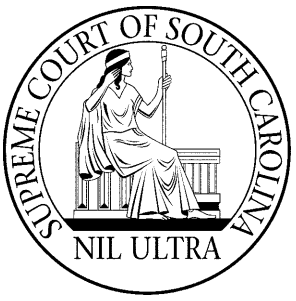

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
May 29, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shirley's Iron Works, Inc., and Tindall Corporation, Respondents,

v.

City of Union, South Carolina, Gilbert Group LLC and William E. Gilbert, Defendants,

Of whom, City of Union, South Carolina is Petitioner.

Appellate Case No. 2010-170066

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Union County
John C. Few, Circuit Court Judge

Opinion No. 27256
Heard March 6, 2013 – Filed May 29, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

William E. Whitney, Jr., of Whitney Law Firm, of Union, and Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, for Petitioner.

Boyd B. Nicholson, Jr., of Haynsworth Sinkler Boyd, PA, of Greenville, and Norman W. Lambert and Raymond P. Smith, both of Harper Lambert & Brown, P.A., of Greenville, for Respondents.

JUSTICE KITTREDGE: This case concerns the interplay between the Subcontractors' and Suppliers' Payment Protection Act (SPPA)[1], the Tort Claims Act (TCA)[2], and this Court's opinion in *Sloan Construction Co. v. Southco Grassing, Inc.* (*Sloan I*), 377 S.C. 108, 659 S.E.2d 158 (2008). When subcontractors Shirley's Iron Works, Inc. and Tindall Corporation (collectively Respondents) did not receive full payment from the general contractor Gilbert Group, LLC (Gilbert) for their work on a public construction project for the City of Union (the City), they filed suit, asserting the City failed to comply with the statutory bond requirements pertaining to contractors working with subcontractors on public projects found in the SPPA. The circuit court granted summary judgment to the City. The court of appeals reversed and remanded. *Shirley's Iron Works, Inc. v. City of Union*, 397 S.C. 584, 726 S.E.2d 208 (Ct. App. 2009). We granted a writ of certiorari to review the court of appeals decision. We now affirm in part, reverse in part, and remand. Further, we clarify *Sloan I* and hold that a governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements.

I.

In 2002, the City issued a request for proposals for the design and construction of a spec building. Thereafter, the City contracted with Gilbert for the project, the cost of which totaled approximately $875,000. Gilbert entered into contractual agreements with various subcontractors, including Respondents. The City did not require Gilbert to secure a payment bond, and it is undisputed no payment bond was secured. Ultimately, Gilbert failed to fully compensate all of the subcontractors after they completed work on the project.

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[1] S.C. Code Ann. §§ 29-6-210 -290 (Supp. 2012).

[2] S.C. Code Ann. §§ 15-78-10 -220 (Supp. 2012).

At the project's completion, the City contended it owed $111,270 on its contract with Gilbert. Respondents also had significant unpaid invoices.[3] After the City was notified of Gilbert's failure to pay its subcontractors,[4] the City offered to distribute the balance of its contract with Gilbert to the unpaid subcontractors in exchange for a release of the City's liability. The City offered each Respondent $25,000. Upon Respondents' refusal to accept the offer and execute a release in favor of the City, the City distributed their pro rata portions to the other unpaid subcontractors.

In 2003, Respondents filed a Complaint against the City, alleging the City should be required to pay the amounts owed under their respective subcontracts because the City failed to require Gilbert to secure a payment bond in violation of S.C. Code Ann. section 29-6-250.[5] Respondents also requested attorney's fees pursuant to S.C. Code Ann. section 15-77-300 (Supp. 2012).[6] The City filed an answer denying Respondents' allegations. The City also filed a third-party complaint against Gilbert, alleging Gilbert was negligent in failing to acquire a payment bond.

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[3] Respondent Shirley's Iron Works had unpaid invoices in the amount of $132,782. Respondent Tindall Corporation had unpaid invoices in the amount of $165,500.

[4] A City administrator testified that the $111,270 was the balance owed as of the project's completion. However, he could not remember the date upon which the City learned of Gilbert's nonpayment, but stated it was while the project was still under construction.

[5] Section 29-6-250(1) provides that when a governmental entity is a party to a contract to improve real property, and the contract is for a sum in excess of $50,000, the property owner must require the general contractor to provide a payment bond in the full amount of the contract.

[6] Section 15-77-300(A) states that in any civil case contesting state action, the prevailing party may recover reasonable attorney's fees if the governmental agency acted without substantial justification in pressing its claim against the party, and there are no special circumstances that would make the award of attorney's fees unjust.

In 2004, Judge Paul Short granted the City's motion to strike Respondents' request for attorney's fees.[7] No appeal was taken from the order granting the motion to strike.

In August 2005, Respondents filed an Amended Complaint against the City and Gilbert, asserting third-party beneficiary status of the contract between the City and Gilbert, alleging Gilbert failed to pay Respondents for their work, and contending the City failed to require Gilbert to secure a payment bond in violation of the SPPA. This Amended Complaint was considerably more detailed than the original complaint. In the "Facts" section, Respondents contended section 29-6-250(1) created an obligation on the City to ensure that a payment bond is in place to protect subcontractors and is a term of the City's contract with Gilbert. Respondents asserted they were third-party beneficiaries of the City's contract with Gilbert because the bonding requirements of section 29-6-250 serve to protect Respondents as subcontractors and are "legislatively mandated contractual obligations" incorporated into the contract as a matter of law. Respondents argued they were damaged by the City's breach of its statutorily imposed contractual obligation to secure a payment bond from Gilbert. Respondents asserted causes of action for (1) "[v]iolation of S.C. Code Ann. [section] 29-6-250," (2) attorney's fees for violation of S.C. Code Ann. section 27-1-15, (3) negligence, (4) quantum meruit, and (5) attorney's fees and prejudgment interest.

Thereafter, Judge Steven John granted the City's motion to strike Respondents' claims for attorney's fees and prejudgment interest. Judge John noted that Judge Short's previous order stated Respondents' original complaint sounded in tort, and that attorney's fees and prejudgment interest were not available under the TCA. Judge John held that Judge Short's unappealed order "constitute[d] the law of the case," which he was "bound to apply."

Subsequently, both parties moved for summary judgment. Judge John Few granted the City's motion for summary judgment on all of Respondents' causes of action and denied Respondents' motion. Judge Few found Respondents' claims sounded

[7] Judge Short also granted the City's motion to join Gilbert as a defendant, finding Gilbert and the City were "joint tortfeasors whose alleged acts combined and concurred to cause the harm for which [Respondents] seek to recover."

in tort and were barred by the TCA. Additionally, Judge Few held that a governmental entity's violation of the SPPA does not give rise to a private cause of action by a subcontractor.[8] Respondents appealed, and the court of appeals reversed and remanded.

Specifically, the court of appeals reversed Judge Few's findings with respect to Respondents' negligence claim, holding that the SPPA provided for a tort cause of action which was not governed by the TCA. The court reasoned that *Sloan I* supported its conclusion. Additionally, the court of appeals held Judge John's and Judge Short's previous orders stating Respondents' claims sounded in tort were not the law of the case and Respondents' Amended Complaint, when read as a whole, sufficiently pled a third-party beneficiary breach of contract cause of action for violation of the SPPA. Concluding a ruling on the merits would be premature, the court of appeals remanded to the circuit court for findings regarding Respondents' tort, breach of contract, and quantum meruit claims to determine liability and damages.[9] This court granted the City's writ of certiorari to review the court of appeals opinion.

II.

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial judge under Rule 56(c), SCRCP. *Bovian v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

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[8] Judge Few's order was based, in part, on the court of appeals decision in the *Sloan I* litigation. *See Sloan Constr. Co. v. Southco Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006). However, Judge Few issued his summary judgment order prior to our opinion in *Sloan I*, which reversed the court of appeals.

[9] The court of appeals also found Respondents' claim for attorney's fees under section 27-1-15 of the South Carolina Code was not preserved for review and Respondents have not appealed this ruling.

III.

A.

With the enactment of the TCA in 1986, the legislature intended to remove the common law bar of sovereign immunity in certain circumstances, but only to the extent legislatively authorized. *See* S.C. Code Ann. § 15-78-20 (declaring it is the public policy of the state that government entities are only liable for torts within the limitations of this chapter). However, the TCA expressly delineated many exceptions to the waiver of immunity, including that the governmental entity is not liable for loss resulting from failure to enforce any law or statute. *See id*. § 15-78-60(4).

Thereafter, in 2000, the legislature enacted the SPPA. The SPPA reads in pertinent part as follows:

> (1) When a governmental body is a party to a *contract* to improve real property, and the *contract* is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the *contract* . . . .
> . . . .
>
> (3) For purposes of any *contract covered by the provisions of this section*, it is the duty of the entity *contracting* for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

S.C. Code Ann. § 29-6-250 (emphasis added).

It is the interplay of these two statutory schemes which is implicated in the present case. Both parties rely on *Sloan I* to advance their respective positions.

In *Sloan I*, this Court addressed whether a subcontractor may bring a private right of action against a governmental entity for failure to comply with the statutory bonding requirements of the SPPA. A subcontractor working on a state highway maintenance project brought claims against the Department of Transportation (SCDOT) for its alleged failure to comply with the bonding requirements of the

SPPA. The subcontractor brought an action for negligence against SCDOT pursuant to the TCA and a breach of contract claim alleging SCDOT was obligated to it, as a third-party beneficiary to the contract between SCDOT and the contractor, to ensure that the contractor was properly bonded pursuant to the SPPA.

We held the SPPA is specifically applicable to subcontractors and suppliers on government projects and outlines a detailed bonding scheme that significantly expands the protections already afforded these parties. *Sloan I*, 377 S.C. at 114, 659 S.E.2d at 161. However, the Court noted the SPPA does not expressly provide for a private right of action between the subcontractor and the contracting government body. *Id.* at 114, 659 S.E.2d at 162. Nevertheless, the Court reasoned the "very title of the SPPA clearly indicates the [legislature] intended to provide stronger payment protection specifically for subcontractors and suppliers on government projects." After an analysis of the terms of the SPPA, we held "the legislature must have intended for those to whom the government owed the duty to be able to vindicate their rights under a statute enacted for their special benefit." *Id.* (noting "the SPPA is framed solely in the context of payment security by virtue of its location in Chapter 6, Title 26, entitled 'Payments to Contractors, Subcontractors, and Suppliers'"). Thus, we found "an implied private right of action by a subcontractor against the government exists under the SPPA." [10]

Specifically addressing the third-party beneficiary claim, the Court relied on the reasoning of the Seventh Circuit Court of Appeals in *A.E.I. Music Network, Inc. v. Bus. Computers, Inc.*, 290 F.3d 952 (7th Cir. 2002). In *A.E.I.*, the Seventh Circuit explained that the statutory bond requirement, which is similar to this state's, was a contractual term incorporated by the legislature. In creating the bond requirement, the Seventh Circuit reasoned the legislature intended public works construction contracts to protect subcontractors. *A.E.I.*, 290 F.3d at 955. Thus, the *A.E.I.* court

[10] In 2011, after a second appeal in the *Sloan* litigation, this Court modified its holding from *Sloan I*. *See Sloan Constr. Co. v. Southco Grassing, Inc. (Sloan II)*, 395 S.C. 164, 717 S.E.2d 603 (2011). In *Sloan II*, we held that the governmental entity did not owe a continuing duty to maintain the payment bond throughout the course of the project. However, because Respondents allege that the City failed to ensure that a payment bond was procured in the first instance, *Sloan II*'s holding does not impact this case.

held the subcontractor's claim as a third-party beneficiary sounded in common law as a claim for breach of contract. *Id.* at 957.

We found *A.E.I.*'s analysis persuasive and stated:

> Because the legislature intended to protect contractors by creating bonding requirements, and because the subcontractors are the only ones with a financial stake in enforcing the bond requirements, subcontractors are direct third-party beneficiaries to the contract between a government entity and a general contractor to which the SPPA is applicable. *For this reason, the government may be liable to a subcontractor for breach of contract for failing to comply with the SPPA bonding requirements.*

Sloan I, 377 S.C. at 120, 659 S.E.2d at 165 (emphasis added).

The *Sloan I* Court did not address the subcontractor's negligence claim in the body of the opinion. However, in footnote five, which is the source of the apparent confusion in the current appeal, the Court stated:

> Although we find that the court of appeals incorrectly based its conclusion with respect to the SPPA on this issue on federal Miller Act jurisprudence, *we nevertheless agree that a claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the Tort Claims Act because the Act does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute*. *See* S.C. Code Ann. § 15–78–60(4) (2005). *See also Hawkins v. City of Greenville*, 358 S.C. 280, 292–93, 594 S.E.2d 557, 563–64 (Ct.App.2004) (noting that the South Carolina Tort Claims Act is only a limited waiver of sovereign immunity for tort claims against government entities and does not create new substantive causes of action). *Therefore, the Tort Claims Act is not relevant to the government's liability for failure to comply with a duty under the SPPA.*

Id. at 118, 659 S.E.2d at 164, n.5 (emphasis added).

We find footnote five is clear and presents no ambiguity. The TCA forecloses a tort action under the SPPA. Indeed, this Court must presume the legislature knew of and contemplated the TCA in enacting the SPPA. *See State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."). The TCA is the sole and exclusive remedy for tort actions against the government. *See* S.C. Code Ann. § 15-78-200 ("Notwithstanding any other provisions of law, [the TCA] is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."). And, subsection (4) of section 15-78-60 makes clear that the government is not liable in tort for its failure to enforce a statute. *See also Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 290, 628 S.E.2d 496, 502 (Ct. App. 2006) ("The [TCA] governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct. App. 2005))). Footnote five in *Sloan I* reinforces these provisions and plainly excludes a tort action under the SPPA.

Finally, after expressly stating that "the government may be liable to a subcontractor *for breach of contract* for failing to comply with the SPPA bonding requirements[,]" we addressed the extent of governmental liability under the SPPA. *Sloan I*, 377 S.C. at 120, 659 S.E.2d at 165(emphasis added). The Court observed that "in a *tort or a contract* action arising under the SPPA, the government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." *Id.* at 121, 659 S.E.2d at 165-66 (emphasis added). We believe the superfluous use of the term "tort" here is the reason for the lingering confusion whether a violation of the SPPA will support a tort cause of action.

In this case, the court of appeals found that the Respondents could proceed against the City on a tort cause of action based on our conclusion that "the SPPA establishes both an affirmative duty on the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond." The court of appeals held such language "clearly suggested a tort remedy for breach of the duty created pursuant to section 29-6-250 of the SPPA."

B.

Both parties contend the court of appeals was correct in finding Respondents' cause of action for violation of the SPPA was a tort. The City argues a tort cause of action is governed by, and ultimately barred by, the TCA. Conversely, Respondents contend the court of appeals properly held the SPPA permits a tort cause of action, notwithstanding the TCA. We reject both contentions, for the SPPA does not permit a private cause of action sounding in tort.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *McKnight*, 352 S.C. at 648, 576 S.E.2d at 175. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." *Hodges*, 341 S.C. at 88-89, 533 S.E.2d at 583.

We reject the suggestion that the legislature intended to provide a tort remedy under the SPPA. First, the text of the pertinent sections of the SPPA sounds in contract, not tort. *Sloan I* adopted the reasoning of *A.E.I.*, which held the bonding requirement is incorporated into public works construction contracts and a subcontractor's claim sounded in common law as a claim for breach of contract. And this Court's definitive holding in *Sloan I* could not have been clearer: "For this reason, the government may be liable to a subcontractor for breach of contract for failing to comply with the SPPA bonding requirements." *Sloan I*, 377 S.C. at 120, 659 S.E.2d at 165.

Finally, it is true that *Sloan I*, in the section concerning relief, referenced a "*tort or contract* action arising under the SPPA . . . ." However, we now clarify that no tort action arises under the SPPA. Therefore, we reverse the court of appeals with respect to its holding and find that the SPPA does not provide for a tort cause of action against a governmental entity.

C.

The City next contends the court of appeals erred in reversing the circuit court's grant of summary judgment as to the claim of third-party beneficiary breach of contract. Specifically, the City contends the law of the case doctrine forecloses a third-party beneficiary claim, and even assuming it does not, Respondents did not sufficiently plead a third-party beneficiary breach of contract action in their Amended Complaint. We disagree and affirm the court of appeals in both respects.

i.

An unappealed ruling is the law of the case and requires affirmance. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010). Certainly,

> The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right. . . . Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.

Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (quoting 21 C.J.S. Courts Section 195 at 335 (1940)). This State has a long-standing rule that one judge of the same court cannot overrule another. *Charleston Ctny. Dep't of Soc. Servs. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995).

We find the orders of Judge John and Judge Short are not the law of the case insofar as the Amended Complaint is concerned. Neither Judge Short nor Judge John specifically ruled on the issue of whether Respondents pled a third-party beneficiary breach of contract claim. Moreover, the City's motions to strike did not require the trial court to determine whether a breach of contract action had been pled.[11] Therefore, we hold the law of the case doctrine does not foreclose Respondents' third-party beneficiary contract claim.

[11] Furthermore, the two orders merely granted the City's motion to strike with regard to attorney's fees and prejudgment interest pursuant to section 15-7-300 and should not be viewed beyond their intended and limited purpose.

ii.

"Pleadings are to be liberally construed 'to do substantial justice to all parties.'" *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000) (quoting Rule 8(f), SCRCP). "It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." *S.C. Nat'l Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986); *see also Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are.").

We find Respondents' Amended Complaint pled a third-party beneficiary contract claim. In the "Facts" section of the Amended Complaint, Respondents allege they were "third-party beneficiaries" of the City's contract with Gilbert because the bonding requirements are "legislatively mandated contractual obligations" that were incorporated into the contract as a matter of law. The First Cause of Action incorporated the allegations within the "Facts" section and is entitled "Violation of S.C. Code Ann. section 29-6-250." While the word "contract" does not appear in the first cause of action, neither do the words "tort" or "negligence." A fair reading of the Amended Complaint leads to the reasonable conclusion that the first cause of action is one for breach of contract. Moreover, in light of our holding in section B, *infra*, the only claim that can be asserted under section 29-6-250 is a contract claim. Thus, we hold the Amended Complaint sufficiently put the City on notice that Respondents were proceeding on a third-party beneficiary claim theory.

Therefore, we affirm the court of appeals on the issues relating to Respondents' third-party beneficiary breach of contract claim.

D.

The City also contends the court of appeals erred in reversing summary judgment as to Respondents' quantum meruit claim. We agree. Because there is no dispute as to the existence or validity of the underlying contract at issue, which is fundamentally at odds with the quasi-contractual theory of quantum meruit, we reverse the court of appeals' holding with respect to this claim. *See Sloan I*, 377 S.C. 108, 659 S.E.2d 158 (holding the SPPA's bonding requirements are incorporated into all public works construction contracts); *Strickland v. Coastal*

Design Assocs., 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct. App. 1987) ("The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit *unless the original contract remains in force*." (emphasis added)). The grant of summary judgment in favor of the City on the quantum meruit claim is reinstated.

E.

As a final matter, the City contends summary judgment should have been affirmed in any event because it has satisfied its obligation under the SPPA by paying the remaining balance on its contract with Gilbert to several of the unpaid subcontractors. Thus, the City argues no remand is necessary. We disagree.

Sloan I limits the City's liability to the remaining unpaid balance on the contract with Gilbert at the time the City received notice of Gilbert's nonpayment. 377 S.C. at 120, 659 S.E.2d at 165-66. The record is unclear as to the City's methodology of payment disbursement, and there are genuine issues of material fact regarding the date upon which the City learned of Gilbert's nonpayment, as well as the amount remaining unpaid at that time. Because factual questions are in dispute, summary resolution would be premature.[12]

IV.

For the foregoing reasons, the court of appeals is affirmed in part and reversed in part, and this matter is remanded to the circuit court for resolution of the remaining issues consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

[12] In light of our holdings, remand is limited to liability and damages based only on the surviving third-party beneficiary breach of contract claim.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, Respondent,

v.

South Carolina Department of Health and Environmental Control; Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System; and Carolinas Physicians Network, Inc., Defendants,

of whom South Carolina Department of Health and Environmental Control is the Petitioner,

and Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System; and Carolinas Physicians Network, Inc. are Respondents.

Appellate Case No. 2011-193828

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 27257
Heard January 10, 2013 – Filed May 29, 2013

REVERSED

Ashley Caroline Biggers, of Columbia, for Petitioner.

Travis Dayhuff, of Nelson Mullins Riley & Scarborough, of Columbia; James Grant Long, III, Tanya Amber Gee, Jennifer Joan Hollingsworth, and Edward Houseal Bender, all of Nexsen Pruet, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: This matter began as a contested case in the administrative law court (ALC) brought by Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center (Piedmont), a hospital in Rock Hill, South Carolina. The dispute arises out of Piedmont's contention that an urgent care center operated by a competitor, Carolinas Physicians Network, Inc. (CPN), was required to have a Certificate of Need (CON) or a Non-Applicability Determination (NAD) from the South Carolina Department of Health and Environmental Control (DHEC). CPN is a wholly owned subsidiary of Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System (CHS). The ALC granted summary judgment to CHS and CPN on the basis the urgent care center was a licensed private physician's office and, thus, exempt from CON review as a matter of law. The Court of Appeals reversed, finding summary judgment was premature, and remanded to allow Piedmont the opportunity to conduct discovery. The Court of Appeals rejected DHEC's argument that the ALC did not have subject matter jurisdiction in this case because the agency had issued no staff decision subject to a contested case hearing. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 2010-UP-523 (S.C. Ct. App. refiled Apr. 25, 2011). This Court granted DHEC's petition for a writ of certiorari as to the issue of jurisdiction. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

I. Development of Medical Center

CPN is a nonprofit corporation organized under the laws of North Carolina. It owns and operates physicians' offices in North Carolina and South Carolina. CPN is a wholly owned subsidiary of CHS, a nonprofit health care system based in Charlotte, North Carolina.

On October 17, 2007, CHS wrote to DHEC and requested confirmation that its proposed construction of a medical office building in Fort Mill, South Carolina

did not require CON review. A DHEC staff member responded on October 26, 2007 and confirmed that the "project does not require Certificate of Need review because it is an expenditure by a health care facility for a non-medical project" as provided in S.C. Code Ann. Regs. 61-15 § 104(2)(f) (Supp. 2008). The letter's subject line referenced this decision as E-07-125 / Construction of a medical office building / Carolinas Medical Center — Fort Mill Office Plaza / Fort Mill, South Carolina.

Upon learning of DHEC's grant of a written exemption for the construction project, Piedmont filed a request for final review (RFR) by the DHEC Board of E-07-125 (the exemption decision) in 2007. The DHEC Board declined review on the basis the request was untimely. Piedmont then requested a contested case hearing. The ALC ruled Piedmont's challenge was not timely filed, and the matter as to E-07-125 was dismissed in 2008. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 2008 WL 4879672 (ALC order filed Oct. 3, 2008). Piedmont did not further challenge this ruling.

According to Piedmont, CHS thereafter had the medical office building constructed in Fort Mill at a cost of approximately $13.9 million. CPN opened its urgent care center there on January 12, 2009. CPN employed two family medicine physicians, two nurses, and other personnel to staff the center. The practitioners provide primary care, including initial diagnosis and treatment, from 8:00 a.m. to 8:00 p.m. seven days a week. Patients are not required to have appointments, and they do not stay overnight at the facility. CPN reportedly owns the center and the personal property, including the equipment, used to treat the patients.

Prior to the opening of the urgent care center, Piedmont's counsel met with DHEC staff on January 5, 2009, regarding the plan to establish the center at the Fort Mill medical office building. On January 16, 2009, Piedmont's counsel sent a follow-up letter to DHEC requesting that DHEC "take immediate steps to require CHS's submission of either a non-applicability request or a CON application" for the urgent care center. Piedmont's counsel asserted CHS's actions were contrary to its previous written assurance to DHEC that it would not open an urgent care center without first obtaining a CON or a NAD, citing a 2007 letter from CHS to DHEC.[1] Counsel further asserted that expenditures by a health care facility in

[1] Bennett Thompson, a CHS Management Associate, made the statement in a letter to DHEC dated December 19, 2007, in which he acknowledged CHS's receipt of DHEC's grant of a written exemption for the construction of the medical building. According to an affidavit dated April 3, 2009 of Dan Wiens, CPN's

excess of $2 million required a CON and that, while the offices of licensed private practitioners generally are exempt, that exemption does not apply to the urgent care center because, "upon information and belief, the physicians who will staff the center are employed by a public health care facility (or its affiliate) . . . ."

On January 28, 2009, Piedmont's counsel, Daniel Westbrook, spoke with Beverly Patterson, Director of DHEC's CON program, about the urgent care center and was informed by Patterson that "DHEC had not decided to take any action to require Carolinas [CHS] to apply for a Non-applicability Determination or Certificate of Need for its Ft. Mill urgent care center." Counsel prepared an affidavit dated January 30, 2009 summarizing this telephone conversation. Counsel added, "As of the date of this affidavit, I have not received a writing from DHEC memorializing its decision to not take any action against Carolinas [CHS] for the opening of its urgent care center."

On February 2, 2009, Piedmont's counsel filed with the Clerk of the DHEC Board a written request for final review, which sought the Board's review of "DHEC's staff decision" not to require a CON or a NAD for the opening of the urgent care center.[2] Counsel attached his affidavit dated January 30, 2009 that summarized his telephone conversation with the Director of DHEC's CON program. Counsel asked the Board (1) to issue a cease and desist order prohibiting further operation of the center until there was a final decision on a CON

Senior Vice President for Operations, CPN later determined the CON Act was not applicable to the urgent care center because it was the office of a licensed private practitioner (which did not require a written exemption), so it did not seek or receive a formal exemption determination from DHEC.

[2] Counsel stated, "Piedmont challenges DHEC staff's decision on the grounds that: 1) it violates S.C. Code Ann. § 44-7-160(3) and S.C. Code Ann. Reg[s]. 61-15 § 102(1)(c) which requires a person or health care facility to obtain a CON before undertaking an expenditure on behalf of a health care facility in excess of $2 million; 2) it violates S.C. Code Ann. Reg[s]. 61-15 § 102(1)(3) which requires an applicant to request a formal determination by the Department of the applicability of the CON requirements when any question exists; 3) the exemption to CON review found in S.C. Code Ann. Reg[s]. [61-15] § 104 do not apply to [CHS's] construction of an urgent care center; 4) it deprives Piedmont of due process under the South Carolina and United States Constitutions; and 5) the staff's decision was arbitrary, capricious, and an abuse of discretion."

application or a NAD request, and (2) to require CHS to file a CON application or a NAD request prior to reopening the center.

The Clerk of the DHEC Board responded to Piedmont's counsel on February 4, 2009, declining the request for review. The Clerk noted the request was filed 464 days after DHEC's decision in the matter was mailed to the applicant on October 26, 2007, and any request for review was due within fifteen days after notice of the decision. The subject line of the letter referenced "**Docket No. 09-RFR-06** - Staff decision dated October 26, 2007, (mailed 1/7/2009), to approve an exemption (E-07-125) for an expenditure by health care facility for a non-medical project." Thus, the letter referenced DHEC's earlier determination that the construction of the medical office *building* was exempt from CON requirements, rather than Piedmont's question regarding the opening of the urgent care center.

Counsel for Piedmont wrote to the Clerk of the Board and acknowledged that any challenge to E-07-125 would be untimely and that Piedmont was not challenging the exemption for the building construction in 2007. Counsel explained, "The DHEC staff decision for which we seek review is the unwritten decision made in January or February 2009 and communicated to me verbally on January 28, 2009, as described in my affidavit of January 30, 2009 . . . ." Counsel asserted DHEC's determination that the center was a private practitioner's office and therefore not subject to CON review was in error because the physicians there were employed by a health care facility. Counsel asked for clarification as to whether the letter of February 4, 2009 represented a final decision of the DHEC Board to deny Piedmont's request for review.

Thereafter, the Clerk of the Board notified Piedmont that the DHEC Board had met on February 12, 2009 and had declined to conduct a final review conference in this matter.

II. Contested Case Hearing

On March 5, 2009, Piedmont filed a request with the ALC for a contested case hearing, challenging DHEC's failure to require CHS to apply for and obtain a CON or a NAD for the urgent care center. CHS and DHEC were named as respondents in the filing. Counsel argued a CON or a NAD was required because the urgent care center was established by or on behalf of a health care facility, i.e., CHS. Counsel for Piedmont attached his January 30, 2009 affidavit regarding his conversation with DHEC staff, along with Piedmont's request for review and the notice from the DHEC Board declining review.

CPN (which was added as a respondent by consent of the parties) and CHS moved for a dismissal or for summary judgment.[3] At the hearing before the ALC on April 16, 2009, Piedmont asserted no discovery had been completed and argued the center was not entitled to classification as a private physician's office because it was owned and operated by a health care facility. Specifically, Piedmont asserted the center[4] is marketed as a CHS facility, not as a physicians' practice, and that CHS, which originally expended the funds to construct the medical office building, controls the urgent care center through its wholly owned subsidiary, CPN. Piedmont contended further discovery was needed to determine the actual relationship of the various entities and the true nature of the operations at the urgent care center.[5]

DHEC, in contrast, argued that a licensed private practitioner's office is exempt from CON requirements and no written exemption is required from DHEC; that the CON requirements apply to health care facilities such as hospitals, but urgent care centers are not included within that statutory definition; that the center challenged here is a private physician's office and therefore exempt as a matter of law; and discovery was not needed as ownership of the center was not a determinative factor since no restrictions as to ownership appear in any of the provisions providing an exemption from CON review for the office of a licensed private practitioner.[6]

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[3] CPN's motion requested a dismissal based on a lack of jurisdiction (CPN asserted there was no DHEC decision giving rise to a contested case), and it alternatively moved for summary judgment on the basis the urgent care center was exempt from CON requirements as a private physician's office.

[4] It is variously referred to in the Appendix as "Carolinas Healthcare Urgent Care Center-Fort Mill" and as "Carolinas Medical Center-Fort Mill Urgent Care."

[5] Piedmont alleges CHS subsequently sold its ownership in the medical office building, and CPN then leased the office space from HR of Carolinas, L.L.C.

[6] In an affidavit dated April 3, 2009, DHEC's CON Director, Beverly Brandt (formerly Patterson), stated an "urgent care center" is not defined in the CON Act or associated regulations. Brandt further stated "[t]he identity of the owner of the physician's office practice is not relevant to whether this exemption applies. If the physician's office practice operates under the name of 'urgent care center' or a

III. ALC's Grant of Summary Judgment

The ALC found summary judgment was appropriate because the urgent care center qualifies as the office of a licensed private practitioner and is therefore exempt from CON review as a matter of law. The ALC observed that "[t]he essence of Piedmont's argument is that the physician office exemption does not apply to physician offices owned by a health care facility." However, the ALC stated this issue does not create a question of fact. The ALC observed that neither the CON Act enacted by the South Carolina General Assembly nor any associated regulations place any restriction on the type of private physician's office that is entitled to receive the exemption from CON review. The ALC concluded the ownership of the center and whether CPN is a health care facility had no bearing on whether the urgent care center is a private physician's office, so further discovery was not necessary on this point. Consequently, the ALC granted summary judgment in favor of CPN and CHS.

IV. Reversal by Court of Appeals

Piedmont appealed to the Court of Appeals, which reversed and remanded. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 2010-UP-523 (S.C. Ct. App. refiled Apr. 25, 2011). The court determined the ALC "erred in finding that it could resolve the case as a matter of law by granting summary judgment without affording Piedmont the opportunity to conduct discovery." *Id.*, slip op. at 2. The court also stated it "disagree[d] with [DHEC's] subject matter jurisdiction argument." *Id.* at 3. The court noted DHEC "sought reconsideration of [the] initial opinion because it alleged there was no decision rendered by [DHEC] in this matter."[7] *Id.* However, the court found "[t]he record indicates that there was a decision by [DHEC] to exempt the Center from review." *Id.* This Court granted certiorari as to DHEC's arguments regarding subject matter jurisdiction.

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similar name, but still retains the nature of simply a physician's office practice, then it qualifies for this exemption."

[7] Although the ALC questioned the lack of a written decision by DHEC at the contested case hearing, the issue was not extensively discussed at that time and the ALC's order does not specifically address this point. However, since the ALC ruled on the merits of Piedmont's claim, it is reasonably inferable that the ALC determined it had jurisdiction.

STANDARD OF REVIEW

The Administrative Procedures Act (APA)[8] governs appeals from the ALC. *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012). Under section 1-23-610(B) of the APA, an appellate court may reverse or modify the decision of the ALC if the appellant's substantial rights have been prejudiced because the decision is (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an 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 an abuse of discretion or a clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B) (Supp. 2012); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27065 (S.C. Sup. Ct. refiled Feb. 27, 2013) (Shearouse Adv. Sh. No. 9 at 28); *Murphy*, 396 S.C. at 639, 723 S.E.2d at 194.

LAW/ANALYSIS

On certiorari, DHEC argues the Court of Appeals erred in finding the ALC had subject matter jurisdiction over this dispute. Specifically, DHEC asserts it did not issue a staff decision requiring notice and an opportunity for a hearing in a contested case proceeding before the ALC.

I. ALC's Jurisdiction in Contested Cases

The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers. *Howard v. S.C. Dep't of Corrections*, 399 S.C. 618, 733 S.E.2d 211 (2012); *see also* S.C. Code Ann. § 1-23-500 (2005 & Supp. 2012) (creating an Administrative Law Judge Division and subsequently renaming it the ALC); *S.C. Dep't of Consumer Affairs v. Foreclosure Specialists*, 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010) (observing the ALC does not have the authority to exceed its statutorily granted powers).

[8] Some of the APA statutes were amended after this proceeding, but the changes do not affect the outcome here.

By statute, the General Assembly has authorized the ALC to preside over "contested case" proceedings. S.C. Code Ann § 1-23-600(A) (Supp. 2012); *see also id.* § 44-1-60(F)(2) (allowing applicants, permittees, licensees, or affected persons to file a request for a contested case hearing with the ALC in accordance with the APA after receiving a written decision from DHEC); *S.C. Dep't of Rev. v. Club Rio*, 392 S.C. 636, 642, 709 S.E.2d 690, 694 (Ct. App. 2011) ("The statutory scheme confers on the ALC subject matter jurisdiction over [DHEC's] contested cases.").

A "contested case" is defined in the APA as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895,[9] to be determined by an agency or the [ALC] after an opportunity for hearing." S.C. Code Ann. § 1-23-505(3) (Supp. 2012) (defining a "contested case" in ALC matters); *see also id.* § 1-23-320(A) (stating that, in a contested case, all parties must be afforded an opportunity for a hearing after proper notice). A "license" in this context "includes the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission *required by law* . . . ." *Id.* § 1-23-505(4) (emphasis added).

A brief overview of the specific provisions governing CONs, NADs, and exemptions will provide guidance in analyzing whether Piedmont's challenge in this case was properly before the ALC as a contested case.

II. The CON Act & DHEC's Review Process

A. The CON Act

(1) CON Requirements

The State Certification of Need and Health Facility Licensure Act (CON Act) governs the establishment of medical facilities and projects in South Carolina. S.C. Code Ann. §§ 44-7-110 to -385 (2002 & Supp. 2008).[10] "The purpose of [the

[9] S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.").

CON Act] is to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002). The General Assembly has designated DHEC as the sole state agency for control and administration of the program for granting CONs and the licensure of health facilities and other related activities. *Id.* § 44-7-140.

Section 44-7-160 provides a person or "health care facility" as defined under the CON Act is required to obtain a CON from DHEC before undertaking certain enumerated activities, such as constructing a new health care facility, changing the existing bed complement of a health care facility, making capital expenditures by or on behalf of a health care facility in excess of a certain threshold prescribed by regulation, or acquiring medical equipment that is to be used for diagnosis and treatment if the total project cost is in excess of an amount established by regulation. *Id.* § 44-7-160.

The CON Act defines a "health care facility" to include entities such as hospitals that provide overnight medical or surgical care, nursing homes, rehabilitation facilities, and other facilities for which a CON is required by federal law.[11] *Id.* § 44-7-130(10). Urgent care centers are not included among the entities listed as constituting a health care facility, and they are not otherwise defined in the CON Act.

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[10] The parties here rely on the version of the CON Act in the main volume and the 2008 Code Supplement because the CON Act was amended after this action arose.

[11] The CON Act provides: "'Health care facility' means acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which [CON] review is required by federal law." S.C. Code Ann. § 44-7-130(10) (2002). "Hospital" is defined as "a facility organized and administered to provide overnight medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy." *Id.* § 44-7-130(12).

An application for a CON must be submitted to DHEC and must be accompanied by proof that the applicant published a notice in a newspaper serving the area where the project is to be located announcing that an application is being made. *Id.* § 44-7-200(A), (B). After receipt of the application with proof of publication and payment of an initial application fee, DHEC shall publish a notice in the State Register that an application has been accepted for filing. *Id.* § 44-7-200(D).

Once DHEC has determined that an application is complete, "affected persons"[12] must be notified, and this notification begins the review period. *Id.* § 44-7-210(A). DHEC may hold a public hearing, if timely requested, to gather additional information and obtain public comment about the proposed project. *Id.* § 44-7-210(B). Ultimately, DHEC staff will make a proposed decision to grant or deny the CON based on the staff review, and notice of the proposed decision shall be sent to the applicant and affected persons who have asked to be notified. *Id.* § 44-7-210(D).

"The proposed decision becomes the final agency decision within ten days after the receipt of a notice of the proposed decision by the applicant unless" (1) an affected person showing good cause timely requests reconsideration of the staff decision in writing, or (2) the applicant or other affected person with standing makes a written request for a contested case hearing before the board or its designee regarding the grant or denial of the CON. *Id.* "The department's proposed decision is not final until the completion of reconsideration or contested case proceedings." *Id.* § 44-7-210(E).

"After the contested case hearing is concluded and a final board decision is made, a party who participated in the contested case hearing and who is adversely affected by the board's decision may obtain judicial review of the decision in the circuit court pursuant to the [APA]." *Id.* § 44-7-220.

(2) Exemptions from CON Requirements

Certain institutions and transactions are exempt from CON requirements. S.C. Code Ann. § 44-7-170 (2002 & Supp. 2008); 24A S.C. Code Ann. Regs. 61-

[12] An "affected person" under the CON Act includes, among others, the applicant, persons residing with the geographic area to be served by the applicant, and persons located in the health service area who provide services similar to the proposed project. S.C. Code Ann. § 44-7-130(1) (2002).

15, § 104 (Supp. 2008). Section 44-7-170 provides a CON is not needed for, among other things, "the offices of a licensed private practitioner whether for individual or group practice *except as provided for in Section 44-7-160(1) and (6)*[.]"[13] S.C. Code Ann. § 44-7-170(A)(2) (Supp. 2008) (emphasis added).

Regulation 61-15 lists twelve transactions that are exempt from CON requirements. 24A S.C. Code Ann. Regs. 61-15 § 104(2)(a) to (l). Among those is an exemption for "[t]he offices of a licensed private practitioner whether for individual or group practice *except as provided for in Section 102.1.f*[.]"[14] *Id.* § 104(2)(e) (emphasis added). The term "licensed private practitioner" is not defined in the CON Act or DHEC's regulations, and the only limiting or qualifying language appears in section 44-7-170 and regulation 61-15 as specified above.

Six of the twelve exempted transactions require that approval of the exemption be obtained *in writing* from DHEC. Notably, the exemption for the office of a licensed private practitioner is *not* among those requiring DHEC to issue a written exemption. *Id.* § 104(2)(e).

If a person or health care facility is required to obtain a written exemption from DHEC, a written request for the exemption must be submitted, accompanied by a project description, including its cost and any other information deemed necessary for DHEC to make a determination on the exemption request. *Id.* §§ 104(1), 105. Thus, as to the exemptions requiring written approval from DHEC, there is a formal decision issued in such cases.

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[13] Section 44-7-160(1) states a CON is required for the construction or establishment of a new health care facility. S.C. Code Ann. § 44-7-160(1) (2002). Section 44-7-160(6) provides a CON is required for the acquisition of medical equipment to be used for diagnosis or treatment where the total project cost exceeds an amount specified by regulation. *Id.* § 44-7-160(6). Neither of these provisions is in contention here.

[14] Section 102(1)(f) removes the exemption for the following: "The acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of $600,000[.]" 24A S.C. Code Ann. Regs. 61-15 § 102(1)(f) (Supp. 2008).

(3) Determinations of Nonapplicability

A provider may seek a written determination from DHEC that the CON Act does not apply to a proposed project; a determination of this kind is known as a NAD. *InMed Diagnostic Servs., L.L.C. v. MedQuest Assocs., Inc.*, 358 S.C. 270, 594 S.E.2d 552 (Ct. App. 2004). This usually occurs when a question arises as to whether the total cost of a project falls below the threshold that would otherwise trigger the requirement for a CON. *See* 24A S.C. Code Ann. Regs. 61-15 §§ 102(1)(c) ($2,000,000 threshold for capital expenditures by or on behalf of a health care facility) & 102(1)(f) ($600,000 threshold for the acquisition of medical equipment to be used for diagnosis or treatment); *see also MRI at Belfair, L.L.C. v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 314,709 S.E.2d 626 (2011) (noting a formal written determination that the total project cost for the acquisition of medical equipment did not exceed the $600,000 threshold is procured by a NAD).

Obtaining "a NAD [is] a process for which DHEC has formulated exacting procedural requirements." *InMed Diagnostic Servs., L.L.C.*, 358 S.C. at 278-79, 594 S.E.2d at 556. The procedure is outlined in section 102 of Regulation 61-15, governing applicability, which states that "[w]hen any question exists, a *potential applicant* shall forward a letter requesting a formal determination by [DHEC] as to the applicability of the [CON] requirements to a particular project." 24A S.C. Code Ann. Regs. 61-15, § 102(3) (emphasis added). "Such a letter shall contain a detailed description of the project including the extent of modifications, changes in services, and total costs." *Id.* "Additional information may be requested as may be reasonably necessary to make such applicability determination." *Id.* "The Department shall respond within sixty days of receipt of the necessary information." *Id.* Thus, by its terms, the NAD procedure is directed to a *potential applicant*, and it requires DHEC to issue a formal determination to that party regarding whether or not a CON is necessary for a proposed project.

B. DHEC Provisions Governing Review

Section 44-1-60, governing appeals from DHEC decisions giving rise to contested case hearings, provides that "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." S.C. Code Ann. § 44-1-60 (Supp. 2008).

"The initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department *shall be a staff decision*." *Id.* § 44-1-60(C) (emphasis added).

"In making a staff decision on any permit, license, certification or other approval, the department staff shall take into consideration all material comments received in response to the public notice in determining whether to issue, deny or condition such permit, license, certification or other approval." *Id.* § 44-1-60(D). "At the time that such staff decision is made, the department shall issue a department decision, and shall base its department decision on the administrative record which shall consist of the application and supporting exhibits, all public comments and submissions, and other documents contained in the supporting file for the permit, license, certification or other approval." *Id.*

"Notice of the department decision must be sent to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail, return receipt requested." *Id.* § 44-1-60(E). "The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person." *Id.*

Not later than sixty days after the receipt of a request for final review, a final review conference must be conducted by the DHEC Board or its designee. *Id.* § 44-1-60(F). "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or other affected person may request a contested case hearing before the [ALC], in accordance with the [APA], within thirty days after the deadline for the final review conference." *Id.*

After review, the DHEC Board or its designee "shall issue a *written final agency decision* based upon the evidence presented." *Id.* § 44-1-60(F)(2) (emphasis added). "The *written decision* must explain the bases for the decision and inform the parties of their right to request a contested case hearing before the [ALC]." *Id.* (emphasis added). "[T]he written decision must be mailed to the parties . . . ." *Id.* "Within thirty days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the [ALC], in accordance with the [APA]." *Id.*

With this background in mind, we turn now to DHEC's arguments regarding whether there was a decision in the current matter that was subject to a contested case proceeding.

III. Jurisdiction for Contested Case

DHEC contends the ALC did not have subject matter jurisdiction to conduct a contested case hearing because there was no staff decision issued by DHEC requiring notice and an opportunity to be heard.

DHEC asserts, "A telephone conversation between a staff member and an attorney is not a staff decision within the purview of S.C. Code Ann. § 44-1-60 (Supp. 2008); nor is an affidavit by an attorney recounting a telephone conversation with a staff member. In ruling otherwise, the Court of Appeals improperly applied S.C. Code Ann. § 44-1-60 (Supp. 2008)." *See* S.C. Code Ann. § 44-1-60(C) ("[T]he initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department *shall be a staff decision*." (emphasis added)).

DHEC argues that neither CPN nor CHS sought a certificate evidencing permission to open the urgent care center because a CON was not required by law, and a private physician's office is not one of the exemptions requiring a party to obtain written proof of its entitlement to the exemption from DHEC. *See* 24A S.C. Code Ann. Regs. 61-15 § 104(2)(e). Thus, since there was no approval or permission *required by law* from DHEC for the offices of a licensed private physician, in the form of a CON, NAD, formal exemption, or any other manner, there was no decision issued by DHEC that qualifies for a contested case hearing before the ALC, citing S.C. Code Ann. § 1-23-600(A) (authorizing the ALC to preside over hearings of contested cases involving DHEC) and S.C. Code Ann. § 1-23-505(3) (defining a contested case as a "proceeding including, but not restricted to, rate-making, price fixing, and licensing, in which the legal rights, duties, or privileges of a party *are required by law* or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the [ALC] after an opportunity for hearing" (emphasis added)). DHEC further argues that, because there was no formal staff decision subject to review, the Clerk of the DHEC Board properly notified Piedmont that the Board would not hold a final review conference.

In contrast, Piedmont maintains the ALC did have jurisdiction, stating, "Because DHEC made the decision that hospital-owned urgent care facilities are exempt from DHEC CON review and this decision adversely affects Piedmont, the [ALC] has jurisdiction to review this matter." Like DHEC, it also cites the statutory language in section 44-1-60(C), but particularly relies upon the portion stating an initial decision involving permits, licenses, "*or other action of the department* shall be a staff decision." *See id.* § 44-1-60(C) (emphasis added).

Piedmont alleges it was DHEC's unwillingness to communicate its "staff decision" in writing that caused it to take the unusual step of relying upon counsel's affidavit to memorialize the decision in order to seek a contested case hearing. Piedmont maintains this unwritten staff decision became a final agency decision when the board met in February 2009 and decided to deny Piedmont's request for review, a written decision evidenced by the letter that was sent to Piedmont. *See id.* § 44-1-60(F) ("If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the [ALC], in accordance with the [APA], within thirty days after the deadline for the final review conference."

Piedmont maintains that, as a purported "affected person," it was entitled to challenge DHEC's determination in a contested case hearing. Piedmont further alleges that, under the DHEC regulations, CPN or CHS should have sought an applicability determination from DHEC if any question existed regarding the project.[15] *See* 24A S.C. Code Ann. Regs. 61-15 § 102(3) (governing the procedure for obtaining a NAD).

In finding there was a decision subject to a contested case hearing before the ALC, the Court of Appeals stated, "The record indicates that there was a decision by the Department to exempt the Center from review." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 2010-UP-523, slip op. at 3 (S.C. Ct. App. refiled Apr. 25, 2011). "For example, in a letter from CHS to the Department dated December 19, 2007, CHS stated that the Department provided notification that the Center was exempt from CON review." *Id.* "Also, in a letter dated February 13, 2009, from the Department, written to CHS and Piedmont, the Department stated, '[t]he S.C. Board of Health and Environmental Control decided

[15] However, we find that, where the potential applicant, here CPN, did not make such a request based on its belief that it did not need DHEC approval, this failure cannot serve as the basis for a reviewable decision in a contested case matter.

on February 12, 2009, not to conduct a Final Review Conference on the above-referenced matter.'" *Id.* (alteration in original). The court noted DHEC's letter declining to conduct a final review conference referenced in the subject line a "Staff decision dated October 26, 2007," and included in the same letter was a reference to section 44-1-60(F). *Id.*

We agree with DHEC that the first letter cited by the Court of Appeals as evidence of a staff decision, the letter dated December 19, 2007 from CHS to DHEC, refers, on its face, to an unrelated staff decision issued in a separate matter, i.e., DHEC's grant of an exemption to CHS in 2007 for the construction of the medical office *building*. It did not constitute a decision on the subsequent opening of the urgent care center, which occurred some two years later. Moreover, the letter is from one of the parties; it is not a formal decision issued by DHEC.

We also find no support for the determination by the Court of Appeals that there was a staff decision as to the urgent care center based on the letter dated February 13, 2009 from DHEC declining the request for a final review conference. Piedmont had cited section 44-1-60(F), which provides that *a department decision* becomes the final agency decision *if* a final review conference is not timely conducted, to support its argument that the DHEC Board's failure to conduct a review conference gave rise to a final agency decision subject to a contested case hearing. However, this reference to the statute in DHEC's letter declining review was included along with other information outlining general review procedures, and neither DHEC's general reference to section 44-1-60(F) nor the statute itself can transform a letter simply declining review into a staff decision. In this case, there is no original *department decision* existing that could have become a final agency decision under the statute.

DHEC asserts the Court of Appeals did not specifically address Piedmont's contention that counsel's affidavit memorializing the alleged staff decision could be considered sufficient to demonstrate a decision subject to review. We believe this only serves to further illustrate the nebulous nature of Piedmont's contention. In any event, we find the phone conversation with DHEC staff is not a "staff decision" on the grant or denial of a license, permit, or other matter for which a determination is required by law, and it does not fall within the statutory parameters for a contested case.

CPN and CHS neither sought nor received a formal approval from DHEC for a CON or a NAD, and there was no license, order, or decision issued. If DHEC had determined that CPN was in violation of any applicable provision, it was

entitled to pursue an enforcement action. DHEC, however, never found that CPN or CHS was in violation of any procedures.

Piedmont alleges DHEC has taken a contradictory position in this case because it has argued there was no staff decision, while at the same time the affidavit of its CON Director shows that DHEC did make a decision to exempt the urgent care center from CON requirements. However, we discern no inconsistency in DHEC's position. DHEC has averred there was no formal, written decision in this case because the statutory and regulatory exemption for the offices of a licensed private practitioner do not mandate that a provider obtain a written exemption from DHEC on this basis. Thus, there was no formal staff decision required by law, and there was no staff decision issued that was subject to the ALC's review.

Piedmont's dispute here essentially concerns its desire to challenge CPN's entitlement to an exemption from the CON process based on its status as the office of a licensed private practitioner. Under the CON Act and the regulation, this exemption does not require a formal, written determination or approval from DHEC. In urging that it be allowed to assert its challenge in a contested case proceeding, Piedmont maintains the lack of a written exemption and formal decision would insulate DHEC's decisions in this regard from any oversight. DHEC, in contrast, alleges that to allow Piedmont to utilize the contested case process, which is specifically defined and limited by our General Assembly, would subject DHEC to an overwhelming number of contested case matters on everyday decisions that the General Assembly did not see fit to subject to CON review or the contested case process.

Our review of the relevant statutes and regulations evinces the clear delineation of separate procedural tracks in these matters. For example, CON applications must go through a rigorous and detailed examination before resulting in a formal decision. The NAD procedure, which is less exacting, is used when *an applicant* (not a competitor) is unsure whether the total project costs will be under the threshold that would otherwise require a CON. In addition, some of the exemptions require that approval for the exemption be obtained in writing from DHEC, while others do not; in such cases, however, the requirement for written approval is expressly noted within the exemption. In each of the foregoing circumstances, i.e., where there is a CON, a NAD, or an exemption for which written approval is required, a formal decision emanates from DHEC for which a contested case proceeding is provided by law.

Since there was no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case, there was no corresponding obligation that Piedmont be afforded a contested case hearing before the ALC. Accordingly, we hold Piedmont may not utilize the contested case review process where it has not been authorized by the General Assembly.

CONCLUSION

Based on the foregoing, we conclude the Court of Appeals erred in finding Piedmont has established the existence of a staff decision by DHEC that is properly the subject of a contested case hearing and in remanding the matter for discovery and further proceedings.[16]

REVERSED.

PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. HEARN, J., concurring in result only.

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[16] Although we conclude the ALC lacked jurisdiction to review this matter in a contested case proceeding, we find no fault in the ALC's reasoning. The General Assembly did not choose to include an "urgent care center" in its statutory definition of a "health care facility." The only possible item the center could fall under is a "hospital," but the center clearly does not meet the CON Act's definition of a hospital because it does not offer medical and surgical services to its patients on an overnight basis. Thus, to *sua sponte* include an "urgent care center" within the statutory definition of a "health care facility" would be beyond the function of this Court. Moreover, we are concerned that Piedmont's suggestion that we should treat physicians' offices owned by hospitals differently from those that are not would constitute an improper judicial restriction on a legislative provision, and it would effectively eviscerate the private business model, a result that we do not believe was ever intended by the General Assembly. The statutory and regulatory provisions regarding the exemption for a private physician's office contain the only restrictions set forth by the General Assembly and by DHEC, respectively, and Piedmont cannot independently engraft additional limitations that were not so specified by those authorities.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Ryan Hercheck, Respondent.

Appellate Case No. 2011-195567

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 27258
Heard April 4, 2013 – Filed May 29, 2013

REVERSED

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

Joseph M. McCulloch, Jr., and Kathy Ridenoure Schillaci, of Law Offices of Joseph M. McCulloch, Jr. of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This case is one of two[1] heard by the Court that presents the question of whether a pre-breath test videotape recording is required upon an arrest for driving under the influence (DUI) if the arrestee refuses the breath test. At both trials, the trial court dismissed the DUI charges, finding that the arresting officers did not comply with section 56-5-2953(A)(2)(d) of the South Carolina Code by failing to videotape a twenty-minute pre-test waiting period. *See* S.C. Code Ann. § 56-5-2953(A)(2)(d) (2006). The same panel of the court of appeals affirmed Ryan Hercheck's dismissal, but reversed Justin Elwell's dismissal seven months later. The State now appeals the dismissal of Hercheck's case, and Elwell appeals the reversal of the dismissal in his case. With respect to Hercheck's appeal, we reverse the court of appeals.

FACTS/PROCEDURAL BACKGROUND

Hercheck was arrested on December 10, 2006 for driving under the influence (DUI), 1st offense, after his car collided with another vehicle while driving eastbound on South Carolina Highway 48. According to the traffic collision report, Hercheck attempted to leave the scene of the accident, but was apprehended. The arresting officer requested Hercheck submit to a breath test, and Hercheck refused. Hercheck's conduct, through his refusal of the breath test, was videotaped. However, once Hercheck refused the breath test, the arresting officer shut down the videotape recording and placed Hercheck into custody.

This case proceeded to trial in magistrate's court on May 15, 2008. During a pre-trial hearing, the magistrate heard arguments concerning Hercheck's motion to dismiss the charges due to the arresting officer's failure to record a twenty-minute, pre-test waiting period, which Hercheck alleged was required under section 56-5-2953. Because the arresting officer only filmed twelve minutes prior to Hercheck's refusal of the test, the magistrate dismissed the case: "The failure of the arresting officer to produce the video required by this section is not grounds for a dismissal if the officer submits the sworn affidavit. You either got the video or got to submit the affidavit. If he didn't submit the affidavit he cut it off twelve minutes and wasn't twenty minutes, I don't have no choice by law to grant [Hercheck's] motion to dismiss and so I do."

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[1] The other case, *State v. Justin Elwell*, Op. No. 27259 (S.C. Sup. Ct. filed May 29, 2013) (Shearhouse Adv. Sh. No. 24 at 54), was heard immediately following this case.

The State appealed the magistrate's dismissal to circuit court, and a hearing was convened on January 27, 2009. By order dated June 1, 2009, the circuit court upheld the dismissal of Hercheck's case.

The State appealed the case to the court of appeals. In an unpublished opinion, the court of appeals affirmed the dismissal of the case, stating "the plain language of subsection 56-5-2953(A)(2)(d) mandates a twenty minute video-recording of the arrested individual's conduct during the breath test waiting period, and no exception exists permitting premature termination of the videotaping in the event the arrested individual indicates he or she will not submit to the breath test." *See State v. Hercheck*, Op. No. 2011-UP-161 (S.C. Ct. App. filed April 13, 2011). In addition, the court of appeals declined to find error in the circuit court's refusal to reverse the magistrate court's dismissal of Hercheck's case based on a determination that the "totality of the circumstances" exception provided in 56-5-2953(B) was inapplicable, because such an action by the circuit court was "not an error of law." *Id.*

This Court granted the State's petition for writ of certiorari to review the court of appeals' decision.

ISSUES

I. Whether section 56-5-2953(A)(2)(d) requires law enforcement officers to videotape a twenty-minute pre-test waiting period when the arrestee refuses to take a breath test?

II. Whether the court of appeals erred in refusing to reverse the dismissal of this case based on the totality of the circumstances under section 56-5-2953(B) of the South Carolina Code?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Therefore, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006).

ANALYSIS

I. Videotape Requirement

The State argues that section 56-5-2953(A)(2)(d) does not require a law enforcement officer to videotape the entire twenty-minute pre-test waiting period once the arrestee refuses a breath test. We agree.

Pursuant to section 56-5-2953(A), any person arrested for DUI "must have his conduct at the incident site and the breath test site videotaped." S.C. Code Ann. § 56-5-2953(A) (2006).[2] To this end, there are certain requirements that must be met at the breath test site (in addition to those required at the incident site and outlined in subsection 56-5-2953(A)(1)), one of which is that the videotape "must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video-tape this waiting period . . . . [, h]owever, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped." *Id.* at § 56-5-2953(A)(2)(d).[3] The breath test videotape must also: (1) be completed within three hours of the person's arrest or a probable cause determination, unless compliance is impossible because the person requires emergency medical treatment; (2) "include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;" and (3) "must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test." S.C. Code Ann. § 56-5-2953(A)(2)(a)–(c) (2006).[4]

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[2] Because Hercheck was arrested prior to the enactment of the 2008 amendments (effective February 10, 2009) to this section, we decide this case under the 2006 version of the statute.

[3] The current provision is codified at 56-5-2953(A)(2)(c), and reads: "The video recording at the breath test site must . . . also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period." *See* S.C. Code Ann. § 56-5-2953(A)(2)(c) (Supp. 2012).

The court of appeals found that "the plain language of subsection 56-5-2953(A)(2)(d) mandates a twenty minute video-recording of the arrested individual's conduct during the breath test waiting period and no exception exists permitting premature termination of the videotaping in the event the arrested individual indicates he or she will not submit to the breath test." *Hercheck*, Op. No. 2011-UP-161.

The State argues the exact opposite that the statutory language is clear and unambiguous, as it refers to a "pre-test" waiting period. On the other hand, Hercheck argues that nothing in the language used in the statute permits the State to prematurely stop videotaping the arrestee's conduct once an arrestee refuses to submit to the breath test. Instead, Hercheck asserts that "[t]he law plainly requires that the breath site video 'must' include 'the person's conduct during the required twenty-minute pre-test waiting period' unless the officer submits a sworn affidavit certifying physical impossibility to do so." *See* S.C. Code Ann. § 56-5-2953(A)(2)(d)).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Therefore, "[i]f a statute's language is plain, unambiguous, and conveys a clear meaning 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used." (citing *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002))). However, penal statutes will be strictly construed against the state. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted).

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[4] The current provision deletes the three-hour requirement and the requirement for videotaping the reading of the Miranda rights (which is now included as part of the incident site videotape requirements). *See* S.C. Code Ann. § 56-5-2953(A)(2)(a)–(b) (Supp. 2012).

We agree with the State that the inclusion of the word, "pre-test," plainly requires a breath test be administered for the videotape requirement to apply, and if there is no test, the statute does not require a videotape. In other words, if no test is administered, then there can be no "pre-test waiting period." Otherwise, the legislature would not have included the "pre-test" modifier. *See, e.g.*, *Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (stating "[e]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction." (citation omitted)); *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning." (citation omitted)); *cf. Pittman*, 373 S.C. at 561, 647 S.E.2d at 161 ("Whenever possible, legislative intent should be found in the plain language of the statute itself." (citation omitted)).

The State further argues that it would be contrary to the legislative purpose of the subsection to require a twenty-minute videotape once an arrestee refuses the breath test.

In *Roberts*, this Court stated that "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Once an arrestee refuses the breath test, the evidence gathering portion is over. As a consequence, we agree with the State that once Hercheck refused the test and no breath test was administered, the statute did not require the arresting officer to continue to videotape the twenty-minute pre-test waiting period, and therefore, the videotape produced at trial complied with the statutory requirements. To require otherwise, would result in the officer having to undergo a useless and absurd act. *See Leviner v. S.C. Dep't of Highways and Pub. Transp.*, 313 S.C. 409, 412, 438 S.E.2d 246, 248 (1993) ("[I]t is unreasonable to expect an arresting officer to consider a refusal as conditional so that he must remain near the arrested person for an extended period of time. The arresting officer would be required to forsake other duties to arrange for a belated test that the motorist had already refused after receiving warnings of the consequences of his noncompliance." (footnote omitted)).

Finally, the State argues that precedent supports its reading of the statute. More specifically, relying on *State v. Parker*, 271 S.C. 159, 245 S.E.2d 904 (1978), and *State v. Jansen*, 305 S.C. 320, 408 S.E.2d 235 (1991), the State claims that the twenty-minute pre-test waiting period merely makes up part of the foundational

requirements for the State's showing to admit the breath test results and to ensure that the breath test results are accurate and reliable as evidence at trial. For this reason, the State claims that the twenty-minute pre-test waiting videotape is not required unless a breath test is actually administered. To the extent that all of these cases were enacted prior to the enactment of the codification of the statute, Hercheck argues, they do not bear on the court's interpretation of the statutes today.[5]

While we agree with Hercheck's contention that the statutory language must control, we further agree with the State that these cases could be relied on to inform the Court's decision in this case. In the similar case, *State v. Elwell*, the court of appeals relied on these two cases to inform their reading of the term "required" in the subsection, finding that the legislature's inclusion of that term was directly linked to the pre-codification *Parker* and *Jansen* decisions. *See State v. Elwell*, 396 S.C. 330, 334, 721 S.E.2d 451, 453 (Ct. App. 2011).

In *Parker*, this Court announced a test for laying a breath test foundation:

> Prior to admitting such evidence, the State may be required to prove (1) that the machine was in proper working order at the time of the test; (2) that the correct chemicals had been used; (3) that the accused was not allowed to put anything in his mouth for 20 minutes prior to the test[;] and (4) that the test was administered by a qualified person in the proper manner.

Parker at 163, 245 S.E.2d at 906. In *Jansen*, the Court held that the State was not required to abide by the waiting period requirement in implied consent cases when a suspect refuses to take a breath test, stating "[T]he *Parker* precautions are intended to ensure that the results of the breathalyzer test if given are accurate and reliable as evidence at trial," and therefore, the precautions were futile if no test were administered. *Jansen*, at 322, 408 S.E.2d at 237. Therefore, the *Elwell* court interpreted the subsection to mean that only when the waiting period is required can the videotape recording also be required; if no test is administered, then the waiting period is rendered unnecessary, and so then is the videotape recording of

[5] We note that the subsection was first codified in 1998, and therefore longstanding SLED policy does not bear on our decision today. Instead, the statutory language is controlling, and SLED must change its policies to comply.

that waiting period. Elwell, 396 S.C. at 335, 721 S.E.2d at 453–54. We find that this is a valid construction of the subsection.

II. Totality of the Circumstances

The State also argues that the court of appeals erred in affirming the circuit court's refusal to reverse the magistrate court's determination that the "totality of the circumstances" exception was inapplicable under section 56-5-2953(B).

We need not reach this question because the statutory interpretation question is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (finding an appellate court need not address remaining issues on appeal when a decision in a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we reverse the court of appeals' decision in this case and find that a twenty minute pre-test video recording is not required where an arrestee has refused the breath test under section 56-5-2953 of the South Carolina Code.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Justin Elwell, Petitioner.

Appellate Case No. 2012-209726

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Chester County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 27259
Heard April 4, 2013 – Filed May 29, 2013

AFFIRMED

Michael Langford Brown, Jr., of Rock Hill, and Heath Preston Taylor of Taylor Law Firm, LLC, of West Columbia, for Petitioner.

Solicitor Douglas A. Barfield, Jr., of Lancaster, for Respondent.

CHIEF JUSTICE TOAL: This case is one of two[1] heard by the Court that presents the question of whether a pre-breath test videotape recording is required upon an arrest for driving under the influence (DUI) if the arrestee refuses the breath test. At both trials, the trial court dismissed the DUI charges, finding that the arresting officers did not comply with section 56-5-2953(A)(2)(d) of the South Carolina Code by failing to videotape a twenty-minute pre-test waiting period. *See* S.C. Code Ann. § 56-5-2953(A)(2)(d) (2006). The same panel of the court of appeals affirmed Ryan Hercheck's dismissal, but reversed Justin Elwell's dismissal seven months later. Elwell appeals the reversal of the dismissal in his case, and the State appeals the dismissal of Hercheck's case. With respect to Elwell's case, we affirm.

FACTS/PROCEDURAL BACKGROUND

On January 3, 2009, Elwell was arrested and indicted for driving under the influence (DUI), 2nd offense, in Chester County. On that date, Elwell was taken to a breath test site, where the arresting officer informed Elwell that he was being videotaped, delivered *Miranda*[2] warnings, and requested Elwell submit to a breath test, but also informed him of his right to refuse the test. All of these actions were videotaped. Elwell refused the test, which was also videotaped, but the arresting officer turned off the video recording equipment after Elwell refused the test but before twenty minutes had elapsed.

On December 2, 2009, this case proceeded to trial in the circuit court. During a pre-trial hearing, the circuit court dismissed the case, finding the arresting officer did not comply with section 56-5-2953 of the South Carolina Code by turning off the videotape recording after Elwell refused the breath test but prior to the expiration of the twenty minute waiting period.

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[1] The other case *State v. Hercheck*, Op. No. 27258 (S.C. Sup. Ct. filed May 29, 2013) (Shearhouse Adv. Sh. No. 24 at 46), was heard by the Court immediately preceding this case.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The State appealed. Relevant to this appeal, the court of appeals held that subsection 56-5-2953(A)(2)(d) does not require the videotape to include a twenty-minute waiting period if an arrestee refuses to submit to the breath test. *State v. Elwell*, 396 S.C. 330, 333, 721 S.E.2d 451, 452 (Ct. App. 2011).

Elwell now appeals, and this Court granted his petition for writ of certiorari to resolve the discrepancy in outcomes between this case and *State v. Hercheck*.

ISSUE

Whether section 56-5-2953(A)(2)(d) requires law enforcement officers to videotape a twenty-minute pre-test waiting period when the arrestee refuses to take a breath test?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Therefore, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006).

ANALYSIS

Pursuant to section 56-5-2953(A), any person arrested for DUI "must have his conduct at the incident site and the breath test site videotaped." S.C. Code Ann. § 56-5-2953(A) (2006).[3] To this end, there are certain requirements that must be met, one of which is that the videotape "must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video-tape this waiting period . . . . [, h]owever, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be

[3] Because Elwell was arrested prior to the enactment of the 2008 amendments (effective February 10, 2009) to this section, we decide this case under the 2006 version of the statute.

videotaped." *Id.* at § 56-5-2953(A)(2)(d).[4] The breath test site videotape must also: (1) be completed within three hours of the person's arrest or a probable cause determination, unless compliance is impossible because the person requires emergency medical treatment; (2) "include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test; and (3) "must include the person taking or refusing the breath test and the actions of the breath test operator while the conducting the test." S.C. Code Ann. § 56-5-2953(A)(2)(a)–(c) (2006).[5]

The court of appeals based its decision to reverse the trial court on the plain language of subsection 56-5-2953(A)(2)(d), which requires the videotape to include the arrestee's conduct "during the *required* twenty-minute *pre-test* waiting period." *Elwell*, 396 S.C. at 334, 721 S.E.2d at 453 (quoting S.C. Code Ann. § 56-5-2953(A)(2)(d)) (emphasis in original). It is the use of the words "required" and "pre-test" that the court of appeals focused on to "limit the application of the subsection:"

> First, the use of "pretest" indicates the entire waiting period must precede a breath test. Second, the use of "required" indicates the waiting period must be videotaped only if the waiting period itself is required.

Id. As to whether the waiting period is "required," the court focused on the analysis contained in the implied consent cases decided prior to the codification of the subsection at issue, *State v. Parker*, 271 S.C. 159, 245 S.E.2d 904 (1978) and *State v. Jansen*, 305 S.C. 320, 408 S.E.2d 235 (1991).[6] *Id.* at 334–35, 721 S.E.2d

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[4] The current provision is codified at 56-5-2953(A)(2)(c), and reads: "The video recording at the breath test site must . . . also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period." *See* S.C. Code Ann. § 56-5-2953(A)(2)(c) (Supp. 2012).

[5] The current provision deletes the three-hour requirement and the requirement for videotaping the reading of the Miranda rights (which is now included as part of the incident site videotape requirements). *See* S.C. Code Ann. § 56-5-2953(A)(2)(a)–(b) (Supp. 2012).

[6] In *Parker*, this Court announced a test for laying a breath test foundation:

at 453–54. Finding that the General Assembly enacted subsection 56-5-2953(A)(2)(d) in 1998 with the implied consent statute in mind, the court of appeals found that the phrase "required twenty-minute pre-test waiting period" was directly linked to the reasoning of *Parker* and *Jansen*, and consequently, where a "breath test is refused, the twenty-minute waiting period is not required and therefore, need not be videotaped." *Id.* at 335, 721 S.E.2d at 453–54.

The court of appeals further found its reading to be consistent with the legislative purpose behind the requirement, stating "[h]ere, the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence." *Elwell*, 396 S.C. at 336, 721 S.E.2d at 454 (footnote omitted). Therefore, "the statute ensures the attempt to establish the breath test's reliability need not endure such swearing contests" and when a breath test is given, "the waiting period's videotaping provides evidence that helps resolve credibility disputes as to the procedure used in administering the breath test." *Id.* However, where no breath test is given, the court of appeals found "none of those credibility disputes will arise." *Id.* Finally the court reasoned:

> The statute must be interpreted with realistic circumstances and rationales in mind, and this interpretation follows that approach. *See State v. Baker*, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair

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> Prior to admitting such evidence, the State may be required to prove (1) that the machine was in proper working order at the time of the test; (2) that the correct chemicals had been used; (3) that the accused was not allowed to put anything in his mouth for 20 minutes prior to the test[;] and (4) that the test was administered by a qualified person in the proper manner.

Parker at 163, 245 S.E.2d at 906. In *Jansen*, the Court held that the State was not required to abide by the waiting period requirement in implied consent cases when a suspect refuses to take a breath test, stating "[T]he *Parker* precautions are intended to ensure that the results of the breathalyzer test if given are accurate and reliable as evidence at trial," and therefore, the precautions were futile if no test was administered. *Jansen*, at 322, 408 S.E.2d at 237.

> interpretation consonant with the purpose, design, and policy of the lawmakers."). Our interpretation does not require a police officer to turn off the video recorder after the person refuses to take the test, nor does it frustrate the statute's general requirement that a person arrested for DUI "have his conduct at . . . the breath test site videotaped." § 56–5–2953(A). In all cases, the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so. *See* S.C. Code Ann. § 56–5–2953(A)(2)(b)–(c) (Supp. 2007). Accordingly, if a person refuses to take the breath test, dismissal of a DUI charge is not warranted for the failure to videotape the person's conduct for twenty minutes so long as the other requirements of subsection 56–5–2953 (A)(2) are satisfied.

Id. at 336–37, 721 S.E.2d at 454 (footnote omitted).

The State argues that section 56-5-2953(A)(2)(d) does not require a law enforcement officer to videotape the entire twenty-minute pre-test waiting period once the arrestee refuses a breath test. Elwell argues that his case is simple, in that the videotape was produced, it was incomplete and therefore the statute was violated. Moreover, Elwell interprets the statute's repeated reference to "conduct" to mean that the State is required to videotape *all* conduct, not just pre-test conduct, for the full twenty minutes. We disagree.

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Therefore, "[i]f a statute's language is plain, unambiguous, and conveys a clear meaning 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used." (citing *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002))). However, penal statutes will be strictly construed

against the state. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted).

In our opinion, the inclusion of the term "pre-test" plainly requires a breath test be administered for the video requirement to apply, and if there is no test, the statute does not require a videotape. Otherwise, the legislature would not have included the "pre-test" modifier. *See, e.g., Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (stating "[e]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction." (citation omitted)); *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning." (citation omitted)); *cf. Pittman*, 373 S.C. at 561, 647 S.E.2d at 161 ("Whenever possible, legislative intent should be found in the plain language of the statute itself." (citation omitted)). Moreover, we agree with the *Elwell* court's interpretation concerning the inclusion the term "required" in the statute. The court of appeals correctly and reasonably interpreted the pre-codification *Parker* and *Jansen* decisions to interpret the statute, concluding that only when the waiting period is required can the videotape recording also be required. On the other hand, if no test is administered, then the waiting period is rendered unnecessary, and so then is the videotape recording of that waiting period.

Furthermore, we agree with the court of appeals' analysis concerning the legislative purpose behind the videotape requirements. In *Roberts*, this Court stated that "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Once an arrestee refuses the breath test, the evidence gathering portion is over. As a consequence, we agree with the State that once Elwell refused the test and no breath test was administered, the statute did not require the arresting officer to continue to videotape the twenty-minute pre-test waiting period, and therefore, the videotape produced at trial complied with the statutory requirements. To require otherwise, would result in the officer having to undergo a useless and absurd act. *See Leviner v. S.C. Dep't of Highways and Pub. Transp.*, 313 S.C. 409, 412, 438 S.E.2d 246, 248 (1993) ("[I]t is unreasonable to expect an arresting officer to consider a refusal as conditional so that he must remain near the arrested person for an extended period of time. The arresting officer would be required to forsake other duties to arrange for a belated test that the motorist had

already refused after receiving warnings of the consequences of his noncompliance." (footnote omitted)).

Elwell argues that the remedy for the State's noncompliance is provided in *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007). *Suchenski* is inapplicable under the present facts. In that case, the respondent was arrested for DUI and was later indicted for DUAC (driving with an unlawful alcohol concentration). *Suchenski*, 374 S.C. at 14, 646 S.E.2d at 879. At the incident site, the arresting officer's video equipment malfunctioned, and the respondent moved to dismiss the charges based on the officer's failure to provide a "complete" videotape from the incident site. *Id.* The municipality argued that the case should not have been dismissed. *Id.* at 16, 646 S.E.2d at 880–81. The Court found that "[u]nder § 56-5-2953, a violation of the statute, with no mention of prejudice, may result in dismissal of the charges." *Id.* at 16, 646 S.E.2d at 881. Therefore, Elwell argues that in the present case, where a complete videotape was not produced, the Court should uphold the dismissal of the charges due to the State's violation of the statute. We agree that the proper remedy in this case for failure to comply with the statutory requirements elucidated in section 56-5-2953 would be dismissal. However, because no statutory violation occurred in this case, we need not rely on *Suchenski* for a remedy here.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Don Alexander, Carolyne Williams, Georgia F. Fields, William R. "Bob" Dixon, Colonel Joe H. Zorn, Jr., Melanie Wright, and Dr. M.O. Khan, Appellants,

v.

Freddie Houston, David Kenner, Keith Sloan, Lowell Jowers, Sr., Joe Smith, Harold Buckmon, and Travis Black, individually and in their capacity as members of Barnwell County Council, Respondents.

Appellate Case No. 2012-212034

Appeal from Barnwell County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 27260
Heard April 2, 2013 – Filed May 29, 2013

REVERSED AND REMANDED

A. Camden Lewis, Keith M. Babcock, and Arial E. King, all of Lewis Babcock & Griffin, LLP, of Columbia, for Appellants.

Elmer Kulmala, of Harvey & Kulmala, and James D. Mosteller, III, of The Mosteller Law Firm, LLC, both of Barnwell, for Respondents.

JUSTICE KITTREDGE: This is a direct appeal from the circuit court's order dismissing a declaratory judgment action pursuant to a Rule 12(b)(6), SCRCP, motion. We reverse and remand.

I.

In 1988, the Barnwell County Council (the Council or Respondents) passed an ordinance creating the Board of Trustees (the Board) for the Barnwell County Hospital (the Hospital). The ordinance stated the Board was created "for the purposes of operating and maintaining adequate hospital facilities for the residents of Barnwell County[,]" and delineated the powers and duties of the Board.[1] The ordinance also described the composition of the Board, set term limits, and provided members annual compensation. Over the years, the Council has passed various ordinances related to the Board.

Appellants, former Board members, allege that in 2009, during their time of service on the Board, the Council was developing a strategy in conjunction with Bamberg and Allendale Counties to close the respective county hospitals and create one hospital for all three counties. Appellants assert the Council embarked upon various detrimental actions against the Hospital in connection with the strategy and maintain these actions financially crippled the Hospital. According to Appellants, when they resisted the Council's plan, which included the Hospital filing for bankruptcy, the Council voted to remove Appellants from the Board and appointed themselves as Board members. The Council, in their new, self-appointed status as Board members, placed the Hospital in bankruptcy.

Appellants filed an action seeking a declaration that the Council violated the constitutional prohibition against dual office holding when it assumed positions as Board members. In response, the Council filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, for failure to state a claim. The Council argued the claim presented a non-justiciable political question, and the dual office prohibition was not violated by what it termed a "vertical" duality. Specifically, the Council

[1] The powers and duties include, but are not limited to, the authority to: adopt bylaws; operate the Hospital and its facilities; accept gifts, donations, and devises; improve and maintain the Hospital facilities; establish rates charged by the Hospital; contract; expend the proceeds derived from revenue generated; sue and be sued; employ various personnel; establish personnel policies; and adopt a budget to be approved by the Council.

contended that because the Board is a sub-entity of the Council, the two offices represented vertical, rather than horizontal, duality which does not run afoul of the Constitution. They cited no authority to support this unique theory.

The circuit court granted the Council's motion to dismiss, finding the issue was a non-justiciable political question. Nevertheless, the circuit court addressed and rejected the dual office holding challenge. Appellants filed a notice of appeal, and the appeal was certified to this Court, pursuant to Rule 204, SCACR.

II.

A.

Appellants first contend the circuit court erred in holding the issue presented was a non-justiciable political question. We agree.

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 121, 691 S.E.2d 453, 460 (2010) (quoting *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006)). "The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *Id.* at 122, 691 S.E.2d at 460 (quoting *S.C. Pub. Interest Found.*, 369 S.C. at 142-43, 632 S.E.2d at 278). "In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962)). Indeed, the political question doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker v. Carr*, 369 U.S. 186, 217 (1962). "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Id.* Therefore, "this Court is duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional[.]" *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460.

The circuit court erred in dismissing Appellants' claim as a nonjusticiable political question. A court must conduct a limited examination of the matter when it is argued a non-justiciable political question is presented. Here, Appellants do not challenge the wisdom of the Council's actions or the process by which this

situation developed. Nor do Appellants contest the broad powers granted to counties by the legislature.[2] Rather, Appellants make a specific and concrete assertion that due to Respondents' actions, Respondents now hold two offices for honor or profit in violation of the Constitution. This question presents a bona fide legal challenge which is proper for judicial resolution.

B.

The South Carolina Constitution provides: "No person may hold two offices of honor or profit at the same time." S.C. Const. art. VI, § 3. To be considered an office for purposes of the dual office holding provision, it must be demonstrated that "'the power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.'" *Segars-Andrews*, 387 S.C. at 124, 691 S.E.2d at 461 (quoting *Willis v. Aiken County*, 203 S.C. 96, 103, 26 S.E.2d 313, 316 (1943)). Furthermore, "'[t]he powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority.'" *Id.* quoting (63C Am Jur.2d *Public Officers and Employees* § 5 (2009)).

The Council concedes, as it must, that service on the Board constitutes an office in the constitutional sense.[3] *See Op. S.C. Att'y Gen.*, 2007 WL 655610, at *1-2 (2007) (finding service on the Board is a constitutional office). Indeed, the ordinance creating the Board establishes the specifics of Board composition and membership, and contains an extensive list of powers and duties afforded to the members of the Board.

Despite its concession, the Council asserts there is no constitutional violation in serving in more than one office. The Council contends its duality is vertical, rather

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[2] With the passage of the Home Rule Act, S.C. Code Ann. §§ 4-9-10 -1210 (Supp. 2012), and specifically section 4-9-30(6), counties were granted broad powers to establish, regulate, merge or abolish such boards, agencies, departments and positions as may be necessary and proper. *See also* S.C. Const. Art. VIII, § 7 ("The General Assembly shall provide by general law for the structure, organization, powers, duties, functions and the responsibilities of counties . . . ."). It is this broad grant of power which the Council asserts renders the claim at hand a non-justiciable political question.

[3] Likewise, it is undisputed that service on the Council is an office in the constitutional sense.

than horizontal, and is therefore constitutional. The Council's argument misapprehends the prohibition on dual office holding.[4] *See Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 89-90, 44 S.E.2d 88, 94 (1947) ("The proposition seems to us to prove itself, that a member cannot sit upon the board of auditorium trustees established in the act under review and at the same time retain his membership in the General Assembly. The language of the fundamental law is plain and unambiguous. It admits of no doubt of its meaning."). Membership on the Board is a separate and distinct constitutional office, and the Council has not asserted its service on the Board is in an ex officio capacity supported by a constitutional nexus. Given the record before us, we are constrained to conclude

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[4] The most prominent exception to the dual office prohibition is the ex officio or incidental duties exception, which provides that "dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law." *Segars-Andrews* (quoting *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947)). "A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his *official capacity*, and the functions of the board or commission are related to the duties of the office." *Ashmore*, 211 S.C. at 92, 44 S.E.2d at 95 (emphasis added). This exception "may properly be invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the 'ex officio' office." *Segars-Andrews*, 387 S.C. at 126, 691 S.E.2d at 462.

Respondents briefly referenced the ex officio argument in their memorandum in support of the motion to dismiss, but the circuit court did not rule on the issue. Moreover, Respondents do not present on appeal the ex officio argument as an additional sustaining ground. Correspondingly, Appellants have not addressed the ex officio exception in briefing. While a respondent may raise on appeal any additional sustaining grounds appearing in the record, even where those reasons have not been ruled on by the lower court, we are reticent to invoke an alternative sustaining ground where the ground is not raised in the appellate brief. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000) (recognizing that a respondent may abandon an additional sustaining ground by failing to raise it in the appellate brief). Invoking an additional sustaining ground under such circumstances would generally be unfair to an unaware appellant. We emphasize that we do not intimate that the ex officio exception applies in this case. We merely observe that we do not reach that issue in light of the general framework concerning additional sustaining grounds.

Respondents' simultaneous service on the Council and the Board constitutes improper dual office holding in violation of the Constitution.

The circuit court erred in granting the motion to dismiss Appellants' declaratory judgment action, and we reverse and remand.

REVERSED AND REMANDED.

TOAL, C.J., BEATTY, and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of Paul C. Ballou, Respondent.

Appellate Case No. 2013-001032

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b) and (c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has filed a return objecting to the suspension.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that James G. Long, III, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Long shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Long may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that James G. Long, III, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James G. Long, III, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Long's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.

Columbia, South Carolina

May 23, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chase Home Finance, LLC, Appellant,

v.

Cassandra S. Risher, individually, as Personal Representative and Legal Heir of the Estate of Sidney Allan Risher, Justin R., a minor, Sydney R., a minor, Ashley R., a minor, Sidney J. Risher, Pierre Risher and Drayton Holmes, as Legal Heirs to the Estate of Sidney Allan Risher, and Highland Hills Homeowners Association, Inc., Defendants,

Of whom Cassandra S. Risher is Respondent.

Appellate Case No. 2012-205706

Appeal From Lexington County
James O. Spence, Master-In-Equity

Opinion No. 5138
Heard January 16, 2013 – Filed May 29, 2013

AFFIRMED

Louis H. Lang and Jennifer N. Stone, both of Callison Tighe & Robinson, of Columbia, and Kevin T. Hardy, of Korn Law Firm, of Columbia, for Appellant.

H. Ronald Stanley, of Columbia, for Respondent.

THOMAS, J.: Chase Home Finance, LLC (Chase) sought to foreclose a mortgage on property owned by Cassandra S. Risher (Cassandra) and her late husband, Sidney Allan Risher (Sidney). The Lexington County Master-In-Equity allowed Chase to proceed against Sidney's undivided one-half interest, but refused to allow foreclosure of Cassandra's interest. Chase appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 17, 2008, Cassandra and Sidney entered into a contract to purchase a residence in Lexington County for $505,000. After signing the sales contract, Sidney met with a loan officer at Midland Mortgage Corporation to apply for a loan. Although Cassandra was present when Sidney met with the loan officer, she did not remember completing a loan application or any other paperwork in connection with the sale.

The closing took place on July 7, 2008. At the closing, Sidney obtained a loan from Midland Mortgage Corporation for $479,750 to finance the purchase of the property and executed a purchase money note in favor of Midland Mortgage Corporation along with a purchase money mortgage to secure the note. Although Cassandra was present at the closing and both she and Sidney were named on the deed, she did not sign either the note or mortgage. The note and mortgage were subsequently assigned to JPMorgan Chase Bank, N.A., on July 7, 2008.

Sidney died on August 23, 2009, and Cassandra was appointed personal representative of his estate. According to probate documents, Sidney's assets included an undivided one-half interest in the residence.

No payments were made on the loan after Sidney's death, and the mortgage went into default. On February 3, 2010, Chase, as current holder of the note and mortgage,[1] filed this action against Cassandra individually and in her capacities as personal representative and legal heir of Sidney's estate.[2] In its complaint, Chase

[1] JPMorgan Chase Bank assigned the note and mortgage to Chase on February 16, 2010, and the assignment was recorded on March 5, 2010.

[2] Chase also named as defendants several other individuals and the Highland Hills Homeowners Association. None of these defendants are parties to this appeal.

sought (1) foreclosure of its mortgage, (2) the establishment and foreclosure of an equitable lien on the entire subject property, including Cassandra's one-half interest, and (3) a judgment against Cassandra for unjust enrichment.

Cassandra responded on March 5, 2010, denying the substantive allegations of the complaint. Although she acknowledged Chase had a valid mortgage on Sidney's interest, she asserted she never mortgaged her undivided one-half interest and Chase should be barred from claiming any lien on the property other than its mortgage on Sidney's interest.

Pursuant to an order of reference, the Master heard the matter on May 12, 2011. During the hearing, Chase presented the testimony of a real estate paralegal and licensed title insurance agent who prepared the closing package for the sale, and the attorney who supervised the closing.[3] In addition, the record includes excerpts from a deposition that Cassandra gave on October 4, 2010.

On July 11, 2011, the Master signed an order in which he found (1) the mortgage executed by Sidney was not enforceable against Cassandra's interest in the property, (2) Chase was not entitled to an equitable lien against Cassandra's interest or judgment against Cassandra under the theory of unjust enrichment, and (3) Chase could proceed with its foreclosure action against Sidney's undivided one-half interest.

Chase moved to alter or amend the Master's order. The Master denied the motion, and Chase appeals.

ISSUES ON APPEAL

I. Did the Master err in finding that Chase failed to establish an equitable lien against Cassandra's undivided one-half interest in the subject property?

II. Did the Master err in finding Chase could not recover under the South Carolina common law remedy of unjust enrichment?

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[3] The attorney testified he was not present at the closing because he was probably on vacation. According to the appealed order, the paralegal who prepared the closing package contacted another attorney to attend the closing.

III. Did the Master err in citing a case on the federal common law theory of unjust enrichment?

IV. Did the Master err in holding that Chase was not entitled to any form of equitable relief?

STANDARD OF REVIEW

"An action to establish an equitable lien is an action in equity." *Fibkins v. Fibkins*, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct. App. 1990). Likewise, "[u]njust enrichment is an equitable doctrine." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). In an action in equity referred to a master for final judgment, an appellate court may find facts according to its own view of the preponderance of the evidence; however, it is not required to ignore the trial judge's findings. *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 571, 682 S.E.2d 252, 256-57 (2009).

LAW/ANALYSIS

I. Equitable Lien

Chase first argues the Master erred in ruling Chase failed to prove the necessary elements to establish an equitable lien against Cassandra's interest. Specifically, Chase complains the Master erred in (1) finding Chase failed to show a debt, duty, or obligation owed by one person to another, (2) requiring Chase to show a specific debt owed from Cassandra, (3) finding such a showing of a debt from Cassandra was necessary for an equitable lien to attach, (4) requiring Chase to show an "expressed affirmative action" by Cassandra to make Sidney's debt her own debt, (5) holding that because Cassandra had no obligation to Chase, there was no property on which such an obligation could attach, and (6) finding no evidence of express or implied intent that the entire property serve as collateral to secure the purchase money loan. We hold the Master correctly determined that Chase did not establish an equitable lien against Cassandra's undivided one-half interest in the subject property.

"An equitable lien or charge is neither an estate or property in the thing itself, nor a right to recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing so that the very thing itself may be

proceeded against in equity for payment of a claim." *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct. App. 1985). "'For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt.'" *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 250, 715 S.E.2d 348, 353 (Ct. App. 2011) (quoting *First Fed. Sav. & Loan Ass'n of S.C. v. Finn*, 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989)). Furthermore, "equity is generally only available when a party is without an adequate remedy at law." *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 328, 721 S.E.2d 447, 449 (Ct. App. 2011).

Citing *First Federal Savings and Loan Ass'n of Charleston v. Bailey*, 316 S.C. 350, 356, 450 S.E.2d 77, 80-81 (Ct. App. 1994), and *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct. App. 1985), the Master correctly stated that "[i]n order for an equitable lien to arise as to specific property, there must be a debt, a duty or obligation owing from one person to another, a res to which the obligation attaches, which can be described with reasonable certainty, *and* an intent, expressed or implied, that the property is to serve as security for the payment or obligation." (emphasis added). If a party seeking an equitable lien cannot satisfy any one of these requirements, this remedy is not available.

Here, there is no dispute that Chase had a valid mortgage on Sidney's interest. The question, then, is whether any deficiency remaining after a foreclosure of this mortgage would attach to Cassandra's interest. In other words, the "res to which the obligation attaches" was not the entire interest in the subject property, but Cassandra's undivided one-half interest. We agree with the Master that Chase did not show the parties had an express or implied intent that Cassandra's interest would serve as security for payment of the debt that Sidney incurred.

We recognize that Cassandra admitted in a deposition (1) she and Sidney could not have purchased the residence without the loan from Midland Mortgage, (2) she was aware of the loan, and (3) she benefited from the transaction. Nevertheless, these admissions do not warrant a finding that the Rishers and Midland Mortgage intended that Midland Mortgage or any successor-in-interest could recover against Cassandra's interest in the property for any part of the debt that Sidney's share could not satisfy in the event of a default. The Master noted the attorney who attended the closing did not testify at the hearing; therefore, no information was presented about her review of the title examination, the title commitment, the loan closing instructions and documents, the deed, and the failure to obtain Cassandra's

signature on the mortgage. Furthermore, although Cassandra signed several documents at the closing, there is no evidence that she was asked to sign either the note or the mortgage. We find particularly significant the Master's concern that no one from Midland Mortgage offered evidence that would have supported Chase's argument that Midland Mortgage had bargained for more than a mortgage encumbering only Sidney's interest. Applying our standard of review to the evidence presented, then, we affirm the Master's refusal to find Chase established a right to an equitable lien on Cassandra's interest.

Chase further suggests that it is entitled to an equitable lien on Cassandra's interest because it held a purchase money mortgage and note on the property. The priority conferred to the mortgagee of a purchase money mortgage, however, extends only to "all other claims or liens arising *through the mortgagor*." *SunTrust Bank v. Bryant*, 392 S.C. 264, 268, 708 S.E.2d 821, 823 (Ct. App. 2011) (emphasis added) (quoting *Hursey v. Hursey*, 284 S.C. 323, 327, 326 S.E.2d 178, 180 (Ct. App. 1985)). Chase further attempts to equate Cassandra's interest with "a variety of other non-lien interests arising through the purchase-mortgagor," such as dower rights and homestead claims. Cassandra's interest, however, did not "arise" through Sidney or from her status as his wife and widow. Moreover, her interest is not a judgment or lien, but an undivided ownership interest in the property that was granted to her by the prior owners of the property.

Citing *Home Owners' Loan Corp. v. Cilley*, 125 S.W.2d 313 (Tex. App. 1939), Chase further argues that Cassandra, as a tenant-in-common who knew about the mortgage at its inception and benefited from it, "agreed" that the entire property would be used as collateral for the loan. We hold *Cilley* is not applicable to the present case. The court in *Cilley* stated two exceptions to the rule co-tenants cannot encumber more than their individual shares: "One is that the act of the cotenant *with reference to the common property* must have been previously authorized by the nonassenting cotenants, and the other is that it must have been *subsequently ratified*." *Id.* at 316-17 (emphases added). Here, it was not established that Sidney's execution of the note and mortgage was "with reference to the common property" rather than solely to his undivided one-half interest. Furthermore, without evidence that Sidney ever encumbered Cassandra's one-half interest as well as his own, there was no unauthorized act for Cassandra to ratify. *Cf. Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989) (noting that ratification, as it relates to the law of agency, requires,

among other elements, "circumstances or an affirmative election indicating an intention to adopt the *unauthorized* arrangements") (emphasis added).

Finally, we agree with Cassandra that Chase has not alleged or proved it lacked an adequate remedy at law. Although the Master did not discuss the adequacy of a legal remedy in detail, he expressly allowed Chase to proceed with its foreclosure action against Sidney's undivided one-half interest. Here, there was no dispute Chase had a valid mortgage against Sidney's interest and, if necessary, the right to proceed with a deficiency claim against his estate.

II. Unjust Enrichment

Chase next argues the Master erred in finding Chase failed to establish the necessary elements to recover under the South Carolina common law remedy of unjust enrichment. As a corollary to this argument, Chase takes issue with the Master's finding that it did not confer a benefit to Cassandra because she was not a direct recipient of the loan. We hold the Master correctly determined that Chase was not entitled to recovery under the theory of unjust enrichment.

"Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff." *Regions Bank*, 394 S.C. at 256-57, 715 S.E.2d at 356. "Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1998). "Unjust enrichment is usually a prerequisite for enforcement of the doctrine of restitution; if there is no basis for unjust enrichment, there is no basis for restitution." *Id.* at 473, 366 S.E.2d at 14-15.

In *Niggel Associates, Inc. v. Polo's of North Myrtle Beach, Inc.*, 296 S.C. 531, 532-33, 374 S.E.2d 507, 509 (Ct. App. 1988), this court stated:

> For restitution to be warranted, the plaintiff must confer the benefit nongratuitously: that is, it must either be (1) at the defendant's request or (2) in circumstances where the plaintiff reasonably relies on the defendant to pay for the benefit and the defendant understands or ought to understand that the plaintiff expects compensation and looks to him for payment. *It is not enough that the*

> *defendant has knowledge of the plaintiff's conduct; he must have induced the plaintiff to confer the benefit*.

(Emphasis added.) Here, there was no evidence that Cassandra induced Midland Mortgage to make a loan secured only by Sidney's undivided one-half interest but in an amount greatly exceeding the value of that interest. To the contrary, the evidence shows Midland Mortgage was aware that Cassandra, though she was named on the sales contract with Sidney as a purchaser, did not sign the note or the mortgage and never requested that she do so.

III. Federal Common Law

Chase next takes issue with the Master's citation to a federal case on unjust enrichment, arguing there is no federal question at issue in this action.[4] Although Chase is correct that this case does not involve a federal question, we find no error. It is not improper to cite cases from the federal courts as persuasive authority even on a matter litigated in a state court that does not present a federal question. Moreover, the cases from the South Carolina state courts that we have cited on unjust enrichment and restitution support the affirmance of the Master's finding that Chase is not entitled to recover against Cassandra based on a theory of unjust enrichment.

IV. Other Relief

Finally, Chase contends that the Master erred in holding it is not entitled to any form of equitable relief because Midland Mortgage and the closing attorney could have avoided the loss. In support of this assertion, Chase argues the closing attorney is deemed to represent the buyer and Cassandra should be charged with the error of her attorney. Chase also points out that Midland Mortgage Corporation did not prepare or review the deed of conveyance. We hold these circumstances do not warrant reversal of the Master's refusal to award equitable relief to Chase.

We agree that in a standard real estate transaction, the closing attorney represents the borrower. *See* S.C. Code Ann. § 37-10-102(a) (2002) (referring to "legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing" of a loan that is primarily "for a personal, family or household purpose" and "is secured in whole or in part by a lien on real estate"). Nonetheless, even though Midland Mortgage Corporation did not prepare or review the deed, it processed the Rishers' loan application and, according to the Master's order, prepared the other closing documents. We found nothing in the record suggesting Midland Mortgage would have not had access to the contract of sale, which listed both Sidney and Cassandra as purchasers and was admitted into evidence as a plaintiff's exhibit. Furthermore, although Cassandra accompanied Sidney when he applied for the loan, she was never asked to complete an application or to sign either the note or the mortgage. We therefore hold that

[4] The Master cited *Mason v. M.F. Smith & Assocs.*, 158 F. Supp. 2d 673 (2001).

although Midland Mortgage Corporation was not formally represented by counsel at the closing, it had sufficient information to avoid the loss it sustained.

CONCLUSION

We affirm the Master's findings that Chase was not entitled to an equitable lien, recovery under the theory of unjust enrichment, or any other form of equitable relief.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.