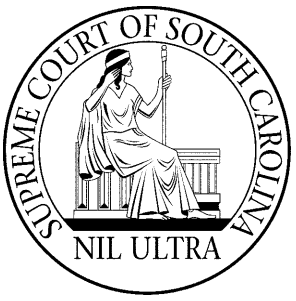

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
July 30, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

State Accident Fund, Appellant,

v.

South Carolina Second Injury Fund, Respondent,

In Re: Johnny M. Adger, Employee,

v.

City of Manning, Employer,

and

State Accident Fund, Carrier.

Appellate Case No. 2012-212722

Appeal from the South Carolina Workers' Compensation Commission

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Opinion No. 27424
Heard February 6, 2014 – Filed July 30, 2014

REVERSED AND REMANDED

F. Earl Ellis, Jr., of Adams and Reese, LLP, of Columbia, for Appellant.

Latonya Dilligard Edwards, of Dilligard Edwards, LLC, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State Accident Fund (Appellant) appeals an order from the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission) denying Appellant's request for reimbursement from the South Carolina Second Injury Fund (Respondent) for benefits paid to Johnny Adger (Claimant), who suffered from preexisting diabetes when a work-related injury occurred. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Claimant suffered an accidental injury to his left knee on August 17, 2007, while working as a police officer with the Manning Police Department. As a result, Claimant was treated using various non-operative methods, including steroid injections. In January 2008, Claimant reached maximum medical improvement (MMI) and was assigned a 32% permanent impairment rating to his lower left extremity. However, in April 2008, Claimant returned to the doctor because he continued to experience swelling and pain in his left knee. Ultimately, Claimant underwent knee replacement surgery. Claimant continued to experience swelling and pain in his left knee, and Claimant followed up with the orthopaedic center for several months after the surgery.

At the time of his injury, Claimant suffered from preexisting diabetes, which Claimant's employer was aware of prior to the injury. Claimant experienced problems with his diabetes for years before the accident and required medication to control the condition.[1] Claimant's diabetes was medically controlled around the time of the injury; however, Claimant's diabetes was uncontrolled on several occasions during the course of his knee treatment.

Claimant's primary care physician, Dr. William Aldrich, opined that Claimant's injury "most probably aggravate[d] the diabetes" and resulted in "substantially greater medical costs" than would have occurred from the injury alone. However, in Dr. Aldrich's opinion, the aggravation of Claimant's diabetes "most probably" did not result in "substantially greater time lost from work" or "substantially greater disability" than would have occurred from the injury alone.

[1] For example, Claimant suffered tingling in his right foot which only subsided after removing his shoe. In addition, Claimant was prescribed shoes made especially for diabetics.

The workers' compensation carrier, Appellant, filed a claim for partial reimbursement from Respondent, alleging that it incurred substantially greater liability for compensation benefits and medical benefits because Claimant's preexisting diabetes was aggravated by his work-related injury. Respondent denied that the claim met the requirements of the statute governing reimbursement. *See* S.C. Code Ann. § 42-9-400 (Supp. 2013).[2]

South Carolina Workers' Compensation Commissioner T. Scott Beck (the Single Commissioner) held a hearing on this matter on September 27, 2011. Thereafter, the Single Commissioner filed an order denying Appellant's claim for reimbursement and dismissing the claim with prejudice. The Single Commissioner concluded that Appellant "had the burden to prove that Claimant's preexisting diabetes was permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment," but also found that "the evidence in the record rebuts the presumption that Claimant's diabetes was a hindrance to his employment." In addition, the Single Commissioner determined that Appellant did not prove that "Claimant's preexisting diabetes created substantially greater lost time from work and permanent disability than would have resulted from the work injury alone" based upon his findings that "[t]he evidence in the record does not indicate a fluctuation in blood sugars, a modification in diabetic medication or delayed post-surgical healing" and that "the medical records reveal that Claimant was written out of work for only three (3) days immediately after the work injury." Therefore, the Single Commissioner denied Appellant's claim for reimbursement, concluding that it did not meet the standard of reimbursement in section 42-9-400.

On appeal, the Commission affirmed the Single Commissioner's order in its entirety.[3] Appellant appealed the Commission's order to the court of appeals. This Court certified the appeal pursuant to Rule 204(b), SCACR.

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[2] Subject to detailed provisions of the statute, section 42-9-400 provides that if an employee with a permanent physical impairment suffers a subsequent injury by accident arising out of and in the course of his employment, the Second Injury Fund must reimburse the employer or his insurance carrier for compensation and medical benefits. S.C. Code Ann. § 42-9-400.

[3] One commissioner dissented, asserting that she would find the evidence did not rebut the presumption that Claimant's diabetes was a hindrance or obstacle to employment and that instead, the evidence supported the conclusion that Claimant's injury aggravated his diabetes and resulted in increased medical costs.

ISSUE

Whether the Commission erred in denying Appellant's claim for reimbursement for Claimant's medical payments under section 42-9-400?[4]

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (the APA) sets forth the standard for judicial review of decisions by the Commission. *See* S.C. Code Ann. § 1-23-380 (Supp. 2012); *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); *Lark v. Bi-Lo*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Although the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, the Court may reverse a decision of the Commission if it is affected by an error of law or is clearly erroneous in view of the substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380. The Court may find the Commission's findings clearly erroneous if they are based on a mistaken view of the evidence. *Grayson v. Carter Rhoad Furniture*, 312 S.C. 250, 252, 439 S.E.2d 859, 860 (Ct. App. 1993).

LAW/ANALYSIS

The Second Injury Fund was established in 1972 to encourage employers to hire disabled or handicapped persons. *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995); *Springs Indus. v. S.C. Second Injury Fund*, 296 S.C. 359, 361, 372 S.E.2d 915, 916 (Ct. App. 1988). If a disabled or handicapped employee's work-related injury results in the award of workers' compensation benefits, the employer is entitled to partial reimbursement if it satisfies the statutory requirements of section 42-9-400. *Springs Indus.*, 296 S.C. at 361, 372 S.E.2d at 916. Therefore, the Second Injury Fund serves to fully compensate disabled employees for work-related injuries without penalizing an employer if the employer is subject to greater liability because of the employee's preexisting condition. *Liberty Mut.*, 318 S.C. at 518, 458 S.E.2d at 551; *Springs Indus.*, 296 S.C. at 361, 372 S.E.2d at 916.

Section 42-9-400(a) of the South Carolina Code provides:

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[4] Appellant does not challenge the Commission's decision to deny reimbursement for Claimant's compensation benefits.

> If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment resulting in compensation and medical payments liability or either, for disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund . . . for compensation and medical benefits . . . .

S.C. Code Ann. § 42-9-400(a).

"[P]ermanent physical impairment" is defined as a "permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed." *Id.* § 42-9-400(d). When an employer establishes prior knowledge of the employee's permanent condition, "then *there shall be a presumption* that the condition is permanent and that a hindrance or obstacle to employment or reemployment exists," but only if the condition is one of thirty-two conditions listed in the statute. *Id.* (emphasis added). Diabetes is one such condition. *Id.* § 42-9-400(d)(2).

I. Presumption Under Section 42-9-400(d)

First, Appellant argues that the Commission erred by incorrectly applying the presumption found in section 42-9-400(d). In its findings of fact, the Commission stated that "[t]hough [Appellant] is entitled to a presumption that Claimant's preexisting diabetes was a hindrance to employment, the medical evidence in the record rebuts this presumption." However, inconsistent with this finding of fact, the Commission stated in its conclusions of law that "[t]o qualify for reimbursement, [Appellant] had the burden to prove that Claimant's preexisting diabetes was permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment." Appellant further contends that the Commission erred in concluding that Appellant had the burden of proof because it was entitled to a presumption that Claimant's preexisting diabetes constituted a "permanent physical impairment." We agree.

A presumption is a "legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." Black's Law Dictionary 1304 (9th ed. 2009). "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." *Id.* Appellant presented facts sufficient to support the application of the presumption under section 42-9-400(d).

Therefore, we find that Appellant was entitled to a presumption that Claimant's diabetes was permanent and constituted a hindrance or obstacle to his employment or reemployment. Because the Commission's order incorrectly sets forth the burden of proof in its law section, we hold that the Commission's order is erroneous as a matter of law. *See* S.C. Code Ann. § 1-23-280 (providing that the Court may reverse a decision of the Commission if it is affected by an error of law).

II. Rebuttal of the Presumption

Because Appellant was entitled to the presumption, the burden to rebut the presumption then shifted to Respondent. The Commission concluded that "the evidence in the record rebutted the presumption that Claimant's preexisting diabetes was a hindrance to his employment." Therefore, we must determine whether Respondent, in fact, presented evidence which rebutted the presumption.

Appellant argues that the Commission erred in concluding that Respondent rebutted the presumption provided under section 42-9-400(d). We agree.

When a presumption shifts the burden of production to the opposing party, that party must present substantial evidence in order to rebut the presumption. *See* 100A C.J.S. *Workers' Compensation* § 1029 (2014) ("Because a fact must be proved with substantial evidence in a workers' compensation proceeding, a rebuttable presumption must be met with substantial evidence.").

In deciding whether there was evidence to rebut the presumption that the Claimant suffered a "permanent physical impairment," the Commission focused on medical evidence indicating that prior to the injury, Claimant's diabetes was medically managed and was not uncontrolled or problematic. The Commission relied on this evidence in discussing whether Claimant's preexisting diabetes was a hindrance to Claimant's employment at the time of his injury, *not* whether it was a hindrance to *obtaining* employment, as the statute requires. *See* S.C. Code Ann. § 42-9-400(d) (defining "permanent physical impairment" as a permanent condition

constituting "a hindrance or obstacle to *obtaining* employment or to obtaining reemployment if the employee should become unemployed" (emphasis added)); *Springs Indus.*, 296 S.C. at 362, 363–64, 372 S.E.2d at 917 (concluding that an employee's chronic cough and breathing difficulties caused by exposure to cotton dust would be a hindrance to obtaining employment); s*ee also State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (1993) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." (citation omitted)).

The Commission also relied on medical evidence suggesting that post-surgery, Claimant's diabetes was successfully managed with medication and that his left knee was responding well to treatment. This view of the evidence fails to consider the substantial evidence in the record indicating the significant symptoms and problems Claimant experienced after his work-related injury. According to the medical records, Claimant's diabetes caused tingling in his foot which did not subside until he removed his shoe, and Claimant required special shoes and medication to control his diabetes. The evidence in the record actually *supports* the presumption that Claimant's diabetes constituted a hindrance or obstacle to obtaining employment or reemployment as a police officer. Accordingly, the Commission's conclusion that the evidence rebutted the presumption is clearly erroneous in view of the substantial evidence on the record. *See* S.C. Code Ann. § 1-23-380 (providing that the Court may reverse a decision of the Commission if it is clearly erroneous in view of the substantial evidence on the record as a whole).

III. Increased Medical Costs

Finally, Appellant argues it satisfied section 42-9-400 by proving that the aggravation of Claimant's preexisting diabetes resulted in substantially increased medical costs, and therefore, the Commission erred in denying Appellant reimbursement under section 42-9-400(a). We agree.

Section 42-9-400(a) provides that the Second Injury Fund must reimburse a carrier for medical payments when an employee with a preexisting condition incurs a subsequent disability from a work-related injury "resulting in compensation and medical payments liability, or either, for disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone . . . ." S.C. Code Ann. § 42-9-400(a). Subsection (a)(2) specifies the details of reimbursement of medical payments, stating that "an employer or carrier must establish that his *liability for medical payments is substantially greater by reason of the aggravation of the preexisting*

impairment than that which would have resulted from the subsequent injury alone." S.C. Code Ann. § 42-9-400(a)(2) (emphasis added).

In conforming to the purpose of the Second Injury Fund, section 42-9-400(a) provides for reimbursement from the Second Injury Fund when—subsequent to a work-related injury—the aggravation of a preexisting permanent impairment causes substantially greater liability for compensation *or* medical payments than would have resulted from the work-related injury alone. *See* S.C. Code Ann. § 42-9-400(a); *Liberty Mut.*, 318 S.C. at 519, 485 S.E.2d at 551–52.

Section 42-9-400 provides for reimbursement of medical payments even when there is not increased liability for compensation. *See* S.C. Code Ann. § 42-9-400(a); *Liberty Mut.*, 318 S.C. at 519, 485 S.E.2d at 551–52. In *Liberty Mutual*, we held that a carrier was entitled to reimbursement for medical payments where the carrier was liable for greater medical payments—but not greater compensation payments—because of an employee's preexisting diabetes. 318 S.C. at 519, 458 S.E.2d at 551. The employee was paralyzed by a work-related accident and was rendered totally and permanently disabled for workers' compensation purposes. *Id.* at 517, 458 S.E.2d at 551. The employee's preexisting diabetes aggravated his paralysis, causing him to undergo a double amputation. *Id.* The Second Injury Fund argued that section 42-9-400(a) required the employee to suffer greater *disability*, in addition to increased medical payments, for the carrier to receive any reimbursement. *Id.* at 518, 458 S.E.2d at 551. Although we found that the carrier was not entitled to reimbursement of compensation payments because the accident rendered the employee totally disabled and thus the employee's diabetes did not increase the compensation payments, we held that the carrier incurred greater liability for the employee's medical payments because of the diabetes, and was therefore entitled to reimbursement for medical payments under section 42-9-400. *Id.* at 519, 485 S.E.2d at 551–52.

The Commission denied Appellant's claim for reimbursement in full. Without mentioning medical payments, the Commission stated that "Claimant's preexisting diabetes did not create substantially greater liability for permanent disability nor did it result in substantially greater lost time from work." However, these facts fall under the compensation liability prong of the statute. In its order, the Commission ignored Dr. Aldrich's expert opinion that Claimant's injury most probably aggravated his diabetes and resulted in substantially greater medical costs than would have resulted from his work-related injury alone. Respondent presented no evidence or expert opinion that contradicted Dr. Aldrich's statement concerning medical costs. Therefore, based on the fact that the medical evidence

supports the conclusion that the Claimant's work-related injury aggravated his diabetes and resulted in increased medical costs, we hold that Appellant satisfied the requirements of section 42-9-400(a), and the Commission's decision to deny Appellant's claim for reimbursement of medical payments is clearly erroneous based on the evidence.[5]

CONCLUSION

For the foregoing reasons, the Commission's decision denying Appellant reimbursement for Claimant's medical payments is reversed and remanded for the Commission to determine the amount of reimbursement to which Appellant is entitled.

REVERSED AND REMANDED.

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

[5] Although Dr. Aldrich opined that aggravation of Claimant's diabetes most probably did not result in substantially greater time lost from work or substantially greater disability than would have occurred from the injury alone, reimbursement for increased medical payments is an important aspect of the Second Injury Fund and section 42-9-400, regardless of a preexisting condition's effect on compensation payments. *See Liberty Mut.*, 318 S.C. at 519, 485 S.E.2d at 551–52.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert Paul Taylor, Respondent

Appellate Case No. 2014-001413

Opinion No. 27425
Heard July 1, 2014 – Filed July 30, 2014

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Ryan A. Stampfle, Esquire, of Stampfle Law Firm, LLC, of Myrtle Beach, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. Respondent requests the disbarment be imposed retroactively to February 19, 2014, the date of his interim suspension. In the Matter of Taylor, 407 S.C. 168, 754 S.E.2d 714 (2014). In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of a sanction and, further, to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School prior to seeking readmission. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to the date of his

interim suspension, and impose additional conditions as set forth hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Complainant A hired respondent to represent him in a child support modification action. Respondent charged Complainant A a flat fee of $1,500.00 for attorney's fees as reflected in the fee agreement. Respondent's affidavit of attorney's fees presented to the court requested attorney's fees in the amount of $1,687.50, more than the total fee in the agreement. In addition, the affidavit states "[u]pon Plaintiff's retaining of Affiant, Plaintiff was informed by the office that he would be charged an hourly rate of Two Hundred Twenty-Five and No/100s ($225.00) Dollars per hour for attorney time." However, respondent's fee agreement makes no mention of an hourly rate to be charged for his services.

Respondent filed a Motion for Temporary Relief seeking modification of child support. A hearing was convened on February 17, 2010. The judge denied the request for modification, ordered a case from Lexington County (in which an Order and Rule to Show Cause hearing had been scheduled to address delinquent child support by Complainant A) be transferred to Horry County and ordered the parties to submit the issues to mediation.

Mediation was not held. Complainant A's Rule to Show Cause was transferred to Horry County and a hearing was held on April 16, 2010, at which time Complainant A was held in civil contempt and ordered to pay $6,540.32 to purge the contempt.

Complainant A filed a complaint with ODC on June 18, 2010, alleging respondent engaged in misconduct in several aspects. He alleged respondent made promises he did not keep, failed to communicate with him, gave him bad advice, and failed to act diligently on his behalf. Several of Complainant A's allegations are without merit with regard to respondent's efforts on Complainant A's behalf in the underlying action. However, during the course of the investigation, respondent fabricated evidence to present to ODC in an effort to demonstrate communications with his client.

In a supplemental response to the Notice of Investigation, respondent provided ODC with copies of several letters allegedly sent by him to Complainant A. Investigation by ODC revealed several of these letters were falsified. In particular, two letters, one dated October 15, 2009, and one dated November 6, 2009, contained a caption number that was not assigned to the case until December 28, 2009.[1] Therefore, those letters could not have been written in October or November 2009.

Respondent admits these letters were completely fabricated and backdated. He admits he created these letters for the purpose of demonstrating to ODC that he was diligent and communicative in his representation of Complainant A.

In addition, respondent submitted a letter dated February 19, 2010, allegedly written by him to Complainant A. This letter purports to discuss what happened at the hearing on February 17, 2010. However, the letter references events that were not discussed until the hearing on April 16, 2010. Respondent created the letter for purposes of the disciplinary investigation, again to demonstrate diligence and communication.

Matter II

In October 2013, Complainant B hired respondent to represent her in a divorce action. At a meeting on October 19, 2013, Complainant B paid respondent $900, $750 of which was for attorney's fees and $150 of which was for costs. Complainant B and respondent went over the complaint respondent had drafted and discussed serving Complainant B's husband. Complainant B informed respondent that the marital residence was in foreclosure proceedings and that, after the foreclosure hearing, her husband would be difficult to serve.

Throughout the remainder of 2013 and the beginning of 2014, Complainant B called respondent's office several times to inquire whether her husband had been served. The process server was unsuccessful in serving the husband.

[1] Further, respondent filed two separate matters with different action numbers on December 9, 2009. Respondent placed the incorrect action number on the letters at issue in Complainant A's matter.

The last time Complainant B spoke to respondent's receptionist was on January 13, 2014. She called approximately twice a day for the next couple of weeks and never received an answer or a return call. Complainant B went by respondent's office on January 17, 2014, and January 24, 2014, but it was closed and locked on both occasions. Respondent did not serve Complainant B's husband with the complaint and did not inform Complainant B that he was closing his office. Complainant B could not retain a new attorney as respondent was still the attorney of record and she could not find him in order to obtain a release of representation.

As a result of abandoning his office, the Court placed respondent on interim suspension on February 19, 2014. Id.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 1.16 (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect clients' interests); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of client); Rule 8.1 (in connection with disciplinary matter, lawyer shall not knowingly make false statement of material fact); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent further admits he violated the Lawyer's Oath as contained in Rule 402(k), SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay ODC and the Commission the costs incurred in the investigation and prosecution of this matter. Respondent shall not apply for readmission until he has completed the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Watson Smiley, IV, Respondent

Appellate Case No. 2014-000911

Opinion No. 27426
Heard July 9, 2014 – Filed July 30, 2014

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James K. Holmes, of The Steinberg Law Firm, LLP, of Charleston, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand. In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of imposition of a sanction and to complete the Legal Ethics and Practice Program Trust Account School within six (6) months of the imposition of a sanction. We accept the Agreement, issue a public reprimand, and order respondent to pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the date of this opinion and to complete the Legal Ethics and Practice

Program Trust Account School within six (6) months of the date of this opinion. The fact, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent appeared in federal court to address allegations that he had failed to respond to a summons from the United States Internal Revenue Service concerning his tax liability. Although the underlying question of respondent's cooperation was resolved, respondent acknowledged to the court that his office files and accounts were not in good order as a result of personnel issues. Concerned, the judge reported respondent to ODC.

Respondent did not respond to ODC's written request for six months of trust account records or a written reminder of the outstanding request. ODC then issued a subpoena to respondent for ten months of his trust account records. Through counsel, respondent provided partial bank statements for the six months originally requested. He did not provide any receipt and disbursement journals, client ledgers, or reconciliation reports as demanded in the subpoena, records he was required to maintain pursuant to Rule 417, SCACR.

While ODC was trying to obtain respondent's Rule 417 records, respondent wrote himself a trust account check for earned fees; the check was returned for nonsufficient funds. Respondent issued and negotiated the check immediately after depositing the client's corresponding check into his trust account on a Friday afternoon. Although the client's check met the definition of good funds, respondent admits he should not have drawn against the deposit immediately because he was informed by bank staff and a note on the deposit receipt that the funds would not be available until the next business day, a Tuesday.

Respondent did not respond to the Notice of Investigation concerning the non-sufficient funds until after receiving a reminder letter. In addition to being untimely, respondent's response was incomplete and did not include all of the records requested. ODC again requested, but did not receive, the missing records. Respondent did not provide the records because he did not have them, but his failure to explain this fact prolonged the investigation. Although his trust account

had little activity and there is no indication of misappropriation, respondent was not keeping adequate records as required by Rule 417, SCACR.

Matter II

On October 14, 2010, John Doe retained respondent to represent him on charges of speeding, driving under suspension, second offense, and presenting a suspended driver's license. Respondent received notice from the court for a docket sounding scheduled for May 2, 2011. Mr. Doe and two of respondent's other clients were on the docket, but respondent failed to place Mr. Doe's appearance on his calendar and, thus, failed to notify Mr. Doe of the appearance.

Respondent appeared for the docket sounding and realized Mr. Doe's case was on the docket. He then confused Mr. Doe's file with that of another client. Respondent attempted to contact the other client, but the client's phone number was no longer in service. Respondent negotiated a plea that included dismissal of Mr. Doe's charge of presenting a suspended driver's license and advised the court of the plea agreement. Respondent incorrectly advised the court that he had discussed the plea with Mr. Doe. The court accepted the plea and sentenced Mr. Doe to sixty days imprisonment or payment of a fine. Additionally, at respondent's request, the court granted Mr. Doe fifteen days to establish a payment plan. Respondent told the court he would write Mr. Doe a letter advising him of the plea and the deadline to set up the payment plan, but failed to send the letter.

Mr. Doe learned of his convictions when he received a letter in the mail from the Department of Motor Vehicles discussing his driving privileges as a result of the convictions. After several unsuccessful attempts to reach respondent, Mr. Doe contacted the court and explained what happened. The Court permitted Mr. Doe to set up a payment plan for the fine and court costs. The guilty pleas were reopened at respondent's request and the driving under suspension charge was ultimately dismissed and expunged.

During ODC's investigation, respondent failed to respond to a request for additional information until he received multiple reminders.

Matter III

In ten additional investigations, respondent responded to one or more written inquiries from ODC only after receiving the reminder letters. Although the investigation of the underlying allegations did not reveal clear and convincing evidence of misconduct, respondent admits he failed to fully cooperate.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation); Rule 1.4 (lawyer shall promptly inform client of any decision or circumstance to which client's informed consent is required); Rule 1.15(f) (lawyer shall not disburse funds from trust account unless funds have been collected); Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent further admits he violated the recordkeeping requirements of Rule 417, SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to lawful demand from disciplinary authority to include request for response).

Conclusion

We find respondent's misconduct warrants a public reprimand.[1] Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the

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[1] Respondent's prior disciplinary history includes a confidential admonition issued in 2005 and four letters of caution issued between 2000 and 2009 warning him to be careful to adhere to some of the specific Rules of Professional Conduct cited in the current proceeding. See Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against

investigation and prosecution of this matter by ODC and the Commission. Further, within six (6) months of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Trust Account School and shall submit documentation of completion to the Commission no later than ten (10) days after the conclusion of the program. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

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lawyer unless the caution or warning contained in letter of caution is relevant to the misconduct alleged in proceedings); Rule 7(b)(4), RLDE (admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon issue of sanction to be imposed).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Wilson Pearson, Appellant.

Appellate Case No. 2012-212430

Appeal From Clarendon County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5251
Heard June 17, 2014 – Filed July 30, 2014

REVERSED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jennifer Ellis Roberts, both of Columbia, for Respondent.

GEATHERS, J.: Appellant Michael Wilson Pearson challenges his convictions for first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime. Pearson argues the State failed to present substantial circumstantial evidence of his involvement in any of the crimes charged and, therefore, the trial court erred in denying his motion for a directed verdict. We reverse.

FACTS/PROCEDURAL HISTORY

Around 6:15 a.m. on May 15, 2010, Edward "Slick" Gibbons was jumped by three men as he exited his garage. The three men robbed Gibbons of approximately $840, beat him, and wrapped duct tape around his head. Following the attack, the men fled the scene in Gibbons' 1987 Chevrolet El Camino. The vehicle was discovered approximately thirty minutes later, abandoned on the side of a nearby road. A fingerprint recovered from the rear of the vehicle was matched to Pearson. The duct tape removed from Gibbons' head contained DNA evidence, which was matched to Victor Weldon.

Pearson and Weldon were both indicted for attempted murder, first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime. A joint trial was held from May 16 through May 18, 2012. At the time of trial, investigators had yet to identify a third suspect.

At trial, Gibbons testified that as he was leaving for work, three black men wearing masks came out of the storage room inside of his garage and threw him on the ground. According to Gibbons, one of the men sat on top of his legs, while the other two men hit and kicked him. While Gibbons was on the ground, the men wrapped duct tape around his head. Gibbons claimed that one of the men had something in his hand that "looked like a pistol." He further testified the men took all of the money in his wallet and then one of the men asked him, "Slick . . . where is the rest of it[?]" After the robbery, the three men left the garage and started to drive away. Gibbons described how he pulled himself off the ground and looked out a window in the garage to see them driving off in his El Camino. Gibbons noted that when he got up, one of the men, who was seated in the rear bed of the El Camino, jumped out of the vehicle, ran back, and knocked him unconscious.

Cecil Eaddy, a local farmer, testified he found the abandoned El Camino around 6:40 a.m. with the motor running and the passenger door open. Eaddy recounted how he turned the vehicle off and took the keys to Gibbons' auto parts store. Eaddy stated he returned the keys so that one of Gibbons' employees could drive the vehicle back to the store. Walter Bush, an employee at Gibbons' store, corroborated Eaddy's testimony. According to Bush, Eaddy picked him up from the store and drove him to the location of the vehicle. Bush testified he drove the vehicle "straight back to the store."

Ricky Richards, an investigator with the Clarendon County Sheriff's Office, testified he went to Gibbons' store, where he processed the El Camino. Richards stated he lifted fingerprints from the driver's side "door jamb" and the "rear quarter on the driver's side." On cross-examination, Richards admitted there was no way to determine when the fingerprints were left on the vehicle.

Investigator Thomas "Lin" Ham testified he visited Gibbons at the hospital on the day of the crimes.[1] Ham indicated that while he was at the hospital, he took the duct tape that was removed from Gibbons' head into evidence. In addition, Ham testified that during an interview with Pearson following his arrest, Pearson "adamantly denied knowing Mr. Gibbons." Ham elaborated: "[Pearson] told me he didn't know where [Mr. Gibbons] lived. He had never been there. He had never been to [Mr. Gibbons'] place of business. He had never come into contact with [Mr. Gibbons'] vehicle."

Marie Hodge, the automated fingerprint identification system (AFIS) examiner at the Sumter Police Department, was qualified as an expert in fingerprint identification. Hodge testified she ran seven fingerprints lifted from the vehicle through AFIS but did not obtain an identification for any of the prints. After obtaining no hits, Hodge printed out the fingerprints of persons of interest from AFIS and compared each set of prints "one-on-one" to the lifted fingerprints. According to Hodge, a side-by-side comparison of the prints showed that a right thumbprint found on the rear of the vehicle belonged to Pearson. Hodge later received a card containing Pearson's ink-rolled fingerprints from the Sheriff's Office, and compared the prints on the card to the lifted thumbprint. Hodge testified the comparison "reaffirmed" that the thumbprint belonged to Pearson. On cross-examination, Hodge conceded that she was unable to "date" or "age" a fingerprint. She further testified that when left undisturbed, a fingerprint "can be there for quite some time."

Investigator Kenneth Clark testified he interviewed Pearson following his arrest. Clark noted that during the interview, Pearson denied ever being around Gibbons or Gibbons' property. According to Clark, when he informed Pearson that his fingerprint had been found on Gibbons' vehicle, Pearson declined to comment. Clark testified that subsequent investigation revealed Pearson had previously worked on a landscaping project at Gibbons' residence.

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[1] Investigator Ham testified he had known Gibbons all of his life and frequently referred to Gibbons as "Mr. Slick" throughout his testimony.

Clark also testified concerning the investigation into co-defendant Victor Weldon's involvement in the crimes. He noted that during an interview with Weldon, Weldon denied knowing Pearson or having any involvement in the crimes. Clark indicated, however, that records from the South Carolina Vocational Rehabilitation Center revealed Pearson and Weldon both worked at the same job training program from December 9-12, 2008.

Richard Gamble, a local landscaper, testified Pearson had previously assisted him in doing landscaping work for Gibbons and Gibbons' son, who lived on the same block. Gamble could not recall the exact date of the landscaping project; however, he indicated it took place in the spring of 2009 or 2010. He estimated the project lasted "at least 5 days." Gamble testified that while working on the project, he observed Pearson enter Gibbons' garage in order to retrieve job-related tools that were located in the storage area.

The State also presented the testimony of John Hornsby, who worked as an area supervisor at the South Carolina Vocational Rehabilitation Center. According to Hornsby, time cards and attendance records revealed Pearson and Weldon were both assigned to the facility's woodshop from December 9-12, 2008. Hornsby stated that around twenty-five individuals generally worked at the woodshop on a daily basis.

After the State rested, Pearson and Weldon both moved for a directed verdict on all charges. Pearson argued that even though his fingerprint was found on the outside of Gibbons' car, the fingerprint was insufficient to place him at the crime scene because he lived only a block from Gibbons' store and there was expert testimony indicating a fingerprint could remain on a surface for an indeterminate period. In reply, the State argued the fingerprint was found on the rear of the vehicle, where Gibbons testified one of the men who robbed him had been seated as they fled his house. The State also pointed to evidence that the two co-defendants attended the same job training program over a four-day period, as well as testimony that Pearson had done landscaping work at Gibbons' home. The trial court denied Pearson's and Weldon's motions for a directed verdict. The trial court stated:

> As far as Mr. Pearson's fingerprint[,] the evidence in this case that has come before this jury that I recall he told the police officer he did not know Mr. Gibbons. He had not been at his house or his place of business. His vehicle was taken that morning. Within 30 minutes[,] the vehicle was found abandoned a mile and a half or two miles

> away. The vehicle was processed and was carried to the auto parts place and processed. That day his fingerprint was found on the vehicle. And I certainly think at least that's sufficient evidence for the jury to make a determination of guilt or innocence in this case. And I respectfully deny your motion.

The jury found Pearson and Weldon guilty of burglary in the first degree, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime. The trial court sentenced Pearson to a total of sixty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"On appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *Id.*

LAW/ANALYSIS

Pearson argues the circumstantial evidence presented by the State did not rise to the level of substantial circumstantial evidence necessary to submit the case to the jury. We agree.

"'A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged.'" *State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (quoting *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010)). "The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes." *Id.*; *see also State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) (stating the State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act"). If there is substantial circumstantial evidence reasonably tending to prove the defendant's guilt, an appellate court must find the trial court properly submitted the case to the jury. *Lane*, 406 S.C. at 121, 749 S.E.2d at 167 (citing *Odems*, 395 S.C. at 586, 720 S.E.2d at 50). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). "The lower court should not refuse to grant the motion

where the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances [that] do not amount to proof." *State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404–05 (2001).

In this matter, the key piece of evidence relied upon by the State to place Pearson at the crime scene was the presence of his fingerprint on the rear of Gibbons' vehicle. Our courts have addressed the sufficiency of fingerprint evidence where the State relies on such evidence to prove a defendant's guilt. We find a review of these cases is instructive in determining whether the circumstantial evidence presented by the State met the "substantial circumstantial evidence" standard.

In *Mitchell*, our supreme court affirmed this court's decision that Mitchell was entitled to a directed verdict on a burglary charge. 341 S.C. at 409, 535 S.E.2d at 127. The only evidence linking Mitchell to the burglary was his fingerprint on a window screen that was propped up against the exterior of the victim's house. *Id.* at 408–09, 535 S.E.2d at 127. The court found the fingerprint evidence was insufficient to prove Mitchell's guilt because there was testimony Mitchell had been in and around the victim's house at least three times before the burglary. *Id.* at 409, 535 S.E.2d at 127. Additionally, the court reasoned a directed verdict was appropriate because "[t]he State did not present any evidence whether the screen was on the window at the time the window was broken or when the screen had been removed." *Id.*

Similarly, in *State v. Bennett*, 408 S.C. 302, ___, 758 S.E.2d 743, 745 (Ct. App. 2014), this court assessed whether evidence of Bennett's fingerprint and DNA at the site of a burglary constituted substantial circumstantial evidence. Therein, a television, computer, monitor, and keyboard were stolen from a Spartanburg community center. *Id.* at ___, 758 S.E.2d at 744. Bennett's fingerprint was discovered on a wall-mounted television in the community room that appeared to have been manipulated by the burglar. *Id.* at ___, 758 S.E.2d at 744. Additionally, two droplets of Bennett's blood were found directly below the location of a missing television in the computer room. *Id.* at ___, 758 S.E.2d at 745. It was undisputed that Bennett was a frequent visitor to the center before the crime, and spent much of his time in the computer room. *Id.* at ___, 758 S.E.2d at 745. The director of the center testified she did not recall seeing Bennett in the community room, which was solely used for scheduled events. *Id.* at ___, 758 S.E.2d at 744. However, the director acknowledged that the community room was not always locked or consistently monitored. *Id.* at ___, 758 S.E.2d at 744.

Applying the directed verdict standard, the *Bennett* court found the State did not present substantial circumstantial evidence reasonably proving Bennett's guilt. *Id.* at ___, 758 S.E.2d at 746. The court recognized the evidence presented by the State "undoubtedly placed Bennett at the *location where a crime ultimately occurred*." *Id.* at ___, 758 S.E.2d at 746. However, the court rejected the State's assertion that the evidence served to "place[] Bennett *at the scene of the crime*." *Id.* at ___, 758 S.E.2d at 746. The court reasoned the exact locations of the DNA and fingerprint evidence "d[id] not rise above suspicion" because it was not "unexpected" to find Bennett's DNA and fingerprints in a communal area he frequented before the crime. *Id.* at ___, 758 S.E.2d at 746.

Additionally, in *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004), our supreme court held that fingerprint evidence placing Arnold with the victim on the day of the murder was not substantial and merely raised a suspicion of Arnold's guilt. In *Arnold*, the victim's body was discovered off a dirt road in Colleton County, South Carolina. *Id.* at 388, 605 S.E.2d at 530. The victim was last seen alive some three days earlier, when he borrowed a friend's BMW to go to a dentist appointment. *Id.* One of the State's witnesses testified he had introduced the victim to Arnold. *Id.* The witness indicated he had received a message from Arnold to call him at a phone number belonging to Arnold's father, who lived in Gray, Tennessee. *Id.* at 389, 605 S.E.2d at 530. The borrowed BMW was later found in a parking lot in Johnson City, Tennessee, approximately ten miles away from where Arnold's father lived. *Id.* The BMW had unspecified scratches on it, and a coffee cup lid containing Arnold's fingerprint was found in the car's center console. *Id.* In concluding that the circumstantial evidence presented by the State was not sufficient to overcome a directed verdict motion, the court reasoned:

> Viewing the evidence most favorably to the State, [Arnold]'s fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where [Arnold] was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that [Arnold] killed [the victim]. Further, there is no evidence [Arnold] was at the scene of the crime, which according to the State's theory was in Colleton County.

Id. at 390, 605 S.E.2d at 531 (footnote omitted).

Under the facts of this case and consistent with the court's reasoning in the aforementioned cases, there is insufficient evidence tying Pearson to the crimes. Here, the most damaging evidence was Pearson's fingerprint on the rear of Gibbons' vehicle. However, there was other evidence showing Pearson may have had an opportunity to come in contact with the vehicle before the crimes occurred. For instance, Pearson lived only a block away from Gibbons' store and there was testimony that Gibbons regularly parked his vehicle in a public lot adjacent to his store. Moreover, even assuming Pearson lied about working at Gibbons' residence, no evidence indicated Pearson did not have the opportunity to come in contact with the vehicle during the five-day landscaping project. Most notably, the State's fingerprint expert testified she could not determine when the print was placed on the vehicle and that such a print could remain on a vehicle for an indefinite period if left undisturbed. Because the State offered no timing evidence to contradict reasonable explanations for the presence of the fingerprint, the jury could only have guessed the fingerprint was made at the time of the crimes. *See Buckmon*, 347 S.C. at 322–23, 555 S.E.2d at 405 (holding defendant was entitled to a directed verdict where none of the evidence presented by the State placed defendant at the crime scene and the jury was left to speculate as to defendant's guilt).

We further note the additional incriminating evidence presented by the State failed to fill the gaps in proof and left the jury to speculate as to Pearson's guilt. *See State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) ("The motion [for a directed verdict] should be granted where a jury would be speculating as to the accused's guilt or where the evidence is sufficient only to raise a strong suspicion of guilt." (citation omitted)). In addition to the fingerprint, the State offered evidence that Pearson and his co-defendant, Weldon, previously attended the same job training program. It would be speculative, however, to infer a relationship between the two co-defendants considering approximately twenty-five individuals took part in the job training program. At most, this evidence demonstrates the two co-defendants worked in the same facility at the same time. Moreover, Pearson and Weldon both denied knowing each other during their separate interviews with investigators. Although it is possible Pearson and Weldon interacted during the program, it is not incredible that neither man could remember a fellow participant in a program they attended more than a year before the crimes. Despite the fact Weldon was tied to the crimes because of his DNA on the duct tape, nothing tied Pearson to the crime scene.

Viewing all of the evidence in the light most favorable to the State, there was insufficient evidence to submit the case to the jury. The recovered fingerprint directly tied Pearson to the stolen vehicle. Nonetheless, the fingerprint merely

raised a suspicion of Pearson's guilt because there was no additional evidence showing when the fingerprint was placed on the vehicle. Moreover, none of the other evidence presented by the State placed Pearson at the crime scene or established a relationship between Pearson and Weldon. For this reason, the jury could only have guessed Pearson was involved in the crimes. "[S]uspicion, however strong, does not suffice to sustain a conviction." *State v. Hyder*, 242 S.C. 372, 379, 131 S.E.2d 96, 100 (1963). A defendant is entitled to a judgment of acquittal "where [the] evidence merely raises a suspicion of guilt, or is such as to permit the jury to merely conjecture or to speculate as to the accused's guilt." *State v. Brown*, 267 S.C. 311, 316, 227 S.E.2d 674, 677 (1976). Accordingly, we find the trial court erred by denying Pearson's directed verdict motion.

CONCLUSION

For the foregoing reasons, Pearson's convictions are

REVERSED.

FEW, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Daisy Lynne Mimms, Appellant.

Appellate Case No. 2012-212931

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5252
Heard June 4, 2014 – Filed July 30, 2014

AFFIRMED

Assistant Public Defender Mark Wise, of Orangeburg, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Salley W. Elliott, both of Columbia, for Respondent.

CURETON, A.J.: Daisy Mimms appeals a circuit court order dismissing an appeal of her conviction in magistrate court for driving under the influence of alcohol or drugs (DUI). Mimms contends the circuit court erred in finding the magistrate court did not err in concluding: (1) there is no criminal intent required for the crime of DUI; and (2) veering off a roadway on one occasion was sufficient to show impaired driving. We affirm.

FACTS

On October 23, 2010, Trooper Jamie Burris, while responding to a dispatch call of a driver driving erratically, conducted a traffic stop of Mimms because her car fit the description from dispatch and he observed her drive off the roadway. Burris "smelled an odor of alcohol" as he walked toward Mimms' car; therefore, he asked her to get out of the car. During the stop, Burris told Mimms, "You [were] weaving all over the roadway." Burris administered three parts of the Horizontal-Gaze Nystagmus (HGN) test to determine if Mimms was under the influence. Mimms was unable to keep her balance while performing the test and she did not successfully complete any portion of the HGN test. Based on Mimms' performance on the HGN test, Burris "did not feel comfortable" requiring Mimms to complete additional field sobriety tests. Additionally, based on her appearance and mannerisms, Burris determined Mimms was "clearly" under the influence of alcohol. Mimms admitted she consumed alcohol earlier that evening. Mimms also told Burris she had cancer and was undergoing chemotherapy treatment. Burris explained to Mimms the mixture of alcohol with her medication could have had a "synergy effect," impacting her level of intoxication.

Subsequently, the State charged Mimms with DUI, and she proceeded to a jury trial in magistrate court. After the State rested, Mimms moved for a directed verdict, arguing there was insufficient evidence of impaired driving because the evidence only showed she "ran off the road slightly." Further, Mimms maintained there was no evidence showing she weaved back and forth, drove into a ditch, or crossed the dotted line. As a second ground for a directed verdict, Mimms argued the State failed to prove an intentional act of violating the law. Mimms asserted the State was required to prove criminal intent and it failed to present such evidence. Mimms contended the evidence did not indicate she knew or had any reason to know she should not have drank a beer or there would be a "synergy effect" when she consumed the medication and alcohol. According to Mimms, there was no evidence she knew combining beer with her medication would impact her ability to drive. The magistrate denied the motion, finding there was sufficient evidence of impaired driving and the DUI statute does not require the State to prove criminal intent. Mimms presented no defense.

Prior to instructing the jury, the magistrate reviewed the parties' proposed jury charges and determined she "[would] not instruct on criminal intent."[1] The jury convicted Mimms of DUI and the magistrate sentenced her to thirty days' imprisonment, suspended upon payment of a $997.00 fine. Mimms appealed to the circuit court, which dismissed her appeal with prejudice. This appeal followed.

STANDARD OF REVIEW

Section 18-7-170 of the South Carolina Code (2014) articulates the standard of review to be applied by the circuit court in an appeal of a magistrate's judgment:

> Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception. In reviewing criminal cases, this court may review errors of law only." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) (internal citations omitted). "When there is any evidence, however slight, tending to prove the issues involved, [the appellate court] may not question a magistrate court's findings of fact that were approved by a circuit court on appeal." *Allendale Cnty. Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004). This court will presume that an affirmance by a circuit court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law. *See Bowers v. Thomas*, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007). However, "[q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

[1] The actual charge to the jury is not included in the record.

LAW/ANALYSIS

I. CRIMINAL INTENT

Mimms argues the magistrate erred in failing to charge the jury on criminal intent as an element of DUI. Although our DUI statute does not provide for any mental state, Mimms essentially argues a culpable mental state—intent—must be read into the statute. Otherwise, according to Mimms, her right to due process of law would be violated. We disagree.

Section 56-5-2930(A) of the South Carolina Code (Supp. 2013) provides:

> It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired. A person who violates the provisions of this section is guilty of the offense of driving under the influence . . . .

In a trial for DUI, the state has to prove: (1) the defendant's ability to drive was materially and appreciably impaired; and (2) this impairment was caused by the use of drugs or alcohol. *State v. Salisbury*, 343 S.C. 520, 524, 541 S.E.2d 247, 248-49 (2001).

> In offenses at common law, and under statutes which do not disclose a contrary legislative purpose, to constitute a crime, the act must be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent.

State v. Ferguson, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990) (quoting *State v. Am. Agric. Chem. Co.*, 118 S.C. 333, 337, 110 S.E. 800, 802 (1922)). "Of course, the legislature, if it so chooses, may make an act or omission a crime regardless of fault." *Id.* at 271-72, 395 S.E.2d at 183; *see also State v. Manos*, 179 S.C. 45, 49-50, 183 S.E. 582, 584 (1936) ("The legislature, however, may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, although the intent of the doer may have been innocent. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state, where the word 'knowingly' or other apt words are not employed to indicate that knowledge is an essential element of the crime charged. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt." (quotation marks and citation omitted)). "These crimes are referred to commonly as 'strict liability' offenses. Whether an offense is a strict liability offense, and if not, what kind of criminal intent is required to satisfactorily show a commission of that offense, are questions of legislative intent." *Ferguson*, 302 S.C. at 272, 395 S.E.2d at 183. "Therefore, whether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute, construed in the light of its purpose and design." *Guinyard v. State*, 260 S.C. 220, 227, 195 S.E.2d 392, 395 (1973).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (quoting *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). "[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). The statutory language must be construed in light of the intended purpose of the statute. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks and citation omitted). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Roberts*, 393 S.C. at 342, 713 S.E.2d at 283. Appellate courts will not construe a statute in a

way which leads to an absurd result or renders it meaningless. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.").

"[D]riving of an automobile upon the public highway by a person while intoxicated is not only malum prohibitum, but malum in se." *State v. Long*, 186 S.C. 439, 446-47, 195 S.E. 624, 627 (1938).

> 'It is true the statute forbids it and provides a penalty, but this in no way determines whether it is only malum prohibitum. The purpose of the statute is to prevent accidents and preserve persons from injury, and the reason for it is that an intoxicated person has so befuddled and deranged and obscured his faculties of perception, judgment, and recognition of obligation toward his fellows as to be a menace in guiding an instrumentality so speedy and high-powered as a modern automobile. Such a man is barred from the highway because he has committed the wrong of getting drunk and thereby has rendered himself unfit and unsafe to propel and guide a vehicle capable of the speed of an express train and requiring its operator to be in possession of his faculties.'

Id. (quoting *People v. Townsend*, 183 N.W. 177, 179 (Mich. 1921)). Malum in se is defined as a "crime or an act that is inherently immoral." Blacks Law Dictionary 971 (7th ed. 1999). Malum prohibitum is defined as an "act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Id.* "A corrupt purpose, a wicked intent to do evil, is indispensable to a conviction of a crime which is morally wrong. But no evil intent is essential to an offense which is a mere malum prohibitum." *State v. Moore*, 128 S.C. 192, 199, 122 S.E. 672, 674-75 (1924) (Cothran, J., concurring) (quotation marks and citation omitted).

> A simple purpose to do the act forbidden in violation of the statute is the only criminal intent requisite to a

> conviction of a statutory offense which is not malum in se. It follows that the only criminal requisite to a conviction of an offense created by statute, which is not malum in se, is the purpose to do the act in violation of the statute.

Id. at 199-200, 122 S.E. at 675 (quotation marks and citations omitted).

> [S]tatutes that forbid [DUI], such as the statute before us,[2] typically do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all. The Government argues that 'the knowing nature of the conduct that produces intoxication combined with the inherent recklessness of the ensuing conduct more than suffices' to create an element of intent. And we agree with the Government that a drunk driver may very well drink on purpose. But this Court has said that, unlike the example crimes, the conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate.

Begay v. United States, 553 U.S. 137, 145 (2008) (citation omitted).

The DUI statute is devoid of any language regarding knowledge or intent. *See* S.C. Code Ann. § 56-5-2930(A). The statute is primarily a safety statute which seeks to punish an individual's drunken actions, not his or her intent. *See Long*, 186 S.C. at 446, 195 S.E. at 627 ("The purpose of the statute is to prevent accidents and

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[2] "New Mexico's DUI statute makes it a crime (and a felony after three earlier convictions) to 'drive a vehicle within [the] state' if the driver 'is under the influence of intoxicating liquor' (or has an alcohol concentration of .08 or more in his blood or breath within three hours of having driven the vehicle resulting from 'alcohol consumed before or while driving the vehicle')." *Begay v. United States*, 553 U.S. 137, 141 (2008) (alteration in original) (quoting N.M. Stat. Ann §§ 66-8-102(A), (C)).

preserve persons from injury . . . ."); *see also Case v. Com.*, 753 S.E.2d 860, 866 (Va. Ct. App. 2014) ("Thus[,] the concern is what could happen with an intoxicated individual behind the wheel, regardless of whether he intended to be there, turn on the car, or move the vehicle."). Therefore, we hold the legislature intended DUI to be a strict liability offense. *See Guinyard*, 260 S.C. at 227, 195 S.E.2d at 395 ("[W]hether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute, *construed in the light of its purpose and design*." (emphasis added)); *see also Case*, 753 S.E.2d at 866 ("Bearing these concerns . . . in mind, we conclude that there is no *mens rea* requirement in [the DUI statute]. As long as the Commonwealth proves beyond a reasonable doubt that an intoxicated individual 'operated' his vehicle, regardless of intent, he is guilty of [DUI].").

We note our supreme court has incorporated a mental state into criminal statutes lacking any requirement of intent, knowledge, recklessness, or negligence. In *Ferguson*, 302 S.C. at 272-73, 395 S.E.2d at 184, our supreme court stated, "A reading of the entire statutory scheme convinces us that the legislature intended to place a mental state requirement in the offense contained in [the statute prohibiting manufacturing, distributing or dispensing a controlled substance]." (footnote omitted). Similarly, in *State v. Jefferies*, 316 S.C. 13, 19, 446 S.E.2d 427, 430-31 (1994), our supreme court stated, "We find that the *mens rea* of 'knowledge' is required under [the kidnapping statute]." (footnote omitted). However, in *Ferguson* and *Jefferies* the courts examined the relevant statute for a clear legislative purpose for imposing strict liability, which the courts did not find. *See also* S.C. Code Ann. § 56-5-2920 (2006) (including the *mens rea* of recklessness, stating "[a]ny person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving"); *cf. State v. Kirkland*, 282 S.C. 14, 16, 317 S.E.2d 444, 444 (1984) ("It is apparent that this section, in prohibiting sexual intercourse with any persons confined to a mental institution, imposes strict liability for its violation, as neither lack of consent, intent, nor knowledge were made elements of the offense." (internal quotation marks and citation omitted)); *State v. Jenkins*, 278 S.C. 219, 222, 294 S.E.2d 44, 45-46 (1982) ("By failing to include 'knowingly' or other apt words to indicate criminal intent or motive, we think the legislature intended that one who simply, without knowledge or intent that his act is criminal, fails to provide proper care and attention for a child or helpless person of whom he has legal custody, so that the life, health, and comfort of that child or helpless person is endangered or is likely to be endangered, violates . . . the Code.").

We find that under our DUI statute, there is a clear legislative purpose for imposing strict liability and public policy favors strict liability. Moreover, the majority of jurisdictions, in cases involving the same or similar argument, hold DUI and related offenses are intended to impose liability without requiring a specific finding that the defendant possessed a culpable state of mind.[3] Importantly, Mimms' interpretation would lead to an unreasonable and absurd result. As the State correctly points out, under Mimms' reasoning, any person convicted under this statute could argue he or she did not "intend" to become intoxicated such that his or her faculties to drive a motor vehicle were materially and appreciably impaired.[4] Furthermore, after ingesting the highly potent medication required for her illness, Mimms voluntarily decided to consume alcohol

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[3] *See generally State v. Parker*, 666 P.2d 1083, 1084 (Ariz. Ct. App. 1983); *People v. Senn*, 824 P.2d 822, 824 (Colo. 1992); *Bodoh v. D.C. Bureau of Motor Vehicle Servs.*, 377 A.2d 1135, 1137 (D.C. 1977); *Albaugh v. State*, 721 N.E.2d 1233, 1236 (Ind. 1999); *City of Wichita v. Hull*, 724 P.2d 699, 702 (Kan. Ct. App. 1986); *State v. McDole*, 734 P.2d 683, 686 (Mont. 1987); *State v. Glass*, 620 N.W.2d 146, 151 (N.D. 2000); *State v. Goding*, 489 A.2d 579, 580-81 (N.H. 1985); *State v. Fogarty*, 607 A.2d 624, 628 (N.J. 1992); *State v. Johnson*, 15 P.3d 1233, 1240 (N.M. 2000); *State v. Pistole*, 476 N.E.2d 365, 366 (Ohio 1984); *State v. Miller*, 788 P.2d 974, 977 (Or. 1990); *State v. Turner*, 953 S.W.2d 213, 215 (Tenn. Crim. App. 1996); *Farmer v. State*, 411 S.W.3d 901, 905 (Tex. Crim. App. 2013).

[4] Mimms' counsel seems to have conceded to the slippery slope that could result should this court determine the DUI statute requires the State to prove criminal intent. While presenting arguments to the circuit court, Mimms' counsel stated:

> I'd submit to the [c]ourt that in certain circumstances the [c]ourt is going to make a determination. Even when you say you didn't intend to get drunk[,] the facts of the case are not going to allow you to get the criminal intent statute. . . . [I]f I represent somebody who's had five drinks, maybe even three drinks[,] I'm probably not going to ask for the criminal intent statute, because I think at that point looking at the kind of *mens rea* that exists, I think that's a reasonable issue.

(italics added).

and drive a vehicle. *See City of Milwaukee v. Johnston*, 124 N.W.2d 690, 693 (Wis. 1963) ("If one afflicted with [an illness] has a low tolerance to intoxicants or is more susceptible to be influenced by the consumption of intoxicants, it behooves such a person to imbibe less quantitatively to keep within his capacity than his friends who may enjoy greater consumption within their capacity because of their natural or acquired tolerance. A person is chargeable not with knowledge of an objective quantitative standard of drinking but with the knowledge of his own limitations and capacity, and if he chooses to consume intoxicants and to operate a motor vehicle he does so at his own risk."). Accordingly, we hold the circuit court did not err in dismissing Mimms' appeal for the magistrate court's failure to charge criminal intent as an element of the DUI statute. Our ruling does not apply to situations wherein a drug is involuntarily or unknowingly ingested while consuming alcohol.

II. IMPAIRED DRIVING

Mimms argues the magistrate erred in failing to grant her motion for a directed verdict because the State only produced evidence she veered off the roadway on one occasion. Consequently, according to Mimms, the circuit court erred in determining the magistrate did not err in finding "the mere veering off of a roadway on one occasion is sufficient to show impaired driving." We disagree.

"On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. McKnight*, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." *State v. Horton*, 359 S.C. 555, 563, 598 S.E.2d 279, 283 (Ct. App. 2004).

Mimms correctly asserts the pertinent statute "does not penalize the act of leaving a lane of travel on one occasion" and that fact alone does not render her driving impaired. However, during oral argument before this court, Mimms conceded Trooper Burris had probable cause to initiate the stop. In fact, Mimms never argued to the magistrate court or circuit court Trooper Burris did not have probable cause to make the stop. The State produced a great deal of evidence of impaired driving uncovered after the initial stop. Specifically, the State submitted evidence:

(1) Mimms' car matched the description of a car driving erratically; (2) while responding to the dispatch, Burris observed Mimms run off the roadway; (3) during the stop, Burris told Mimms "You [were] weaving all over the roadway"; (4) Burris "smelled an odor of alcohol" as he walked toward Mimms' car and inside her vehicle; (5) Mimms did not successfully complete the HGN test; (6) during the HGN test, Mimms was unable to keep her balance; (7) based on Mimms' performance on the HGN test, Burris "did not feel comfortable" requiring Mimms to complete additional field sobriety tests; and (8) Mimms' appearance and mannerisms indicated she was under the influence of alcohol. Therefore, viewing the evidence in the light most favorable to the State, the evidence supports the magistrate's submission of this case to the jury.

CONCLUSION

Accordingly, the circuit court's dismissal of the appeal is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sierra Club, Appellant,

v.

South Carolina Department of Health and Environmental Control and Chem-Nuclear Systems, LLC, Respondents.

Appellate Case No. 2012-212791

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5253
Heard February 5, 2014 – Filed July 30, 2014

AFFIRMED IN PART, REVERSED IN PART

Amy Elizabeth Armstrong and Michael Gary Corley, S.C. Environmental Law Project, both of Pawleys Island, and Robert Guild, of Columbia, for Appellant.

Mary Duncan Shahid and Stephen Peterson Groves, Sr., both of Charleston, and Sara S. Rogers, of Columbia, all of Nexsen Pruet, LLC, for Respondent Chem-Nuclear Systems; Claire Harley Prince and Jacquelyn Sue Dickman, both of Columbia, for Respondent South Carolina Department of Health & Environmental Control.

FEW, C.J.: This is an appeal from the administrative law court (ALC), which upheld the South Carolina Department of Health and Environmental Control's (DHEC) decision to renew the license under which Chem-Nuclear Systems, LLC operates a disposal facility for low-level radioactive waste. We affirm the ALC as to all issues, except four subsections of the regulation governing DHEC's issuance and renewal of such licenses. *See* 24A S.C. Code Ann. Regs. 61-63, pt. VII (1992 & Supp. 2010).

I. Procedural History

Chem-Nuclear operates a disposal facility for low-level radioactive waste in Barnwell County (the "facility") pursuant to a license DHEC first issued in 1971. Part VII of regulation 61-63—entitled "Licensing Requirements for Land Disposal of Radioactive Wastes"—establishes "specific technical requirements" and "performance objectives" "upon which [DHEC] issues licenses for the land disposal of wastes." 24A S.C. Code Ann. Regs. 61-63 § 7.1.1, 7.1.3 (1992). Before DHEC may renew Chem-Nuclear's license to operate the facility, it must determine Chem-Nuclear designed, constructed, and operates the facility in compliance with the requirements and objectives of part VII of regulation 61-63. *See generally* § 7.1.

In 2000, Chem-Nuclear submitted an application to renew its license. After holding a public hearing and accepting comments, DHEC issued a renewal license to Chem-Nuclear in 2004. DHEC's decision to renew the license was challenged on the basis that the disposal methods at the facility do not meet certain requirements and objectives of part VII of the regulation. The ALC issued an order affirming DHEC's decision to renew the license (the "2005 order"), and found Chem-Nuclear complied with subsections 7.10.1 through 7.10.4 of South Carolina Code Regulation 61-63 (1992 & Supp. 2010) and section 7.18 of South Carolina Code Regulation 61-63 (1992). However, the ALC ordered Chem-Nuclear to conduct further studies to address concerns "related to the potential for groundwater contamination on and near the [facility]." In particular, the 2005 order stated these studies must "concern[] methods to reduce contact between radioactive waste and rainfall and other water at its facility" and ordered Chem-Nuclear to submit the results of the studies to DHEC within 180 days.

This court's opinion reviewing the findings of the 2005 order is reported at 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010) (*Chem-Nuclear I*). We affirmed the findings related to section 7.18 and subsections 7.10.1 through 7.10.4. 387 S.C. at 438, 693 S.E.2d at 20. However, we remanded the case to the ALC to apply its

factual findings from the 2005 order to determine whether Chem-Nuclear complied with the following subsections of regulation 61-63: 7.11.1 through 7.11.12 (1992 & Supp. 2010), 7.23.6 (1992), and 7.10.5 through 7.10.10 (1992 & Supp. 2010). 387 S.C. at 435, 436, 438, 693 S.E.2d at 18-19, 20.

On remand, the ALC issued an order affirming DHEC's conclusion that Chem-Nuclear complied with these subsections (the "remand order"). In this appeal, we review the findings in the remand order.

II. Factual Findings in the 2005 Order

Following this court's instructions, the ALC considered on remand only the findings from the 2005 order. In reviewing the remand order, therefore, we likewise consider only the findings from the 2005 order. In this section of the opinion, we recite those findings relevant to our review. Unless otherwise indicated, all quotations in this section are from the 2005 order.

A. Overview of Chem-Nuclear's Disposal Practices

Chem-Nuclear disposes of waste at the facility using "enhanced shallow land burial with engineered barriers." An engineered barrier is "a man-made structure or device that is intended to improve the land disposal facility's ability to meet the performance objectives" set out in part VII of regulation 61-63. 24A S.C. Code Ann. Regs. 61-63 § 7.2.9 (Supp. 2010). The primary engineered barriers used by Chem-Nuclear are disposal trenches, disposal vaults, and enhanced caps.

Initially, waste is shipped to the facility in a disposal container. *See* 24A S.C. Code Regs. 61-63 § 3.2.30 (Supp. 2010) ("'Disposal container' means a container principally used to confine low-level radioactive waste during disposal operations at a land disposal facility . . . [and] for some shipments, the disposal container may be the transport package."). Depending on the type of waste, disposal containers are also shipped to the facility inside a container called a cask. When a shipment of waste arrives at the facility, it is directed to either the appropriate trench for disposal or the Cask Maintenance Building, where Chem-Nuclear performs quality control inspections to ensure the casks are not damaged. Following this inspection, Chem-Nuclear transports the casks to the appropriate disposal trench where the disposal containers are loaded into reinforced concrete disposal vaults inside the trench. As disposal containers are loaded into vaults, Chem-Nuclear continues to inspect them.

Some "large components," such as steam generators and pressurizers, are considered disposal vaults themselves and can be placed directly into the trench after DHEC approves them for burial. Otherwise, all waste is contained inside a disposal container that is loaded into a vault, which is located within a trench.

Chem-Nuclear uses the term "active" to describe disposal vaults and trenches that are in the process of being filled. Thus, vaults are active until filled to capacity with disposal containers, and trenches are active until filled to capacity with vaults and large components. Once vaults and trenches become full, Chem-Nuclear refers to them as "inactive." When an individual vault becomes full, Chem-Nuclear covers the inactive vault with "general cover soils and an initial clay cap," which reduces "the infiltration of surface water into the trench." When a trench becomes full, Chem-Nuclear installs an "impermeable" multi-layer enhanced cap over the inactive trench, which consists of an initial clay cap, polyethylene and bentonite, a sand drain layer, and general soil materials.

Waste is divided into three classes—A through C—based on the concentration of "long-lived" and "shorter-lived radionuclides" in the waste. Class A is the least radioactive waste, while C is the most radioactive. *See* 24A S.C. Code Ann. Regs. 61-63 § 3.56.1.1 to .8 (Supp. 2010). Chem-Nuclear currently uses three types of disposal trenches that are designed to hold different types of waste: (1) Class A trenches, which are the largest of the three types, hold vaults containing Class A waste; (2) Class B/C trenches hold vaults containing Class B and C waste; and (3) slit trenches, which are narrow, hold irradiated hardware and large components. Chem-Nuclear uses soil to fill voids between the vaults in each type of trench, which "enhance[s] long-term stability of the entire trench system."

Each trench has a drainage system "to facilitate monitoring of water accumulation entering the trench." Chem-Nuclear also implements a "surface water management plan" to manage rainfall after it collects in trenches, which consists of pumping water into either adjacent trenches or a lined pond.

B. Tritium Contamination of Groundwater

Tritium is a radioactive isotope of hydrogen that is found in "trace amounts in groundwater throughout the world." *NRC Senior Management Review of Overall Regulatory Approach to Groundwater Protection* (N.R.C., Rockville, M.D.), Feb. 9, 2011, at SECY-11-0019. Although tritium is naturally occurring, it is also a byproduct of the manufacture of nuclear power, and found in radioactive waste generated by nuclear power plants. *Id.*

The waste disposed of at the facility contains tritium. Rainfall "in and on the disposal trenches drives tritium into the groundwater beneath the facility." Chem-Nuclear initially discovered the presence of tritium in its disposal trenches in 1974. Chem-Nuclear determined that early disposal practices utilizing "unreliable containment and waste forms" led to this initial tritium contamination. However, these early containment methods "were acceptable at the time" under the regulations. In fact, they "were identical to practices at . . . other low-level radioactive waste disposal facilities."

Although "it is inadvisable to attempt to uncover or excavate" the old containers that caused the initial tritium release, improvements in disposal technology and changes in the operations at the facility have "enhanced site performance." In 1995, DHEC substantially revised part VII of regulation 61-63 to require engineered barriers for all waste classes disposed of at the facility. Specifically, DHEC required all waste, except large components, to be placed in vaults, and required enhanced caps to be installed on all inactive trenches. Chem-Nuclear began using vaults and enhanced caps to meet these new requirements. In addition, Chem-Nuclear began using high-integrity polyethylene disposal containers to hold certain waste forms and discontinued the disposal of unstable, liquid waste forms. All of these measures served to "reduce[] the amount of tritium migrating to groundwater."

DHEC imposes a regulatory limit on the amount of radioactive material Chem-Nuclear may release to the "general environment." *See* § 7.18. Although certain groundwater samples collected from beneath the facility show high concentrations of tritium, these samples are inappropriate for evaluating Chem-Nuclear's compliance with section 7.18. This is because DHEC regulates the release of radiation into the "general environment," § 7.18, not into the groundwater within the boundaries of the facility where there is no risk of public exposure. To determine whether Chem-Nuclear is in compliance with section 7.18, DHEC established a "compliance point"—defined as the "first point where a hypothetical member of the public might receive a dose of radiation"—at which it measures Chem-Nuclear's release of tritium into the general environment. This compliance point is located at Mary's Branch Creek, where the groundwater from beneath the facility flows into an above-ground stream. Chem-Nuclear regularly samples the water from Mary's Branch Creek to determine whether there has been a release of tritium above the regulatory limit set by DHEC. Since 2001, tritium concentrations at the compliance point have been declining, and all measurements taken at Mary's Branch Creek have been well below the regulatory limit for

exposure under section 7.18. In fact, "[t]here is no evidence of any actual release resulting in an exposure above regulatory limits to any member of the general public."

C. Actions to Prevent Tritium Exposure

Chem-Nuclear has taken steps to protect the public from exposure to radiation at the compliance point. The general public is restricted from accessing the waters of Mary's Branch Creek at the compliance point, and there are no known consumers of the water who are "located in and around the compliance point." Chem-Nuclear also erected a fence around the compliance point to prevent entry of unauthorized persons. Additionally, Chem-Nuclear has a restrictive covenant and easement on three parcels of property surrounding the compliance point. This property serves as a buffer zone by prohibiting the use of groundwater under the property, as well as surface water on the property, without written consent from DHEC. Moreover, changes in design and operations at the facility further reduce the potential for radioactive exposure to the general environment.

D. Long-Term Predictions for Compliance

As required by DHEC, Chem-Nuclear created a predictive model—the Environmental Radiological Performance Verification (ERPV)—to predict the future performance of the site for up to two thousand years. This model relies on data collected through a system of groundwater monitoring wells and thirty years of data derived from over two hundred sampling points. DHEC commissioned and funded a panel of experts—the "Blue Ribbon Panel"—to review the ERPV and determine whether Chem-Nuclear's predictions were accurate. After finding the ERPV predictions to be reliable, the Blue Ribbon Panel concluded the facility "pose[d] minimal risk to either the environment or members of the public, both today and into the long-term future." DHEC relied on the conclusions of both the ERPV and the Blue Ribbon Panel in deciding to renew the facility's license.

III. Standard of Review

In the 2005 order, the ALC conducted a de novo review of DHEC's decision to renew Chem-Nuclear's license. *See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) (stating the ALC acts "as the fact-finder" in a contested case and "must make sufficiently detailed findings supporting the denial [or grant] of a permit application" (alteration in original) (citation omitted)). In *Chem-Nuclear I*, this court reviewed

the ALC's findings and conclusions in the 2005 order to determine whether they were "[]supported by substantial evidence or controlled by some error of law." *See* 387 S.C. at 430-31, 693 S.E.2d at 16 (relying on the standard of review set forth in S.C. Code Ann. § 1-23-610(B) (Supp. 2013)). Although we affirmed the ALC's determination that Chem-Nuclear complied with all sections of regulation 61-63 addressed in the 2005 order, we remanded for the ALC to apply the factual findings from the 2005 order to other, applicable sections it did not address. 387 S.C. at 439, 693 S.E.2d at 20-21. *See* 387 S.C. at 439, 693 S.E.2d at 20 (instructing the ALC "to apply its factual findings [from the 2005 order] to these sections of regulation 61-63" on remand). In the remand order, the ALC applied the factual findings from the 2005 order to determine whether Chem-Nuclear complied with these additional sections.

In this appeal from the remand order, we must accept the factual findings in the 2005 order. We review the remand order under the standard of review set forth in subsection 1-23-610(B)(d), and may reverse only if the ALC's decision was affected by an error of law. *See* § 1-23-610(B)(d) (stating an appellate court may reverse the ALC's decision when it is affected by an error of law); *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) ("The construction of a regulation is a question of law to be determined by the court. We will correct the decision of the ALC if it is affected by an error of law, and questions of law are reviewed de novo." (internal quotation marks and citations omitted)).

IV. Chem-Nuclear's Compliance with Regulation 61-63

DHEC drafted part VII of regulation 61-63 to include three general categories of regulations. *See* § 7.1.3 ("This Part establishes procedural requirements[,] . . . performance objectives[,] . . . [and] specific technical requirements for near-surface disposal of radioactive waste . . . ."). All three categories are applicable to the enhanced shallow land burial of low-level nuclear waste at the facility.[1] In this appeal, we address the ALC's determination that Chem-Nuclear complied with regulations in two of these categories—regulations imposing technical requirements and performance objectives. Generally, regulations containing technical requirements require Chem-Nuclear to take specific action to comply with the regulation, while regulations containing performance objectives require

[1] Subsection 7.1.3 provides that the "procedural requirements" and "performance objectives" apply "to any method of land disposal," and the "specific technical requirements" apply to "near-surface disposal of radioactive waste."

Chem-Nuclear to achieve certain results sought under the regulation. There is some overlap, however, between the action-based and result-based requirements of these two categories of regulations.

As an example of a regulation imposing "technical requirements," subsection 7.11.11.7 of South Carolina Code Regulation 61-63 (Supp. 2010) requires "[t]he disposal units and the incorporated engineered barriers . . . be designed and constructed to . . . prevent[] contact between the waste and the surrounding earth." Chem-Nuclear's compliance with this subsection, which we discuss in section IV.B.5 of this opinion, may be determined only by examining specific actions taken by Chem-Nuclear to prevent contact between waste and the "surrounding earth." On the other hand, compliance with a regulation imposing "performance objectives" must be determined by examining whether Chem-Nuclear obtained the results required by the regulation. An example of such a regulation is section 7.18, which requires reasonable efforts be made to maintain radioactive releases to the general public "as low as is reasonably achievable"—a concept known by the acronym "ALARA."[2] This and other result-based "performance objective" regulations require consideration of existing environmental conditions, such as the fact that tritium levels are declining in the groundwater below the facility and in the surface water of Mary's Branch Creek.

In *Chem-Nuclear I*, we affirmed the ALC's finding that Chem-Nuclear met the performance objectives of sections 7.18 and 7.10. 387 S.C. at 438, 693 S.E.2d at 20. Section 7.18 and the subsections of 7.10 that we addressed in *Chem-Nuclear I* relate to whether Chem-Nuclear is protecting the public from radioactive releases,

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[2] Regulation 61-63 defines the "ALARA" standard as:

> [M]aking every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken, taking into account the state of technology, the economics of improvements in relation to state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and licensed materials in the public interest.

24A S.C. Code Ann. Regs. 61-63 § 3.2.6 (Supp. 2010).

and generally do not impose specific requirements as to how Chem-Nuclear must accomplish any particular result.[3] In affirming Chem-Nuclear's compliance with section 7.18, we gave deference to the ALC's finding that "Chem-Nuclear . . . demonstrated adherence to ALARA . . . by taking appropriate measures to address tritium migration from the Barnwell facility and the potential for releases from other radionuclides." 387 S.C. at 429, 438, 693 S.E.2d at 15, 20. Showing similar deference, we affirmed the ALC's findings that Chem-Nuclear complied with four of the performance objectives in section 7.10. 387 S.C. at 438, 693 S.E.2d at 20. We found, however, the ALC did not address the six remaining subsections of 7.10 (7.10.5 through 7.10.10). 387 S.C. at 438-39, 693 S.E.2d at 20-21. We remanded for the ALC to determine whether Chem-Nuclear complied with those subsections. *Id.*

We also required the ALC to consider on remand Chem-Nuclear's compliance with section 7.11 and subsection 7.23.6. 387 S.C. at 435-36, 693 S.E.2d at 18-19. DHEC argued that in determining whether DHEC properly renewed the license, the ALC must consider compliance with the result-based requirements "set forth in section 7.10 . . . rather than apply criteria set forth in sections 7.11 and 7.23.6." 387 S.C. at 431, 693 S.E.2d at 16. We rejected that argument, finding "the [specific] technical requirements" of "section 7.11 impose[] additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address[] whether Chem-Nuclear is in compliance." 387 S.C. at 435, 693 S.E.2d at 18-19. Similarly, we found "the technical requirements of [sub]section 7.23.6 . . . impose[] additional compliance requirements for Chem-Nuclear." 387 S.C. at 436, 693 S.E.2d at 19. Under our holding in *Chem-Nuclear I*, therefore, the technical requirements of subsections 7.11.11 and 7.23.6 require Chem-Nuclear to take action to design and construct the disposal site, disposal units, and engineered barriers to meet the specifications in those subsections. *See* 387 S.C. at 432, 435, 436, 693 S.E.2d at 17, 19, 20. DHEC and Chem-Nuclear

[3] *See* § 7.10.1 ("The issuance of the license will not constitute an unreasonable risk to the health and safety of the public."); § 7.10.2 ("The applicant is qualified . . . to carry out the disposal operations . . . in a manner that protects health and minimizes danger to life or property."); § 7.10.3 ("The . . . operations . . . are adequate to protect the public health and safety in that they provide reasonable assurance that the general population will be protected from releases of radioactivity . . . ."); § 7.10.4 ("The . . . operations . . . are adequate to protect the public health and safety in that they will provide reasonable assurance that individual inadvertent intruders are protected . . . .").

may not demonstrate compliance with those subsections simply by showing Chem-Nuclear met the performance objectives of other subsections. *See id.*

With these considerations in mind, we discuss the ALC's determination that DHEC properly found Chem-Nuclear complied with the applicable subsections of regulation 61-63.

A. Section 7.10[4]

The subsections of 7.10 that we review in this appeal[5] set forth performance objectives for the issuance and renewal of Chem-Nuclear's license. The correctness of DHEC's and the ALC's determination of compliance with subsections 7.10.6 and 7.10.8 depends, in part, on Chem-Nuclear's progress in reducing the amount of tritium released from the facility. In reviewing the ALC's findings as to these subsections, therefore, we rely upon evidence that shows its operations are "adequate to protect the public health and safety," which includes the following result-based evidence: (1) Chem-Nuclear's disposal operations currently meet the ALARA standard; (2) "improvements in waste disposal procedures" have enhanced site performance; and (3) there is a decline in the "tritium concentration at the compliance point."

1. Subsection 7.10.6

Subsection 7.10.6 provides that before DHEC may issue a license to Chem-Nuclear, it must find:

> [Chem-Nuclear]'s proposed disposal site, disposal site design, land disposal facility operations, disposal site closure, and postclosure institutional control are adequate to protect the public health and safety in that they will provide reasonable assurance that long-term stability of the disposed waste and the disposal site will be achieved

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[4] In this section, we discuss compliance with subsections 7.10.6 and 7.10.8, and not 7.10.7, because our analysis of that subsection depends on whether Chem-Nuclear complied with the relevant subsections of 7.11.11. We later discuss subsection 7.10.7 in section IV.D. of this opinion.

[5] Chem-Nuclear's compliance with subsections 7.10.5, 7.10.9, and 7.10.10 is not an issue in this appeal.

> and will eliminate to the extent practicable the need for ongoing active maintenance of the disposal site following closure.

This subsection focuses our analysis on Chem-Nuclear's efforts to protect the public, the environment, and inadvertent intruders from radioactive exposure by ensuring "long-term stability of the disposed waste and the disposal site." We begin our discussion with the definitions of the relevant terms used in subsection 7.10.6.

"Site closure" is defined as "those actions that are taken upon completion of operations that prepare the disposal site for custodial care [by the State of South Carolina] and that assure that the disposal site will remain stable and will not need ongoing active maintenance." 24A S.C. Code Ann. Regs. 61-63 § 7.2.19 (1992).

Once site closure is accomplished, the "institutional control" period begins, in which the State of South Carolina "assume[s] responsibility" for maintaining the facility, 24A S.C. Code Ann. Regs. 61-63 §§ 7.8.1, 7.15 (1992), and "control[s] access to the disposal site." 24A S.C. Code Ann. Regs. 61-63 § 7.27.2 (1992). By regulation, the institutional control period is one hundred years. *Id.*

"Stability" is defined as "structural stability." 24A S.C. Code Ann. Regs. 61-63, § 7.2.20 (1992). According to Part III of regulation 61-63, structural stability results from: (1) "the waste form itself" being stable, or "processing the waste to stable form"; (2) converting waste containing liquid "into a form that contains as little free-standing and non-corrosive liquid as is reasonably achievable"; and (3) filling "[v]oid spaces within the waste and between the waste and its package." 24A S.C. Code Ann. Regs. 61-63 § 3.56.2.2.1 to .3 (Supp. 2010).

"Active maintenance" means "any significant activity needed during the period of institutional control to maintain a reasonable assurance that the performance objectives in 7.18 and 7.19 are met." 24A S.C. Code Ann. Regs. 61-63 § 7.2.1 (1992). As we previously discussed, section 7.18 regulates the concentration of radioactive material that may be released to the general environment and the public. Section 7.19 of South Carolina Code Regulation 61-63 (1992) requires that the "[d]esign, operation, and closure of the land disposal facility . . . ensure protection of any individual inadvertently intruding into the disposal site and occupying the site or contacting the waste at any time after active institutional controls over the disposal site are removed." An "inadvertent intruder" is a "person who might occupy the disposal site after closure and engage in . . . activities . . . in

which an individual might be unknowingly exposed to radiation from the waste." 24A S.C. Code Ann. Regs. 61-63 § 7.2.13 (1992).

The following findings from the 2005 order support the ALC's determination that the waste and disposal site are structurally stable:

(1) All waste is placed into reinforced concrete disposal vaults;
(2) Void space between the vaults is filled with soil, which enhances "long-term stability of the entire trench system";
(3) Enhanced caps are installed on all inactive trenches;
(4) "[T]he elimination of liquid waste forms . . . have increased site performance"; and
(5) "Improvements in waste forms . . . have succeeded in reducing the amount of tritium that is migrating to groundwater."

Additionally, the following findings support the determination that *long-term* stability of the disposed waste and disposal site will be achieved and will be adequate to protect the general public and inadvertent intruders from radioactive exposure:

(1) Predictions of a declining trend in radioactive releases to the general environment;
(2) The Blue Ribbon Panel's conclusion that the facility "poses a minimal risk to either the environment or members of the public, both today and into the long-term future";
(3) The presence of a buffer zone, which provides "long-term protection to the public from exposure to radioactive material in the surface water at the compliance point"; and
(4) The use of concrete disposal vault lids[6] for Class C waste, which serves as an intrusion barrier for inadvertent intruders.[7]

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[6] We are uncertain of the nature and purpose of disposal vault lids. Neither the regulations nor the 2005 order defines "disposal vault lid," and the 2005 order references disposal lids only twice and in two limited contexts: (1) "the lids of the vaults are not grouted or otherwise sealed to prevent water from entering the vault"; and (2) "[t]he disposal vaults lids serve as an intrusion barrier for Class C waste."

[7] Subsection 3.56.1.2.3 requires Class C waste to be disposed of in a manner that "protect[s] against inadvertent intrusion."

Based on these findings, we find the ALC did not err in concluding Chem-Nuclear is in compliance with subsection 7.10.6.

2. Subsection 7.10.8

Subsection 7.10.8 requires Chem-Nuclear to provide a "proposal for institutional control" that gives "reasonable assurance that such control will be provided for the length of time found necessary to ensure the findings in 7.10.3 through 7.10.6 and that the institutional control meets the requirements of 7.27." On appeal, Chem-Nuclear's compliance with this subsection is challenged on the ground that it violated subsection 7.10.6.[8] As previously discussed, subsection 7.10.6 requires the design and operations of the facility to provide "long-term stability of the disposed waste." When considered in the context of subsection 7.10.6, subsection 7.10.8 requires Chem-Nuclear to provide reasonable assurances the waste will be stable after the facility is closed. Based on our ruling regarding subsection 7.10.6, we find the ALC correctly determined Chem-Nuclear is in compliance with subsection 7.10.8.

B. Subsection 7.11.11

Subsection 7.11.11 provides, in relevant part,

> The disposal units and the incorporated engineered barriers shall be designed and constructed to meet the following objectives:
>
> 7.11.11.1 to minimize the migration of water onto the disposal units.
>
> 7.11.11.2 to minimize the migration of waste or waste contaminated water out of the disposal units.
>
> 7.11.11.4 temporary collection and retention of water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures

[8] We previously affirmed Chem-Nuclear's compliance with subsections 7.10.3 and 7.10.4. *Chem-Nuclear I*, 387 S.C. at 438, 693 S.E.2d at 20. Chem-Nuclear's compliance with subsection 7.10.5 is not an issue on appeal.

> without the contamination of groundwater or the surrounding soil.
>
> 7.11.11.6 reasonable assurance that the waste will be isolated for at least the institutional control period.
>
> 7.11.11.7 prevention of contact between the waste and the surrounding earth, except for earthen materials which may be used for backfilling within the disposal units.

DHEC and Chem-Nuclear continue to assert that in reviewing the ALC's findings as to subsection 7.11.11, we may rely on result-based evidence—(1) its operations meet the ALARA standard, (2) "improvements in waste disposal procedures" have enhanced site performance, and (3) there is a decline in the "tritium concentration at the compliance point." As we previously acknowledged, evidence of improvements in disposal practices and a decline in tritium concentrations is certainly relevant to our analysis of compliance with the regulations containing performance objectives. However, that evidence does not directly relate to, and cannot alone show compliance with, the technical requirements imposed by subsection 7.11.11. *See* 387 S.C. at 435, 693 S.E.2d at 18-19 (holding "the [specific] technical requirements" of "section 7.11 impose[] additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address[] whether Chem-Nuclear is in compliance"). For these subsections of the regulation, compliance may not be measured solely by results. Instead, we must consider whether Chem-Nuclear took any actions to meet the technical requirements imposed by these subsections, and if so, the sufficiency of Chem-Nuclear's actions.

1. Subsection 7.11.11.1

Subsection 7.11.11.1 requires that Chem-Nuclear design and construct its disposal units and engineered barriers "to minimize the migration of water onto the disposal units."

The regulations define "disposal unit" to include "a vault or a trench," 24A S.C. Code Ann. Regs. 61-63 § 7.2.8 (Supp. 2010), and "engineered barrier" to include "vaults or equivalent structures," § 7.2.9. The regulations, however, do not define the phrase "migration of water." DHEC concedes the phrase encompasses not only the flow of surface water, but also rainfall. Thus, for DHEC to have correctly determined Chem-Nuclear complied with this subsection, DHEC must have found

Chem-Nuclear took action that reduced rainfall and the flow of surface water onto the vaults and trenches. Chem-Nuclear's compliance concerning the migration of rainfall onto disposal units is particularly important, given the followings findings from the 2005 order: (1) "[t]ritium is driven into the groundwater through rainfall in and on the disposal trenches," and (2) tritium concentrations in the groundwater seem to "vary[] with the amount of rainfall." Referring to these and other findings, the ALC called this "the undeniable 'rainfall problem.'"

We first examine whether the ALC correctly determined Chem-Nuclear complied with subsection 7.11.11.1 in regard to rainfall migrating onto active disposal units—vaults and trenches that are in the process of being filled. The 2005 order provides that while Chem-Nuclear is filling individual vaults with disposal containers, it employs "no cover or roof, so rain can fall directly into the vault during the loading period." The 2005 order also indicates Chem-Nuclear provides no cover for active trenches, which leaves these trenches and the vaults contained within them exposed to rainfall until the trenches become full. Vaults contained within an active trench remain exposed to rainfall for up to two years while Chem-Nuclear fills the trench. The 2005 order further states rainfall enters vaults because they "are not sealed against water intrusion," and the "lids of the vaults are not . . . sealed to prevent water from entering" them.

DHEC interprets subsection 7.11.11.1 as requiring Chem-Nuclear to "minimize the migration of water onto the disposal units" during the period in which the trenches are active. This interpretation required DHEC to consider what action Chem-Nuclear took to reduce the amount of rain falling onto open vaults while they are being filled, and onto closed vaults in active trenches. However, neither the 2005 order, the remand order, nor any other portion of the record or the briefs contain any evidence that Chem-Nuclear has taken a single action to prevent a single raindrop from falling onto active vaults or trenches.

Although the ALC determined Chem-Nuclear complied with this subsection, none of the evidence it relied upon addresses the rainfall issue. Specifically, the ALC listed the following factual findings from the 2005 order to support DHEC's determination of compliance as to active and inactive disposal units:

(1) The Class A trench has a sloped floor and a drainage system that facilitates monitoring of water that enters the trench;
(2) The Class B/C trench contains a French drain and sump system that allows monitoring of water accumulation in the trench;

(3) The slit trench has a sloped floor that is filled with "coarse drain sand" and contains "standpipes" that monitor water accumulation;
(4) Chem-Nuclear implements a surface water management plan to pump water out of trenches;

We find none of these findings support the ALC's determination that Chem-Nuclear complied with this subsection as to rain falling on disposal units—active or inactive. These findings relate to remedial measures to monitor, drain, and manage water that has already migrated onto disposal units. The plain language of this subsection, however, requires Chem-Nuclear to do more than monitor, drain, or otherwise manage water once it enters the vaults and trenches.[9] These measures listed by the ALC have no effect on the initial migration of rainfall and thus, do not relate to compliance with subsection 7.11.11.1. Furthermore, the record is devoid of any evidence to support the ALC's conclusion that Chem-Nuclear has done *anything* to reduce rainfall onto active disposal units. When pressed at oral argument to list what Chem-Nuclear has done to reduce rainfall onto active disposal units, neither Chem-Nuclear nor DHEC could name one action Chem-Nuclear took, except to construct berms along the edges of trenches.[10]

The ALC also listed the following two factual findings, in addition to the four discussed above, to affirm DHEC's determination of compliance with this subsection as to rainfall on inactive disposal units only:

(5) Backfilling methods that fill voids between vaults are implemented for all trenches; and
(6) Initial clay caps placed on inactive vaults and enhanced caps installed over inactive trenches minimize the infiltration of surface water into the trench.

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[9] Other subsections of regulation 61-63 deal with accumulation of water within disposal units once it migrates there. *See, e.g.*, § 7.23.6 (requiring the disposal site to be designed in a way that "minimize[s] . . . the contact of *standing water* with waste during disposal, and the contact of *percolatin*g or *standing wate*r with wastes after disposal" (emphasis added)).

[10] While berms may keep surface water from migrating onto the disposal units, they do nothing to minimize direct rainfall onto active trenches and vaults. Additionally, the ALC made no findings as to whether Chem-Nuclear ever constructed a berm, or if so, whether the berms reduce the migration of surface water onto the disposal units.

We find neither of these findings support—and only one actually addresses—the ALC's determination that Chem-Nuclear complied with this subsection as to inactive disposal units. Regarding finding (5), "backfilling methods" involve placing soil in open spaces between the vaults, which has nothing to do with reducing the migration of water onto disposal units. Finding (6), however, is relevant to Chem-Nuclear's compliance with subsection 7.11.11.1 as to inactive disposal units. The installation of the initial clay cap on inactive vaults and the enhanced cap on inactive trenches reduces the migration of water onto these disposal units. Although these measures *reduce* the migration of water, subsection 7.11.11.1 requires Chem-Nuclear to "minimize" this occurrence. Thus, whether finding (6) supports Chem-Nuclear's compliance with this subsection requires us to consider the meaning of "minimize."

Regulation 61-63 does not define minimize. Chem-Nuclear and DHEC filed a joint brief with this court in which they set forth the following definition of minimize: "to reduce to the smallest possible amount, extent, size, or degree."[11] Applying this definition to the requirements of subsection 7.11.11.1, we must consider two sub-issues in analyzing compliance: (1) whether there is evidence to support a finding that Chem-Nuclear has reduced the migration of water onto disposal units, and (2) whether the extent of this reduction is adequate to meet DHEC's definition of minimize. Thus, we cannot find the ALC correctly determined Chem-Nuclear complied with this subsection simply because Chem-Nuclear "reduced" the migration of water onto disposal units.

[11] While this definition sets a strict standard for compliance, we find this is supported by the way in which this regulation, and others, are written. For example, subsection 7.23.6 requires Chem-Nuclear to "minimize to the extent practicable" the contact of water with waste at different stages of the disposal process. We interpret subsection 7.23.6 as imposing a less stringent standard for compliance than subsection 7.11.11.1 because the term "minimize" is followed by language prompting DHEC to consider the reasonableness of Chem-Nuclear's efforts to comply. The lack of similar language in subsection 7.11.11.1 suggests there is no inherent reasonableness or practicability consideration involved in analyzing Chem-Nuclear's compliance. The definition of "minimize" provided by Chem-Nuclear and DHEC accords with this interpretation. Thus, we rely on their definition of minimize—"to reduce to the smallest possible amount, extent, size, or degree"—in analyzing DHEC's and the ALC's determinations of compliance.

As to the first sub-issue, we agree with the ALC that installation of initial clay caps and enhanced caps reduce the migration of surface water and rainfall onto inactive vaults and trenches. However, the ALC did not address the second sub-issue—whether initial clay caps and enhanced caps "reduce to the smallest possible amount" the migration of water onto inactive disposal units. Both DHEC and Chem-Nuclear represented to this court in their brief that Chem-Nuclear must have taken action to "reduce [the migration of water onto inactive trenches] to the smallest possible amount." Yet, neither DHEC nor the ALC made any finding as to whether Chem-Nuclear did so. The determination of this issue is crucial to the question of whether Chem-Nuclear complied with subsection 7.11.11.1.

In considering whether Chem-Nuclear's disposal units and engineered barriers adequately reduce—"minimize"—the migration of water, we acknowledge it is the duty of DHEC, not this court, to enforce regulation 61-63. Similarly, it is the duty of Chem-Nuclear, not DHEC, to take the necessary action to comply with the regulations. Nevertheless, we find support in the 2005 order that implementing "relatively simple measures" could further reduce the migration of water onto both active and inactive disposal units. These measures include "shelter[ing] the disposal trenches from rainfall" while they are being filled and "sealing and grouting the concrete disposal vaults to prevent the intrusion of water."

In 2001, DHEC directed Chem-Nuclear to consider implementing such measures. According to the 2005 order, "during the review of the re-issuance of the Chem-Nuclear license, DHEC . . . advis[ed] Chem-Nuclear to review and revise all trench construction details, plans, specifications, and procedures." "In particular, [DHEC] informed Chem-Nuclear that consideration should be given to protection of the open trenches from direct rainfall and runoff such as temporary covers." In response to this directive, Chem-Nuclear considered "several conceptual trench designs," including designs for "temporary roofs to keep water out of the trenches and vaults." Although Chem-Nuclear informed DHEC in 2001 it would take "up to two years to evaluate [these] designs," the ALC found in the 2005 order "Chem-Nuclear ha[d] not completed its evaluation and ha[d] not submitted final designs to DHEC for review and approval."

The ALC found it significant that Chem-Nuclear had not yet completed and submitted these final designs to DHEC, given the "undeniable 'rainfall problem.'" Specifically, the 2005 order stated, "Chem-Nuclear has already considered conceptual designs to keep rainfall out of the trenches, . . . [but] it failed to complete a report on its research and has not submitted such a report to DHEC, despite its request." (internal citations omitted). Additionally, the ALC found

further studies "were needed to evaluate the . . . feasibility of employing or implementing designs" that would: (1) "shelter disposal trenches from rainfall and prevent rainfall from entering the trenches," and (2) "provide for sealing and grouting the concrete disposal vaults to prevent the intrusion of water to the maximum extent feasible." The order explained these additional studies were necessary because "no evidence was presented . . . that the Blue Ribbon Panel considered any of these particular issues." The ALC ordered that "Chem-Nuclear shall conduct the[se] studies . . . and submit the results to DHEC within 180 days."

These findings and directives from the 2005 order support the importance of implementing measures to address concerns related to rainfall on the disposal units. Both DHEC and the ALC ordered Chem-Nuclear to consider such measures. However, none are currently in place, a fact directly relevant to Chem-Nuclear's ability to reduce water migration onto the disposal units "to the smallest possible amount."

In conclusion, we find the record in this case conclusively demonstrates Chem-Nuclear has taken no action whatsoever to prevent even one rain drop from migrating onto one active vault or trench. Additionally, while initial clay caps and enhanced caps reduce the migration of water onto inactive disposal units, there is no evidence and no finding by the ALC that DHEC has required, or that Chem-Nuclear has taken, any action that would reduce this migration to the smallest possible amount. In light of these facts, we hold the ALC erred in affirming DHEC's conclusion that Chem-Nuclear complied with subsection 7.11.11.1.

2. Subsection 7.11.11.2

Subsection 7.11.11.2 requires that Chem-Nuclear design and construct its disposal units and engineered barriers "to minimize the migration of waste or waste[-] contaminated water out of the disposal units." DHEC and Chem-Nuclear contend the same definition of minimize used in the previous section applies to the analysis of this subsection.

Based on the plain language of subsection 7.11.11.2, Chem-Nuclear must minimize the migration of two types of wastes: (1) the radioactive waste-form contained within the disposal containers, and (2) water that has been contaminated by radioactive waste. As to the first, we agree with the ALC's determination that Chem-Nuclear's disposal units and engineered barriers minimize the migration of radioactive waste-forms out of disposal units. The record establishes that Chem-Nuclear uses disposal containers and reinforced concrete vaults, which prevent the

migration of these waste-forms out of disposal units. Thus, we affirm the ALC's ruling that DHEC correctly determined Chem-Nuclear is in compliance with this subsection as to the migration of the waste itself out of the disposal units.

We next address whether Chem-Nuclear is in compliance as to the migration of waste-contaminated water out of the disposal units. According to the 2005 order, the vaults contain holes that allow water to drain from them and into the trenches. As for the trenches, they are lined with partially impermeable materials so that liquids may drain to the soil below the trench. Thus, "rainfall that accumulates in the trenches eventually percolates into the soil" and groundwater beneath the trenches. Also, the water table may rise during "wet periods," causing groundwater to "rise up into the [vaults]."

The ALC relied on its previous findings related to subsection 7.11.11.1 to hold Chem-Nuclear complied with this subsection because the methods "designed to minimize the infiltration of water into the vaults" serve to "minimize[] the migration of . . . waste-contaminated water out of them." We agree evidence of compliance with subsection 7.11.11.1 is relevant to our determination of compliance with this subsection. This is because reducing the initial migration of water onto disposal units has a reciprocal effect upon reducing the migration of waste-contaminated water out of disposal units. Therefore, our holding that Chem-Nuclear failed to comply with subsection 7.11.11.1 relates to whether it complied with subsection 7.11.11.2 as to waste-contaminated water.[12]

Relying on the two-part definition of minimize discussed in the previous section, we must first analyze whether there is evidence that Chem-Nuclear reduced the migration of waste-contaminated water out of disposal units. The ALC found Chem-Nuclear's use of disposal containers prevents waste from coming into direct contact with water that enters vaults, which reduces the potential for water to become contaminated. This, in turn, reduces the migration of waste-contaminated water out of vaults. Second, the ALC found that although the drainage holes in the vaults allow "water to rise up into the containers" and drain into the trenches

[12] Noncompliance with subsection 7.11.11.1 would not conclusively establish non-compliance with this subsection. Subsection 7.11.11.1 regulates the migration of "water," while subsection 7.11.11.2 regulates the migration of "waste[-] contaminated water." Thus, the fact that water migrates onto and, subsequently, out of disposal units does not itself violate this subsection. A violation occurs only when water is allowed to come in contact with waste and waste-contaminated water then migrates out of disposal units.

below, they also allow water to drain away from the waste. This decreases the likelihood that water entering the vaults will become contaminated. We agree the ALC's findings support the conclusion that Chem-Nuclear has taken *some* action to reduce the migration of waste-contaminated water from the disposal units.

However, the ALC did not address the second part of the analysis—whether these measures are sufficient to meet DHEC's definition of minimize. As we previously stated regarding subsection 7.11.11.1, compliance with subsection 7.11.11.2 depends on whether there is evidence to support a finding that Chem-Nuclear's actions "reduce to the smallest amount possible" the migration of waste-contaminated water out of disposal units.

On this point, the 2005 order stated "trench water . . . becomes contaminated by the fact that there is some residual tritium on . . . vaults and waste packages that have . . . water on them as a result of rain." Based on this fact, the following findings in the 2005 order demonstrate the vaults and trenches allow water that has come into contact with residual tritium on the disposal containers to migrate out of them:

(1) The "floors of the vaults have holes to allow water to drain from the vaults";
(2) These drainage holes "can also allow water to rise up into the containers";
(3) "[N]one of the trenches . . . have an impermeable liner";
(4) "The bottoms of the trenches" are not designed to "prevent the migration of liquids out of the bottom of trenches" and, in fact, are "designed to be partially impermeable and . . . allow liquids to infiltrate the soil below the trenches"; and
(5) "Precipitation in and on the disposal trenches drives tritium into the groundwater beneath the [facility]."

As we acknowledged above, the holes in the vaults allow water to drain away from the waste, which decreases the likelihood that water entering the vaults will become contaminated. Nevertheless, these holes permit water that has come in contact with residual tritium to drain into the trenches, which, in turn, allow the water to percolate into the soil and groundwater beneath the facility. This supports that Chem-Nuclear has not taken action to reduce to the smallest possible amount the migration of waste-contaminated water out of its vaults and trenches. Moreover, the fact that Chem-Nuclear has failed to minimize the migration of

water onto vaults under subsection 7.11.11.1 weighs in favor of non-compliance with subsection 7.11.11.2.

In affirming DHEC's conclusion that Chem-Nuclear complied with this subsection, the ALC recognized that trench bottoms "are designed to be partially impermeable and allow liquids to infiltrate the soil below" them. However, the ALC noted the 2005 order contained "no finding that Chem-Nuclear's waste disposal design is faulty or fails to minimize the migration of . . . waste-contaminated water out of disposal units." We find the ALC erred in relying on the absence of such a finding in the 2005 order.

In *Chem-Nuclear I*, we held "section 7.11 imposes additional compliance requirements" not addressed by the 2005 order. 387 S.C. at 435, 693 S.E.2d at 19. We remanded for the ALC "to apply its factual findings [in the 2005 order] to the technical requirements" of section 7.11—including subsection 7.11.11.2. 387 S.C. at 435, 693 S.E.2d at 18-19. Thus, the ALC could not rely on the fact that the 2005 order did not contain the conclusion we ordered the ALC to make on remand—whether, based on the factual findings in the 2005 order, the disposal units minimized the migration of waste-contaminated water out of them. The lack of such a conclusion in the 2005 order was the very reason we remanded for the ALC to make this determination.

We also find the ALC erred in relying on evidence that "improvements in waste disposal procedures" have reduced the "tritium concentration at the compliance point." As acknowledged by the ALC in the remand order, this evidence "does not get to the heart of the technical requirements" established by the subsection. This is because subsection 7.11.11.2 imposes specific technical requirements, and we find the evidence does not relate to the requirement that the disposal units be designed to minimize the migration of waste-contaminated water out of them. Instead, this evidence relates to Chem-Nuclear's compliance with the result-based performance objectives contained in section 7.18—that Chem-Nuclear keep radioactive releases to the general environment "as low as is reasonably achievable." Subsection 7.11.11.2 required DHEC and the ALC to analyze the sufficiency of Chem-Nuclear's actions to comply with the plain language of this subsection. Thus, we cannot base our decision on the fact that Chem-Nuclear has reduced the overall tritium concentration at the compliance point.

We conclude the record demonstrates Chem-Nuclear has taken measures to reduce the migration of waste-contaminated water out of disposal units. However, the record does not support a finding that Chem-Nuclear complied with subsection

7.11.11.2. We base our holding on (1) Chem-Nuclear's failure to comply with subsection 7.11.11.1, and (2) there being no evidence, and no finding, that Chem-Nuclear has taken action to "minimize"—reduce to the smallest amount possible—the migration of waste-contaminated water out of disposal units. We hold the ALC erred in affirming DHEC's conclusion that Chem-Nuclear complied with subsection 7.11.11.2.

3. Subsection 7.11.11.4

Subsection 7.11.11.4 requires Chem-Nuclear to design and construct its disposal units and engineered barriers in a way that allows for "temporary collection and retention of water and other liquids for a time sufficient to allow for the detection and removal or other remedial measures without the contamination of groundwater or the surrounding soil." The plain language of this subsection imposes multiple requirements on Chem-Nuclear: (1) collect and retain water that migrates onto the disposal units, (2) test this water for radioactive waste material, (3) if such waste material is discovered, engage in removal or remedial measures, and (4) accomplish this without contaminating the groundwater or surrounding soil.

The ALC relied on the following findings in the 2005 order to support its conclusion that Chem-Nuclear complied with this subsection:

(1) Chem-Nuclear implements a surface water management plan to manage precipitation that collects in trenches, which involves pumping water into adjacent trenches or a lined pond; and
(2) The trenches are designed to prevent the flow of surface water from coming into contact with waste.

We find neither finding supports—and only one addresses—the ALC's determination that DHEC correctly concluded Chem-Nuclear complied with this subsection. Finding (1)—regarding Chem-Nuclear's surface water management plan—is relevant to the first requirement of subsection 7.11.11.4, "temporary collection and retention of water." However, there is no evidence that Chem-Nuclear tests the water pumped from the trenches for radioactive waste material. The subsection requires Chem-Nuclear to do more than collect and retain the water. Finding (2)—that trenches are designed to prevent surface water from coming into contact with waste—is irrelevant to Chem-Nuclear's compliance with this subsection. It has nothing to do with collecting, testing, or removing contaminated water from the disposal units. Because the ALC cited no additional evidence of Chem-Nuclear's compliance with this subsection, we hold the ALC

erred in affirming DHEC's determination that Chem-Nuclear complied with subsection 7.11.11.4.

Upon our review of the 2005 order, we find no evidence of compliance with this subsection.[13] In fact, the evidence in the record demonstrates Chem-Nuclear is not in compliance. First, the vaults and trenches are designed to allow water that enters them to drain into the soil and groundwater below. That water is not tested before it enters the ground. Second, the only other evidence relevant to this subsection is the finding in the 2005 order that states, "None of the trenches at the [facility] have . . . a leachate collection system." Leachate is defined as "any liquid, including any suspended or dissolved components in the liquid, that has percolated through or drained from the [radioactive] material." 10 C.F.R. § 40 app. A (2011). Although the regulation does not define "leachate collection system," in common industry usage, it is "a system or device . . . that is designed, constructed, maintained, and operated to collect and remove leachate" for proper disposal. 40 C.F.R. § 503.21(i) (2011); *see also* 40 C.F.R. § 264.301(a)(2) (2011).[14] Such a system would allow Chem-Nuclear to satisfy the four requirements of subsection 7.11.11.4—(1) collect water migrating onto the disposal units, (2) test this water, (3) remove waste-contaminated water, and (4) do this without contaminating the groundwater because the system would collect the leachate for alternate disposal. Thus, the ALC's finding regarding the non-existence of a leachate collection system undermines its conclusion that Chem-Nuclear complied with this

[13] This regulation imposes requirements for the design and construction of "disposal units" and "engineered barriers." While Chem-Nuclear has monitoring wells to test the groundwater for contamination and a system to monitor water accumulation in trenches, neither of these qualifies as a disposal unit. *See* § 7.2.8 (defining "disposal unit" as "a discrete portion of the disposal site into which waste is placed for disposal"). To the extent they are considered engineered barriers—"a man-made *structure or device* that is intended to improve the land disposal facility's ability to meet the performance objectives in this part," § 7.2.9 (emphasis added)—there is no evidence these monitoring "devices" allow Chem-Nuclear to collect and test this water "without the contamination of the groundwater." § 7.11.11.4.

[14] These regulations provide the Environmental Protection Agency's definition of "leachate collection system" as stated in the regulations for "surface disposal" of "sewage sludge," 40 C.F.R. § 503.20(a) (2011), and "dispos[al] of hazardous waste in landfills," 40 C.F.R. § 264.300 (2011).

subsection and supports our determination that the ALC erred in reaching that conclusion.

DHEC and Chem-Nuclear argue Chem-Nuclear is justified in not having a leachate collection system due to "concerns regarding the radioactive exposure to workers handling and processing the leachate." We find the argument contrary to the purpose and intent of the regulation. We fail to see how the danger of radioactive contamination to workers actually *justifies* releasing it into the groundwater without testing and remediation. Rather, it seems the danger to health and safety *requires* testing and remediation. We believe the drafters of these regulations imposed such a requirement for just that purpose. Subsection 7.11.11.4 contains no language excusing Chem-Nuclear's duty to comply with its regulatory requirements, which is especially important when the excuse for not taking a particular action is the very reason for the regulation—health and safety. Instead, the focus of compliance is on what action Chem-Nuclear did take—whether it designed and constructed its engineered barriers in a manner that allows it to collect, test, and remove contamination before it percolates into the soil and groundwater.[15]

We find no evidence to support a finding that Chem-Nuclear meets the requirements imposed by this subsection. We hold the ALC erred in affirming DHEC's conclusion that Chem-Nuclear complied with subsection 7.11.11.4.

4. Subsection 7.11.11.6

Subsection 7.11.11.6 requires Chem-Nuclear to design and construct its disposal units and engineered barriers in a way that provides "reasonable assurance that the waste will be isolated for at least the institutional control period."

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[15] In deciding whether Chem-Nuclear's operations met the ALARA standard, the 2005 order appropriately weighed Chem-Nuclear's concerns regarding exposure to workers because an ALARA analysis involves balancing the benefit to the general public with the risk associated with worker exposure. *See* 24A S.C. Code Ann. Regs. 61-63 § 7.20 (1992) ("Operations at the land disposal facility shall be conducted in compliance with the standards for radiation protection . . . [and] governed by 7.18."). In determining compliance with the technical requirements of subsection 7.11.11.4, however, we consider the actions taken by Chem-Nuclear to comply, not the reasons why it decided not to implement a certain measure based on its own ALARA analysis.

We hold the ALC did not err in affirming DHEC's determination that Chem-Nuclear's current disposal units and engineered barriers—including the disposal containers, concrete disposal vaults, disposal vault lids, disposal trenches, and enhanced caps on inactive trenches—comply with subsection 7.11.11.6. Waste is put into a disposal container, which is then placed into a reinforced concrete vault that is covered with an initial clay cap and buried in a disposal trench. Once the trench is full, Chem-Nuclear installs an enhanced cap over the trench. The following findings from the 2005 order demonstrate that the use of these disposal units and engineered barriers provide reasonable assurance the waste will be isolated from the general environment and inadvertent intruders "for at least the institutional control period": (1) the predictions of a "continually declining trend in radioactive releases to the general environment"; and (2) the Blue Ribbon Panel's conclusion that the facility's disposal practices "pose a minimal risk to either the environment or members of the public, both today and *in the long-term future*." (emphasis added).

5. Subsection 7.11.11.7

Subsection 7.11.11.7 requires Chem-Nuclear to design and construct its disposal units and engineered barriers in a way that "prevent[s] contact between the waste and the surrounding earth, except for earthen materials which may be used for backfilling within the disposal units." We interpret the plain language of this subsection as seeking to prevent waste, and not waste-contaminated water, from coming in contact with soil. Otherwise, the regulatory effect of subsections 7.11.11.1 and 7.11.11.2 become obsolete.[16] Under this interpretation, we hold the ALC did not err in affirming DHEC's determination that Chem-Nuclear complied with this subsection because the "placement of waste in a waste container and a reinforced concrete vault" prevents the waste from coming into direct contact with the soil.

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[16] Subsections 7.11.11.1 and 7.11.11.2 explicitly regulate the migration of *water* onto disposal units and the migration of *waste* and *waste-contaminated water* out of disposal units. This distinction between "water," "waste," and "waste-contaminated water" in these subsections support a conclusion that these regulations seek to prevent waste and waste-contaminated water from infiltrating the soil and groundwater beneath disposal units. Thus, we narrowly construe subsection 7.11.11.7 as applying to only the prevention of waste, and not waste-contaminated water, from coming in contact with the soil. To the extent the ALC relied on evidence related to subsections 7.11.11.1 and 7.11.11.2, we hold the ALC erred in that regard.

C. Subsection 7.23.6

Subsection 7.23.6 requires Chem-Nuclear to design the disposal site in a way that "minimize[s] to the extent practicable the contact of water with waste during storage, the contact of standing water with waste during disposal, and the contact of percolating or standing water with wastes after disposal."[17]

As we previously discussed, subsection 7.23.6 imposes technical requirements that require Chem-Nuclear to take action to design and construct the disposal site to meet the specifications of this subsection. Thus, DHEC and Chem-Nuclear cannot demonstrate compliance with subsection 7.23.6 simply by showing Chem-Nuclear met the performance objectives of other subsections. *Chem-Nuclear I*, 387 S.C. at 436, 693 S.E.2d at 19. Instead, we must consider whether Chem-Nuclear took any actions to meet the technical requirements of this subsection, and if so, the sufficiency of Chem-Nuclear's actions.

This subsection distinguishes between "water," "standing water," and "percolating water" and between the three different phases of operations at the facility—storage, disposal, and after disposal. This subsection requires Chem-Nuclear to implement practices that drain or remove water from active vaults and trenches, as well as minimize to the extent practicable the entry of water into inactive vaults and trenches. Although the failure to minimize the migration of water onto active vaults and trenches under subsection 7.11.11.1 contributes to the accumulation of standing water, the regulatory effect of this subsection, when narrowly construed, requires Chem-Nuclear to implement methods to minimize to the extent practicable standing water that has already migrated into the disposal units.

As to the requirement that Chem-Nuclear design the disposal site in a way that minimizes to the extent practicable the contact of water with waste *during storage*, the ALC found that "[a]ny 'storage' of waste is temporary" because "there is available disposal capacity at the [facility]." The ALC stated that when a shipment of waste is received, it is taken either to the appropriate trench for disposal or to the Cask Maintenance Building, where Chem-Nuclear inspects the casks and prepares them for off-loading. The ALC found that "[b]ased on the practice of inspecting and preparing waste for disposal within the [Cask Maintenance Building], Chem-

[17] "Disposal site" is defined as "that portion of a land disposal facility which is used for disposal of waste" and "consists of disposal units and a buffer zone." 24A S.C. Code Ann. Regs. 61-63 § 7.2.7 (1992).

Nuclear minimizes the contact of water with waste prior to off-loading the waste into the trench." We affirm because this evidence relied on by the ALC supports compliance with this particular requirement of subsection 7.23.6.

As to whether Chem-Nuclear designed the disposal site to minimize to the extent practicable the contact of standing water with waste *during disposal*, we interpret this requirement as applying to Chem-Nuclear's active vaults and trenches. We hold the ALC did not err in affirming DHEC's conclusion that Chem-Nuclear complied with this requirement of subsection 7.23.6 because the following findings from the 2005 order support this conclusion:

(1) The vaults and trenches are designed to allow water to flow out of them;
(2) Trenches are sloped and contain other design features that prevent "water from coming in contact with waste";
(3) Each trench has a drainage system that allows Chem-Nuclear to monitor any water that accumulates in the trench; and
(4) Chem-Nuclear implements a surface water management plan to manage rainwater that collects in the open trenches.

Turning to the requirement regarding minimizing to the extent practicable the contact of percolating or standing water with wastes *after disposal*, we interpret this as applying to Chem-Nuclear's inactive vaults and trenches. We hold the following findings relied on by the ALC support DHEC's determination of compliance:

(1) When vaults become full, Chem-Nuclear places an initial clay cap over inactive vaults;
(2) When trenches become full, Chem-Nuclear installs an impermeable enhanced cap on inactive trenches; and
(3) Employees fill void spaces between the vaults with backfill, which "minimizes the potential for subsidence of the enhanced caps."

Based on the above discussion, we hold the ALC did not err in finding DHEC correctly determined Chem-Nuclear is in compliance with subsection 7.23.6.

D. Subsection 7.10.7

Subsection 7.10.7 requires DHEC to find Chem-Nuclear "provides reasonable assurance that the applicable technical requirements of [part VII] will be met." The technical requirements relevant to this appeal include those set forth in

subsections 7.11.11 and 7.23.6. Based on Chem-Nuclear's noncompliance with subsections 7.11.11.1, 7.11.11.2, and 7.11.11.4—particularly the absence of evidence that Chem-Nuclear took *any* action to comply with the technical requirements of subsections 7.11.11.1 and 7.11.11.4—we do not understand how DHEC could make, nor how the ALC could affirm, a finding that Chem-Nuclear provided assurance it would meet the applicable technical requirements.

DHEC argues, however, Chem-Nuclear is in compliance with these subsections because "tritium concentrations began to decline at the compliance point" after "the incorporation of new disposal techniques." While this may have been a reasonable position for DHEC to take prior to our opinion in *Chem-Nuclear I*, the argument ignores our holding in that case—that the "specific technical requirements" of 7.11.11 cannot be met by satisfying the "performance objectives" of 7.10. As we found in *Chem-Nuclear I*, "section 7.11 imposes additional compliance requirements for Chem-Nuclear such that the balancing test of ALARA would not be sufficient to address[] whether Chem-Nuclear is in compliance with section 7.11." 387 S.C. at 435, 693 S.E.2d at 19. In light of our holding in that case, however, it is no longer reasonable for DHEC to argue Chem-Nuclear complied with subsection 7.10.7 without considering what action Chem-Nuclear took to comply with the "specific technical requirements" of 7.11.11. This is particularly true given that Chem-Nuclear failed to take *any* action to comply with the requirements of subsections 7.11.11.1 and 7.11.11.4. And yet, DHEC continues to assert Chem-Nuclear "provide[d] reasonable assurance that the applicable technical requirements of [its own regulations] will be met." Considering, for example, the technical requirement in subsection 7.11.11.1—that Chem-Nuclear "minimize the migration of [rainfall] onto the disposal units"—DHEC could not identify one action Chem-Nuclear took to meet this requirement. Nevertheless, DHEC determined Chem-Nuclear complied with subsection 7.10.7 by providing reasonable assurance that this technical requirement of 7.11.11.1 would be met.

To determine whether DHEC complied with subsection 7.10.7 in light of these facts, we consider DHEC's role in the disposal of low-level radioactive waste. In 1967, our General Assembly enacted the Atomic Energy and Radiation Control Act. *See* Act No. 223, 1967 S.C. Acts 305 (*codified at* S.C. Code Ann. §§ 13-7-10 to -100 (1977 & Supp. 2013)). Noting "that remarkable scientific developments have occurred in the field[] of atomic energy," and "plans for further developments . . . are creating broad opportunities and also responsibilities for the states," *id.* at 305, the General Assembly found "[i]t is prudent and wise that the State [give] . . . full consideration of the health and safety requirements of its people." *Id.* at 305-06. Based on these findings, the General Assembly required DHEC to "formulate,

adopt, [and] promulgate . . . regulations relating to the control of ionizing and nonionizing radiation." S.C. Code Ann. § 13-7-40(F)(3) (Supp. 2013). Pursuant to this mandate, DHEC promulgated Part VII of regulation 61-63. Under the authority of the Act, the regulations are the law of South Carolina,[18] and DHEC is required by law to enforce them. *See* S.C. Code Ann. § 13-7-40(A) (Supp. 2013) (providing DHEC "is designated as the agency of the State which is responsible for the control and regulation of radiation sources"); § 13-7-40(F)(9) (stating DHEC "shall . . . provide by regulation for the licensing . . . of radiation sources").

The United States Nuclear Regulatory Commission (NRC), through its federal enforcement policy, has emphasized the importance of regulatory enforcement when nuclear disposal facilities do not conduct their operations with "the necessary meticulous attention to detail" and in accordance with "the high standard of compliance" imposed by the applicable regulations. General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Pt. 2, app. C (1995). Thus, while it is important for private companies such as Chem-Nuclear to comply with applicable regulations, it is equally important, if not more so, that the administrative agency mandated by law to enforce the regulations require adherence to its own standard for compliance. To allow otherwise would impede the purpose for which DHEC was created—to act in the public interest—and risk the health and safety of our citizens. *See* S.C. Code Ann. § 48-1-20 (2008) ("It is declared to be the public policy of the State to maintain reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of its citizens, . . . [and] that to secure these purposes and the enforcement of the provisions of this chapter, [DHEC] shall have authority to abate, control and prevent pollution.").

DHEC promulgated regulation 61-63 under statutory mandate for the obvious reason that nuclear waste can adversely affect the health and welfare of our citizens if not disposed of properly. In doing so, DHEC required Chem-Nuclear to comply with the "specific technical requirements" and "performance objectives" that DHEC chose to put in the regulations. It is important that DHEC enforce its own regulations and require Chem-Nuclear to take action to comply with the specific technical requirements. This importance derives not simply from the need to avoid the serious consequences of non-compliance; it is important because it is the law.

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[18] *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010) (noting "a regulation has the force of law").

We are concerned that DHEC did not follow the law in failing to require Chem-Nuclear to comply with all of the technical requirements of subsection 7.11.11.

We are also concerned by DHEC's decision not to amend the requirements for issuance of the license after the ALC instructed Chem-Nuclear in its 2005 order to submit a report to DHEC regarding the feasibility of covering trenches and sealing vaults. The propriety of DHEC's decision to "concur[] with the report's evaluation of the issues" is not before this court, and we do not base our holding on the merits of that decision.[19] However, the fact that DHEC did not require Chem-Nuclear to take *any* action or make *any* changes to its disposal practices casts doubt upon DHEC's decision to renew the license.

Regardless of our affirmance of Chem-Nuclear's compliance with the remaining subsections of 7.11.11, we hold the ALC erred in affirming DHEC's determination that Chem-Nuclear complied with subsection 7.10.7.

V. Remedy

As to four separate subsections of regulation 61-63, DHEC failed to enforce the law of South Carolina. As to each, the ALC erred in finding Chem-Nuclear in compliance. Under the law, Chem-Nuclear's license to operate the facility is invalid. However, the appellant informed the court at oral argument it does not seek revocation of the license; it asks simply that DHEC enforce its regulations, and that Chem-Nuclear comply. In light of this request, we order DHEC and Chem-Nuclear to submit a written plan for compliance to the ALC within ninety days of this opinion. The ALC shall promptly determine if Chem-Nuclear will come into compliance with the regulations under the plan. If the ALC determines the plan will bring Chem-Nuclear into compliance, it shall set a schedule for

[19] A footnote in the ALC's order states Chem-Nuclear conducted these studies and DHEC "concurred with the report's evaluation of the issues." The record does not contain the results of these studies or the reasons DHEC chose not to amend the license requirements as a result of the report. The basis of DHEC's decision not to amend the license or impose additional requirements for operating the facility is not before this court. While DHEC must enforce—and Chem-Nuclear must comply with—the regulations, it is not our place to disagree with DHEC as to how it should enforce its own regulations, or mandate how Chem-Nuclear should comply with these regulations. We merely review the ALC's and DHEC's determinations of compliance without passing judgment upon the technical aspects of how this compliance is accomplished.

Chem-Nuclear to promptly implement the plan. If the ALC determines the plan will not bring Chem-Nuclear into compliance, it shall issue an order revoking Chem-Nuclear's license.

The requirement of a written plan will not be stayed except by order of this court or the supreme court. However, an order of the ALC revoking Chem-Nuclear's license will be stayed while a petition for rehearing is pending before this court, or while a petition for certiorari is pending before the supreme court.

VI. Conclusion

We affirm the ALC as to all issues presented to this court, except Chem-Nuclear's compliance with subsections 7.11.11.1, 7.11.11.2, 7.11.11.4, and 7.10.7. As to those four subsections, we hold the ALC erred in affirming DHEC's conclusion that Chem-Nuclear was in compliance.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Leslie Parvin, Appellant.

Appellate Case No. 2012-205888

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5254
Heard February 5, 2014 – Filed July 30, 2014

AFFIRMED

Dwight Franklin Drake and Michael J. Anzelmo, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Brendan Jackson McDonald, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

LOCKEMY, J.: In this criminal appeal, Leslie Todd Parvin argues the trial court committed reversible error in allowing inadmissible hearsay statements from two witnesses. We affirm.

FACTS

Parvin was indicted on two counts of murder related to the deaths of Edgar Lopez and Pablo Guzman-Gutierrez. The State tried the case under the theory that Parvin solicited Lopez for sex and then killed Lopez and Gutierrez in retaliation when Lopez refused him later in the night. Parvin argued self-defense.

Motion *In Limine*

Immediately prior to trial, Parvin made a motion *in limine* to exclude any testimony referring to other crimes, wrongs, or bad acts. He contended that any statements alleging he was at Lopez's home for homosexual sex were inadmissible; specifically he objected to statements from three different witnesses—testimony from Adan Soto and Marlin Avila regarding statements made by Lopez at a gas station and testimony from Jose Monroy regarding statements Monroy overheard at Lopez's home. For purposes of appeal, we focus only on the contested testimony from Soto and Avila, which will be referred to as the Lopez statements. Parvin does not appeal any issue related to Monroy's testimony.

Parvin argued (1) the Lopez statements were inadmissible pursuant to Rule 404(b), SCRE, because the State could not prove by clear and convincing evidence that Parvin committed any bad acts, (2) the State was improperly introducing the Lopez statements to prove he was of bad character, and (3) the Lopez statements were more prejudicial than probative. Parvin also contended the Lopez statements would be inadmissible as hearsay.

The State argued the Lopez statements were admissible under the theory of res gestae or the present sense impression exception to the hearsay rule.[1] As to the issue of res gestae, the State asserted there was an ongoing chain of events, and the Lopez statements were an integral part of the crime. The State also contended the Lopez statements were admissible under Rule 803(3), SCRE, "then existing

[1] The State cited *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996), and *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996), to support its arguments.

mental, emotional, or physical condition." Finally, the State emphasized that the Lopez statements also indicated Parvin's alleged motive and were not intended to show bad character. However, the State also asserted it was not attempting to enter the Lopez statements pursuant to Rule 404(b), SCRE.[2]

The trial court ruled the Lopez statements (1) were admissible under the *res gestae* theory, (2) constituted an exception to the hearsay rule, and (3) were probative to the issue of Parvin's motive. During the trial, the trial court clarified its holding and stated that in admitting the testimonies under the res gestae theory, the testimonies "did not involve other crimes, but may have suggested some bad acts." It further stated the probative value of the evidence outweighed the prejudicial effect.

Parvin's Version of the Events

Parvin testified that on July 30, 2010, the day of the incident, he was driving his van and collecting scrap metal for recycling and profit. He carried a forty-five caliber pistol in his van as a result of his prior military service. On the way home from an unsuccessful search, Parvin picked up beer and passed Lopez's home, where Lopez and Gutierrez were drinking beer in the yard. Parvin stated he assumed the men were in the construction industry due to their attire and could possibly have leads regarding scrap metal. Parvin stopped in the yard and began speaking and drinking with Lopez and Gutierrez. Parvin claimed he did not want to immediately ask for connections or leads on scrap metal and first wanted to establish some sort of relationship with the men.

Parvin agreed to drive Lopez to the gas station for more beer and gave Lopez money for the beer. While at the gas station, Parvin claimed Lopez observed him move his gun from between the front seats and place it in the waistband of his shorts. Parvin remained in the van while Lopez entered the store and purchased the beer. Parvin and Lopez then returned to Lopez's home. Throughout the evening, several people came and left the home until only Parvin, Lopez, and Gutierrez remained. Parvin stated that when he tried to leave, Lopez would not let

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[2] Rule 404(b), SCRE provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

him and requested more money. Parvin refused and then asked for the change from the beer Lopez had purchased earlier in the night. Lopez became upset and threatened Parvin and Parvin's family. When Parvin attempted to leave again, Gutierrez blocked his exit. Gutierrez made physical contact with Parvin and tried to obtain control of Parvin's gun. Parvin kept control of his gun and saw Lopez reach for something in the shed located in the yard. Parvin stated he became fearful for his life at that time and shot both Lopez and Gutierrez in self-defense.

The State's Case

In support of its version of events, the State offered testimony from Jose Monroy, who claimed he was drinking with Parvin, Lopez, and Gutierrez prior to the incident. Monroy stated he overheard Lopez tell Gutierrez that Parvin would be sleeping inside with him that evening. The beer was depleted at some point during the evening, and Lopez asked Parvin to drive him to a gas station to purchase more. The State presented testimony from Soto and Avila, who spoke with Lopez at the gas station.[3] Soto and Lopez were both from Guatemala, and Soto knew Lopez through Soto's sister-in-law. Soto stated Lopez approached him and began talking with him. Lopez mentioned he was at the gas station with an American to purchase a case of beer and further explained that Parvin had offered two hundred dollars to buy the beer and have sex. Lopez then showed Soto the two hundred dollars but told Soto he was going to tell Parvin to go home. Avila corroborated Soto's testimony. After returning to Lopez's home, the State opined that Parvin became angry because Lopez refused to have sex with him. The State presented Roberto Gonzalez-Merrin as an eyewitness to the shooting. Merrin explained that Parvin pulled a gun from his back and shot Lopez before turning the gun on Gutiererez, who was attempting to flee the scene, and shooting him in the back. Merrin testified that when the shooting occurred, Parvin was outside of the fence that surrounded Lopez's front yard while Lopez and Gutierrez were both inside the fence. Following the shooting, Parvin fled the scene in his minivan. Parvin then returned to his home, destroyed the guns used in the shooting, checked his family in to a motel for the evening, changed his appearance, and drove his minivan to Louisiana. While in Louisiana, Parvin sold his minivan for scrap and continued to Texas. Parvin returned to Columbia on August 15, 2010, and despite knowing that the authorities were looking for him, he never attempted to contact police.

[3] Parvin objected to the testimony immediately prior to Soto's and Avila's answers, but the trial court overruled the objection.

Verdict

The jury convicted Parvin of two counts of murder, and the trial court sentenced Parvin to thirty-five years' imprisonment. Parvin moved for a new trial based upon three grounds, and the trial court denied his motion. Thereafter, Parvin filed this appeal, in which he focuses only on the first ground contained within his motion for a new trial.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973)). "We are bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829 (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Id.* "On review, we are limited to determining whether the trial judge abused his discretion." *Id.* "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.*

LAW/ANALYSIS

Parvin argues the trial court committed reversible error by allowing Soto and Avila to testify about the Lopez statements.[4] Specifically, he argues the Lopez statements were hearsay and did not qualify as a present sense impression under Rule 803(1), SCRE. He also argues the Lopez statements were unduly prejudicial because they related to the central issues in the case and allowed the State "to shape its entire presentation to the jury." We agree.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding

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[4] At trial, Parvin also objected to any reference by Monroy regarding homosexual sex. However, he does not raise that argument on appeal. Thus, we only address the Lopez statements.

evidence only upon a showing of 'a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006).

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996). "Hearsay is inadmissible as evidence unless an exception applies." *Id.* Rule 803(1), SCRE, provides for the "present sense impression" exception, which allows for the admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Our courts have not delineated a time frame that would constitute "immediately thereafter"; however, this court has held that a statement given nearly ten hours after the perceived incident cannot be admitted under Rule 803(1), SCRE. *State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997).

Parvin contests the admission of the following testimony from Soto:

> Q: And did you have a chance to speak to [Lopez] on that day?
> A: Yeah, I spoke to him the day that I saw him at the gas station at that time.
>
> . . . .
>
> Q: And while you were talking to [Lopez], did he mention what he was doing at the gas station?
> A: Yeah, he told me he was going to buy a case of beer, that he was with an American.
> Q: Okay. Did he say anything else about the American and the beer?
> A: Yes, he said the American had given him $200 to buy beer because he wanted to have sex with him.

Parvin also contests the admission of the following testimony from Avila:

> Q: What did [Lopez] tell you about what he was doing with that American?
> A: He said that the American had given him money to buy beer and he said the American had given him $200 to have sex.

The witnesses gave no indication as to the amount of time between when Parvin allegedly solicited sex and when Lopez spoke with them. The State simply explained it was an "ongoing chain of events." We find the trial court erred in ruling the Lopez statements were admissible because the timing of the declarant's statement is a critical component of the present sense impression exception.

Despite finding error in the trial court's ruling, we must also find that it prejudiced Parvin before we can reverse. *See State v. Garner*, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." (alteration by court) (internal quotation marks and citation omitted)).

Further in the trial, the State presented Detective William Gonzalez as a witness. Detective Gonzalez recorded statements from both Avila and Soto regarding the night of the incident. Detective Gonzalez testified that Avila stated Lopez said Parvin gave him two hundred dollars to have sex. There was no objection at the time of this testimony. Because the improperly admitted Lopez statements were cumulative to Detective Gonzalez's testimony, their admission did not prejudice Parvin. *See State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) ("Where the hearsay is merely cumulative to other evidence, its admission is harmless.").

CONCLUSION

For the forgoing reasons, we find the trial court's error in allowing hearsay testimony was harmless because it was cumulative to other evidence received without objection. Thus, the trial court is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Loretta Katzburg, Respondent,

v.

Peter Katzburg, Appellant.

Appellate Case No. 2013-000171

Appeal From Berkeley County
Jack A. Landis, Family Court Judge

Opinion No. 5255
Heard May 8, 2014 – Filed July 30, 2014
Formerly Opinion No. 2014-UP-255
Heard May 8, 2014 - Filed June 25, 2014

VACATED

Gregory Samuel Forman, of Gregory S. Forman, PC, of Charleston, for Appellant.

Mark Thomas Rainsford, of Pierce, Herns, Sloan & Wilson, LLC, of Charleston, for Respondent.

CURETON, A.J.: Peter Katzburg (Husband) appeals family court orders holding him in contempt, refusing to consider evidence, and requiring him to pay Loretta Katzburg (Wife) $704,861.76 pursuant to a foreign judgment registered in South Carolina. Husband argues the family court: (1) lacked subject matter jurisdiction to enforce the foreign judgment; (2) denied him due process; (3) erred in holding him in contempt; and (4) erred in refusing to consider an affidavit in his motion to

reconsider. Additionally, Husband argues to the extent this court reverses the family court order, the award of attorneys' fees should be reversed as well. We vacate the family court's orders.

"Subject matter jurisdiction refers to the court's 'power to hear and determine cases of the general class to which the proceedings in question belong.'" *Watson v. Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (quoting *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 442 S.E.2d 598 (1994)). "The jurisdiction of a court is determined by the sovereign creating it, and thus the question of the specific court in which an action is to be brought is determined in the first instance by reference to local law." *Peterson v. Peterson*, 333 S.C. 538, 548, 510 S.E.2d 426, 431 (Ct. App. 1998) (quotation marks and citation omitted). "A 'court of competent jurisdiction' must be 'competent' not only under the law of its own sovereign, but also by virtue of subject matter jurisdiction under the law of the forum in which New York law is being applied." *Id.* (quoting *Barry E. v. Ingraham*, 43 N.Y.2d 87, 400 N.Y.S.2d 772, 371 N.E.2d 492 (1977)). "Although we may utilize the law of another state in deciding a case, we cannot use another state's law to confer subject matter jurisdiction upon a South Carolina court which, under the laws of this State, the court does not have." *Id.*

"A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4)[, SCRCP]." *Gainey v. Gainey*, 382 S.C. 414, 424, 675 S.E.2d 792, 797 (Ct. App. 2009). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect . . . ." *Id.* (quotation marks and citation omitted).

> A court, lacking subject matter jurisdiction, cannot enforce its own decrees. It would serve no useful purposes to determine issues submitted to the court since the jurisdiction as to subject matter can be raised at any time, and if the case were remanded to the family court, it would have no authority to carry out its previously ordered mandate.

Hallums v. Bowens, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993).

"The family court is a statutory court created by the legislature and, therefore, is of limited jurisdiction. Its jurisdiction is limited to that expressly or by necessary implication conferred by statute." *State v. Graham*, 340 S.C. 352, 354, 532 S.E.2d

262, 263 (2000). Section 63-3-530(A)(1) and (2) of the South Carolina Code (2010) grants the family court the exclusive jurisdiction: "to hear and determine matters which come within the provisions of the" Uniform Interstate Family Support Act (UIFSA) and

> to hear and determine actions for divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage and attorney's fees, if requested by either party in the pleadings.

South Carolina's Uniform Enforcement of Foreign Judgments Act (UEFJA) provides the mechanism for the filing and enforcement of foreign judgments in South Carolina. S.C. Code Ann. §§ 15-35-910 to -960 (2005 and Supp. 2013). The UEFJA generally permits the filing and enforcement of judgments, decrees, and orders of the courts of the United States or of other states to the extent mandated by the United States Constitution. *See* § 15-35-910(1). Once docketed in accordance with the UEFJA, a foreign judgment has the same effect and is subject to the same defenses as a judgment rendered in South Carolina and must be enforced or satisfied in like manner. *See* § 15-35-920(C). Excluded from the UEFJA are judgments subject to the UIFSA and the Uniform Child Custody Jurisdiction and Enforcement Act, each of which provides special procedures for foreign orders related to its subject matter. *See* §§ 15-35-910, 63-15-300 to -394, and 63-17-2900 to -3390.

In South Carolina, money judgments generally are enforced by way of writs of execution issued to the sheriff. *See* S.C. Code Ann. § 15-35-180 (2005 and Supp. 2013) (providing that judgments requiring the payment of money or the delivery of real or personal property "may be enforced in those respects by execution as provided in this Title"); S.C. Code Ann. § 15-39-80 (2005) (setting forth the requirements for the contents of the execution, including that it be directed to the sheriff and intelligibly refer to the judgment by stating the court, the county in which the judgment roll or transcript is filed, and the amount of the judgment). When an otherwise money judgment requires the doing of an act other than the payment of money, it may be enforced by contempt upon refusal of judgment debtor to comply with the mandates of the judgment. *See* § 15-35-180. If a judgment is unsatisfied, the judgment creditor may institute supplementary

proceedings in circuit court to discover assets. *See* S.C. Code Ann. § 15-39-310 (2005). In addition to their discovery functions, supplementary proceedings "furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action." *Lynn v. Int'l Bhd. of Firemen & Oilers*, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955). The master-in-equity is considered a division of the circuit court and obtains jurisdiction through an order of reference from the circuit court. *See* S.C. Code Ann. § 14-11-15 (Supp. 2013); Rule 53(b), SCRCP.

> It should be borne in mind that the enforcement of an alimony decree in this State, as in other states, differs radically from the enforcement of an ordinary money judgment. In the latter case, subject to some exceptions . . . , enforcement may be had by execution against property only, and not by attachment for contempt. But in the case of a decree for alimony a defaulting husband may be imprisoned if he fails to make payment in accordance with the terms of the decree.

Johnson v. Johnson, 196 S.C. 474, 478, 13 S.E.2d 593, 595 (1941). "We are unable to find any logical reason to distinguish money judgments which are enrolled . . . as the result of an equitable distribution award from money judgments awarded in legal actions." *Casey v. Casey*, 311 S.C. 243, 245, 428 S.E.2d 714, 716 (1993).

Here, Husband and Wife married in September 1979 and divorced in July 2003. On July 14, 2003, after a thirty-four day trial in a New York supreme court, Judge John C. Bivona issued a judgment of divorce (divorce decree). The divorce decree ordered, in pertinent part: (1) Husband pay Wife support and maintenance of $3,200 per month commencing October 1, 2001, and terminating September 30, 2005; (2) Husband pay Wife $662,770.50 for 50% equitable distribution of the marital assets; and (3) Husband transfer certain shares of stock to Wife.

During the divorce proceedings, Husband made several attempts to delay the divorce or avoid paying Wife. For example, Husband filed a competing divorce action in the State of Washington and a meritless bankruptcy petition in South Carolina. On March 3, 2008, after Husband failed to pay the full amounts owed to Wife under the divorce decree, Judge Bivona issued an additional judgment (2008 order), indicating Wife had received $504,539.36 from Husband, and requiring

Husband pay Wife "the sum of $395,346.37 with interest thereon from May 25, 2005[, in the] amount of $98,747.24 for a total of 494,093.61."[1]

On October 6, 2008, a few months after Wife received the 2008 order, she registered it in South Carolina pursuant to the UEFJA and initiated an action in circuit court that resulted in supplemental proceedings in Berkeley County and Charleston County. After proceeding in circuit court for two years, on October 4, 2010, Wife sought to register the same New York orders in a South Carolina family court.[2] On April 20, 2012, Wife served Husband with an amended notice of hearing for supplemental proceedings before the Berkeley County master-in-equity scheduled for June 5, 2012. On June 15, 2012, Wife filed a Rule to Show Cause asking a South Carolina family court to find Husband in contempt for violating the registered court orders. Thereafter, the parties proceeded to a contempt hearing in family court and the family court held Husband in contempt for failing to comply with the New York orders.

Although we are sympathetic to Wife's difficulties in securing money owed by Husband, in light of the fact that Wife filed the 2008 order as a money judgment pursuant to the UEFJA and proceeded in circuit court, we are constrained to vacate the family court's orders. While this action was originally brought in circuit court, Husband was ultimately held in contempt in family court after Wife again registered the same New York orders in family court in 2010. We think it is clear the family court did not oust the circuit court of subject matter jurisdiction and the jurisdiction of the family court did not extend to this money judgment. We therefore hold the family court's orders at issue are void for lack of subject matter jurisdiction.[3] *See Simmons v. Simmons*, 370 S.C. 109, 116, 634 S.E.2d 1, 4 (Ct. App. 2006) ("It is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void.").

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[1] The order indicates Wife sought it as a money judgment.

[2] The family court appears to have incorporated the 2008 order into the divorce decree and registered both orders as a single, foreign divorce decree. However, only language from the 2008 order appears in the family court's order entitled "Order for Registration of Foreign Divorce Decree." The order does not indicate the statutory authority for its registration.

[3] Because we find the family court lacked subject matter jurisdiction over this case, we do not address Husband's remaining issues on appeal.

Accordingly, the family court's orders are hereby

VACATED.

HUFF and THOMAS, JJ., concur.