer to the second question we instructed the parties to brief after oral arguments, are beyond the scope of this appeal. These consequences must be addressed, if at all, in a separate proceeding before the circuit court under Rule 60(b)(2), SCRCP. However, I am sufficiently troubled by what I have seen that I could not let these facts go unnoted, nor my concern over these events unspoken.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

George E. White, Respondent,

v.

South Carolina Department of Health and Environmental Control and Coffin Point Plantation Homeowners Association, Defendants,

Of whom Coffin Point Plantation Homeowners Association is, Appellant.

Appeal From Administrative Law Court
Carolyn C. Matthews, Administrative Law Court Judge

Opinion No. 4812
Submitted January 4, 2011 – Filed March 23, 2011

AFFIRMED

James J. Wegmann and Brian R. Murphy, both of Beaufort, for Appellant.

Leslie S. Riley, of Charleston, and Robert L. Widener, of Columbia, for Respondent.

PER CURIAM: Appellant Coffin Point Plantation Homeowners Association (Coffin Point) seeks review of an order of the Administrative Law Court (ALC) requiring Coffin Point to rebuild its private community dock in accordance with its permit as originally issued on November 15, 2004, by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM). Coffin Point argues that the administrative law judge (ALJ) erred in concluding that the location of the dock constitutes a material harm to the policies of the South Carolina Coastal Zone Management Act, S.C. Code Ann. § 48-39-10 to -360 (2008 & Supp. 2010) (the Act). We affirm.[1]

FACTS/PROCEDURAL HISTORY

In 2004, Coffin Point submitted an application for a permit to build a community dock on Coffin Creek in Beaufort County. A drawing attached to the application showed that the proposed dock would be located twenty feet from the extended property line between Coffin Point's property and the property of Respondent George White (White), who maintained a commercial dock for shrimpers to buy fuel and ice. The drawing depicted the extended property line as a straight line extension of the high ground property line. OCRM then issued a permit that included the drawing of the proposed dock. After Coffin Point built the dock so that it crossed White's extended property line, White sought OCRM's assistance in enforcing the permit as written.

OCRM contacted Coffin Point and ultimately determined that the dock was built in compliance with the permit "as the [attached] drawing was intended to be interpreted." OCRM advised Coffin Point to submit an "after-the-fact permit amendment request." Coffin Point submitted the request along with an "as-built" survey. The survey purports to show an extended property line, but rather than a straight line extension of the high ground

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

property line, the survey shows a line extending into the creek at a forty-five degree angle. OCRM then amended the original permit to authorize "the existing after-the-fact community dock alignment in accordance with the submitted survey." White sought a contested case hearing to challenge the permit as amended.

The ALJ issued a written order requiring Coffin Point to rebuild its dock in accordance with the permit as originally issued. The ALJ later issued an amended order to correct a clerical error in the original order. This appeal followed.

ISSUES ON APPEAL

1. Does this court have jurisdiction over Coffin Point's appeal when it served the notice of appeal over thirty days after OCRM sent the ALJ's order to Coffin Point by electronic mail?

2. Did the ALJ err in interpreting the term "navigation" before concluding that the location of Coffin Point's dock constituted a significant navigational hazard?

3. Did the ALJ err in concluding that the location of Coffin Point's dock constituted a material harm to the policies of the Act?

STANDARD OF REVIEW

Under the Administrative Procedures Act, the ALJ presides as the fact-finder in contested cases. Hill v. S.C. Dep't of Health and Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). "[T]his Court's [review] is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." Id. at 9, 698 S.E.2d at 617. "In determining whether the ALJ's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached." Id. at 9-10, 698 S.E.2d at 617. "The mere possibility of

drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Id.

LAW/ANALYSIS

I. Appellate Jurisdiction

Rule 203(b)(6), SCACR, provides that when a statute allows a decision of the ALC to be appealed directly to this court, the notice of appeal must be served on the agency, the ALC, and all parties of record within thirty days after "receipt of the decision." Here, Coffin Point served the Notice of Appeal on March 12, 2009. White argues that Coffin Point received the ALJ's January 28, 2009 decision on February 9, 2009, when OCRM's counsel e-mailed a signed and filed copy of the decision to Coffin Point's counsel. White notes that Coffin Point's counsel responded by e-mail the same day (February 9th) and outlined his initial thoughts on the decision, thus showing that counsel received the decision on this date. A Coffin Point representative then responded to both counsel pointing out a clerical error in the ALJ's decision.

Coffin Point's counsel does not deny receiving the e-mail transmission of the ALJ's January 28, 2009 decision. Rather, counsel maintains that Rule 203(b)(6) contemplates receipt of the decision through proper service by mail or hand delivery and that the applicable rules do not authorize service of the decision by e-mail.[2] Accordingly, the thirty-day period in which to file a

[2] We note that on January 31, 2011, the ALC submitted to the General Assembly proposed amendments to the ALC Rules of Procedure that would allow for the ALC to serve certain documents, including orders, by e-mail. The proposed amendments concern the ability of the ALC to utilize service by e-mail in notifying parties of its decisions. However, the proposed amendments would not apply to the facts in this case, which involve service by a party rather than service by the ALC.

notice of appeal did not commence on the day that counsel received the decision via e-mail. We agree.

While we have found no South Carolina case law discussing the application of Rule 203(b)(6) to the precise set of facts present in this case, this court's opinion in Trowell v. South Carolina Department of Public Safety is instructive. 384 S.C. 232, 681 S.E.2d 893 (Ct. App. 2009). In Trowell, this court declined to hold that the facsimile of an agency's final decision regarding an employee grievance constituted proper service for the purpose of initiating the time frame in which the employee had to file his appeal. 384 S.C. at 235-37, 681 S.E.2d at 895-96. The court noted that the Department of Public Safety's interpretation of its grievance procedure created a rule that it had never before employed or sought to enforce. Id. at 236, 681 S.E.2d at 896. The court further noted that such a rule was not included in any written materials or guidelines available to the public or the bar. Id. at 236-37, 681 S.E.2d at 896. The court observed that the Department's decision "arbitrarily created a trap for the unwary petitioner." Id. at 237, 681 S.E.2d at 896. The court held that the employee's substantial rights were prejudiced due to the arbitrary and capricious nature of the Department's interpretation of its grievance procedure. Id. at 237, 681 S.E.2d at 896.

Here, there is nothing in the current applicable rules that authorizes service of a decision of the ALC by electronic mail.[3] Hence, the circumstances of this case are analogous to those in Trowell. Prior to the time that Coffin Point filed its appeal in 2009, there was no official written rule or notice about the binding effect of the service of an order by electronic mail. Therefore, due process does not allow this court to recognize such service in applying Rule 203(b)(6), SCACR, to determine the timeliness of the appeal in this case. Cf. State v. Collins, 329 S.C. 23, 28 n.4, 495 S.E.2d 202, 205 n.4 (1998) (recognizing that although the ex post facto clause itself does not apply to actions of the judicial branch, judicial decisions applied retroactively can violate the Due Process Clause and that an unforeseeable

[3] See ALC Rule 5 (Service by delivery or mail); ALC Rule 29(C) (Contested Case Hearings-Decision); Rule 5, SCRCP (Service and Filing); Rule 203(b)(6), SCACR (time for service of notice of appeal).

judicial enlargement of a criminal statute, applied retroactively, "operates precisely like an ex post facto law").

Further, ALC Rules 5 and 29(C) contemplate service of an ALC decision by the ALC via the United States Postal Service and not by a party via electronic mail.[4] White relies on the opinions in Ackerman v. 3-V Chemical, Inc., 349 S.C. 212, 562 S.E.2d 613 (2002), and Canal Insurance Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999), in support of his assertion that service of the decision by DHEC's counsel was a proper substitute for service by the ALC. However, those cases involved a determination of timeliness under Rule 203(b)(1), SCACR, which governs appeals from the court of common pleas and designates the commencement of the period in which to appeal as "receipt of written notice of entry of the order[.]" Ackerman, 349 S.C. at 215-16, 562 S.E.2d at 615; Canal, 338 S.C. at 5-6, 524 S.E.2d at 418. The analyses in both Ackerman and Canal explicitly distinguished the receipt of notice of the entry of an order from receipt of the order itself. Id. Receipt of notice was the critical event in Ackerman and Canal, whereas receipt of the order itself is the critical event under Rule 203(b)(6), SCACR, in the present case. Therefore, Ackerman and Canal are not instructive in analyzing the "receipt" of an ALJ's decision within the meaning of Rule 203(b)(6), SCACR.

Based on the foregoing, the motion to dismiss is without merit.

II. Navigation

Coffin Point maintains that the ALJ misinterpreted the term "navigation" within the meaning of Regulation 30.12(A)(1)(p) of the South Carolina Code (Supp. 2010) when she concluded that the location of Coffin Point's dock constitutes a significant navigational hazard and thus a "material harm to the policies of the Act." Coffin Point argues that policing disputes between neighboring dock owners is not contemplated by the policies of the Act. Because members of the public are affected by Coffin Point's dock, this

[4] The 2011 proposed amendments to the ALC rules also contemplate service by the ALC and not by a party.

case is not a mere dispute between neighboring dock owners. Therefore, we disagree with Coffin Point's assignment of error.

Initially, White contends that Coffin Point's challenge of the ALJ's interpretation of the term "navigation" is not preserved for review because Coffin Point did not raise this precise issue in its Prehearing Statement, at the hearing, or in its proposed order. We disagree. In her written order, the ALJ ruled for the first time on the proposed dock's effect on navigation. She made this ruling in the context of addressing whether allowing the proposed dock to cross extended property lines would cause material harm to the policies of the Act. This issue was properly before the ALJ when White sought a contested case hearing to challenge the amended permit on the ground that it allowed Coffin Point's dock to cross their shared extended property line. Therefore, the challenge to the ALJ's interpretation of "navigation" is preserved for review.

Turning to the merits of the issue, Regulation 30.12(A)(1)(p) states:

> No docks, pierheads or other associated structures will be permitted closer than 20 feet from extended property lines with the exception of joint use docks shared by two adjoining property owners. However, the Department may allow construction closer than 20 feet or over extended property lines where there is no material harm to the policies of the Act.

(emphasis added). Coffin Point cites the case of Dorman v. South Carolina Department of Health and Environmental Control in support of its argument that policing disputes between neighboring dock owners is not within the policies of the Act. 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002). Dorman involved objections to a proposed boat dock from neighbors on both sides of the applicant's property. 350 S.C. at 162-63, 565 S.E.2d at 121. The neighboring property owners objected on the grounds that the proposed dock would crowd too close to their existing docks and the roof would impinge on their view. 350 S.C. at 163, 565 S.E.2d at 121. This court adopted OCRM's

interpretation of Regulation 30.12, which included the position that any navigational issue between docks is a private property issue. Id. at 171, 565 S.E.2d at 126. Specifically, the Appellate Panel of OCRM stated "It is not the policy of OCRM to police navigational disputes that should be dealt with among the adjacent property owners." Id. at 163, 565 S.E.2d at 121 (internal quotation marks omitted). This court remanded the case to the ALJ to determine whether the permit should be granted in light of OCRM's interpretation of Regulation 30.12. Id. at 171-72, 565 S.E.2d at 126.

In contrast, the present case involves the disruption of a commercial enterprise and its customers. The objection lodged by White does not involve merely a private dispute with Coffin Point, but also concerns the needs of White's customers, who themselves are members of the public, and the local shrimping industry in general. Unlike Dorman, this case does not involve a mere private navigational dispute. Therefore, the ALJ's conclusion that the location of Coffin Point's dock presents a significant navigational hazard does not conflict with OCRM'S policy of avoiding the regulation of private navigational disputes.

Coffin Point also argues that in interpreting the term "navigation," the ALJ overlooked the public's ability to navigate the creek in general and instead focused too narrowly on the inability of White's customers to navigate to and from White's dock under specific conditions. The ALJ's amended order addresses this point by citing from Chapter III of Part II of the Coastal Management Program: "The policies of the Coastal Management Program include [the policy that] 'docks and piers will not be approved where they interfere with navigation or reasonable public use of the waters.'" (emphasis added). Because White's customers are members of the public, their navigation to and from White's commercial dock to conduct business constitutes "reasonable public use of the waters" within the meaning of the Coastal Management Program.

Even if the ALJ's interpretation of navigation as used in Regulation 30.12 was too broad, the error is harmless and therefore not reversible. See Jensen v. Conrad, 292 S.C. 169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987)

(holding that a judgment will not be reversed for insubstantial errors not affecting the result). In support of her decision, the ALJ also relied on section 48-39-150(A)(10) of the South Carolina Code (2008), which requires OCRM to consider the extent to which the proposed use could affect the value and enjoyment of adjacent owners. Further, OCRM representatives admitted that the "policies of the Act" included the value and enjoyment of adjacent property owners. Thus, the consideration of how the proposed use affects an adjacent property exists independently of the requirement that the proposed use not interfere with navigation.

III. Material Harm

Coffin Point argues that the evidence does not support the ALJ's conclusion that the location of its dock constitutes a material harm to the policies of the Act. Specifically, Coffin Point maintains that there is no evidence that its dock impedes the general public's use of Coffin Creek and that there is no substantial evidence that the dock impacts White's business. We believe there is substantial evidence of an adverse impact on White's commercial dock and the shrimpers who use it, and, therefore, we disagree with Coffin Point's assignment of error.

Section 48-39-150(A) requires OCRM to base its evaluation of a permit application on its individual merits. In presenting the unique circumstances of this case, White testified that the number of his customers decreased after Coffin Point's dock was built and that there had been a steady decline in gross sales over the past five years. Although his profit and loss statements showed what was characterized by OCRM's counsel as a "spike" in ice sales in 2007, White explained that his former accountant had distorted the numbers (presumably by artificially lowering them) for the years prior to 2007 as part of an embezzlement scheme. He also added that he gained a new customer in 2007 only because that individual had been evicted from his previous facility and no longer had ready access to ice. Further, one of White's customers testified that he had cut back on the number of his visits to White's dock within the past two years.

Two of White's customers also gave testimony on the adverse impact of the location of Coffin Point's dock. They explained that the limited amount of space between White's dock and Coffin Point's dock, combined with the size of their shrimp boats, presented a danger of their boats colliding with the Coffin Point dock when they attempted to leave White's dock to exit the creek.[5] Further, a customer expressed concern over his lack of liability insurance to cover such a loss. Significantly, an OCRM official admitted that OCRM staff would consider any "significant impact" on a neighboring dock to constitute material harm to the policies of the Act.

Finally, Coffin Point argues that the ALJ erroneously attempted to link the alleged navigational hazard to White's business in an attempt to show that the Coffin Point dock is a material harm to the policies of the Act. However, as stated above, section 48-39-150(A)(10) requires OCRM to consider the effect of the proposed use on the value and enjoyment of adjacent owners. This consideration is independent of OCRM's policies on navigation.

CONCLUSION

Accordingly, the motion to dismiss is **DENIED** and the ALJ's order is **AFFIRMED**.

THOMAS, PIEPER, and GEATHERS, JJ., concur.

[5] White estimated that the distance between the Coffin Point dock and his commercial dock is approximately thirty-five feet and that the average shrimp boat that visits his dock is seventy feet long. One customer testified that he captains an eighty-foot boat.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Labor, Licensing, and Regulation, South Carolina Manufactured Housing Board, Appellant,

v.

Angela B. Chastain, f/k/a Angela Brown, f/k/a Angela Brown-Neal, Respondent.

Appeal From Administrative Law Court
Ralph K. Anderson, III, Administrative Law Court Judge

Opinion No. 4813
Heard November 4, 2010 – Filed March 23, 2011

AFFIRMED IN PART AND VACATED IN PART

Suzanne L. Hawkins, of Columbia, for Appellant.

William H. Edwards, of West Columbia, for Respondent.

KONDUROS, J.: The South Carolina Manufactured Housing Board[1] (the Board), filed suit to enjoin Angela Chastain from selling manufactured homes without a license in violation of a cease and desist order. The Board further requested Chastain be fined for the violations. The administrative law court (ALC) determined Chastain had not violated the cease and desist order and granted summary judgment in her favor. The Board appeals. We affirm the ALC's finding that Chastain did not violate the cease and desist order and vacate the portions of the ALC's order not necessary to our ruling.

FACTS

Chastain held a license to sell manufactured homes until she surrendered it in 2002.[2] In 2003, the Board became aware Chastain might still be involved in the sale of manufactured homes and issued a cease and desist order prohibiting such conduct. In 2008, the Board brought this suit contending Chastain violated the cease and desist order in several respects. First, in 2006, Chastain purchased real property to which a manufactured home was attached. She sold that property, including the detitled manufactured home, to Steven Hickerson in April 2007.[3] Also in 2006, Chastain purchased a manufactured home in MacGregor Downs Mobile Home Park. Her son lived in the home while attending Midlands Technical College. After her son vacated the residence, Chastain allowed the Russell family, who needed a place to stay, to reside in the home. Meanwhile, Chastain purchased another piece of real property that included a manufactured home with a retired title. Chastain eventually sold this

[1] The Board is a licensing board under the purview of the South Carolina Department of Labor, Licensing, and Regulation.

[2] Chastain surrendered her license as part of an agreement to resolve pending federal criminal charges against her relating to the manufactured housing business.

[3] A manufactured home's title is similar to a vehicle's title until the home is affixed to real property. Then, the title is retired and the home is "detitled" and treated as real property. S.C. Code Ann. § 56-19-560 (Supp. 2010).

property to the Russells. In October 2007, Chastain sold the MacGregor Downs home to another purchaser.

In 2008, two manufactured homes were offered for sale through the Manufactured Housing Global network internet site (MHG network) by "Chastain Builders." Chastain maintained she had not listed the homes for sale and testified it could have been her ex-husband who did so because he was familiar with how to create such listings. Finally, Chastain offered for sale in the Carolina Trader newspaper two pieces of property to which detitled manufactured homes were affixed.

Following a hearing, the ALC determined Chastain had not violated the cease and desist order because she had not engaged in the act of selling or offering for sale manufactured homes that fell within the parameters of the Uniform Standards Code for Manufactured Housing, sections 40-29-5 to -380 of the South Carolina Code (Supp. 2010) (the Code). The ALC concluded homes with a retired title did not fall within the purview of the governing statutes and regulations and federal law regarding the regulation of the sale of manufactured housing did not preempt state law with respect to the sale of used manufactured homes. The ALC declined to address Chastain's argument that the MacGregor Downs home involved the sale of a manufactured home acquired for personal use thereby bringing it within an exception under the Code. This appeal followed.

STANDARD OF REVIEW

The standard of review with respect to orders on appeal from the ALC is set forth in the Administrative Procedures Act, section 1-23-610 of the South Carolina Code (Supp. 2010). This court may reverse or modify the decision of the ALC if its findings, conclusions, or decisions 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.

§ 1-23-610(B). "The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." Id.

LAW/ANALYSIS

Chastain urges the ALC's ruling should be affirmed on the ground that the MacGregor Downs home was acquired for her personal use as contemplated by Regulation 79-12(A)(3) of the South Carolina Code (Supp. 2010). We agree.

A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, even if those reasons have not been presented to or ruled on by the lower court." I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. at 420, 526 S.E.2d at 723. "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

Under the Code, "[n]o person may engage in the business of selling, wholesale or retail, as a manufactured home retail dealer . . . without being licensed by the [B]oard." S.C. Code Ann. § 40-29-30(A) (Supp. 2010). A "'[m]anufactured home retail dealer' means a person engaged in the business of buying, selling, offering for sale, or dealing in manufactured homes or offering for display manufactured homes for sale in South Carolina." S.C. Code Ann. § 40-29-20(13) (Supp. 2010). A person must buy, sell, offer or

display for sale, or deal in three or more manufactured homes in a twelve-month period to be a "manufactured home retail dealer." Id.

The Board cites two twelve-month periods in which it alleges Chastain acted as a manufactured home retail dealer in violation of the cease and desist order. First, beginning in April 2007, Chastain sold a detitled manufactured home to Hickerson, a detitled manufactured home to Russell, and the MacGregor Downs manufactured home. In addition, the Board points to the sale of the MacGregor Downs home, the two listings on the MHG network, and the two advertisements in the Carolina Trader as violations of the cease and desist order during a twelve-month period beginning October 2007.

Regulation 79-12(A)(3) exempts from the licensing requirement "[p]ersons disposing of manufactured homes acquired for personal use, provided that said home is not used for the purpose of avoiding the provisions of this Act or Regulations." In this case, Chastain testified she purchased the MacGregor Downs home for her son to live in while attending Midlands Technical College "because it was right close to [the school]." She further testified her son lived in the home for "almost a year, maybe over a year" and she paid the electric bill. The Board did not dispute that Chastain's son resided in the home or for how long.

Although the term "personal use" is not defined in the Code, we are persuaded by Chastain's argument that the purchase of the manufactured home for her son to live in constitutes her acquisition of it for personal use. Furthermore, the Board presented no evidence demonstrating Chastain's initial acquisition of this home for her son's residence was an attempt to avoid the provision of the Code. This conclusion means Chastain's sale of the MacGregor Downs home is not included in the total number of sales under section 40-29-20(13). Therefore, she did not sell three or more manufactured homes in violation of the cease and desist order within the twelve-month period beginning April 2007.

In the second twelve-month period, beginning October 2007, two of the infractions cited by the Board were the offering for sale of two homes on the

MHG network. However, the ALC found the evidence was insufficient to establish Chastain had actually listed these homes. The Board does not appeal that finding by the ALC. An unappealed ruling is the law of the case. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 282 n.5, 701 S.E.2d 742, 745 n.5 (2010). Absent those sales, and excluding the sale of the MacGregor Downs home, the Board alleged only two additional violations: the offer for sale of two detitled manufactured homes in the Carolina Trader. Consequently, the Board has failed to establish Chastain sold or offered for sale three manufactured homes as contemplated by section 40-29-20(13) within the second twelve-month period beginning October 2007.

Based on the foregoing analysis, we affirm the ALC's ultimate ruling that the Board failed to establish Chastain violated the cease and desist order. We vacate the ALC's order insofar as it addresses the issue of whether a detitled manufactured homes is subject to the strictures of the Code. Therefore, the ruling of the ALC is

AFFIRMED IN PART AND VACATED IN PART.

HUFF and LOCKEMY, JJ., concur.