RECEIVED
Jul 25 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

_____

Case No. 2018-CP-10-02764
Appellate Case No. 2021-001395

_____

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated.....Appellant,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks.....Respondent.

FINAL BRIEF OF APPELLANT

Ross A. Appel, Esq., SC Bar No. 79149
Clayton B. McCullough, Esq., SC Bar No. 13722
McCULLOUGH ▪ KHAN ▪ APPEL
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com
clay@mklawsc.com

James L. Ward, Jr., Esq., SC Bar No. 13453
McGowan, Hood & Felder, LLC
10 Shem Drive, Suite 300
Mount Pleasant, SC 29464
(843) 388-7202
(843) 388-3194 (fax)
jward@mcgowanhood.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

1. Whether the Trial Court erred by failing to understand the applicable legal framework in evaluating the lawfulness of municipal utility rates.

2. Whether the Trial Court erred by misapplying the standard of review for a motion for summary judgment.

STATEMENT OF THE CASE

On June 1, 2018, Appellant Snee Farm Lakes Homeowner's Association, Inc. (Appellant) filed a class action lawsuit against Respondent the Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks (Respondent or MPW) seeking declaratory relief and refunds for previously paid excessive and unlawful Basic Facility Charges ("BFCs"). (R. pp. 53-67).

On July 5, 2018, Respondent moved to dismiss. (R. pp. 68-72). On November 30, 2018, the Honorable Jennifer McCoy denied Respondent's motion to dismiss. (R. p. 1).

On January 24, 2019, Appellant moved for class certification. (R. pp. 73-78). The Honorable Bentley Price granted class certification by order dated June 14, 2019. (R. pp. 2-14). Respondent moved to reconsider the order granting class certification (R. pp. 79-83), which Judge Price denied by order dated August 27, 2019. (R. p. 15). Respondent appealed the order granting class certification (R. pp. 98-119). Appellant moved to dismiss the appeal as interlocutory. (R. pp. 120-131), which the Court of Appeals granted on December 5, 2019 (R. pp. 16-17).

The case was designated as complex and assigned to the Honorable Roger Young by order dated April 9, 2020. (R. pp. 18-19). Appellant filed an Amended Complaint on September 1, 2020, which revised the Class definition. (R. pp. 147-158). Appellant subsequently moved to have the revised class definition and the class Notice Plan approved. (R. pp. 173-177). Judge

Young approved the revised class definition and Notice Plan by order dated September 17, 2020. (R. pp. 20-23). The certified class (the "Class") is defined as:

> All current and former MPW commercial customers who paid excessive BFC in excess of $100, defined as a customer's average daily usage from January 1, 2014 (or any later date of service inception) to December 31, 2019 being less than that customer's assigned REU.

Class Notice was sent to 526 Class members beginning in October 2020.[1] Class members were given the opportunity to request exclusion from the Class ("opt out"), but none chose to do so.

Appellant's expert estimated, based on the data provided by Respondent, that the excessive BFCs associated with the Class definition and period amounts to $1,918,471 in excessive Water BFCs and $3,639,828 in excessive Wastewater BFCs, for a total of $5,558,299.

Judge Young ordered the parties to mediation, which took place on November 12, 2020 with the Honorable Costa M. Pleicones, former Chief Justice of the Supreme Court of South Carolina. The mediation resulted in an impasse. (R. pp. 619-620).

The case was reassigned to the Honorable R. Markley Dennis on January 6, 2021, and trial was set for the week of May 10, 2021. On March 9, 2021, Respondent moved for summary judgment. (R. pp. 185-192). A hearing was held April 16, 2021. Prior to the hearing, Appellant filed a Memorandum in Opposition along with twenty-six exhibits. (R. pp. 193-618). Respondent filed a Reply along with eight exhibits. (R. pp. 621-710).

[1] Class counsel worked with Epiq Class Action & Claims Solutions, Inc. to effectuate notice. On September 22, 2020, Epiq received one data file from Class counsel, which contained 724 records. Epiq rolled up the data and combined exact name and addresses, which resulted in 526 total Class member records. Of the 724 data records, 526 Class member records had a physical mailing address and were sent notice via direct mail. Decl. of Cameron R. Azari, Esq. on Implementation & Adequacy of Notice Plan (filed February 1, 2021).

Judge Dennis granted summary judgement in favor of Respondent by order dated July 12, 2021. (R. pp. 24-44).

Judge Dennis's order states that "Plaintiff has not met the burden of showing Respondent's BFC rate structure is unreasonable[2]" because "Plaintiff has presented no allegations regarding *the quality of service* it has received or continues to receive." (R. p. 32). The order goes on to reference Appellant's expert's testimony and interpreted it as suggesting that "simply because the BFC is based on potential future demand or a reservation of capacity rather than actual use does not prove the rate system is unreasonable." (R. p. 35).

Judge Dennis also granted summary judgment to Respondent on three of its affirmative defenses, namely the statute of limitations, voluntary payment doctrine, and failure to mitigate damages. In so doing, it concluded that the water bill "contains the number of REUs assigned to the customer's account as well as the gallons consumed in the particular billing cycle[and t]he back of each bill notes that 'one REU equals 9,200 gallons per month'" and based on this information, Plaintiff should have discovered the inequity at least three years prior to the filing of this lawsuit. In considering the voluntary payment doctrine, the court declined to consider that water is necessary for life and stated "[t]he point is not that the Plaintiff is paying for service it needs, but rather Plaintiff paid without ever asking that its rate be lowered or its REU reduced." It then concluded "Plaintiff has made no allegations of fraud, duress or extortion" and therefore it had no ability to challenge payment it had made. (R. p. 41). Finally, when concluding Appellant

[2] This conclusion also misstates a plaintiff's burden. On a motion for summary judgment, as the non-moving party Appellant was not required to prove its case, instead it only need present a scintilla of evidence. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.").

had failed to mitigate damages, it held Appellant "could have determined that [it] had more REUs assigned to its account when compared with [] actual water usage" and further that Appellant should have at least contacted Respondent to reduce its REU after "receiving the 2018 letter." (R. p. 38).

On July 21, 2021, Appellant filed a motion to alter or amend, arguing that Judge Dennis had improperly stated the law and failed to adhere to the standard or review. (R. pp. 711-919). Judge Dennis denied the motion without a hearing by order dated November 23, 2021. (R. pp. 45-52).

In the order, Judge Dennis concluded that the way the rates were set were not at issues because "the BFC collected is used to maintain and keep the water and sewer system running." (R. p. 46). It went on to state that Appellants' expert "Mantz testified 1) that a water system should charge a BFC based on something other than actual volumetric use – that to do so is the recommended best practice and 2) that a system whereby the BFC is based on a water meter size is reasonable and acceptable." (R. p. 48). The order similarly rejected the arguments on the affirmative defenses.

Appellant timely filed and served its Notice of Appeal on December 2, 2021.

STATEMENT OF FACTS

Appellant and a certified class of similarly situated commercial ratepayers (the "Class") claim they have been overcharged BFCs by Respondent. This case implicates the following important, yet surprisingly unsettled, question of law: What, if any, legal constraints govern municipal water and sewer ratemaking? This case provides this Court an opportunity to clarify the law on an issue impacting the daily lives (and wallets) of countless South Carolina residents and businesses across the State.

Respondent is a municipal water and sewer utility established pursuant to a Town of Mount Pleasant, South Carolina ordinance and state law. As a municipal utility, it enjoys a monopoly in its service area for providing water and sewer services. Unlike investor-owned utilities, Respondent's rates are not subject to review and regulation by the Public Service Commission. Instead, Respondent's rates are set by elected politicians (the Commissioners) with no independent, third-party review whatsoever.

Appellant is a non-profit homeowners' association that owns, manages, and maintains the common elements articulated in its restrictive covenants.[3] (R. pp. 220-294). Appellant and the Class obtain water and wastewater services through Respondent.

Respondent's monthly bills consist of two distinct line items, namely (1) Volumetric Rates and (2) BFCs. (R. pp. 549-550). Volumetric Rates reflect each customer's actual, monthly usage as determined by their meter reading. (R. pp. 303-305). This case has nothing to do with the Volumetric Rates.

Rather, this case deals solely with BFC overcharges. Respondent's Cost Recovery Policy 7.2 defines BFC as follows:

> *Water and Wastewater Basic Facility Charges will recover an amount equal to or greater than the sum of the annual Renewal and Replacement (R&R) debt service expense, a portion of the capital expenditures for the system, a portion of operation and maintenance costs, and a portion of general administrative costs.*
>
> The Commission incurs fixed costs for providing services to its customers including, but not limited to, Renewal and Replacement (R&R) debt service, capital costs, operating and maintenance costs, and general administrative costs.
>
> The BFC is a charge for the reservation of capacity based on the total active REUs assigned to a property. To ensure the purchased capacity remains available, all BFCs must be paid.

[3] Snee Farm Lakes has a single water meter. The individual unit owners are neither separately metered nor MPW customers. The HOA is MPW's customer.

(R. pp. 303-304) (emphasis in original). Respondent's expert William Zieburtz explained the purpose of a base charge as follows:

> Q. What is a true base charge?
>
> A. A true base charge is a reference to a fixed fee that captures some of the costs of utility operation typically including a portion of administrative costs and often including a portion of capital costs and sometimes other types of costs and charges that amount on a monthly basis regardless of use and including cases where there is no use at all.
>
> Q. So this is essentially the same concept that Mount Pleasant Waterworks has with respect to its BFC, it's just a base charge?
>
> A. Yes.

(R. p. 993, lines 10-22). Utilities use base charges to promote regular and predictable cash flow as part of the rate base.

Respondent calculates a ratepayer's monthly BFCs based on the number of Residential Equivalent Units ("REU") assigned to its account. REU are a unit of measure equal to 300 gallons per day or 9,000 gallons per month. (R. pp. 509-514). According to Appellant's expert Bryan Mantz, Respondent's base charge practices deviate from most utilities who calculate base charges according to meter or pipe size – not pre-service inception use assumptions based on REU. (R. p. 1006, lines 3-10) (observing that Respondent's BFC practices are not discussed in the American Water Association M1 Manual and other industry authorities).

Under Respondent's system, a ratepayer's REU assignment occurs *prior to* the inception of service and any actual use records. The REU assignment derives from complex engineering assumptions, provided to ratepayers by Respondent, aimed at forecasting estimated water and wastewater demand. (R. pp. 358-366). The customer pays Respondent "impact fees" based on the number of REU assigned based on its proposed use. Respondent defines "impact fees" as follows:

> Impact fees are charges assessed against new development to recover part of the capital costs of expanding the water and wastewater infrastructure to serve them. Considered as a capital-recovery charge, impact fees allow recovery of the capital costs of developing the new service directly from the customers who will benefit from the service. proportionate share of each customer's infrastructure demands on the system.

(R. pp. 307-308). As Respondent's rate consultant put it, "the impact fees are what a customer pays to 'reserve' their rights to capacity in the system." (R. pp. 432-434).

Once REU are purchased by way of paying impact fees, Respondent recognizes each ratepayer's REU as assets corresponding to purchased capacity in the system. Clay Duffie, Respondent's longtime General Manager, testified at his deposition as follows: "Well, the capacity, . . . is assigned to the property, so it is an asset that is assigned to the property." (R. p. 617, lines 20-22). A commercial customer who changes its use and requires more capacity can pay additional impact fees to increase its capacity reservation. (R. pp. 509-514).

As previously mentioned, Respondent calculates a ratepayer's monthly BFCs based on the number of REU assigned to its account from the impact fee stage. Unfortunately for commercial ratepayers like Appellant and the Class, Respondent does not periodically review and update these REU assignments to ensure BFCs are consistent with actual use data, as opposed to pre-service inception estimates. This practice, called administrative "right-sizing," is a common feature for utilities who calculate their base rates on REU. (R. pp. 446-508). Appellant's expert identified several utilities who periodically right size on their own without placing this responsibility on ratepayers. (R. p. 1005, lines 20-25). Utilities possess the resources and expertise to efficiently right-size accounts system-wide, as this is a straightforward, data-driven analysis.

Rather than handling the right sizing itself, Respondent shifts that burden on to individual ratepayers via obscure Policies 5.3.2 and 5.3.3, which allow ratepayers to request an REU reduction. These policies place a ratepayer between the horns of a dilemma. If a ratepayer elects

to reduce its number of assigned REU, to bring BFCs more in line with actual usage and demand, it must abandon REU previously purchased via impact fees – a capacity asset, according to Respondent. Should a ratepayer subsequently wish to increase the number of REU, it must repay the impact fees it previously purchased and was forced to abandon earlier. (R. pp. 509-514).

The overcharges at issue in this case are caused by the fact that Appellant and the Class use significantly less water and wastewater than their assigned REU and, therefore, pay excessive BFCs. In other words, they are paying BFC based on outdated and inaccurate use assumptions – not actual use records. Respondent, at all times relevant, possessed Appellant's and the Class's actual consumption data, but it failed to right-size their accounts and continued to charge BFC based on outdated and inaccurate use assumptions.

Respondent has known about these specific BFC overcharges for over a decade. In 2014, Respondent hired Raftelis Financial Consultants, Inc., one of the nation's leading utility experts, to determine "updated water and wastewater [REUs] for utility planning and rate making purposes." (R. pp. 319-320). In the engagement letter, George Raftelis, himself a nationally renowned authority on water and wastewater rate making, explained the basis of this project to Respondent's Chief Financial Officer Mark Coffin as follows:

> **MPW has determined that certain commercial customers have been assigned an <u>incorrect number of REUs</u>**, which is a[n] equivalent measure of demand used to quantify utility customer loadings and identify future capacity necessary to accommodate new customer demands.
> …
> **<u>These inconsistencies present complexities an[d] potential customer inequities</u>** in estimating user charge revenues and defining the current and future levels of service for calculating impact fees.

(R. pp. 319-320) (emphasis added).

The resulting study confirmed Mr. Raftelis' suggestion that Respondent had assigned numerous commercial ratepayers "incorrect number of REUs." Specifically, CDM Smith's analysis revealed that over the past seven years a staggering 40% of all REU assigned to commercial ratepayers went consistently unused. (R. p. 346, lines 5-24; R. p. 347, lines 6-10). Specifically, "approximately 700 commercial customers used less than their allocated REUs in 2013 and approximately 90 customers used more than their allocated REUs in 2013." (R. pp. 323-324). Appellant and the Class find themselves amongst the former group.

Armed with this information, Respondent *only* contacted the latter, smaller number of commercial ratepayers who had been *exceeding* their allocated REU and paying less than their usage should have required (the winners). (R. p. 350; R. p. 352). Respondent reached out to these "undersized" customers, the very same customers identified in the 2014 report, to recommend they purchase additional impact fees to bring their REU count more in line with actual use. (R. p. 618, lines 12-17). During this time, Respondent chose not to inform the larger number of commercial customers like Appellant and the Class that they were paying to cover significantly more of Respondent's fixed costs than their actual use could equitably allow (the losers).

However, in 2014, a commercial customer who was changing its use from a restaurant to a spa discovered that although it had been using only four REU for years, Respondent had been charging it for fifteen REU. (R. p. 353). Understandably upset at this overcharge never being corrected, the customer demanded a refund of the overpayment. (R. p. 353). Respondent *agreed* and refunded the excess BFCs collected over the previous decade. (R. p. 353). Appellant and the Class seek similar treatment and refunds for the excessive BFC they have paid over the years.

Concerned that word might get out, Respondent finally audited the accounts for the purpose of identifying commercial customers using *less than their assigned REU*, concluding "[a] recent

audit of commercial accounts revealed that a portion of customers had more REUs assigned to their account than they were using in their highest quarter of the year." (R. p. 368); (R. p. 372); (R. p. 421); (R. p. 422).

Respondent's own internal audits identified several hundred commercial ratepayers, including Appellant, who had been paying excessive BFCs for years.

Once this analysis was completed, Respondent finally notified ratepayers, including the Appellant, who had long been charged excessive BFCs relative to their actual use and demand records. Respondent's letter to Appellant states, "[o]ur records show that your assigned REUs exceed the gallons you are using. You are currently paying Basic Facility Charges for each REU assigned to your account." It goes on to state that "[y]our average monthly consumption for your highest quarter is 697,383 gallons," [4] which equates to 76 REU – far less than the 148 REU assigned to Appellant's account since 1982.

The letter then explains the bottom-line impacts to Appellant as follows: "[y]ou are currently paying $3,418.80 per month in Basic Facility Charges. Lowering your REUs to the average month of your highest quarter would lower your monthly Basic Facility Charges to $1,755.60 per month." The letter concludes with the following "guidance," which reveals the prejudicial dilemma Respondent's policies impose on its captive ratepayers.

> MPW's Policy 5.3.3 - Impact Fee Management can be found on our website. It explains in detail the management of Impact Fees and REUs.

[4] Appellant disputes MPW's "highest quarterly average" approach for ascertaining what constitutes proper REU demand sizing. Per the certified Class definition and Plaintiff's expert Bryan Mantz's analysis, the proper analytical approach is "average daily use" during the Class period. (R. pp. 551-610). Moreover, the REU concept pertains to average daily flow – not any "peaking" concept. According to Mr. Mantz, Plaintiff's average daily usage during the class period correlates to 72 REU as opposed to 76 REU as stated in MPW's letter. Mr. Mantz's analysis is consistent with MPW's approach when it calculates REU at the impact fee stage. (R. pp. 358-366).

> If you reduced the number of REUs or if the REUs have lapsed you may adjust active REUs once per year to a number that does not exceed the REUs originally assigned to the property. To add any reduced or lapsed REUs back to the property, impact fees or back BFCs must be paid at MPW's current rate in accordance with Policy 5.3.2 (whichever is less).

(R. pp. 354-357).

Appellant refused to abandon the REU capacity assets it paid for and brought this action, seeking a declaratory judgment on the legality of Respondent's BFC practices and refunds of excessive BFCs paid.

While the aforementioned 2018 audit and notification campaign was underway, Respondent contemporaneously embarked on a review of its BFC policies and practices. The ensuing internal discussions revealed Respondent's own reservations about its BFC and REU management policies and practices.

For instance, in an e-mail from Respondent's counsel James Atkinson "Chip" Bruorton to Respondent's General Manager Clay Duffie about proposed revisions to the REU adjustment policies, Mr. Bruorton aptly questioned: "Did we not conclude that because the customer would have already paid impact fees on the original number of REUs that a capacity reservation fee or back payment for REUs **was not equitable**?" (R. pp. 528-539) (emphasis added). Despite Mr. Brourton's well-founded concerns, Respondent's inequitable policies have never been changed.

Similarly, George Raftelis, Respondent's preeminent rate consultant, testified at his deposition that it was improper to use the phrase "capacity reservation fee" in connection with BFC. (R. p. 546, lines 8-10; R. p. 547, lines 9-11) ("To me, the term 'capacity reservation fee' is not a relevant term in what we're talking about when we're dealing with BFCs."). Incredibly, he agreed the final two sentences of Policy 7.2 should be struck. (R. p. 548, lines 8-17). These sentences are as follows:

> The BFC is a charge for the reservation of capacity based on the total active REUs assigned to a property. To ensure the purchased capacity remains available, all BFCs must be paid.

However, just as Mr. Brourton's concerns were rejected by Respondent, Mr. Raftelis' recommendations were as well. These two sentences remain in Policy 7.2 today even though Respondent's expert said they should be struck.

Appellant's and the Class's claims echo Mr. Bruorton' s and Mr. Raftelis' critiques. If BFCs are not properly considered a "capacity reservation fee" and it is inequitable to require ratepayers to forfeit and repay impact fees to adjust their REU based on actual demand needs, there is no reason for Respondent not to have periodically right-sized accounts for the purposes of BFC rates. This would have ensured all ratepayers are charged a fair amount, pegged to actual use versus outdated assumptions, thus avoiding the BFC overcharges at issue in this litigation.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP. *Trousdell v. Cannon*, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002). Pursuant to Rule 56(c), SCRCP, summary judgment may only be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*. "If triable issues exist, those issues must go to a jury." *Mulherin-Howell v. Cobb*, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. *Tupper v. Dorchester Cnty*., 326 S.C. 318, 487

S.E.2d 187, 191 (1997). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Id.* In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988).

Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

ARGUMENT

Respondent has for years taken money from Appellant and the Class in an amount that far exceeds the cost of service it provides them and outstrips the benefits received. As discussed in detail below, this overcharge offends not only our foundational concepts of governance, but the law governing municipal utilities. Although the precise confines of the applicable law are unsettled, South Carolina law simply does not allow, as the trial court ruled, a municipal utility to simply charge whatever it wants and sidestep meaningful judicial review.

Rather, the relevant statutes and case law compel rates to be anchored by the actual cost borne by the utility to serve each ratepayer and the individualized benefit received by the ratepayer. The touchstone for setting rates must therefore be a ratepayer's real – as opposed to hypothetical – use of the system.

However, in granting summary judgement in favor of Respondent, the trial court neglected to mention, must less apply, the "user fee" statutes and case law governing municipal utility ratemaking. Rather, the trial court erroneously applied a general "reasonableness" test and engaged in a haphazard "apples to oranges" examination of other utilities who calculate their base

charges according to meter size rather than REU. This approach failed to take seriously Appellant's well-founded critique of Respondent's base charge practices, which wildly depart from industry norms according to both Appellant's and Respondent's experts.

This was legal error, and it clouded the lens through which the trial court viewed the evidence presented by Appellant at the summary judgment hearing. Instead of adhering to the standard of review and considering the facts in the light most favorable to the non-moving Appellant, the trial court mischaracterized testimony and settled on cherry-picked evidence on which it could hang its ill-founded legal theories.

When applying the appropriate inquiry, the evidence in the record demonstrates a material question of fact as to whether Respondent's ratemaking practices adhere to the legal framework in which it must operate. Appellant therefore asks that this Court reverse the trial court's grant of summary judgment and remand with clarification of the relevant legal standard.

I. The Trial Court Erred by Applying the Wrong Legal Framework to Evaluate the Lawfulness of Municipal Utility Rates.

Although this Court could simply reverse and remand because the trial court improperly weighed the evidence, incorrectly applying the summary judgment standard of review, that error emanates from the trial court's failure to apply the correct law governing municipal utility ratemaking. Because that issue shapes the question of whether Appellant proffered a mere scintilla of evidence, it warrants initial consideration.

The trial court failed to appreciate that water and wastewater utility charges such as the BFCs are "service or user fees" under Section 6-1-300(6) of the South Carolina Code. *See Azar v. City of Columbia*, 414 S.C. 307, 310, 778 S.E.2d 315, 317 (2015) ("The City admits the [revenue from water and sewer services] at issue fall within the definition of 'service or user fee' as the term is statutorily defined [under section 6–1–300(6)].").

As a service or user fee, BFCs must be "paid in return for a particular government service or program made available to the payer that *benefits the payer in some manner different from the members of the general public not paying the fee*." S.C Code Ann. § 6-1-300(6) (emphasis added). Additionally, section 6-1-330(B) prescribes that "[t]he revenue derived from a service or user fee imposed to finance the provision of public services *must be used to pay costs related to the provision of the service or program for which the fee was paid*" (emphasis added). These statutes impose a nexus requirement. Essentially, a service or user fee must (1) provide a specific benefit to those paying it and (2) the fees charged to each customer must correlate to the amount necessary to pay the costs associated with their service.

Aligned with these limitations are the statutes and case law addressed more specifically to the provision of water and wastewater service. The municipal commissioners of public works' enabling legislation reads as follows:

> The board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. It may supply and furnish water to citizens of the city or town and also electric, gas or other light and *may require payment of such rates, tolls and charges as it may establish for the **use** of water and light.*

S.C. Code Ann. § 5-31-250 (emphasis added). Furthermore, Section 5-31-670 of the South Carolina Code states municipal utilities may "furnish water to persons for ***reasonable*** compensation and charge a ***minimum and reasonable*** sewerage charge . . ." (emphasis added). So municipal utilities may charge only for a customer's "use" and the rates set must be guided by reasonableness. *Simons v. City Council of Charleston*, 181 S.C. 353, ___, 187 S.E. 545, 547 (1936) ("A waterworks is a public utility, and it makes no difference whether such utility be operated by a municipality or by a private corporation. Both are bound by the rule of reasonableness."); 94

C.J.S. Waters § 730 ("As a general rule, a municipality authorized by law to fix the rates to be charged for service from a water system operated by it is not free to exact whatever rates it may see fit, but must fix reasonable rates, or rates reasonably proportionate to the value of the service rendered, or bearing some relationship to the present or future cost of providing service" (footnotes omitted)).

Succinctly stated, the legal question at issue is not whether the challenged BFCs are merely "reasonable," from a *political perspective*, as the trial court held. At the summary judgment hearing, the trial court was clearly troubled by the prospect of second guessing the ratemaking decisions of politicians. The following excerpt from the hearing is instructive:

> And, Mr. Appel, I don't argue with one thing you have said. I agree with all of that, they could have done a lot of things, but they didn't. And the problem that I see you have, from my standpoint is, that's what the legislature said. Now, they can be unelected. You can run for that, just as you ran. You know, you can run for the body and say, Look, we need to change this, this is totally wrong. Let's vote on this.
>
> But the Court doesn't come in and say, No, no, folks, you elected persons, you can't do that. You need to find a better system, because this isn't fair to certain people here.
>
> I hear you. I just – my question is, How do I have the authority to tell an elected board this is what you – you have to use a different method. That's my – that's my concern.

(R. p. 965, line 19 – p. 966, line 9).

Though surely well intentioned, the trial court granted far too much deference to Respondent's ratemaking practices. Under South Carolina law, municipal utility ratemaking is not a purely political question. Rather, the aforementioned authorities provide a specific legal framework under which fees such as these are required to comply. This analysis must be anchored to actual use data and demand – not pre-service inception assumptions. S.C. Code Ann. § 5-31-250 (restricting municipal utility rates to the "use of water").

The trial court misunderstood the law and therefore failed to engage in the proper legal analysis. When examining the law surrounding service and user fees, it only addressed how the money collected is *spent*[5] and the quality of the service.[6] (R. p. 32). Wholly absent from the trial court's analysis was a discussion of the service or user fee statutes, namely sections 6-1-300(6) and 6-1-330(B), which mandate a nexus between the fees customers are being charged and benefit received in return. Those are the legal issues driving Appellant's and the Class's claims over excessive BFC – not how Respondent is spending its revenue or the quality of the water coming out the tap.

The trial court ignored the question of the *value* of the service received, relative to the rate being charged, which is the actual guiding principal. Appellant and the Class have alleged BFC overcharges – not water quality issues. Appellant and the Class are not required to allege some suspension in service or brown water from the tap to claim the rates are unreasonable. That conclusion would allow a municipality to charge whatever rates it fancies provided the water is clear and free flowing.

The trial court's analysis was therefore materially incomplete and reflects its failure to review Respondent's actions with the requisite incisiveness. This apparent hesitancy is especially concerning where the judiciary is the *only* check to a municipal utility's ratemaking power. Respondent's rates are neither reviewed nor approved by the Public Service Commission or other neutral, third-party body. Only the courts can ensure Respondent complies with South Carolina

[5] The Supreme Court's holding in *Azar* addressed the City of Columbia's spending practices but did not indicate the statutory limitations *only* applied to how the money was spent.

[6] In support of its position, the trial court relied on the proposition that "[i]n South Carolina the 'test of the reasonableness of rates established by a public service district is the service received.'" *H.A. Sack Company, Inc. v. Forest Beach Pub. Serv. District*, 272 S.C. 235, 238, 250 S.E.2d 340, 341 (1978) (citing *Simons v. City Council of Charleston et al*., 181 S.C. 353, 187 S.E. 545 (1936)). (R. p. 32. Neither of those cases reference the quality of the service.

law. Judicial oversight of government entities in neighboring branches remains a hallmark of our democracy that cannot be so lightly ignored. *See* The Federalist No. 78, at 404 (Alexander Hamilton) (The Gideon ed., 2001) ("It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rationale to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.").

Moreover, examining the care with which local governments are implementing their statutory authority has lately been a concern inviting greater scrutiny, particularly by the courts. In *Burns v. Greenville County Council*, 433 S.C. 583, 861 S.E.2d 31 (2021), which clarified the application of the same service and user fee statutes at issue here, the Supreme Court emphasized the important role of the courts, with the concurrence unequivocally stating that "[g]oing forward, courts will carefully scrutinize so-called 'service or user fees' to ensure compliance with section 6-1-300(6)." *Id.* at 590, 861 S.E.2d at 34 (Kittredge, J., concurring); *c.f.* Tony Bartelme, Glenn Smith, Joseph Cranney, and Avery G. Wilks *UNCOVERED: News deserts and weak ethics laws allow corruption to run rampant in SC*, THE POST AND COURIER, February 13, 2021 ("South Carolina has many islands of governance, and they are hotbeds of abuse. From the Upstate to the Lowcountry, and especially the rural areas in between, South Carolina is covered in fiefdoms of government that all but regulate themselves, avoiding scrutiny and other checks that prevent mischief.").

It is the province of the courts to say what the law is, and whether it has been offended. Appellant asks this Court to reverse the grant of summary judgment and remand for review under the proper legal standard.

II. The Trial Court Erred by Misapplying the Standard of Review for a Motion for Summary Judgment.

Compounding the error in misunderstanding to legal inquiry involved is the trial court's failure to review the evidence through the lens of summary judgment. Armed with the faulty legal standard discussed above, the trial court culled evidence tending to support Respondent's theory of the case instead of construing the facts and circumstances in the light most favorable to Appellant. This disregard for the standard of review similarly permeated the trial court's review of the affirmative defenses, which was undertaken with similar results-oriented discussions. Appellant proffered evidence at length supporting the claim that Respondent's ratemaking practices do not conform to the law and none of the affirmative defenses apply.

Rule 56(c), SCRCP, provides that a court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A moving party must meet its burden of showing there is "an absence of evidence to support the non-moving party's case." *Lord v. D.&J Enters., Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). In reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving party. *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014). Moreover, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Patterson v. Witter*, 425 S.C. 213, 226, 821 S.E.2d 677, 684 (2018). "Even if there is no dispute regarding the facts, summary judgment should be denied if there is a dispute as to the conclusions to be drawn therefrom." *Dowling v. Home Buyers Warranty Corp., II*, 303 S.C. 295, 298, 400 S.E.2d 143, 145 (1991).

A. The Trial Court Erred in its Application of the Standard of Review to the Merits of the Claims.

In rejecting Appellant's arguments that Respondent failed to comply with its legal obligations to charge rates that are reasonable and in harmony with the user fee statutes, the trial court focused on isolated and mostly irrelevant testimony regarding water meters from Appellant's expert, Brian Mantz, and ignored the evidence tending to show Respondent's rates are both unreasonable and violative of sections 6-1-300(6) and 6-1-330(B). As discussed *supra*, a proper review of a municipal utility's rates under the relevant statutes involves a close inquiry into not just whether Respondent's BFC methodology is "reasonable," but whether the alleged excessive BFC charged to Appellant and the Class reflect the actual cost borne by the utility to serve these ratepayers and confer an individualized benefit to these ratepayers. In short, the guiding principle is the ratepayer's real – as opposed to hypothetical – use of the system.

In support of Appellant's argument that Respondent was not conforming the rates it charged to the service it was providing the customer, it submitted deposition testimony and documentary evidence to at least create a question of material fact for trial. This evidence includes, but is not limited to, the following:

- The Raftelis Engagement Letter & CDM Smith Memorandum unequivocally confirms Respondent's REU assignments were both incorrect and inequitable:
    - **MPW has determined that certain commercial customers have been assigned an <u>incorrect number of REUs</u>**, which is a[n] equivalent measure of demand used to quantify utility customer loadings and identify future capacity necessary to accommodate new customer demands. …**<u>These inconsistencies present complexities an[d] potential customer inequities</u>** in estimating user charge revenues and defining the current and future levels of service for calculating impact fees. (R. pp. 319-320) (emphasis added).
    - "Assuming one REU is equivalent to 300 gpd average consumption, approximately **700 commercial customers used less than their allocated REUs in 2013** and approximately 90 customers used more than their allocated REUs in 2013. The difference between the allocated and calculated REUs for

each customer account was summed, resulting in a net of **approximately 4,400 REUs that are allocated to commercial accounts, but are 'unused'**. **It is assumed that the number of unused REUs is consistent over the past seven years**. Therefore, 4,400 REUs were subtracted from the total allocated commercial REUs for the analysis . . ." (R. p. 323-324) (emphasis added).

- "Of the 4,400 unused commercial water REUs, 4,300 are also allocated to MPW's wastewater system. Therefore, 4,300 REUs were subtracted from the total allocated wastewater REUs." (R. p. 326).

- Armed with actual knowledge of these incorrect and inequitable REU assigments, Respondent not only failed to correct the imbalance, but also increased the weight of that burden by *significantly* increasing the rates in 2015. In that fiscal year, Respondent raised the BFC rates for water ($3.33/ REU to $6.00/REU, an 80.2% increase) and wastewater ($8.97/REU to $12.00/REU, a 33.8% increase), all the while leaving volumetric rates untouched. Fiscal year 2016 saw another substantial BFC rate increase, this time $6.00/REU to $8.00/REU for water (a 33.3% increase) and $12.00/REU to $14.00/REU for wastewater (a 16.7% increase), with volumetric charges, again, remaining constant. (R. p. 437).

- Mantz testified that a REU system has the potential to be very fair, but only where "the REUs are periodically right-sized" by the utility. (R. p. 1017, line 2). He further testified it would be "very easy" for Respondent to right-size its rates. (R. p. 1011, line 17-25; R. p. 1013, lines 3-6). Respondent places the burden of right-sizing on ratepayers.

- Mantz testified that Respondent's base charge practices deviate from most utilities who calculate base charges according to meter or pipe size – not use assumptions based on REU. (R. p. 1006, lines 3-10) (observing that Respondent's BFC practices are not discussed in the American Water Association M1 Manual and other industry authorities).

- Appellant's expert identified several utilities who periodically right size on their own without placing this responsibility on ratepayers. (R. p. 1005, lines 20-25). This includes, but is not limited to, the Brunswick-Glynn Joint Water and Sewer Commission. This utility is also a client of Respondent's rate consultant Raftelis Financial Consultants, Inc. (R. pp. 446-508).

- Mantz discussed how after it audited its accounts, Respondent dramatically *increased* BFC rates, which are multiplied by the number of REU assigned to each account. (R. p. 1016, lines 13-25) (discussing the increase of water BFCs by 152 per cent, and wastewater BFCs by 86 percent); *see* (R. p. 437). Buttressing this testimony, the documentary evidence presented illustrates the significant discrepancy between the billed REU and the used REU, a fact Respondent **capitalized on instead of correcting**.

Appellant also presented evidence that the "unused REU" mentioned above constitute an incredible 40% of the total commercial REU in Respondent's system. Stated another way, almost half of the capacity Respondent charges customers for is unused and therefore not related to the provision of *any* service or individualized benefit to ratepayers paying BFCs based on admittedly "unused REU." (R. p. 346, lines 5-24; R. p. 347, lines 6-10; R. pp. 323-324). This evidence highlights the excessive BFC alleged by Appellant and the Class.

The trial court also ignored evidence from Respondent's expert, attorney, and rate consultant that supports Appellant's and the Class's arguments. For instance, Respondent's expert, William Zieburtz, acknowledged that the magnitude of the incorrect assignments is relevant to whether inequity exists in the rate structure. (R. p. 994, lines 5-9). Mr. Zieburtz admitted at his deposition on April 1, 2021 that in his thirty-plus years in the utility industry, **he has never heard of a utility that similarly conflates capacity and base charge concepts**, requiring surrender of the former for adjustments to the latter. (R. p. 995, lines 13-20) (emphasis added).

Respondent's attorney referred to Respondent's policy of requiring customers to abandon REU to be charged BFC consistent with actual use as inequitable. (R. pp. 528-539) ("Did we not conclude that because the customer would have already paid impact fees on the original number of REUs that a capacity reservation fee or back payment for REUs was **not equitable**?") (emphasis added).

The trial court itself was similarly troubled by Respondent's BFC practices. Specifically, Judge Dennis remarked at the summary judgment hearing as follows:

> I understand you've got some legitimate concerns for people that – to me, if I happened to be one of those persons, I'd probably be a little upset about it, too. I wouldn't want to be paying for everybody else.
>
> But the bottom line is: Get somebody that these people – I assume all of these people vote in the elections, don't they?

(R. p. 967, lines 17-24). As previously discussed, the trial court applied excessive and undue deference to Respondent's ratemaking practices. Had the correct legal framework and judicial review been applied, Judge Dennis' well-founded concerns over Respondent's BFC practices would have factored into his legal analysis and ultimately justified denial of summary judgment.

Finally, Respondent's rate consultant's own letter confirms Respondent has long known certain ratepayers had been assigned incorrect REU and the resulting BFC overcharges were presenting "inequities." (R. pp. 319-320) ("MPW has determined that certain commercial customers have been assigned an incorrect number of REUs," . . . "These inconsistencies present complexities an[d] potential customer inequities in estimating user charge revenues.") Respondent's rate consultant also stated he disagreed with Respondent's definition of BFC (found in Policy 7.2) because he would not use the phrase "capacity reservation fee" in connection with BFC. (R. p. 546, lines 8-10; R. p. 547, lines 9-11) ("To me, the term 'capacity reservation fee' is not a relevant term in what we're talking about when we're dealing with BFCs."). Incredibly, he agreed the final two sentences of Policy 7.2 should be struck. (R. p. 548, lines 8-17). These sentences are as follows:

> The BFC is a charge for the reservation of capacity based on the total active REUs assigned to a property. To ensure the purchased capacity remains available, all BFCs must be paid.

These sentences, which Respondent's own rate consultant disputes, is what provides the rationale behind Respondent's policy of not periodically rightsizing and placing this burden on ratepayers.

The trial court ignored all of this evidence entirely. When viewing the whole of the record through the lens of summary judgment, there is at least a scintilla of evidence that Respondent has been illegally overcharging Appellant and the Class. This Court should reverse and remand for trial.

B. The Trial Court Erred in its Application of the Standard of Review in Ruling on the Affirmative Defenses.

The trial court similarly erred in concluding Appellant's claims are barred by the statute of limitations and the doctrines of mitigation of damages and voluntary payment.

i. Statute of Limitations

In holding Appellant's claims are barred by the statute of limitations, the trial court concluded that the water bill "contains the number of REUs assigned to the customer's account as well as the gallons consumed in the particular billing cycle[and t]he back of each bill notes that 'one REU equals 9,200 gallons per month'" and based on this information, Appellant should have discovered the inequity at least three years prior to the filing of this lawsuit. Specifically, the trial court held Appellant should have independently calculated BFCs and compared it to the total water gallon usage.[7]

Initially, this holding reflects the trial court's misunderstanding of the claims involved and the way information is provided (or not provided) to a customer. Respondent has for years knowingly overcharged customers, and each bill they sent out caused a new injury. Our courts have recognized that in cases such as this involving ongoing violations "the statute of limitations begins to run anew with each violation." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 79, 777 S.E.2d 176, 200 (2015) ("[W]here a claim involves a series of ongoing violations, recovery is limited to a period coextensive with the applicable statute of limitations.").

[7] The trial court frequently references the fact that Appellant employs a property manager as if to suggest that bookkeeping should include the savvy to discern inequities in water utility ratemaking. Both parties involved in this litigation employed experts to opine on reasonableness of water rates. *Cf. Spartanburg Reg'l Med. Ctr. v. Bulsa*, 308 S.C. 322, 324, 417 S.E.2d 648, 650 (Ct. App. 1992) (holding expert testimony is required where a matter outside the common knowledge and experience of most lay persons).

Furthermore, the trial court's holding heavily skews the facts in Respondent's favor – in direct contradiction to the summary judgment standard. The bill does *not* expressly state how the amount of REU charged for BFCs relates to actual usage, and the conclusion that customers should have to sit down and figure that out themselves is contrary to the very basic proposition that the public is entitled to presume a municipality is charging a reasonable rate as required by law. 12 McQuillin Mun. Corp. § 35:56 (3d ed.) ("A customer is entitled to assume that a municipal utility is charging it for service at the most favorable rate available. The city is under a legal duty to disclose to the customer the availability of a more favorable rate."); *c.f. S.C. Nat'l Bank v. Florence Sporting Goods*, 241 S.C. 110, 115-16, 127 S.E.2d 199, 202 (1962) ("[P]ublic officers are presumed to have properly discharged the duties of their offices and to have faithfully performed the duties with which they are charged.").

During the deposition of Appellant's board member, Dorothy Yager, Respondent's counsel asked: "Did you understand that even prior to that letter, at any time Snee Farm Lakes could reduce its REU's?" Ms. Yager responded "No. You're a public utility. I trust you. I'm a customer." (R. p. 519, line 23 – p. 520, line 2). Simply put, the Appellant relied on Respondent to charge only those rates allowed by law.

Suggesting a customer is required to provide monthly oversight to make sure it is being billed fairly is a significant departure from the trial court's own statement that "water rates are entitled to a presumption of reasonableness." (R. p. 31) (quoting 12 McQuillin Mun. Corp. § 35:57 (3d ed.)). The bill nowhere indicates that reducing REU is an option and certainly does not explain the procedure to accomplish a reduction if the customer figures out it needs one. The evidence presented indicates that prior to the 2018 letter, Respondent never provided Appellant with the relevant information to evaluate its options, so at the very least whether the statute of limitations

applies should be left to the fact-finder. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (internal citations omitted) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

ii. The Voluntary Payment Doctrine

At the outset, the trial court misstated the relevant inquiry in holding that "[t]he point is not that the Plaintiff is paying for service it needs, but rather Plaintiff paid without ever asking that its rate be lowered or its REU reduced." In holding the voluntary payment doctrine applies, it follows that there must be some determination that the payment was, in fact, voluntary. South Carolina has never found this doctrine applicable in a case involving local government in a tax, fee, or rate dispute.[8] To substantiate it's ruling, the trial court relies on a case involving the attempt to recover money paid in settlement of a claim based on two notes secured by real estate mortgages where there was in fact no legal obligation to remit *any* payment. That is not the provision of a necessity by a governmental entity where failure to pay the bill could result in the suspension of service and therefore the deprivation of a basic need. Courts confronted with this type of situation have concluded that the doctrine has no place in the provision of basic needs. *E.g. Getto v. City of Chicago*, 426 N.E.2d 844, 850 (Ill. 1981) ("Even were it to be held that the plaintiff had sufficient knowledge of all the facts to permit a conclusion that [the payments of his utility bills] were voluntary, we judge that the implicit and real threat that phone service would be shut off for

[8] In its order denying Appellant's motion pursuant to 59(e), the trial court suggests *South Carolina Self Storage Association v. City of Aiken*, WL 10862806 (Ct. App. 2012) supports the conclusion that the voluntary payment doctrine is applicable against local governments, this reliance is wholly misplaced. *Self Storage* is an unpublished opinion affirming a grant of summary judgment pursuant to Rule 220(b), SCACR in which the court unequivocally declined to discuss the issues of voluntary damages because it had chosen to affirm on other grounds.

nonpayment of charges amounted to compulsion that would forbid application of the voluntary-payment doctrine.").

And although the trial court dismissively states the fact that "you can't live without water" is unpersuasive, the Supreme Court *did* find that statement persuasive in considering whether a service arrangement for water is a voluntary one. *Azar v. City of Columbia*, 414 S.C. 307, 311 & n.3, 778 S.E.2d 315, 317 & n.3 (2015) (rejecting "the unsupported premise that these contracts for water and sewer services are 'freely entered into by resident and non-resident consumers' and quoting the City of Columbia's budget director "that 'you can't live without water and sewer' and that these services are the 'basis of life'"). The Supreme Court recognized the fallacy in treating provisions of basic services as voluntary, and that understanding should apply with the same force in this case as Appellant has always argued. So even if the voluntary payment doctrine could be implicated in this situation, it is inaccurate to state "Plaintiff has made no allegations of fraud, duress or extortion." (R. p. 41). The threat of losing water and wastewater services, which would render a home unoccupiable and business inoperable, is duress. Moreover, the mandate to forfeit REU (previously purchased through the payment of expensive impact fees) to reduce BFC rates amounts to duress and extortion, as Appellant has maintained. Under these circumstances, it can hardly be said that payments of unlawful rates are ever truly voluntary.

iii. Failure to Mitigate Damages.

Without citing any law, the trial court concluded Appellant's case should be dismissed based on its failure to mitigate damages. However, the law is clear that a plaintiff is not required to mitigate damages by prejudicing its other rights. "A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid

damages." *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 285, 573 S.E.2d 830, 838 (Ct. App. 2002).

Although the trial court again discusses water meters, the comparison is ill-fit and merely reflects the misapplication of the proper standard of review. Had Appellant reduced its REU in the manner Respondent requires under its Policy 5.3.3, it would have lost something of value it had paid for (REU-based capacity assets), and the law does not require it to incur such expense under the doctrine of mitigation of damages. Whether a customer at some other water company has to buy a water meter to increase their flow is inapposite. There is no evidence that a customer with a water meter would have to repay impact fees as Respondent would require of Appellant. The evidence demonstrated this practice is an outlier. (R. p. 995, lines 13-20).

Even trying to compare impact fees to a water meter fails. There is no evidence that a customer who purchases a water meter loses that asset if it increases or decreases its use. It may be that it can sell the one it ceases to use. When construing the facts and circumstances in Appellant's favor, there is at least a question of fact as to the reasonableness of Appellant's actions to mitigate damages. *Cisson Const., Inc. v. Reynolds & Assocs., Inc.*, 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct. App. 1993) ("The reasonableness of a party's actions to mitigate damages is a question of fact which cannot be decided as a matter of law when there is conflicting evidence.").

CONCLUSION

At this juncture, Appellant was required to offer a mere scintilla of evidence that Respondent's methodology does not conform to its legal obligations. That was done and for this reason Appellant request this Court reverse the trial court's grant of summary judgment, remand the case for trial, and clarify the law governing the municipal ratemaking at issue in this case.

Respectfully submitted,

McCULLOUGH ▪ KHAN ▪ APPEL

s/Ross A. Appel
Ross A. Appel, Esq., SC Bar No. 79149
Clayton B. McCullough, Esq., SC Bar No. 13722
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com
clay@mklawsc.com

MCGOWAN, HOOD & FELDER, LLC

James L. Ward, Jr., Esq., SC Bar No. 13453
10 Shem Drive, Suite 300
Mount Pleasant, SC 29464
(843) 388-7202
(843) 388-3194 (fax)
jward@mcgowanhood.com

Counsel for Appellant

July 25, 2022

RECEIVED
Jul 25 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

_____

Case No. 2018-CP-10-02764
Appellate Case No. 2021-001395

_____

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated.....Appellant,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks.....Respondent.

CERTIFICATE OF COMPLIANCE

I certify that the final Appellant's brief in this matter complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal identifiers.

s/Ross A. Appel
Ross A. Appel, Esq., SC Bar No. 79149
Clayton B. McCullough, Esq., SC Bar No. 13722
McCULLOUGH ▪ KHAN ▪ APPEL
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com
clay@mklawsc.com
James L. Ward, Jr., Esq., SC Bar No. 13453
MCGOWAN, HOOD & FELDER, LLC
10 Shem Drive, Suite 300
Mount Pleasant, SC 29464
(843) 388-7202
(843) 388-3194 (fax)
jward@mcgowanhood.com
Counsel for Appellant

July 25, 2022