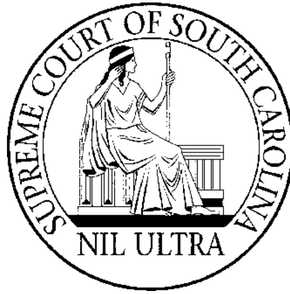

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 24, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center, Appellant,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Authority, Respondents,

AND

Trident Medical Center LLC, d/b/a Trident Medical Center and Summerville Medical Center, Appellants,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital, Respondents.

Appellate Case No. 2020-001323

Appeal from the Administrative Law Court
Ralph King Anderson, III

Opinion No. 28189
Heard October 4, 2023 – Filed January 24, 2024

AFFIRMED

William R. Thomas, Faye Anne Flowers, and David Beam Summer, Jr., all of Parker Poe Adams & Bernstein, LLP, of Columbia, for Appellants.

Robert L. Widener, Mary Elizabeth Crum, Celeste Tiller Jones, and Pamela A. Baker, all of Burr & Forman LLP, of Columbia, for Respondent Medical University Hospital Authority; and Ashley Caroline Biggers and Vito Michael Wicevic, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

JUSTICE FEW: Two hospitals appeal from an administrative law court (ALC) order approving a Certificate of Need (CON) for the Medical University Hospital Authority (MUHA). The opposing hospitals raise four issues. First, they argue the ALC erred in holding certain errors in the review by the South Carolina Department of Health and Environmental Control (DHEC) were rendered "harmless" by the ALC's de novo review. Second, they argue the ALC misinterpreted language in the State Health Plan. Third, they argue the ALC erred by approving MUHA's application on the condition MUHA close a freestanding emergency department it planned to open near the proposed hospital. Fourth, they argue the appeal bond required by section 44-7-220(B) of the South Carolina Code (2018) is unconstitutional. As to the first three issues, we affirm the ALC. As to the fourth issue, we hold the bond requirement is not unconstitutional.

In December 2017, MUHA applied for a CON in order to construct a new general hospital in the Nexton community in Berkeley County so it could alleviate capacity problems at its hospital in downtown Charleston. After a comment and review period, DHEC granted the CON. The opposing hospitals filed a petition for review by the ALC. *See* S.C. Code Ann. §§ 44-7-210(E), 44-1-60(G) (2018). Following a year of discovery and an eleven-day hearing, the ALC approved the CON.

The opposing hospitals originally filed notices of appeal with the court of appeals. In May, the General Assembly amended the CON statutes and provided for direct appeal to this Court in cases arising from the ALC's review of a decision to grant or deny a CON. Act No. 20, 2023 Acts 63, 77. The court of appeals then transferred the case to this Court. Several months after oral argument, the parties jointly requested the Court dismiss the appeal with prejudice and "that the appeal bond . . .

be voided and returned to Appellant Trident Medical Center, LLC." Because of the importance of several issues raised in the appeal, we decline to dismiss it as requested. As addressed below, however, we do direct that the bond "be voided and returned" to Trident Medical Center.

In its briefs and at oral argument, DHEC conceded it violated section 304 of Regulation 61-15 (Supp. 2023). DHEC failed to timely notify MUHA and other "affected persons"[1]—including the opposing hospitals—of the relative importance of the project review criteria it would use to review the application. That notice was due on or before March 23, 2018. *See* S.C. Code Ann. § 44-7-210(A) (2018); Regs. 61-15 § 304 (Supp. 2023). DHEC did not send the notice to the parties until July 11, a mere twelve days before its final decision was required by statute. *See* S.C. Code Ann. § 44-7-210(A) (2018). Because DHEC failed to send the notice on time, the opposing hospitals had less than two weeks to prepare their responses and to provide information intended to aid DHEC in its decision. More importantly, DHEC gave itself less than two weeks to conduct a proper review and prepare an adequate decision.

"This Court has made clear that '[t]he findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings.'" *Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. 79, 91, 690 S.E.2d 783, 789 (2010) (quoting *Able Communications, Inc. v. S.C. Pub. Serv. Comm'n,* 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986)). DHEC's final decision was a mere five pages long and contained only bare, unexplained conclusions. For example, DHEC did not analyze the adverse effects the proposed hospital could have on other healthcare facilities. That is so even though the State Health Plan—which DHEC itself wrote[2]—states that for

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[1] "Affected person" is a defined term that includes "the applicant" and "persons located in the health service area in which the project is to be located and who provide similar services to the proposed project." S.C. Code Ann. § 44-7-130(1) (2018). By statute, affected persons have certain rights of notice and appeal in CON cases. *See* S.C. Code Ann. § 44-7-210 (2018).

[2] S.C. Code Ann. § 44-7-180(B) (2018) ("With the advice of the health planning committee, the department shall prepare a South Carolina Health Plan for use in the administration of the Certificate of Need program provided in this article.").

general hospitals, one of the seven most important project review criteria is "adverse effects." Multiple affected persons presented DHEC with evidence and arguments showing they would be adversely affected by the proposed hospital, yet DHEC never addressed those concerns. Instead, DHEC wrote without any explanation or analysis, "[MUHA] justified . . . the potential adverse impact of the new hospital." Despite the thirty-three project review criteria DHEC itself established by regulation, Regs. 61-15 § 802 (Supp. 2022), DHEC explained its analysis of only four criteria in its decision. DHEC's decision is patently insufficient and constitutes an abdication of the responsibility the General Assembly placed on DHEC.

Nonetheless, DHEC's flawed decision and review procedure are saved by the ALC's de novo review. *See Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) ("An adequate *de novo* review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body." (citing *Ross v. Med. Univ. of South Carolina,* 328 S.C. 51, 492 S.E.2d 62 (1997)). The ALC was repeatedly clear that MUHA justified the CON based on expert testimony, patient origin data, and adverse effects analyses. The ALC found that, while there would be some adverse effects to the opposing hospitals, the impact was justified by the increased access the proposed hospital would bring. We also agree with the ALC's interpretation of Standard 5 of the State Health Plan. MUHA had to justify need and adverse impact of the "new hospital at the chosen site" based on the service area as a whole.

We are unbothered by the ALC's alleged "conditioning" of the CON on MUHA closing the planned freestanding emergency department. MUHA has sworn to this Court it will comply with the ALC's order and will not operate both the proposed hospital as well as the proposed emergency department. If MUHA fails to live up to its promise, the courts will deal with that appropriately at that time.

We emphasize that DHEC—not the ALC—is responsible for administering the CON program. S.C. Code Ann. § 44-7-140 (2018). The General Assembly gave DHEC the authority and responsibility to determine when an application complies "with the South Carolina Health Plan, Project Review Criteria, and other regulations." *See* S.C. Code Ann. § 44-7-210(B) (2018). In the future, DHEC must carefully perform that responsibility, even if the ALC's review in this case shows MUHA adequately supported the CON.

Finally, the bond required by section 44-7-220(B) is not unconstitutional. First, the opposing hospitals are statutory affected persons. They are not the type of litigants bound by an agency decision that article I, section 22 of the South Carolina Constitution was intended to protect. *See* S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review."). Second, and relatedly, there is a rational basis for treating differently a party opposing an approved CON and a party appealing the denial of its own CON application. In the first instance, the opposing party requests judicial undoing of an expert judgment a CON application complies with the State Health Plan and project review criteria. In the second instance, the applying party is seeking review of the denial of a right to which it claims to be entitled. Those are rational classifications, and the bond requirement advances the purposes of the CON statutes. *See Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 467, 530 S.E.2d 112, 114 (2000) ("To satisfy the Equal Protection Clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis.").

Nevertheless, we appreciate the parties' attempt to settle their dispute over the posting of the bond and we accept their agreement to have it "voided and returned." We direct—as requested—"that the appeal bond . . . be voided and returned to Appellant Trident Medical Center, LLC."

AFFIRMED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Blake A. Hewitt, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Peter Rice, Respondent,

v.

John Doe, Petitioner.

Appellate Case No. 2021-000894

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Fairfield County
Daniel Dewitt Hall, Circuit Court Judge

Opinion No. 28190
Heard March 8, 2023 – Filed January 24, 2024

AFFIRMED AS MODIFIED

Sarah Rand-McDaniel and Seth Thomas McDaniel, both of Walker Allen Grice Ammons & Foy, LLP, of Mount Pleasant, for Petitioner.

Sherod Hampton Eadon III, of Eadon Law, LLC, of Columbia, for Respondent.

JUSTICE FEW: This case presents the question whether compliance with the witness affidavit requirement in subsection 38-77-170(2) of the South Carolina Code

(2015) is a condition precedent to the filing of a "John Doe" civil action. We hold it is not. Rather, the witness affidavit may be produced after the commencement of the lawsuit. As we will explain, however, the affidavit should be produced promptly upon request, and if it is not, the action is subject to dismissal pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. We affirm the court of appeals as modified and remand the case to circuit court for trial.

I. Background and Procedural History

Peter Rice was the passenger in a friend's car when the car veered off the road and hit a tree. Rice filed a civil action against the unidentified driver—"John Doe"—of a vehicle Rice contends crossed the center line into his friend's lane of travel, causing the friend to swerve to avoid colliding with the vehicle. Rice alleges he "suffered severe and painful injuries and damages."

Sections 38-77-170 and 38-77-180 of the South Carolina Code (2015) collectively allow recovery under a driver's uninsured motorist policy when an accident is caused by an unidentified driver. However, section 38-77-170 provides "there is no right of action or recovery under the uninsured motorist provision, unless . . . (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle . . . ." In cases in which there was no "physical contact with the unknown vehicle"—as here—subsection 38-77-170(2) requires a "witness must sign an affidavit attesting to the truth of the facts of the accident . . . ."

John Doe filed an answer to Rice's complaint in which Doe included a motion to dismiss the case on the basis Rice "has failed to comply with [section] 38-77-170." The day after Doe filed his answer, Rice produced an affidavit setting forth the facts of the accident. Some months later, Doe filed a motion for summary judgment pursuant to Rule 56(c) in which he again claimed "the Plaintiff has failed to satisfy the terms of [section] 38-77-170." Rice then produced and later filed an amended affidavit in which he clarified there was no contact between the vehicles and included the "statement" required to be "prominently displayed on the face of the affidavit" by the last sentence of section 38-77-170. Circuit Judge Roger E. Henderson heard Doe's motion for summary judgment and denied it by written order, finding Rice's amended affidavit "satisfies the affidavit requirements of S.C. Code § 38-77-170(2)."

The case was called for trial before Circuit Judge Daniel Dewitt Hall. Prior to the court striking a jury, Doe asked the court to hear the motion to dismiss he included in his answer. Doe specifically argued subsection 38-77-170(2) requires a John Doe plaintiff to file the witness affidavit at the same time he files the complaint, and therefore Rice's claim must be dismissed because he failed to do so. Rice objected to Judge Hall hearing the motion on the basis that Doe's argument was the same one heard and rejected by Judge Henderson. Judge Hall first determined Judge Henderson's order denying summary judgment was based on the *contents* of Rice's witness affidavit rather than its *timing*. Judge Hall then found subsection 38-77-170(2) requires a John Doe plaintiff to file the witness affidavit at the same time the complaint is filed as a condition precedent to the right to bring an action under sections 38-77-170 and 38-77-180. Because Rice filed the affidavit many months after he filed the action, Judge Hall dismissed the case.

The court of appeals reversed, finding "Judge Hall did not have the authority to overrule Judge Henderson's previous rejection of Doe's timeliness argument." *Rice v. Doe*, Op. No. 2021-UP-229, at 2 (S.C. Ct. App. filed June 23, 2021). The court of appeals did not address the timeliness of the witness affidavit.

We granted Doe's petition for a writ of certiorari to address whether Judge Hall had the authority to grant the motion to dismiss after Judge Henderson denied summary judgment and whether filing the witness affidavit required by subsection 38-77-170(2) is a condition precedent to the right to bring a John Doe action under sections 38-77-170 and 38-77-180. We find it unnecessary to rule definitively on whether Judge Hall had the authority to hear the motion to dismiss because—on the merits of that motion—we find the filing of the witness affidavit is not a condition precedent to bringing the John Doe action.

II. Analysis

We first address the court of appeals' ruling that Judge Hall did not have the authority to grant the motion to dismiss. We then address whether subsection 38-77-170(2) is a condition precedent to filing a John Doe action.

A.

This Court has stated as a general principle, "One Circuit Court Judge does not have the authority to set aside the order of another." *Enoree Baptist Church v. Fletcher*,

287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986); *see also Steele v. Charlotte, Columbia & Augusta R.R.*, 14 S.C. 324, 330 (1880) ("The judge may sometimes reconsider his own orders, but all the authorities agree as to the general doctrine, that the decision of one judge is not subject to be reviewed by another." (internal quotation marks omitted) (citing 1 Simon Greenleaf, *A Treatise on the Law of Evidence* 543 (Boston, Charles C. Little & James Brown 1850))).

However, this "general doctrine" can be a difficult one to apply. On one hand, it is "clearly an impermissible act" for one judge "to reverse the earlier substantive order" of another judge. *Enoree Baptist Church*, 287 S.C. at 604, 340 S.E.2d at 547. In *Enoree Baptist Church*, as an example of how the principle is intended to apply, the plaintiff filed a motion to amend the complaint, which one circuit judge granted. 287 S.C. at 603, 340 S.E.2d at 547. After a mistrial, a different circuit judge reversed the first judge's ruling, stating, "So your amendment comes too late and I deny your amended complaint." *Id.* This Court reversed the second judge and "remanded for a new trial under the amended complaint." 287 S.C. at 604, 340 S.E.2d at 547. *See also Belton v. State*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (finding on "purely a legal" question of the jurisdiction of a State board, a second circuit judge "was without authority to review [the first judge's] findings" on the exact same issue).

On the other hand, one circuit judge has the authority to make a different ruling than a prior judge in some circumstances. In *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), for example, we held the general principle set forth in *Enoree Baptist Church* did not apply to class certification orders, which "may be altered at any time prior to a decision on the merits," even by a different circuit judge. 377 S.C. at 454, 661 S.E.2d at 88. We have also recognized that pre-trial rulings on evidentiary issues are subject to change by the trial judge. *See State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) (observing that if "an evidentiary ruling is pretrial" there could arise a "basis for the trial court to change its initial ruling"). If the trial judge is different from the judge who ruled on the pretrial motion, the trial judge has an obligation to hear the arguments as to why the ruling during trial should be different from the pretrial ruling.

Under our system of rotating judges through the State, circuit and family court judges often confront situations in which another judge made a ruling that might or might not be final. If the prior ruling addresses a substantive point of law, or if nothing of significance has changed, the second judge should consider the previous

judge's ruling to be final. *See Steele*, 14 S.C. at 329 (observing that if one judge could overrule another, "there would be no end to litigation. No one could tell where it would stop. Nothing could be considered as finally adjudged, and all rights of person and property would be set afloat."). The simple fact a judge disagrees with a prior ruling by another judge is not grounds to change the ruling.

When the circumstances that led to a prior ruling have changed, however, the trial judge should not be bound by an order that no longer serves the interests of justice. Even in *Steele*—one of the first cases in which we acknowledged the "general doctrine" stated in *Enoree Baptist Church* as "One Circuit Court Judge does not have the authority to set aside the order of another"—we recognized, "A motion once heard and decided fully [may] be reviewed *upon a new state of facts arising after the decision*[,] . . . such as to make a new case, as . . . newly-discovered evidence, or that the ground of the order has been removed . . . ." 14 S.C. at 330. The *Enoree Baptist Church* principle is intended, therefore, to prevent what is essentially an appeal from one circuit judge to another. As we explained in *Steele*, "There is no appeal from one Circuit judge to another." 14 S.C. at 329. The principle was never intended to hamstring a subsequent judge when the circumstances legitimately have changed, or—as here—where there was uncertainty whether the first judge (Judge Henderson) even addressed the specific legal issue.

As Judge Hall was obligated to do, he examined the motion for summary judgment, the memorandum filed in its support, and Judge Henderson's order, before making the determination Judge Henderson had addressed only the content of the affidavit, not whether subsection 38-77-170(2) required the affidavit be filed as a condition precedent to bringing the action. Judge Hall noted Judge Henderson's order "did not contain any language that dealt with the issue of [the witness affidavit] being a condition precedent." The court of appeals disagreed and determined Judge Henderson had ruled on the timeliness issue, in part because Doe's memorandum in support of the motion specifically addressed the timeliness issue. *Rice*, Op. No. 2021-UP-229, at 2.

We believe both Judge Hall and the court of appeals had reasonable interpretations of Judge Henderson's order, which shows the difficulty courts face in applying the *Enoree Baptist Church* general principle. On this difficult point, we find it unnecessary to definitively say whether we think Judge Hall was correct or the court of appeals was correct, because we find subsection 38-77-170(2) clearly does not

require filing the witness affidavit as a condition precedent to bringing a John Doe action.

B.

Turning to the question whether the witness affidavit requirement is a condition precedent to the filing of a John Doe action, our analysis is simple—the statute does not provide that the affidavit must be filed as a condition precedent to filing the action. Section 38-77-170 is titled, "Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown." It provides in part:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
>
> . . .
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit . . . .

S.C. Code Ann. § 38-77-170.

There is no requirement in this language or otherwise that the witness affidavit be filed at the same time the action is filed.

Doe makes several points to support his position. Doe relies on the "[c]onditions to sue" language in the title and the "no right of action or recovery . . . unless" language in the introduction of section 38-77-170. He relies on our use of the phrase "condition precedent" in *Wynn v. Doe*, 255 S.C. 509, 512, 180 S.E.2d 95, 96 (1971), interpreting an earlier version of the statute that did not apply to no-contact cases and did not contain a witness affidavit requirement. Doe also relies on our statement, "A plaintiff's strict compliance with the affidavit requirement is mandatory" in

Collins v. Doe, 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002). *Collins*, however, concerned a plaintiff who never produced a witness affidavit—even at trial—and instead relied on witness testimony to establish the facts of the accident. 352 S.C. at 464-65, 574 S.E.2d at 740.

While perhaps Doe's points support an argument the statute *should* require the affidavit before filing the action, the statute simply does not provide that. *See Enos v. Doe*, 380 S.C. 295, 312, 669 S.E.2d 619, 627-28 (Ct. App. 2008) (recognizing the "uninsured motorist statute 'is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished'" (citation omitted)). If the General Assembly intended such a requirement, it could easily have stated the requirement in the statute. *See* S.C. Code Ann. § 15-79-125 (Supp. 2023) ("Prior to filing or initiating a civil action alleging . . . medical malpractice, the plaintiff shall contemporaneously file . . . an affidavit of an expert witness . . . .").

Though we find the witness affidavit is not a prerequisite to filing a John Doe action, we recognize the requirement is essential to the success of the claim. Initially, therefore, we wonder why any plaintiff in such a case would not be eager to produce the affidavit at the earliest opportunity. Certainly, a John Doe defendant or the relevant insurer is entitled to have the affidavit produced promptly upon request. Our courts will not countenance the use of delay in producing the affidavit as an element of strategy. If a defendant or an insurer requests the affidavit in discovery or otherwise, and if the plaintiff does not provide the affidavit promptly, the defendant or insurer may seek relief through Rule 37(a) of the Rules of Civil Procedure (motion to compel) or, if necessary, even Rule 56(c) (motion for summary judgment).

III. Conclusion

Subsection 38-77-170(2) does not require the witness affidavit to be filed at the time the complaint is filed. For a different reason than the court of appeals, therefore, we find the circuit court improperly dismissed Rice's claim. We affirm the court of appeals as modified and remand the case for trial.

AFFIRMED AS MODIFIED.

BEATTY, C.J., JAMES, J., and Acting Justice Alison R. Lee, concur. KITTREDGE, J., concurring in a separate opinion.

JUSTICE KITTREDGE: I concur. I take no issue with the majority reaching "the question [of] whether compliance with the witness affidavit requirement in subsection 38-77-170(2) of the South Carolina Code (2015) is a condition precedent to the filing of a 'John Doe' civil action." Judicial economy favors a merits-based resolution. I also support and join the result reached by the majority. I write separately to note that, in my judgment, the court of appeals was correct in its determination that the issue of "timing" was heard and rejected by Judge Henderson in the initial summary judgment motion. The motion before Judge Henderson asserted "a plaintiff seeking uninsured motorist coverage . . . must produce an affidavit that complies with the statute's terms *as a condition precedent to filing suit*. The Plaintiff did not produce any affidavit until over 10 months after he filed this action. . . . [T]his affidavit was required prior to filing suit." Judge Henderson properly denied summary judgment. Subsequently, the trial judge erred in revisiting the "timing" issue and overruling Judge Henderson. While the court of appeals cannot be faulted for adhering to the rule that one circuit judge lacks authority to overrule another circuit judge on the same issue, I join the majority in reaching and resolving the merits.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jennings-Dill, Inc., Respondent,

v.

Eric Israel, Appellant.

Appellate Case No. 2021-001137

Appeal from Greenville County
Alex Kinlaw, Jr., Circuit Court Judge

Opinion No. 6046
Heard December 6, 2023 – Filed January 24, 2024

AFFIRMED

Matthew R. Ozment, of Grove Ozment, LLC, of Greenville, for Appellant.

Phillip Arthur Kilgore, of Greenville, Christopher Ray Thomas, of Columbia, both of Ogletree Deakins Nash Smoak & Stewart, PC, and Sara Elizabeth Olschewske, of Simpsonville, all for Respondent.

GEATHERS, J.: Appellant Eric Israel appeals the circuit court's issuance of a preliminary injunction that enjoins Israel from using documents to which he had access during his prior employment with Respondent Jennings-Dill, Inc. (JDI). The injunction explicitly prohibits Israel from using the information in the documents to bid on any project on behalf of his current employer, Place Services, Inc. (PSI), or

to solicit JDI employees. JDI alleged the documents contained confidential information and trade secrets. Israel argues the circuit court erred in finding JDI demonstrated a likelihood of success on the merits because (1) no evidence was presented to show that Israel possessed or misappropriated a trade secret or confidential information, and (2) the circuit court relied exclusively on hearsay and speculative statements to find Israel had solicited JDI employees. Israel also argues the circuit court erred by improperly "balancing the equities" between the parties to support granting the preliminary injunction. We affirm.

FACTS

JDI is a full-service commercial plumbing and gas piping company. JDI's Plumbing Division accounts for twenty to thirty percent of JDI's annual revenue. Israel worked for JDI for approximately eleven years as an at-will employee with no restrictive covenants. Israel began his tenure as a plumber and was eventually promoted to plumbing superintendent, a supervisory position over foremen and plumbers. In the superintendent position, Israel was issued a company iPad on which he had access to what JDI deemed to be confidential information related to employee payroll and retention as well as JDI's bidding process.[1] Employees who were issued an iPad received and were subject to JDI's "iPads or Electronic Devices Usage Policy." The policy provided that employees with company-issued iPads were forbidden from copying sensitive data and were responsible for recognizing the need to protect confidential data.

On June 13, 2021, Israel sent an email to JDI's management informing them of his intent to resign on July 8, 2021.[2] On June 24, 2021, Israel discussed his resignation with Andy Locklair, JDI's Vice President of Operations, in a phone call.

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[1] JDI's bidding process involves evaluating the proposed project and specifications, projecting the costs of materials, projecting the hours of labor necessary to complete the project, and assigning a blended hourly labor rate to the project. The blended hourly rate for the Plumbing Division includes the pay rates for plumber helpers, plumbers, plumbing foremen, the plumbing superintendent, and the project manager.

[2] Israel testified his decision to resign was "out of frustration over the low compensation being paid to those [he] supervised and [himself]." However, in the resignation email—which JDI produced—Israel stated he was resigning because he had been "given a good opportunity with another company for change and growth." According to Israel, he was hired by PSI on July 6, 2021.

There is some dispute about what occurred during this phone call. Locklair stated that during the call, Israel reiterated his intention to resign and attempted to give his two-week notice. Locklair testified he told Israel there was no need to work out the remaining two weeks and that Israel needed to return all his company-issued property—including his keys, iPad, truck, and tools—the following morning. According to Israel, he and Locklair had discussed his intention to resign on the phone, but it was not until the following morning on June 25 that Locklair informed Israel via email that he was no longer an JDI employee and that he did not need to work the rest of his notice period. Israel provided a copy of this email in which Locklair stated, "In follow up to our conversation late yesterday afternoon, we accept your resignation. A two[-]week notice will not be required. Please make arrangements this morning to return all company assets . . . ."

Israel testified that on the same night as the phone call with Locklair, one of his subordinates—Anthony Driggers—called Israel and asked about a raise he had been promised. Israel testified that while speaking with Driggers, he opened several files in ShareFile on his company-issued iPad to check Driggers's current pay rate. According to Israel, he attempted to open a file but it failed to open due to the file size. He then attempted to open the file once more. Finally, he tried to open a different file to check Driggers's pay rate. Israel testified he was unable to locate the pay rate in any file he viewed.

A report from ShareFile indicated Israel downloaded three files to his company-issued iPad that evening. The three files were titled: "Personnel Report," "Personnel Report Jan 2021 – Dec 2021," and "JD Employee List" (collectively, Personnel Documents). According to JDI, these files were, respectively, the monthly employee headcounts through July 2021; personnel changes (including new hires and terminations); and the personal contact information and pay rates for all JDI employees, not just those in the Plumbing Division. Israel returned the company-issued iPad on June 25. According to JDI, within three weeks of Israel's resignation, the Plumbing Division lost twelve employees, reducing its workforce down to only seventeen employees.

In July, Israel began working for PSI—a company that engages in mechanical contracting, including plumbing services. Israel was not the first JDI employee to leave JDI's employ and start to work for PSI. A former JDI plumbing

superintendent, Phillip Dobbins,[3] was already employed by PSI at the time Israel resigned.

On July 13, 2021, Dobbins sent an email to Israel's JDI email address in which Dobbins informed Israel that Tony Smith, a PSI employee whom JDI alleged it previously employed, needed to complete a PSI-required training. It was at that moment, according to Locklair, JDI "was able to connect Israel's actions [in] download[ing] its documents with what appeared to be a clear scheme to solicit and recruit [JDI] employees by having Israel use the unlawfully obtained information to raid [JDI's] [P]lumbing [D]epartment." Locklair testified that most of the employees that left following Israel's departure were long-term and never indicated any displeasure with their jobs. According to Locklair, four employees informed JDI management that Israel had entered JDI jobsites with "no legitimate business purpose" and had solicited JDI employees to work for PSI. Locklair testified that two of the employees who reported Israel's presence on jobsites and solicitation have since resigned.[4] Locklair also stated he believed Israel contacted or attempted to contact at least four other employees.

JDI sought the preliminary injunction to prevent Israel from using or disclosing the confidential information and trade secrets contained within the Personnel Documents and from improperly soliciting JDI employees. The claims on which JDI sought injunctive relief were: (1) misappropriation of trade secrets, (2) unfair trade practices, (3) conversion, and (4) unjust enrichment/quantum meruit.[5]

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[3] JDI has commenced a separate action against Dobbins and PSI alleging breach of contract, fraudulent misrepresentation, negligent misrepresentation, tortious interference with contractual relations, intentional interference with prospective contractual relations, conversion, violation of the South Carolina Trade Secrets Act (SCTSA), civil conspiracy, unjust enrichment, and unfair trade practices. *Jennings-Dill, Inc. v. Place Servs Inc.*, 2021-CP-2305713 (available on the Greenville County Public Index). The case has not yet concluded.

[4] Locklair alleged one of those employees, Scottie Strickland, stated he was leaving JDI because Israel approached him and persuaded him to work for PSI. Israel provided an affidavit from Strickland in which Strickland testified he initiated the conversation with Israel about working for PSI and that Israel did not solicit him to work for PSI.

[5] In the underlying action, JDI alleged conversion, breach of duty of loyalty, breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act

JDI stated it considers the compilation of its employees' names, their contact information, and their pay rates to be confidential and a trade secret because it has independent economic value, is not readily available to the public, and allows JDI to maintain a competitive advantage. JDI asserted it made reasonable efforts to maintain the secrecy of the Personnel Documents and JDI would be put at an unfair competitive disadvantage if a competitor received the information. JDI noted its ability to participate in the bidding process is dependent on the number of pending projects and the availability of skilled employees to participate in the potential project. According to JDI, if a competitor knew JDI's wage rates, it could lure away JDI's skilled employees with higher pay and directly impact JDI's ability to participate in the bidding process or work on current projects. JDI alleged it would take years to hire and train plumbers to replace the ones that left. JDI also alleged it had to withdraw from three projects because of its decreased manpower, which resulted in $2.5 million in lost revenue and damaged JDI's reputation.

In support of its motion for a preliminary injunction, JDI submitted affidavits from Locklair and David Dozer, JDI's Executive Vice President, that indicated their belief that the Personnel Documents were trade secrets and confidential information and that Israel used that information to solicit JDI employees to work for PSI. JDI also produced Israel's June 8 email, a log showing which documents were accessed in ShareFile on June 24 on Israel's iPad, and the July 13 email Dobbins sent to Israel's JDI email. Israel submitted Strickland's affidavit—which included Strickland's denial that Israel approached him to leave JDI and work for PSI—and an affidavit of his own in which Israel denied he had a personal copy of the Personnel Documents or was soliciting any employee at JDI to work for PSI. Israel also produced his phone's call history with Locklair for June 22–25 and the June 25 email from Locklair.

Following a hearing, at which no witnesses testified, the circuit court issued an order granting a preliminary injunction based on all four claims. This appeal followed.

(UTPA), misappropriation of trade secrets under SCTSA, civil conspiracy, unjust enrichment/quantum meruit, and tortious interference with contractual relations.

ISSUES ON APPEAL

I. Did the circuit court err in issuing a preliminary injunction by finding JDI demonstrated a likelihood to succeed on the merits when no facts support the assertion that Israel possessed or misappropriated JDI's trade secret or confidential information?

II. Did the circuit court err in finding JDI demonstrated a likelihood to succeed on the merits when the court relied exclusively on hearsay and speculative statements in affidavits outside the affiants' personal knowledge to find Israel solicited JDI employees?

III. Did the circuit court err by improperly "balancing the equities" between the parties by comparing the alleged harm to each party to support issuing a preliminary injunction?

STANDARD OF REVIEW

A preliminary injunction "rests within the sound discretion of the trial judge and will not be overturned unless the order is clearly erroneous." *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007). "The facts alleged must be sufficient to support a temporary injunction[,] and the injunction must be reasonably necessary to protect the rights of the moving party." *Id.*

LAW/ANALYSIS

I. Likelihood of Success on the Merits

Israel contends the circuit court erred in finding JDI demonstrated a likelihood of success on the merits because JDI adduced no evidence that Israel possessed or misappropriated any trade secret or other confidential information belonging to JDI. Israel argues that JDI at no point showed Israel copied, downloaded, or otherwise removed the Personnel Documents from the company-issued iPad. We disagree.

"An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation." *Compton v. S.C.*

Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). "To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Richland County. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018) (quoting *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010) (per curiam)). "In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief." *Compton*, 392 S.C. at 367, 709 S.E.2d at 642.

As an initial matter, we note what is—and is not—properly before this court. Israel did not challenge the circuit court's findings on two of the three parts of the preliminary injunction test: irreparable harm if the injunction is not granted and inadequate remedy at law. Israel only contests the circuit court's findings on whether JDI showed a likelihood of success on the merits. Accordingly, we will only review the circuit court's findings related to the likelihood of success on the merits. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 ("[A]n unappealed ruling, right or wrong, is the law of the case.").

Each of the claims on which JDI sought the preliminary injunction relies on the allegation that Israel possessed or misappropriated a trade secret or other confidential information that belonged to JDI and subsequently used that information to solicit JDI employees to work for PSI. We hold JDI made a sufficient prima facie showing of entitlement to relief.

The filings and evidence presented to the circuit court indicate JDI could succeed in showing that Israel accessed the Personnel Documents and was using the information contained within them to solicit JDI employees. It is uncontested the Personnel Documents were JDI's property. JDI's complaint and Locklair's affidavit provided that JDI had implemented security policies to protect the Personnel Documents from widespread viewing and use. JDI presented a ShareFile activity log reflecting that the Personnel Documents were downloaded onto Israel's company-issued iPad after his phone call with Locklair on June 24. JDI submitted Locklair's affidavit stating Israel had already been informed his resignation was effective immediately at the time he downloaded the Personnel Documents, indicating he did not have permission to access the documents.

JDI also sufficiently alleged facts to support its assertion that the information in the Personnel Documents was confidential and constituted trade secrets. JDI had a policy alerting employees with company-issued iPads that there was sensitive, confidential information on ShareFile. JDI also stated the information in the Personnel Documents was not widely available within the company. With regard to trade secrets, JDI explained the value of the information in the Personnel Documents to its competitive bidding process and stated that the compilation of such information would not be readily ascertainable by the public. *See* S.C. Code Ann. § 39-8-20(5)(a) (2023) (providing that a trade secret can be a compilation of information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and [] is the subject of efforts that are reasonable under the circumstances to maintain its secrecy").

Further, JDI produced affidavits that stated: (1) management received reports Israel was contacting JDI employees following his departure; (2) a significant portion of its employees in the Plumbing Department resigned from employment shortly after Israel left JDI; and (3) at least some of the employees that left JDI are now employed by PSI, Israel's current employer and JDI's competitor. While we acknowledge there is no direct evidence that Israel used the Personnel Documents to solicit JDI employees, the circumstantial evidence and facts alleged are sufficient to demonstrate that Israel could have used the Personnel Documents in a manner that was not authorized. *See Atwood Agency*, 374 S.C. at 72, 646 S.E.2d at 884 ("The facts alleged must be sufficient to support a temporary injunction[,] and the injunction must be reasonably necessary to protect the rights of the moving party."). JDI did not need to prove an absolute legal right, only "a fair question to raise as to the existence of such a right." *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912); *see also Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 466, 626 S.E.2d 38, 42 (Ct. App. 2005) (holding a plaintiff seeking a preliminary injunction need not prove an absolute legal right; a plaintiff need only present a "fair question to raise as to the existence of such a right"), *modified on other grounds*, *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 17 (2010).

Accordingly, we affirm the circuit court's finding that JDI demonstrated a fair question as to the existence of a legal right and a sufficient prima facie showing of entitlement of relief. *See Williams*, 92 S.C. at 347, 75 S.E. at 710 (holding a party

seeking a preliminary injunction need to prove only "a fair question to raise as to the existence of [a legal] right"); *Levine*, 367 S.C. at 465, 626 S.E.2d at 42 (holding a plaintiff seeking a preliminary injunction need not prove an absolute legal right; a plaintiff need only present a "fair question to raise as to the existence of such a right"); *see also Compton*, 392 S.C. at 367, 709 S.E.2d at 642 ("In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief.").

II. Hearsay and Speculative Statements

Israel argues the circuit court erred in relying solely on hearsay and speculative statements in affidavits submitted by JDI to find Israel was soliciting JDI employees. We disagree.

Our case law has not explicitly addressed the reliance on hearsay and speculative statements in issuing a preliminary injunction. However, it would be contrary to the purpose of, and the test for, a preliminary injunction to infer from our case law a prohibition against a court's reliance on hearsay or speculative statements.[6]

A preliminary injunction is issued only when necessary to preserve the status quo ante. *Poynter*, 387 S.C. at 586, 694 S.E.2d at 17. Taking into account the exigent circumstances underlying a request for temporary injunctive relief, the test

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[6] Israel suggests this court use the standard articulated in Rule 56(e), SCRCP, as a guide. The standard in Rule 56(e) cannot be imputed onto affidavits related to a motion for a preliminary injunction. Whereas a summary judgment motion seeks an adjudication on the merits of the claim, a preliminary injunction seeks to preserve the status quo ante. *Compare Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("Summary judgment is an adjudication on the merits of the case[.]"), *with Poynter*, 387 S.C. at 586, 694 S.E.2d at 17 (holding that a preliminary injunction is issued only when necessary to preserve the status quo ante). In weighing motions for preliminary injunctions, the circuit court is explicitly limited in its ability to consider the underlying merits. *See Compton*, 392 S.C. at 367, 709 S.E.2d at 642 ("In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief.").

for a preliminary injunction requires only that "[t]he facts *alleged* . . . be sufficient to support a temporary injunction" and that the court consider the underlying merits "*only to the extent necessary* to determine whether there has been a *prima facie* showing to support a temporary injunction." *Atwood Agency*, 374 S.C. at 72, 646 S.E.2d at 884 (emphases added). Given the purpose of a preliminary injunction and the requirement that the facts *alleged* are sufficient to support a prima facie showing, it is appropriate for a circuit court to rely on hearsay and speculative statements when deciding whether a party has met their burden of demonstrating a likelihood of success on the merits. *Cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."); *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir. 2016), *vacated and remanded on other grounds*, 580 U.S. 1168 (2017) ("Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted."); *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986) ("Affidavits and other hearsay materials are often received in preliminary injunction proceedings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding."); *Commodity Future Trading Comm'n v. IBS, Inc.*, 113 F. Supp. 2d 830, 851 (W.D.N.C. 2000) ("[A]ffidavits are competent evidence and are admissible in a preliminary injunction proceeding. Affidavits are appropriate forms of evidence in such proceedings due to the less formal nature of a preliminary injunction hearing and the need to take action to avoid irreparable injury." (citation omitted)).

Accordingly, we affirm the circuit court's finding that Israel was soliciting JDI employees because the court could rely on the statements made in the affidavits in the record that asserted that Israel was indeed soliciting JDI employees.[7]

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[7] Specifically, the affidavits alleged (1) Locklair received reports from four employees that Israel entered JDI jobsites with no legitimate business purpose and solicited employees to leave JDI and work for PSI; (2) two of those four employees

III. Balancing of Equities Test

Israel argues the circuit court erred by employing the balancing of equities test because it was improper to do so when analyzing a motion for a preliminary injunction. We disagree.

Our supreme court has held,

> [T]he "balancing the equities" requirement is neither necessary nor appropriate in a preliminary injunction case[] where the three requirements (irreparable harm, success on merits, and inadequate remedy at law) are well established and clearly delineate the burden of proof and of persuasion. Moreover, the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test.

Poynter, 387 S.C. at 587, 694 S.E.2d at 17. The court further noted, "[T]here is no separate requirement that a judge perform such a balancing before deciding to issue a preliminary injunction." *Id.* at 586, 694 S.E.2d at 17.

Here, the circuit court found,

> Although this [c]ourt does not engage in a balancing test between the irreparable harm that [JDI] would suffer in the absence of injunctive relief versus whatever harm Israel

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resigned from JDI and at least one of the two now works for PSI; (3) Locklair was aware of at least four other employees being contacted by Israel, at least one of whom Israel contacted to solicit to leave JDI's employment; (4) at least ten employees resigned employment in the three weeks following Israel leaving JDI, many of whom were relatively long-term employees; (5) Doser understood most of the employees who left after Israel's departure were solicited and recruited by Israel to work for PSI; (6) Locklair discovered several former JDI employees now worked for PSI when Dobbins sent the July 13 email to Israel's JDI email address; and (7) Strickland told JDI that Israel came to a JDI jobsite to talk to him about leaving JDI's employment.

> could suffer if the [c]ourt grants injunctive relief, it is appropriate for this [c]ourt, sitting in equity, to consider the impact on Israel. It appears that a grant of the relief [JDI] seeks would have little impact on Israel.

The circuit court also made findings on the three parts of the preliminary injunction test.

While we agree the balancing of the equities test was not necessary, the circuit court's reference to the test and brief analysis of potential harm to Israel does not amount to a reversible error. The *Poynter* court reasoned that the use of the balancing test was unnecessary because it was subsumed by two parts of the three-part test for a preliminary injunction. *See Poynter*, 387 S.C. at 587, 694 S.E.2d at 17 ("Moreover, the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test."). Here, the circuit court made findings on each part of the test for a preliminary injunction *and* discussed the impact on Israel, rendering any alleged use of the balancing test superfluous. Accordingly, we affirm the circuit court's order. *See Atwood Agency*, 374 S.C. at 72, 646 S.E.2d at 884 ("Temporary injunctive relief rests within the sound discretion of the trial judge and will not be overturned unless the order is clearly erroneous.").

CONCLUSION

For the foregoing reasons, the circuit court's order is

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amazon Services, LLC, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2019-001706

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

Opinion No. 6047
Heard February 14, 2023 – Filed January 24, 2024

AFFIRMED

John C. Von Lehe, Jr. and Bryson Moore Geer, both of Nelson Mullins Riley & Scarborough, LLP, of Charleston; Neil H. Conrad and Robert N. Hochman, both of Sidley Austin LLP, of Chicago, Illinois; Constantine L. Trela, Jr., of Chicago, Illinois; and Benjamin J. Razi, Sean Akins, and Carter G. Phillips, all of Washington, D.C., all for Appellant.

Tracey Colton Green, Chad Nicholas Johnston, and John William Roberts, all of Burr & Forman LLP, of Columbia; Jason Phillip Luther, of the South Carolina Department of Revenue, of Columbia; and Lauren Acquaviva, of Viva Law Firm, of Charleston, all for Respondent.

Steve A. Matthews, of Haynsworth Sinkler Boyd, PA, of Columbia, for Amici Curiae Chamber of Commerce of the United States of America, Business Roundtable, Internet Association, South Carolina Chamber of Commerce, and Greater Columbia Chamber of Commerce.

Joshua Madison Tyler Felder, of Parker Poe Adams & Bernstein LLP, of Greenville; and Kay L. Hobart, of Parker Poe Adams & Bernstein LLP, of Raleigh, North Carolina, for Amicus Curiae Council on State Taxation.

Robert T. Bockman, of University of South Carolina School of Law, of Columbia, for Amici Curiae Tax Law Professors Tessa R. Davis and Clinton G. Wallace.

M. Dawes Cooke, Jr., Justin P. Novak, and John William Fletcher, all of Barnwell Whaley Patterson & Helms, LLC, of Charleston; and R. Gregory Roberts, of Roberts Law Group, PLLC, of White Plains, New York; all for Amicus Curiae Institute for Professionals in Taxation.

Edward Raymond Moore, III, of Murphy & Grantland, PA, of Columbia, and Alicia Pilar Mata, of Washington, D.C., both for Amicus Curiae Tax Executives Institute.

Samantha K. Trencs, of Eversheds Sutherland (US) LLP, of Washington, D.C.; Eric S. Tresh, Maria M. Todorova, and Chris R. Lee, all of Eversheds Sutherland (US) LLP, of Atlanta, Georgia; all for Amicus Curiae The South Carolina Manufacturers Alliance.

Jennifer Butler Routh, of McDermott Will & Emery, of Washington, D.C., for Amicus Curiae National Retail Federation.

VINSON, J.: In this contested case, Amazon Services, LLC (Amazon Services) appeals the decision of the Administrative Law Court (ALC) affirming the South Carolina Department of Revenue's (the Department's) determination assessing it approximately $12.5 million in taxes, penalties, and interest for the period of January 1, 2016, to March 31, 2016. Amazon Services argues that (1) as an online marketplace operator, it owed no duty to collect and remit sales tax on products sold on its marketplace by third parties under the Sales and Use Tax Act (the Act)[1] in effect during 2016; (2) the statute in effect in 2016 could reasonably be read not to impose the obligation to collect and remit sales tax for third-party sales upon online marketplace facilitators such that the statute is ambiguous and must be construed against the Department; and (3) imposing a sales tax obligation on it for third-party sales during the relevant period violates the United States and South Carolina constitutional guarantees of fair notice and equal protection. We affirm.

BACKGROUND

Amazon Services, a subsidiary of Amazon.com, Inc. (Amazon), operates the Amazon.com website (the Marketplace). Amazon Services is registered in South Carolina as a retailer for the purposes of the Act. Amazon's business model includes the retail sale of products through the Marketplace. There are three primary sources of products listed for sale on the Marketplace: Amazon, Amazon affiliates,[2] and third-party sellers.

In 2011, the legislature passed the Distribution Facility Sales Tax Exemption (the Moratorium), primarily to encourage Amazon's investment in South Carolina. *See* § 12-36-2691. The Moratorium provided a sales tax exemption for the five-year period from January 1, 2011, until December 31, 2015, for companies that built a distribution facility in South Carolina, provided certain conditions were met. *Id.* In 2011 and 2012, an Amazon subsidiary built two distribution facilities in South Carolina. At the time, the dormant Commerce Clause of the United States

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[1] S.C. Code Ann. §§ 12-36-5 to -2692 (2014 & Supp. 2023).

[2] Amazon affiliates that engage in retail sales include: AmazonFresh, LLC; Fabric.com; Woot, Inc.; Zappos Retail, Inc.; 6pm.com, LLC; Amazon Web Services, Inc.; Quidsi Retail, LLC; IMDb.com, Inc.; BOP, LLC, Amazon.com, LLC; Warehouse Deals, LLC; and Amazon Digital Services, LLC.

Constitution allowed the State of South Carolina to impose sales tax only upon third-party sellers that had a physical presence in the state. *See Nat'l Bellas Hess, Inc. v. Dep't of Revenue of the State of Ill.*, 386 U.S. 753 (1967) (suggesting a business was required to have a physical presence in the taxing state to form the requisite nexus to the state); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (requiring, pursuant to the dormant commerce clause, a physical presence for a business to have a substantial nexus with a taxing state such that it would be subject to that state's sales and use tax). Thus, by building distribution facilities in South Carolina, Amazon established the physical nexus required for the imposition of sales tax.[3] Upon expiration of the Moratorium, Amazon Services began collecting and remitting sales tax for the retail sales of Amazon and its affiliates rather than all of the sales occurring on the Marketplace.

The Department conducted an audit and assessed Amazon Services $12,490,502.15 in taxes, penalties, and interest for the first quarter of 2016. Amazon Services protested the proposed assessment. The Department issued a determination, concluding Amazon Services was a "person in the business of selling tangible personal property at retail, and the Department properly included all the proceeds from [its] online sales in the tax base." Specifically, the Department found Amazon Services owed sales and use tax in relation to the sale of products by third-party sellers occurring on the Marketplace.[4] Amazon Services requested a contested case hearing before the ALC. The ALC held the contested case hearing in February 2019, after which it issued an order affirming the Department's determination.[5] This appeal followed.

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[3] In 2018, the United States Supreme Court decided *South Dakota v. Wayfair, Inc.* and held a physical presence is no longer required to establish a substantial nexus with the taxing state. 138 S. Ct. 2080, 2099 (2018).

[4] Amazon Services already collected and remitted sales tax on its sales and the sales of Amazon affiliates; thus, sales tax on these transactions is not at issue.

[5] The ALC noted the Department issued the proposed assessment without determining whether any merchants had already submitted sales tax for their sales in South Carolina and the Department agreed it would be inappropriate to collect sales tax for the same transaction from two different taxpayers.

FACTS AND PROCEDURAL HISTORY

At the time of the contested case hearing, there were about 2.5 million third-party sellers on the Marketplace. An Amazon Services' employee, Christopher Poad, testified at the hearing and described Amazon's business model with respect to its own retail sales and sales of products by third-party sellers. He explained any third-party seller wishing to list its products for sale on the Marketplace must create an account and agree to the terms of Amazon's Business Solutions Agreement (the BSA). The BSA governs the relationship between Amazon Services and the third-party sellers as well as Amazon subsidiaries, including Amazon Payments, Inc. and Amazon Fulfillment Services, Inc.[6] Poad testified Amazon Payments, Inc. provides payment processing services to third-party sellers. Amazon Fulfillment Services, Inc. operates Amazon's warehouses and provides optional fulfillment services to third-party sellers, referred to as Fulfillment by Amazon, including storage, packaging, shipping, and delivery.

The BSA provides that Amazon Payments acts as the third-party seller's agent for purposes of processing payments, receiving and holding sales proceeds on the seller's behalf, remitting sales proceeds to the seller's bank account, charging the seller's credit card, and paying Amazon and its affiliates amounts the seller owes pursuant to the BSA and related services. The BSA states, "We will also receive all Sales Proceeds on your behalf for each of these transactions and will have exclusive rights to do so . . . ." The seller must agree "that buyers satisfy their obligations to you for [y]our [t]ransactions when we receive the [s]ales [p]roceeds." The BSA further provides the seller's sales proceeds will be held in an account with Amazon Payments and that prior to disbursing the funds to the seller, Amazon Payments may combine such proceeds with the funds of other sellers, invest them, or use them for other legally permissible purposes. According to the BSA, Amazon Services will "remit to [the seller] on a bi-weekly (14-day) (or at our option, more frequent) basis . . . any sales proceeds received by us or our Affiliates" less the fees the seller owes to Amazon Services. The BSA expressly disclaims the existence of an agency relationship between the third-party sellers and Amazon Services, except for Amazon Payments' role as a payment processing agent. With regard to tax collection, the BSA requires third-party sellers to agree

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[6] The BSA describes these entities as "affiliates," which it defines to mean "with respect to any entity, any other entity that directly or indirectly controls, is controlled by, or is under common control with that entity."

to be responsible for the collection, reporting, and payment of all taxes. Amazon Services will collect sales tax if a third-party seller chooses to pay for its tax collection service, but this service is only available to professional sellers or Amazon Webstore sellers—not individual sellers. However, even if a third-party seller uses this tax collection service, Amazon Services collects the tax from the customer and then remits those funds back to the third-party seller to pay to the taxing authority.

Under the BSA, a seller may set any price it wishes for its product except that the seller must offer the price that is at least as favorable to Amazon site users as any price it offers such product through any other sales channel. In addition, third-party sellers must pay Amazon Services fees to sell their products on the Marketplace. These fees include "Referral Fees," which are calculated based on the sales price and Amazon's categorization of the type of product sold. These fees range from six to forty-five percent, with a median fee of fifteen percent.

With regard to a third-party seller's communications with customers, the BSA precludes third-party sellers from receiving or requesting payments directly from customers and third-party sellers must agree to only use the tools and methods Amazon Services provides to communicate with Amazon users regarding transactions.

During the contested case hearing, the ALC admitted evidence of the Department's sworn statements made in 2018 related to proposed "marketplace facilitator" legislation "to the extent it might be probative." It concluded, however, the evidence had little probative value because the Department's interpretation was not entitled to deference and therefore there was no need to impeach its interpretation. The ALC further ruled the Department's statements in the context of the proposed legislation after the Department issued its determination did not render the Act ambiguous because it was the ALC's province, rather than the Department's, to interpret the law and determine whether the law was ambiguous.

The ALC concluded Amazon Services was in the business of selling tangible personal property at retail for the purposes of the Act. It found Amazon Services was not merely a conduit or intermediary but that its actions demonstrated it was in the business of selling pursuant to section 12-36-910(A). The ALC determined Amazon Services accepted consideration from customers because it initially directly received consideration for the sale and transferred the remaining funds to

the seller after deducting its fees. The ALC further stated, Amazon Services' compensation was, in part, directly tied to the amount of sales it could generate, not for any one seller's products, but on the Marketplace as a whole. The ALC concluded Amazon Services indirectly retains a share of the profits from each sale through the Referral Fee. The ALC also found Amazon Services acted as third-party sellers' agent with respect to the sale of the third-party sellers' goods, regardless of whether a formal agency relationship was established. In addition, the ALC found Amazon Services and third-party sellers had a "consignment-type" relationship. The ALC further found the level of control Amazon Services exercised over the Marketplace and the third-party transactions indicated it was in the business of selling on the Marketplace. The ALC concluded that although third-party sellers set their own pricing, Amazon Services benefited from the parameters governing pricing because it received a profit from every sale through its fees while also ensuring the offers listed on the Marketplace were the most attractive offers, which encouraged more sales on the Marketplace.

Finally, the ALC determined no constitutional violations occurred. The ALC concluded Amazon presented no evidence the Department imposed or attempted to impose pending legislation on Amazon Services to obligate it to remit sales and use tax for these transactions such that its actions violated the due process clause. Rather, it concluded the Department applied the existing tax scheme to a relatively new business model. The ALC rejected Amazon's argument that the Department's actions violated its equal protection rights. The ALC found Amazon Services failed to submit any evidence specifically identifying online marketplaces and showing such other online marketplaces were similarly situated.

ISSUES ON APPEAL

I. Did the ALC err in concluding that, under the Act in effect in 2016, Amazon Services owed a duty to collect and remit sales tax on products sold on the Marketplace by third-party sellers?

II. Did the ALC err in concluding the statute in effect in 2016 could not reasonably be read not to impose the obligation upon Amazon Services to collect and remit sales tax for third-party sales such that the statute was ambiguous and must be construed against the Department?

III. Did the ALC err in concluding that imposing a sales tax obligation on Amazon Services for third-party sales during the relevant period did not violate constitutional guarantees of fair notice or equal protection?

STANDARD OF REVIEW

When reviewing a final decision of the ALC,

> [This] court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. Th[is] court . . . may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency
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> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2023).

"Questions of statutory interpretation are questions of law, which [the appellate c]ourt is free to decide without any deference to the [ALC]." *Rent-A-Ctr. E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 587, 824 S.E.2d 217, 219 (Ct. App. 2019) (alterations in original) (quoting *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016)).

LAW AND ANALYSIS

I. Sales and Use Tax

Amazon Services argues that, under the law in effect in 2016, it was not the "seller" of third-party products. Amazon Services argues the *Travelscape*[7] decision does not support the ALC's conclusion because the website operator in that case was a price-setter as opposed to a marketplace operator. Amazon Services argues substantial evidence does not support the ALC's conclusion that it was "in the business of selling" under section 12-36-910(A). It contends it is a service provider and therefore not responsible for collecting and remitting sales tax. Amazon Services further contends its interpretation of section 12-36-70 is reasonable and therefore the ALC should have construed the statute in its favor pursuant to the holding in *Alltel Communications v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). We disagree.

We find the ALC did not err in determining Amazon Services was engaged in the business of selling tangible personal property at retail and was therefore responsible for collecting and remitting sales tax on sales of tangible personal property owned by third parties occurring on the Marketplace.[8]

The Act provides, "A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person *engaged or continuing within this State in the business of selling* tangible personal property at retail." § 12-36-910(A) (emphasis added). "'Business' includes all activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect*." § 12-36-20 (emphasis added).

> "Retailer" and "seller" include every person:
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> (1)(a) selling or auctioning tangible personal property *whether owned by the person or others*;
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> . . .

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[7] *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011).
[8] Unless otherwise specified, our references to "the Act" refer to the version in effect in 2016.

> (c) renting, leasing, or otherwise furnishing tangible personal property for a consideration;
>
> . . .
>
> (2)(a) maintaining a place of business or qualifying to do business in this [s]tate; or
>
> (b) not maintaining an office or location in this [s]tate but soliciting business by direct or indirect representatives, manufacturers agents, distribution of catalogs, or other advertising matter or by any other means, and by reason thereof receives orders for tangible personal property or for storage, use, consumption, or distribution in this [s]tate.
>
> The [D]epartment, when necessary for the efficient administration of this chapter, may treat any salesman, representative, trucker, peddler, or canvasser as the agent of the dealer, distributor, supervisor, employer, or other person under whom they operate or from whom they obtain the tangible personal property sold by them, regardless of whether they are making sales on their own behalf or on behalf of the dealer, distributor, supervisor, employer, or other person. The [D]epartment may also treat the dealer, distributor, supervisor, employer, or other person as a retailer for purposes of this chapter.

§ 12-36-70 (emphasis added).

> "Sale" and "purchase" mean any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including:
>
> (1) a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment, including installment and credit sales;

(2) a rental, lease, or other form of agreement;

(3) a license to use or consume; and

(4) a transfer of title or possession, or both.

§ 12-36-100.

First, we hold the statutes at issue were not ambiguous and therefore do not require us to resolve any substantial doubt in Amazon Services' favor.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *see also McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). "The usual rules of statutory construction apply to the interpretation of tax statutes." *Multi-Cinema, Ltd. v. S.C. Tax Comm'n*, 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987). "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Alltel Commc'ns, Inc.*, 399 S.C. at 321, 731 S.E.2d at 873 (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936)). However, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

In *Alltel*, our supreme court found the term "telephone company" was ambiguous because it was not defined in the statute. *Alltel Commc'ns, Inc.*, 399 S.C. at 316, 321, 731 S.E.2d at 870, 873. Here, however, the relevant terms—"seller," "business," and "sale"—are terms defined in the statute and we find there is no substantial doubt the definitions provided in the Act capture Amazon Services' activities. We therefore conclude the Act was not ambiguous. *See Rent-A-Ctr. E., Inc.*, 425 S.C. at 589, 824 S.E.2d at 221 (holding section 12-36-910(A) was unambiguous and therefore the ALC "was in no position to apply rules of statutory

interpretation" and did not err in failing to construe it in the taxpayers' favor). Thus, there is no ambiguity to resolve in Amazon Services' favor.

Amazon Services further asserts the Department "told the legislature via sworn testimony that there was doubt that the statute could be applied to online marketplace facilitators like Amazon Services," and that the legislature specifically amended the statute in 2019 "to provide the clarity that the Department admitted was missing." Amazon Services argues this testimony confirmed the statute needed to be changed to impose sales tax obligations upon marketplace facilitators and demonstrated the reasonableness of Amazon Services' interpretation. Amazon Services argues this showed the Act was ambiguous and should therefore be construed in its favor. We disagree.

"When the Legislature adopts an amendment to a statute, this [c]ourt recognizes a presumption that the Legislature intended to change the existing law. Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) (citation omitted).

> We recognize the rule of construction that the adoption of an amendment which materially changes the terminology of a statute under some circumstances indicates persuasively and raises a presumption that a departure from the original law was intended. However, like all rules of construction, the presumption is merely an aid in interpreting an ambiguous statute and determining the legislative intent.

N. River Ins. Co. v. Gibson, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964).

We acknowledge the General Assembly amended the Act in 2019 to expressly include marketplace facilitators. *See* Act No. 21, 2019 S.C. Acts 101-02. It was titled:

> An act to amend the code of laws of South Carolina, 1976, by adding section 12-36-71 so as to define "marketplace facilitator"; to amend sections 12-36-70, 12-36-90, and 12-36-130, all relating to sales tax

> definitions, so as to further inform marketplace facilitators of their requirements; and to amend section 12-36-1340, relating to the collection of sales tax by retailers, so as to further inform marketplace facilitators of their requirements.

Id. However, as we stated, we hold the Act is unambiguous and therefore we need not "look for or impose another meaning" beyond the plain language of the Act. *See Paschal*, 317 S.C. at 437, 454 S.E.2d at 892. Further, the 2019 act contained prefatory language stating it "shall not be construed as a statement concerning the applicability of the [Act] to any sales and use tax liability in matters currently in litigation or being audited." Act No. 21, 2019 S.C. Acts 102. Thus, we need not consider either the Department's statements made in the context of the proposed amendments to the Act or the amendments themselves in deciding this issue. *See N. River Ins. Co.*, 244 S.C. at 398, 137 S.E.2d at 266 (opining that the presumption that the adoption of an amendment that materially changes the terminology of a statute means a departure from the original law was intended "is merely an aid in interpreting an ambiguous statute and determining the legislative intent"). Instead, we consider the language of the Act as it existed in 2016. Regardless, the use of the words "further inform" in the title of the 2019 act to amend the Act indicates the Act already encompassed persons with business models like those of Amazon Services. Based on the foregoing, we hold the statutes at issue were not ambiguous and therefore there is no substantial doubt that would require resolution in Amazon Services' favor.

As to Amazon Services' contention the ALC stated the Act was not clear, we hold the ALC was not bound by this statement because the ALC made this observation during the hearing but made no such finding in the written order. *See Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. The written order is the trial judge's final order and as such constitutes the final judgment of the court." (citation omitted)).

Next, we find the evidence supports the ALC's finding that Amazon Services was engaged in the business of selling tangible personal property at retail and was therefore responsible for collecting and remitting sales tax on such transactions pursuant to section 12-36-910(A).

As an initial matter, Amazon Services argues that it and Amazon Payments are separate entities and the actions of Amazon Payments are not attributable to Amazon Services. It asserts that when a customer purchases a product from a third-party seller, Amazon Payments—not Amazon Services—receives the sales proceeds and then remits those funds to the third-party seller. It contends the ALC incorrectly attributed Amazon Payments' actions to Amazon Services with no justification for "piercing the corporate veil." We reject this form-over-substance argument. *See Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978) ("In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding." (quoting *Helvering v. Lazarus & Co.*, 308 U.S. 252, 255 (1939))); *see also Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960) (setting aside the formal structure of the contractual arrangements of the company and holding "[t]o permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance"). In addition, the Act provides "any group or combination acting as a unit" is a "person" within the meaning of the Act. *See* § 12-36-30. Even the BSA treats these entities as the same because it refers to Amazon Services and Amazon Payments as "we." Thus, we find the ALC did not err in treating the actions of Amazon Payments as the actions of Amazon Services.

Both parties argue *Travelscape* should be read in their favor. We find *Travelscape* provides only limited guidance. There, the operator of Expedia.com (Travelscape) negotiated a rate for hotel rooms with hotels, offered those hotel reservations to customers for booking on Expedia.com, and charged the customer's credit card for the transaction. 391 S.C. at 95, 705 S.E.2d at 31. After the customer checked out of the hotel, the hotel invoiced Travelscape for the net room rate and sales tax owed by the hotel. *Id.* Travelscape would then remit the net room rate and tax recovery charge to the hotel but retained facilitation and service fees. *Id.* at 95-96, 705 S.E.2d at 31. Travelscape did not pay sales tax on these fees. *Id.* at 96, 705 S.E.2d at 31. Our supreme court rejected Travelscape's argument that it was not "in the business of furnishing accommodations" within the meaning of section 12-36-920(E) because it did not own or operate hotels. *Id.* at 99, 705 S.E.2d at 33. Travelscape argued it was "only an intermediary providing hotel reservations to transients and d[id] not physically provide sleeping accommodations." *Id.* Our supreme court, however, concluded the definition of "furnish" encompassed "the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel reservations to transients for consideration." *Id.* at 101, 705 S.E.2d at 34. The import of the *Travelscape* decision with respect to this case is that our

supreme court interpreted section 12-36-920(E) of the Act broadly. We likewise interpret section 12-36-910(A) broadly.

Because section 12-36-20 itself defines "business" broadly, we hold the record shows Amazon Services' activities in connection with third-party sales on the Marketplace were with the object of achieving a profit or advantage. *See* § 12-36-20 ("'Business' includes all activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect*." (emphasis added)). Specifically, Amazon Services' agreement with third parties required the third-party sellers to pay a per-item fee—the Referral Fee—based upon a percentage of the item's sales price and the category of the item sold. This is a profit from the third-party seller's sale of the item. *See id.* The restrictions and requirements placed upon third-party sellers in the Marketplace give Amazon Services an advantage over other sales channels. *See id.* For instance, the fact a third-party seller must offer its items at a price at least as low as it offers such item through any other sales channel is designed to ensure the buyer purchases the item from the Marketplace, thus giving Amazon Services an indirect advantage over the other sales channels.

Next, we hold Amazon Services is a seller within the meaning of section 12-36-70. Amazon Services is the only party a buyer encounters during the sales transaction. The buyer receives a confirmation from Amazon and Amazon conducts the transaction. Amazon Services, through Amazon Payments, processes the transaction, holds the funds, and remits those funds (less its fees) to the seller. Amazon Services, through Amazon Payments, has control over these funds until they are remitted to the third-party seller on a biweekly basis. The BSA provides that Amazon Payments may invest the funds and the third-party seller is not entitled to any interest. Although the items sold may be owned by the third-party, section 12-36-70 does not require the seller own the goods sold. We find the foregoing demonstrates Amazon Services is a seller under section 12-36-70.

Further, we find these transactions constitute sales as defined by 12-36-100 because Amazon Services receives payment in exchange for the items even if the items are not in its physical possession. Regardless of whether Amazon Services has title or possession of the items, it requires the third-party seller to send the items to the purchaser or refund the sale if it does not do so. Thus, Amazon Services effects the transfer of the goods and receives consideration. Although it remits the proceeds to the third-party seller, it retains the fees that the third-party seller is responsible for paying to it for the transaction, including the Referral Fee

based upon the price of the item. Accordingly, we hold the definition of sale in section 12-36-100 encompasses these transactions.[9]

We reject Amazon Services' argument that it is merely a service provider. The parties do not dispute that customers making purchases on the Marketplace are buying goods, not services. Thus, we hold substantial evidence supports the ALC's finding Amazon Services is a service provider only with respect to its relationship to the third-party seller. *See Boggero v. S.C. Dep't of Revenue*, 414 S.C. 277, 285, 777 S.E.2d 842, 846 (Ct. App. 2015) ("[T]he analysis under the true object test focuses on factual questions; namely, whether the customer's purpose for entering the transaction was to procure a good or a service.").

Amazon Services further argues the ALC lacked a legal basis for applying the novel concept of a "point of sale" and argues the ALC erred by finding it had a "consignment-type" relationship with the third-party sellers. It asserts its relationship does not function like a consignment relationship because it does not control the inventory, decide what to sell, or set the price. The ALC analogized the sales at issue here to consignment sales. The ALC additionally found Amazon Services accepts customer payments at the point of sale—i.e., at the time the customer purchases the product—for all transactions on the Marketplace. Consideration of these concepts, although illustrative, is not necessary in determining whether Amazon Services was in the business of selling within the meaning of the Act. We find the ALC considered these concepts for purposes of illustrating the practical aspects of sales occurring on the Marketplace in applying the facts of this case to the Act. We therefore conclude the ALC's application of these concepts does not require reversal. *See Cox v. Cox*, 290 S.C. 245, 248, 349 S.E.2d 92, 93-94 (Ct. App. 1986) (holding the burden is on the appellant to show the trial court committed reversible error).

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[9] We note that, as the ALC observed, because Amazon Services exercises control over the transaction, third-party sellers do not have the opportunity to collect sales tax when the transaction occurs; therefore, without Amazon Services collecting the tax, it is unlikely it would ever be collected. This would not effectuate the legislative intent of the Act. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.").

Amazon Services additionally argues that in South Carolina Revenue Ruling 18-14,[10] the Department took the position that third-party sellers were the sellers of the products they sold in an online marketplace for purposes of calculating a remote seller's "gross revenue" from sales in South Carolina to determine if the requisite nexus required under *Wayfair* existed. Amazon Services asserts this interpretation demonstrates the reasonableness of its own interpretation of the statute. We find this argument is unpreserved because the ALC did not address this argument in its final order and Amazon Services did not seek reconsideration of this issue. *See Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration."); *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 560-63, 677 S.E.2d 582, 584-86 (2009) (holding rule 59(e), SCRCP, motions to reconsider are permitted in ALC proceedings and often required for issue preservation purposes). Regardless, Revenue Ruling 18-14 states,

> [U]nder South Carolina sales and use tax law, the sales made via [a] marketplace are sales by the marketplace, and the marketplace is required to . . . remit the sales and use tax on the marketplace's 'gross proceeds of sales,'[[11]] which [would] include[] the . . . sales of products owned by [a] remote seller but sold by the marketplace.

In other words, the ruling treats online marketplaces as sellers in accordance with section 12-36-70 and states they are required to collect and remit sale and use tax under the Act. Therefore, Revenue Ruling 18-14 does not support Amazon Services' position.

Finally, we are not persuaded by Amazon Services' reference to the tax laws of other jurisdictions. Citing to laws that were passed between 2017 and 2019 in other states, Amazon Services contends that as of June 2020, thirty-six other states

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[10] S.C. Dep't of Revenue, S.C. Rev. Rul. 18-14, Retailers without a Physical Presence ("Remote Sellers") - Economic Nexus (2018), 2018 WL 4944851 (stating the Department's position regarding remote sellers in accordance with *Wayfair*, 138 S. Ct. at 2099, and section 12-36-70).

[11] § 12-36-90 (defining gross proceeds generally as "the value proceeding or accruing from the sale, lease, or rental of tangible personal property").

had passed "marketplace facilitator" laws and none of these states concluded a marketplace facilitator was liable for sales tax on third-party sales prior to the enactment of such laws. Amazon Services has failed to identify, which, if any, of these states had statutes substantially similar to sections 12-36-20, 12-36-70, and 12-36-910(A) in effect prior to the enactment of the marketplace facilitator laws. In its reply brief, Amazon Services cited to *Normand v. Wal-Mart.com USA, LLC*, 2019-00263 (La. 1/29/20), 340 So. 3d 615, which was not decided until after it filed its initial brief. In *Normand*, the Louisiana Supreme Court held the trial court erred by concluding the online marketplace was a "dealer" such that it was required to collect and remit sales tax under Louisiana law. *Id.* at pp. 19-26, 340 So. 3d at 627-32. We find *Normand* distinguishable because the statutes at issue there do not contain the same language as the statutes at issue here. *Compare* La. Stat. Ann. § 47:301(4)(b) ("'Dealer' includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in a taxing jurisdiction. 'Dealer' is further defined to mean: . . . (b) Every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in the taxing jurisdiction, tangible personal property as defined herein."), *with* § 12-36-910(A) (2014) ("A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person *engaged . . . in the business of selling* tangible personal property at retail." (emphasis added)), § 12-36-20 ("'Business' includes all activities, with the object of gain, profit, benefit, or advantage, *either direct or indirect*." (emphasis added)), *and* § 12-36-70(1)(a) (providing a "seller" includes every person "selling or auctioning tangible personal property *whether owned by the person or others*" (emphasis added)).

Based on the foregoing, we hold Amazon Services is a person engaged in the business of selling tangible personal property at retail with respect to sales occurring on the Marketplace and is therefore required to collect and remit sales tax on such sales. We further hold Amazon Services is a seller within the meaning of section 12-26-70 with respect to third-party sales on the Marketplace and that such transactions constitute sales under section 12-36-100. Accordingly, we affirm the ruling of the ALC.

II. Constitutional Violations

Amazon Services argues the Department's attempt to collect sales taxes from Amazon Services for third-party sales during the first quarter of 2016 violates the South Carolina and federal constitutional guarantees of due process. Citing to *FCC. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), it argues the Department's assessment was an attempt to retroactively apply the 2019 amendments to Amazon Services and thus violated the constitutional requirement of fair notice. Amazon Services next asserts that applying the 2019 amendments only to Amazon Services violated the constitutional guarantee of equal protection. It contends the Department singled out Amazon Services for retroactive enforcement of its interpretation. Amazon Services argues the Department's director admitted to the General Assembly that the current lawsuit would "pull up some retroactivity." Amazon Services argues the director testified that only Amazon Services had been forced to collect sales taxes on third-party sales before the 2019 amendment took effect. Amazon Services contends "[t]he Department had not attempted to collect sales tax from [it] or any other marketplace facilitator for third-party sales during the more than [fifteen]-year period that Amazon Services had been operating its marketplace." We disagree.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox Television Stations, Inc.*, 567 U.S. at 253. "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.*; *see also* U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."). "It requires the invalidation of laws that are impermissibly vague." *Fox Television Stations, Inc.*, 567 U.S. at 253. "[T]he void for vagueness doctrine addresses at least two . . . due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.*

We conclude the ALC did not err by finding Amazon Services has failed to show any constitutional violations. First, we find *Fox Television Stations* is inapplicable. There, the United States Supreme Court rejected the Federal Communications Commission's (the FCC's) attempt to retroactively apply a change in policy to two television stations for airing content that would have been permissible under the

former policy. *Id.* at 249-55. Prior to issuing the determinations at issue in that case, the FCC had issued a ruling in 2004 in which it changed a preexisting indecency enforcement policy regarding the use of fleeting expletives. *Id.* at 248. The prior policy distinguished between isolated and repeated broadcasts of indecent material and determined that as to the use of expletives, "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Id.* at 246 (quoting *In the Matter of Pacifica Found., Inc. d/b/a Pacifica Radio L.A., Cal. of Kpfk-Fm L.A., Cal.*, 2 F.C.C. Rcd. 2698 (1987)). In the ruling changing the policy, the FCC stated "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Id.* at 248. In addition, the FCC had released prior decisions that declined to find isolated and brief moments of nudity actionably indecent. *Id.* at 257. Given the FCC's prior decisions pertaining to brief nudity, the Court found the FCC "c[ould] point to nothing that would have given [the station] affirmative notice that its broadcast [of a brief shot of nude buttocks] would be considered actionably indecent." *Id.* Even though the broadcasts at issue took place in 2002 and 2003—prior to the 2004 ruling—the FCC applied the indecency policy established in the 2004 ruling to the earlier broadcasts and found the stations violated the policy by broadcasting fleeting expletives and nudity. *Id.* at 249. In vacating these determinations, the Supreme Court found, "The [FCC] failed to give [the stations] fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent." *Id.* at 258. Here, however, no evidence shows the Department attempted to retroactively apply the new law or policies to Amazon Services' conduct. Rather, the Department applied the sales tax law that was in place at the time. Thus, we find the ALC did not err in finding Amazon Services failed to show the Department violated the constitutional requirement of fair notice.

Amazon Services' argument the Department had not attempted to collect sales tax from it prior to 2016 is technically correct, but it ignores the context of the Department's actions. First, prior to the 2018 *Wayfair* decision, the Department could not lawfully collect sales tax from a seller that had no physical presence in this state. *See Wayfair, Inc.*, 138 S. Ct. at 2099 (holding a physical presence is no longer required to establish a substantial nexus with the taxing state); *see also Quill Corp.*, 504 U.S. at 309-18 (requiring a physical presence for a business to have a substantial nexus with a taxing state). Therefore, until Amazon Services established a physical presence in this state by opening its distribution centers, it

was not subject to the Act. However, when it established such presence, the Moratorium ensured the Department would not collect any sales tax from it until the Moratorium expired. *See* § 12-36-2691(D)(1) (providing the Moratorium would cease to apply as of January 1, 2016). Once the Moratorium expired, the Department could—and did—impose sales tax upon Amazon Services' sales occurring on the Marketplace. This was not an attempt to retroactively apply subsequent legislation to Amazon Services' actions. Rather, the Department applied the law that was in place at the time to Amazon Services' sales. The fact the legislature later modified the law to specifically include marketplace facilitators does not establish the Act failed to provide fair notice to Amazon Services that third-party sales occurring on the Marketplace would be subject to sales tax. Further, any statements the Department's director made in 2018 during hearings before the legislature are irrelevant to the Department's 2016 audit and our consideration of the law as it existed at the time of such audit. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged."); *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose."). Accordingly, we reject this argument.

Further, we find Amazon Services has failed to show an equal protection violation. "The South Carolina Constitution provides that no 'person shall be denied the equal protection of the laws.'" *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) (quoting S.C. Const. art. I, § 3); *see also* U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). "[T]o establish an equal protection violation, a party must show that similarly situated persons received disparate treatment." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998). "Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). "To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." *Id.* Amazon Services failed to present any evidence specifically identifying other online marketplaces and showing such

marketplaces were similarly situated persons. Further, Amazon Services failed to present any evidence that any such similarly situated persons received disparate treatment. Thus, we find Amazon Services failed to show an equal protection violation. Based on the foregoing, we find the ALC did not err in concluding Amazon Services failed to show any constitutional violations on behalf of the Department.

CONCLUSION

For the foregoing reasons, the ALC's order is

AFFIRMED.

KONDUROS, J., and LOCKEMY, A.J., concur.