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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Snee Farm Lakes Homeowners' Association, Inc. ("Appellant") filed this action against Respondent the Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks (hereinafter "Respondent" or "MPW") on June 1, 2018 in the Charleston County Circuit Court. (R. pp. 53-67). Appellant moved for class certification on January 24, 2019 and the Honorable Bentley Price granted class certification on June 14, 2019. (R. pp. 73-76; R. pp. 2-14). At that time, the Court certified the following Class:

> 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 present being less than the customer's assigned REU.

Respondent moved to reconsider the order granting class certification (R. pp. 80-92), and Judge Price denied that motion by order dated August 27, 2019. (R. p. 15).

On April 9, 2020 the case was designated as complex and assigned to the Honorable Roger Young. Appellant filed an Amended Summons and Complaint on September 1, 2020, alleging five different causes of action. (R. pp. 147-158). Appellant's causes of action set forth in the Amended Complaint include 1) Declaratory Judgment, 2) Breach of Contract, 3) Conversion, 4) Unjust Enrichment/Money Had and Received, and 5) Constructive Trust. Id. Simultaneously, Appellant also moved to have the revised class definition and the Class Notice Plan approved by the Court. Judge Young approved the revised class definition and Notice Plan by order dated September 17, 2020. (R. pp. 20-23). Five Hundred and Twenty-Six (526) Class members were sent the Class Notice in October 2020. None of those receiving the Class Notice opted out of the Class by requesting an exclusion.

On January 6, 2021, the case was reassigned to the Honorable R. Markley Dennis, who set

trial for the week of May 10, 2021. Respondent moved for summary judgement on March 9, 2021, and a hearing was held on April 16, 2021. (R. pp. 185-192). Prior to the hearing, Appellant submitted a Memorandum in Opposition and Respondent submitted a Reply. (R. pp. 193-618; R. pp. 621-710).

Judge Dennis granted Respondent's motion for summary judgement by order dated July 12, 2021. (R. p. 24-44). In its Order, the Court found that "[a]fter an in-depth analysis… MPW's rate structure does not violate any South Carolina statute." (R. p. 31). The circuit court further noted:

> The General Assembly granted municipalities wide ranging freedom to determine how municipal utilities will set rates and which rate methodology they will employ. It is not for this court to supplant the General Assembly and invalidate MPW's rate methodology….It is not for this court to determine the optimal rate structure, but only if the rate structure in place meets the statutory requirements.

(R. p. 43). The trial court also ruled that even if the trial court had found that Respondent's rate system violated South Carolina statutes, Respondent would still be entitled to summary judgment on the grounds of Appellant's failure to mitigate damages, the voluntary payment doctrine, and the statute of limitations. (R. pp. 37-43).

On July 21, 2021, Appellant filed a Motion for Reconsideration of the trial court's grant of Respondent's Motion for Summary Judgment. (R. pp. 711-821). On November 24, 2021, the trial court denied Appellant's motion (R. pp. 45-46). The trial court's Order Denying the Motion for Reconsideration found that the trial court correctly addressed the applicable law on service and user fees. (R. pp. 45-46). More specifically, the trial court found that even if S.C. Code Ann. § 6-1-300(6) and 6-1-330(B) apply, Respondent's BFC charge based on assigned REUs provides Appellant with a special benefit not available to the general public, including but not limited to the use of the water and sewer. Appellant has made no allegations that the funds collected should not

be collected or that the revenues are being used improperly, and thus, the trial court properly addressed the law on service and use fees. (R. pp. 45-46). The trial court additionally denied Appellant's motion on the grounds that it (1) correctly applied the relevant legal framework on reasonableness, (2) applied the correct legal standard for evaluating a motion for summary judgment, and (3) correctly addressed Respondent's affirmative defenses. (R. pp. 46-51).

Appellant filed and served its Notice of Appeal on December 2, 2021. (R. pp. 920-953). On March 9, 2022, Appellant filed its Initial Brief and Designation of Matter with the Court of Appeals.

COUNTER STATEMENT OF THE FACTS

Appellants assert that they have been charged excessive fees from Mount Pleasant Waterworks ***for decades*** because they claim that all fees should be directly correlated to the volumetric amount of water Appellants use. (R. pp. 53-67). In summary, Appellant seeks a refund on behalf of the Class for allegedly excessive Basic Facility Charges ("BFC")[1] charged by Respondent to the Class, who are all commercial customers, as well as a reduction in Residential Equivalent Units ("REU") allocation used for the calculation of BFC for the Class. (R. pp. 53-67). However, as will be shown below, Appellant cannot show that Respondent's BFC violates the applicable statutes governing water and sewer utility rates in South Carolina. Specifically, there is no requirement that Respondent's charges be solely based on Appellant's volumetric water usage as Appellant contends.

Respondent is a municipal water and sewer utility established pursuant to a Town of Mount Pleasant ordinance in conjunction with state law. *See* S.C. Code Ann. §5-31-250. Respondent is

[1] BFCs are thoroughly defined in Respondent's Cost Recovery Policy 7.2. (R. pp. 295-316).

governed by five commissioners elected by resident of the Town of Mount Pleasant along with the mayor of Mount Pleasant, and the Chairman of the Water Supply Committee of Town Council.

Appellant is a homeowner's association that owns, manages, and maintains Snee Farm Lakes, which is a condominium complex with individual condominium owners. (R. pp. 220-294). Appellant employs a sophisticated property management company that manages multi-family units throughout the Charleston area, including those who are also Respondent's commercial customers. (R. p. 701 (p. 12), lines 13-21).

As noted in Appellant's brief, a customer's monthly bills consist of "two distinct line items, namely 1) Volumetric Rates (a charge for the amount of water a customer uses in a defined period of time) and 2) BFCs." (R. pp. 549-550). In fact, a review of Appellant's bills from January 2017 through July 2018 shows two charges with one designated as "All Gallons" and the other as "Basic Facility Charge." (R. p. 701 (p. 12), lines 1-12). The BFC is the exact same amount every month; in the case of Appellant, $1,184.00 for water and $2,072.00 for sewer. (R. p. 701 (p. 12), lines 1-12). However, the volumetric charge designated as "All Gallons" varies significantly from time to time. (R. p. 701, lines 1-12). At times Appellant's volumetric water charge is as much as $2,700, and other times it drops as low as approximately $1,000 for the month. (R. p. 701 (p. 12), lines 1-12). Yet, again, the BFC remains at the exact same amount every month, clearly showing that it is not tied to actual volumetric use. (R. p. 701 (p. 12), lines 1-12).

In order to have a reliable and dependable source of revenue, MPW includes a BFC along with a volumetric charge in its monthly bills. (R. p. 301). Respondent's Policy 7.2 – Cost Recovery Policy addresses the BFC charged to Respondent's customers:

Policy 7.2 Cost Recovery Policy

[BFC] 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 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.

(R. pp. 303-304).

BFCs (or similarly named charges) are customary and recommended in the industry to allow utilities to have a stable source of revenue for fixed costs of providing services when volumetric charges vary based on the customer's changes in water usage. (R. p. 679, line 18-p. 680, line 22). Fixed costs, which are a large portion of the costs associated with running a municipal water and sewer facility do not change even when the demand for water is reduced. (R. p. 828, (p. 25) line 13-p. 828 (p. 26), line 11). Examples of fixed costs include salary and wages for employees, costs of sewer treatment, facility maintenance costs, utility costs, etc. (R. p. 687, lines 5-8; p. 687, line 20-p. 687, line 4; p. 677, lines 7-21; p. 679, line 18-p. 680, line 7; p. 681, line 24-p. 682, line 5. Water demand can fluctuate in situations for example like the recent pandemic where hotel customers greatly decreased, yet the maintenance costs for water and sewer utilities did not decrease. (R. p. 663, line 24-p. 664, line 16).

Charging a BFC is considered a good practice by professionals like Appellant's expert Bryan Mantz so that utilities can generate revenue necessary to maintain utility operations at times of decreased volumetric water usage. (R. p.672, line 16-p.-673, line 19; p. 679, line 22-p.680, line 2; p. 687, lines 5-8; p. 673, lines 11-19). The BFC is charged at the same amount each month regardless of the customer's water usage and even if the customer does not use any water. (R. p. 663, lines 5-11; p. 663, line24-p.-664, line 16). Appellant's expert testified that he recommends a fixed charge component to water and sewer rates in order to maintain revenue stability for salaries and benefits as well as debt service. (R. p. 677, line 7-p. 678, line 9). Appellant's expert reasoned

those fixed costs must be paid regardless of the volume of water a customer uses. (R. p. 681, line 24-p.-682, line 5).

Water and sewer utilities employ many different ways to set a BFC charge for their customers. There is no perfect way to calculate a BFC. (R. p. 692). In some instances, water and sewer utilities charge a flat fee BFC that is not related in any way to the customer's size, water demands or predicted usage. (R. p. 681, line 24-p. 682, line 5; p. 663, line 5-p. 664, line 20). For example, a utility may charge each commercial customer $1000 per month as a BFC regardless of whether the customer is a small coffee shop or large hotel. Of course, a utility's BFC charge must adhere to the applicable local statutes and regulations, with the ultimate goal of using base charges to promote regular and predictable cash flow as a part of the rate base. (R. p. 827, (p. 22) lines 10-22).

MPW bases its BFC on the number of Residential Equivalency Units ("REU") assigned to a particular piece of property. An REU is equivalent to the estimated water usage for a single residence. (R. p. 509-514). MPW assigns REUs to commercial properties based on the property owner's description of the water and wastewater capacity needed to serve the prospective development of the property at the time the commercial customer is establishing service. (R. p. 94, lines 3-15; p. 509-514). For instance, a property that is planned to be used as a hotel will likely have a greater number of REUs or capacity assigned versus a piece of property that is intended to be used as office space. A hotel will likely have a full bathroom in each room with the expectation that guests will stay overnight and likely take baths or showers. An office will likely have a community bathroom with no showers. Thus, the water and wastewater needs for the two different properties will likely differ. MPW thought it fair to calculate the BFC based on the projected capacity needs for commercial properties determined by the property's projected use described by

the property owners. (R. p. 186).

Appellant's REUs were assigned in 1982 based on information provided to Respondent by engineers retained by Appellant. (R. p. 50). Respondent does not assign REUs in a vacuum. The assignment is made based on information provided by customers about the intended use for a particular property prior to service. (R. p. 969, line 11-p. 971, line 14).

There are many ways to determine a BFC charge other than calculating the same based on REUs. For instance, the City of Charleston calculates a BFC charge for its commercial customers based on the size of the property's water meter. (R. p. 969, line 11-p. 971, line 14). The water meter is installed at the time a building is built and the BFC associated with that property is calculated based on the size of the initial water meter. (R. p. 969, line 11-p. 971, line 14). In other words, the size of the water meter is determined pre-service. If a property is built to accommodate a hotel but later becomes office space, the BFC remains the same unless the owners pay to remove the initial water meter and install a new one.

The City of Charleston BFC calculation is based on a projected pre-service water and sewer usage and thus a larger or smaller water meter at the time of construction, but the BFC is otherwise wholly unrelated to actual water usage by the customer. (R. p. 969, line 11-p. 971, line 14). As stated on the City of Charleston website, if a customer is gone for the month and never turns on the water, the BFC remains the same. (R. at p. 663, lines 5-11). A City of Charleston customer has the option to reduce its BFC by purchasing a new water meter and paying to have the old water meter replaced if its water usage warrants a reduction in the water meter size. Basing a BFC on water meter size is very popular in the industry and Appellant's expert recommends a water meter rate system. (R. p. 669, lines 13-19; p. 664, line 21-p. 666, line 16; p. 669, lines 17-19).

Because REUs have been assigned to properties in Mount Pleasant for a number of decades

based on assumptions and proposed property uses that may have changed over time, there are instances where the REUs assigned to a particular piece of property reflect a greater water capacity reservation than the actual water use of the property. (R. pp. 663, line 2-p. 664, line 20). Respondent customers, with the agreement of the property owners if the customer is a tenant, have always been able to apply to reduce the REUs assigned to their property, which, if reduced, will in turn reduce the customer's monthly BFC. (R. p. 981, line 4-p. 982, line 17). However, a commercial customer reducing its REUs should be mindful that if its volumetric water usage exceeds the number of REUs assigned to the property, the customer will be charged excessive volumetric charges. (R. p. 27). The customer's desire to reduce a property's assigned REUs is a business decision made based on historic water usage and likely future use. *See* (R. pp. 183-184). It is possible that a property owner may wish to keep REUs at a certain level for potential future tenants even though the current water usage is less than the assigned REUs. There are some commercial customers who have reduced assigned REUs. (R. p. 187).

In February 2018, MPW sent a letter to 288 commercial customers, including Appellant, pointing out to the recipients that their actual water use was significantly less than the REUs assigned to the associated property ("the 2018 Letter"). (R. p. 354-357). The 2018 Letter suggested that the recipients reduce their REU assignment to a number determined by MPW based on the customer's historical actual water usage. (R. pp. 354-356). Of the 288 recipients, approximately 80 recipients responded to the 2018 Letter and reduced their REUs. (p. 187). Very few of the 80 recipients reduced their REU as low as the number suggested by MPW. (R. p. 633). The majority of the 80 recipients reduced their REU to a number higher than the REU number suggested by MPW. (R. p. 187). The result is the majority of the 80 recipients have a higher BFC charge that if they had decided to take MPW's advice and reduce their REUs further.

Appellant did not attempt to reduce its assigned REUs, even upon receipt of the 2018 Letter. (R. p. 187). Rather than reduce its REUs, Appellant initiated this lawsuit just months after receiving the February 2018 Letter without ever contacting MPW to discuss the matter. (R. p. 38). As of the grant of Respondent's Summary Judgment Motion, Appellant had not reduced its REUs. [2]

Appellant's professional manager Lona Vest, whose company also manages multiple condominium complexes in the Charleston area, testified that she had been told previously by other water departments that there were basic fees for the availability of water. (R. p. 701 (p. 12), lines 1-12).[3] Despite owning a property management company, providing sophisticated property management services for Appellant and receiving Appellant's water and sewer bills each month, Ms. Vest testified that she never attempted to calculate Appellant's REU charge and compare it to Appellant's actual volumetric use. (R. p. 703 (p. 46), lines 13-23). Ms. Vest testified as the 30(b)(6) witness for Appellant and noted that she understood her testimony was binding on Appellant.

Respondent has a policy in place to allow customers to review their assigned REUs and reduce the same. Respondent's Policy 5.3.3 - Impact Fee Management allows for the reduction of assigned REUs:

[2] Appellant reduced its REUs from 148 to 80 as of January 2022, after the grant of Summary Judgment dismissing Appellant's claim. MPW had recommended that Appellant reduce its REUs from 148 to 76 in February 2018. (R. pp. 354-357).

[3]Lona Vest, the professional manager for Appellant and its 30(b)(6) designee, testified she manages properties through the Charleston area, and "there are basic fees associated with each of the water bills." (R. p. 701 (p. 12), lines 1-12).

Policy 5.3.3 - Impact Fee Management[4]

Request for Reduction in REUs after second full calendar year of active service:

> If a property uses less water than allowed under the number of REUs assigned to the property or for which impact fees were paid, the property owner may request in writing to MPW a reduction in the REUs applicable thus reducing the monthly water and wastewater Basic Facility Charges. Only one request for reduction shall be allowed per fiscal year. The reduction of REUs shall not be less than the monthly average of the highest quarter for the most recent three years.

(R. p. 509-514). In a water meter system, the customer is responsible for paying for and installing a new water meter. (R. pp. 664, line 21-p. 665, line 15). Thus, the water meter customer must immediately come out of pocket in order to "right size" a water meter that is larger than the customer's current water needs. The replacement of a water meter can be quite costly. (R. p. 666, lines 1-11). Unlike a BFC based on a water meter, there is no cost to reduce the REUs assigned in order to reduce a customer's BFC. (R. pp. 670, line 7-p. 671, line 15). However, if a customer wishes to later increase its REUs because its volumetric water usage is regularly larger than the assigned REUs, the customer must pay impact fees at current impact fee prices or pay unpaid BFC (BFC that would have been incurred during the period of reduced REUs) in order to have REUs reinstated (whichever is less). (R. pp. 509-514). Thus, the determination of whether to reduce or increase REUs is truly a business decision by a customer based on their current and future water needs for a particular piece of property.

While Respondent strongly disagrees with and objects to Appellant's introduction and description of evidence involving a settlement between Respondent and another customer in 2014,

[4] At the initiation of service, Respondent's customers are required to pay certain impact fees based on the REUs assigned to their property. Appellant paid approximately $39,088.35 in impact fees when it initiated service with Respondent in 1982. (R. at p. 172). If Appellant paid impact fees for the same number of REUs according to 2019 rates, Appellant would pay approximately $1,103,932 in impact fees. (R. p. 567).

the circumstances of the settlement show that at least some of Respondent's commercial customers knew how many REUs were assigned and that the number of REUs was higher than their regular volumetric usage. (R. p. 353). This evidence directly contradicts Appellant's claims that they do not understand or were not aware of Respondent's billing practices or their water usage compared with the number of REUs assigned.[5] In fact, other properties managed by Appellant's property manager's company voluntarily chose to reduce its REUs. (R. p. 704 (p. 118), lines 10-23). Appellant claims that Respondent should periodically "right-size" the customer's assigned REU to more accurately reflect the customer's volumetric water usage. Appellant's Initial Brief, p. 10. However, when asked about utilities that "right-size" their BFC charges based on a customer's volumetric usage Appellant's expert testified that even water meter size rate structures, a structure Appellant agrees is valid, does not unilaterally right size a customer's water meter size based on the customer's water usage. (R. p. 664, line 1-p. 665, line 4).

Appellant's expert testified that there are many different ways to determine a BFC, even simply charging just a flat rate so long as the BFC meets statutory requirements. (R. p. 680, lines 12-21). Further, there can be many different ways to refer to a BFC. Respondent's expert testified that he didn't find it particularly troubling to refer to a BFC as a "capacity reservation fee" and that BFCs are often referenced in a way to allude to an idea of providing access to the system such as readiness or serve fee, essentially referring to an idea of keeping the system going while a customer may not actually be using a particular volume of water. (R. p. 858 (p. 145), line 14-p. 858 (p. 146), line 11). In summary, both Appellant's and Respondent's experts testified that they

[5] Respondent expressly reserves its objections to the admissibility of this information, including fling a Motion to Strike.

recommend a water utility incorporate a BFC to collect revenue to cover fixed costs when volumetric usage may be reduced. (R. p. 997, lines 7-18; R. p. 838 (p. 67), line 6-p. 838 (p. 68), line 10).

STANDARD OF REVIEW

On appeal, the Court applies the same standard as the trial court pursuant to Rule 56(c), SCRCP *Turner v. Millman*, 392 S.C. 116, 121-122, 708 S.E.2d 766, 769 (2011); *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co*., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)). Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." Rule 56(e), SCRCP; *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991).

If the moving party meets its initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings; rather, the opponent must present specific facts which infer there is a genuine issue for trial. *Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005). Moreover, if the Appellant fails to establish a genuine issue of fact as to one essential element necessary to the cause of action, the existence of factual issues relating to other elements becomes immaterial and therefore subject to summary judgment. *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537, 545-46 (1991); *see also Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970 (4th Cir. 1990) (finding a party "will not be permitted to manufacture a genuine issue of material fact to survive a motion for summary judgment").

ARGUMENT

As an initial matter, Appellant mischaracterizes the issues and conflates arguments to make it appear as though there is a genuine issue of material fact when there is not. The only question regarding Respondent's rate making structure and methodology is whether it violates any South Carolina statutes. If this Court finds, as did the trial court, that the rate structure does not violate South Carolina statutes, it is not for the Court to supplant the General Assembly as well as Respondent's elected commissioners and invalidate Respondent's rate methodology. Thus, the Court should first review Respondent's rate structure and determine if it is permitted pursuant to South Carolina statute. If the answer is yes, then the analysis ends and there should be no discussion of more optimal rate structures or different ways to design or apply Respondent's rates.

Appellant characterized the separation of powers between a court and elected officials as a "political perspective" and noted the trial court was "clearly troubled by the prospect of second guessing the ratemaking decisions of politicians." Appellant's Brief, p. 19.[6] The trial court was not concerned about second guessing politicians because it was worried it might make them mad. Rather, the trial court was very mindful that so long as elected officials are operating within the limits of their assigned authority, the courts are not in a position to legislate, but rather to provide judicial oversight as intended.

As discussed below, Respondent's rate structure does not violate any South Carolina statute because it is "reasonable" as required by the applicable statutes, warranting the trial court's grant of summary judgment. Further, for arguments sake, even if Respondent's rate structure is violative

[6] Respondent takes issue with Appellant's disrespectful description of the trial court as conducting "results-oriented discussions." Appellant Initial Brief, p. 22.

of state statues, Appellant's claims are barred by the voluntary payment doctrine, Appellant's failure to mitigate damages, and the statute of limitations.

Appellant instead attempts to frame its case on a claim that Respondent has charged Appellant in an amount that "far exceeds the cost of service it provides and outstrips the benefits received." Appellant Initial Brief, p. 16. However, Appellant has provided no evidence in the record to support such a claim. Instead, Appellant's position is based on a claim that because the rates are not directly tied to actual volumetric water usage, rather than a pre-service reserved capacity, the rate structure violates the applicable statutes. As will be discussed, Appellant's own expert has testified that he takes no issue with the way in which Respondent has spent the rate structure proceeds. (R. p. 1032, lines 9-17). Further, Appellant's own expert agrees that it is acceptable in the industry, and is in fact, reasonable if not desirable to establish rates based on pre-service estimations and charge a fixed rate unrelated to actual volumetric water usage. (R. p. 1018, lines 7-16). Even accepting Appellant's own expert's testimony, Appellant's claims fail.

I. The Trial Court Properly Evaluated the Lawfulness of Respondent's Municipal Utility Rates Applying Applicable Statutes.

Again, the Court is not entitled to review and criticize a municipalities' rate making methodology unless such rate making violates statutory authority. In this case, the evidence, including Appellant's own expert's testimony, supports a finding that Respondent's rates satisfy the applicable statutory authority.

S.C. Code Ann. § 5-31-250 grants a "board of commissioners of public works or any city or town" the authority to create, operate and manage a waterworks and "require payment…of such rates, tolls and charges as it may establish for the use of water…." Further, S.C. Code Ann. § 5-31-670 requires only that the charge for use of the water be "reasonable compensation and charge

a minimum and reasonable sewer charge for maintenance and construction of such sewerage system…." Thus, the trial court reviewed Respondent's rate structure to determine if it met the reasonableness standard set forth in S.C. Code Ann. § 5-31-670. The trial court found that Respondent's rate structure satisfied the reasonableness standard in part because Appellant's own expert's testimony supported such a finding.

The General Assembly, through S.C. Code Ann. § 5-31-670, provides municipalities with the liberty to determine and set the rate structure for their publicly owned water and sewer systems, which Respondent does for the Town of Mount Pleasant. The court has the ability to review a municipality's current rate system to determine whether such a rate system violates the municipality's authority or statutory requirement, but the court is not in the position of determining the most optimal rate system as Appellant seems to suggest.[7] The issues decided by the trial court in granting Respondent's Motion for Summary Judgment, namely whether Appellants can show Respondent's rate system violates the statutory mandates, are **not** areas of unsettled law. As discussed below, Respondent's rate structure satisfies the statutory mandates, namely that the rate be "reasonable."[8]

a. Respondent's Rate Structure is Reasonable.

In general, "water rates are entitled to a presumption of reasonableness, and a reviewing

[7] Appellant suggests that the optimal rate system would be one based on the size of a customer's water meter. As described, the water meter-based rate system has the same issues that Appellant complains about regarding Respondent's rate system; namely that the system is not periodically right sized by the utility to reflect the actual volumetric water usage by the customers.

[8]Without a true citation, Appellant cites to *City of Commerce v. Duncan & Godfrey, Inc.*, 277 S.E.2d 266 (Ga.Ct.App. 1981) for the position that the city has a legal duty to disclose to the customer the availability of a more favorable rate. However, the case cited is a Georgia case that relies on a specific Georgia statute and there are no similar South Carolina cases or statutes creating such a significant duty.

court will defer to the municipal corporation as long as the rates are nondiscriminatory, and are not arbitrary and capricious." 12 McMillian Mun. Corp. § 35:57 (3d ed.). "Generally speaking, water rates as set by a municipality are presumed to be valid and reasonable until the contrary has been established; and the burden of overcoming the presumption of validity and reasonableness rests with the challenging party." *Id*.

As established by *H.A. Sack Company, Inc. v. Forest Beach Public Service 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), the "test of the reasonableness of rates established by a public service district is the service received." In this case, Appellant reserved a certain level of service capacity or potential demand of service on the system, and Respondent provided service to Appellant for that reserved capacity or reserved demand of service. By calculating a BFC based on Appellant's reserved capacity, Respondent has fixed a rate "*reasonably* proportionate to the value of the service rendered or bearing some relationship to the present or future cost of providing service." 94 C.J.S. Waters § 730 (emphasis added). Appellant has not presented any facts to support a finding that Respondent did not or was unable to provide the level of reserved service if and when Appellant demanded the same, and therefore the granting of summary judgment was proper.

i. MPW's BFC Rate Structure is not Unreasonable Simply Because it is Based on REUs and Not Actual Volumetric Customer Usage.

The fact that Respondent's BFC rate is not directly tied to actual volumetric water use cannot be the basis for a finding that Respondent's rates violate state statutes. Appellant's own expert recommends a fixed charge unrelated to volumetric use as a part of utility's rate system. (R. pp. 1018-1019). When asked why it is important to have a fixed charge component, Mantz

testified it is important for revenue stability because salaries and benefits, as well as debt service, are all fixed costs for the utility regardless of customer volumetric usage. *See* (R. pp. 1018-1019). Mantz further testified, "[BFC is] a fixed cost…regardless of how much [water] [the customers] use, [the customers] have to pay it." (R. p. 1023, line 24-p. 1024, line 5). So, according to Appellant's own expert, it is reasonable and recommended to have at least a portion of a customer charge based on something other than volumetric use.[9]

ii. If a Water Meter Size BFC System is Reasonable Then a BFC System Based on a Customer's Number of REUs is Also Reasonable.

Appellant cites a case in its Standard of Review claiming that "[s]ummary 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." Appellate Brief, p. 16 citing *Tupper v. Dorchester Cnty.,* 326 S.C. 318, 487 S.E.2d 187, 191 (1997). Presumably, Appellant believes that there can be some question as to the conclusion drawn from the facts in this case, namely the way in which Respondent calculates the BFC for its commercial customers. However, only one conclusion can be reached when the Court considers and compares a water meter BFC rate system, which Appellant's ***own expert endorses as reasonable***, with Respondent's BFC rate system based on REUs. (R. p. 1010, lines 13-19). Both a water meter BFC rate system and Respondent's REU BFC rate system, use pre-service assumptions to determine rate, do not automatically "right-size",

[9] In its brief, Appellant claims Respondent's expert testified that "he has never heard of a utility that "similarly conflates capacity and base charge concepts requiring surrender of the former for adjustment to the latter." Appellant's Initial Brief, p. 25-26. However, this is not exactly Mr. Zieburtz's testimony. Rather, Mr. Zieburtz answered negatively to the question as to whether he could name another utility that "marries BFC REU with impact fee REU the way MPW does with all the policies I just mentioned, including surrendering provision in the capacity reservation fee component." (R. p. 877 (p. 244), lines 13-20). Simply because Respondent has a unique way of calculating its BFC does not make that calculation wrong.

and are not calculated based on the volume of water a customer actually uses. Understanding that Appellant's expert believes the water meter BFC rate structure to be acceptable, below is a comparison of the REU BFC rate structure with a water meter size BFC structure and Appellant's expert's cometary on the same. Only one conclusion can be drawn: that Respondent's REU BFC rate structure is acceptable and reasonable pursuant to the applicable statutes and case law.

a. Like MPW's REU Rate Structure System, Water Meter Size Rate Structures Do Not Unilaterally Right Size According to Customer's Actual Volumetric Use.

According to Mr. Mantz, in a water meter size BFC rate structure, it is up to the customer, who may use less water than the original size allowed by their water meter, to later chose to right-size their water meter in order to decrease the customer's monthly BFC. *See* (R. p. 998, line 3-p. 999, line 4; p. 1000, line 21-p. 1001, line 4; p. 1007, line 12-p. 1008, line 2; p. 1012, line 7-p. 1013, line 6; p. 1025, line 14-p. 1026, line 6; p. 1027, line 24-p. 1028, line 9; p. 1033, lines 14-23). For example, if a customer purchases a building originally built to serve as a hotel with the intent to now use the space as office space, the water needed will likely be drastically reduced, but unless the customer installs a new water meter, the BFC will remain the same under a water meter size rate structure. It is up to the customer and Appellant's expert affirmed that the utility has no responsibility to alert the customer to the possibility of reducing their water meter size. (R. p. 1000, line 1-p. 1001, line 4). Water utilities using the water meter size rate structure do not unilaterally right size a customer's water meter size based on the customer's water usage. (R. p. 1000, line 1-p. 1001, line 4). Simply put, water meter rate structures, which Appellant's own expert finds "reasonable", are <u>not</u> based on volumetric water usage.

Similarly, Respondent requires the customer to initiate a request to reduce their assigned REUs if the customer's water usage is lower than the assigned REUs as originally estimated. Thus,

in comparison with the water meter size rate structure, Respondent's requirement that the customer right size its REU assignment cannot be the basis for finding the rate structure unreasonable. Both rate structures require the customer to seek an adjustment of either the water meter or the REUs assigned in order to lower their fixed charge.

iii. There Is No Case Law That Indicates MPW's Rate Structure Is Unreasonable.

Appellant cites to *Simons v. City Council of Charleston*, 181 S.C. 353, 187 S.E. 545 (1936), one of two South Carolina cases that discusses reasonableness in the context of water utility rates, to support its allegation that Respondent's rates are not reasonable. In *Simons*, the Supreme Court analyzed "whether a municipality has the power to make a pledge of income derived from a revenue producing project in the absence of a specific statutory grant of authority." *Id.* at 546. The plaintiff in that case, a taxpayer, alleged that the municipality did not have the authority to use revenues derived from its waterworks system to repay the costs of a project to increase the town's water supply. *Id*. While the court did note that a municipality is bound by the rule of reasonableness, it further elaborated that the proposed method in which the city chose to allocate those funds was within the *discretion of the city council* and "so long as the revenues it uses for the purposes named are derived from "reasonable" rates, *the court will not interfere with the discretion sought to be exercised*. *Id*. (emphasis added). In support of this contention the court added that "it is incumbent upon a municipal corporation to exercise its judgment in a manner that will inure to the greatest benefit of the city and its inhabitants." *Id*. Further, as mentioned previously in this brief, "[t]he service received is the test" as to reasonableness, not the profit or amount collected by the utility. *Id.* at 547 and 45, citing 67 C.J. 1243.

Here, Appellant has not alleged that Respondent is setting the rates in order to pay off bonds for a project like the municipality in *Simons* - Appellant alleged that Respondent's *rate*

structure is unreasonable.[10] Appellant asserts Respondent's commercial customers have been overcharged and Appellant is entitled to a refund. Yet, again, Appellant has not alleged any complaints regarding the quality of service received, only that it believes it has paid too much for said service or "water rent" as the *Simons* court describes it. *Id.*

Respondent has always agreed that municipalities are "bound by reasonableness" and asserts that it has kept within those bounds in terms of its rate methodology – its elected commissioners have set up a rate structure they think benefits the water users in the Town of Mt. Pleasant. Thus, like the municipality in *Simons*, Respondent should be afforded the opportunity to exercise its judgment regarding its rate structure.

Appellant argues the Court misapplied the standard of review when it considered the merits of the case, due to the fact that *the Court relied on Appellant's own expert*. Mr. Mantz's testimony contradicts Appellant's position and the evidence put forth by Respondent indicates that its ratemaking practices are reasonable under the applicable statutes. Essentially, Appellant's position is a dead end because Mr. 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. 1018, line 7-p. 1019, line 4; p. 1029, line 5-p. 1030, line 4; p. 1010, lines 16-19). Appellant offered Mr. Mantz up as an expert and thus is tied to his opinions, which in fact, support Respondent's defense, and warrant the trial Court's granting of summary judgment.

Ignoring the case law and statutory mandates, Appellant argues that it is not enough for

[10] When asked if he believed Respondent has collected too much revenue overall, Appellant's expert responded in the negative. *See* (R. p. 1031, lines 7-24).

Respondent's rates to be reasonable, but that instead the BFC charged must "reflect the actual cost borne by the utility to serve these ratepayers and confer an individualized benefit…." Appellate Brief p. 23.[11] However, Appellant cites no law to support this claim because there is none.

For the reasons set forth above, Respondent's rate structure meets South Carolina's reasonableness requirement, thus, the trial court's granting of summary judgment was proper.

b. Even assuming Respondent's BFC is a user fee, it does not violate the applicable statutes.

For purposes of the below analysis, Respondent will assume that a BFC charge is a service fee or user fee, and S.C. Code Ann. § 6-1-300(6) and 6-1-330(B) apply.[12] Thus, the BFC fee 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. § 6-1-330(6). Respondent agrees with Appellant that there must be a "nexus between the fees customers are being charged and [the] benefit received in return", but that its rate structure does take into account that relationship by and through Appellant's reservation of a certain level of service established by the REUs assigned to Appellant's property.

To support its allegation that Respondent's BFCs are service or user fees, Appellant

[11] Appellant presents various "facts" to support its claim that the BFC rate was not conforming to the service provided to Appellant. None of these "facts" matter in the analysis of whether the BFC rate structure is lawful under the applicable statutes. Each of the facts listed on pp. 23-25 relate to whether the REUs are less than the actual volumetric water use and as a result whether the REU BFC rate system is "fair" or "equitable." Respondent does not deny that there were and are REUs assigned to customer properties over and above the particular customer's current volumetric water use. However, as has been discussed at length, customers have the ability to reduce these REU assignments, but have simply chosen not to. Further, because one water utility system calculates BFC or manages BFC in a way that is different than Respondent, does not make Respondent's system violative of applicable South Carolina statutes.

[12] Respondent does not agree that the BFC is in fact a user fee, but for purposes of the motion for summary judgment, Respondent presented arguments assuming that the BFC is a user fee as Appellant claims.

incorrectly cites to *Burns v. Greenville County Council*, 433 S.C. 583, 861 S.E.2d 31 (2021). *Burns* interprets the service and user fee statutes to require that a service or user fee provide some special benefit to the members of the public paying that fee. 433 S.C. 583, 589 (2021). In *Burns,* the court invalidated road maintenance fees and telecommunication fees because they did not provide the payers with a special benefit. *Id.* Specifically, the roads at issue in *Burns* were used by anyone who might happen to travel that way versus the water rates at issue, which are only charged to customers who gain the ability to use water and sewer services at their particular property at any time 24 hours a day, 7 days a week. Further, the telecommunication charges at issue in *Burns*, as a part of property taxes were not specifically linked with those using the telecommunications services. *Id*. at 590. Again, this is wholly different than the matter at hand regarding the *calculation of rates* charged to water and sewer services customers. The *Burns* facts are distinguishable from the facts in this case whereby the ability to charge the rate at all was called into question rather than the particular rate structure, and for that reason the *Burns* ruling does not impact the trial court's grant of summary judgment. In summation, the BFC charge based on assigned REUs provides Appellant and all Class with a special benefit not available to the general public, including but not limited to the use of the water and sewer system to a certain level for a certain piece of property, which is not available to the general public without the purchase of the same for a particular property.

Importantly, the BFC collected by Respondent is used to maintain and keep the water and sewer system running. There are no allegations that the funds collected should not be collected or that the revenues are being used improperly. The ability to have water flow through a customer's faucets at any time on demand is a real benefit that must be paid for regardless of how much water a customer uses. (Bryan Mantz Dep. 1/13/21, 37-38:8-11, R. pp. 1003, line 8-p. 1004, line 11).

Despite this benefit acknowledged by Appellant's expert, Appellant's claim rests on its position that Respondent should only collect funds from customers based solely on that particular customer's actual volumetric water use. (R. p. 201). Appellant also claims that "a service of user fee…charged to each customer must correlate to the amount necessary to pay the costs associated with their service." Appellant's Initial Brief, p. 18. However, Appellant cites no case law or statute to support this position.

Instead, Appellant cites C.J.S. Waters § 730, "As a general rule, municipality authorized by law to fix the rates to be charged for service from a water system…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." Appellant's Initial Brief p. 19. Respondent's BFC rate structure meets this cited standard. In this case, customers receive a certain assigned REU number for their property based on information provided to Respondent prior to the initiation of water and sewer service. Based on the information provide, Respondent determines the number of REUs assigned and thus the amount of BFC calculated by the rate times the number of REUs assigned for a particular use for a particular property. Thus, the rate has at a minimum "some relationship to the present or future cost of providing services" and is "reasonably proportionate to the value of the service rendered…." C.M.S. Waters § 730.

It would be impossible for Respondent to have a fixed rate that "correlate[s] to the amount necessary to pay the costs associated with [the customer's] services" as Appellant claims. *See* Appellant Initial Brief, p. 18. It is impossible to exactly determine how much each of the fixed costs associated with running a water and sewer system (salaries, debt service, equipment maintenance, etc.) should be charged to each customer based on that customer's exact service, which Appellant equates to actual volumetric use. Appellant's own expert testified when asked

why it was important to have both a fixed charge (in this case, Respondent's BFC) and a volumetric charge component as a part of a utilities rate structure, "[p]rimarily revenue stability because salaries and benefits, as well as debt service, are all fixed costs that the utility has to pay for regardless of customer usage." (R. p. 1018, lines 7-16). Rather, there must be some estimation and ability to charge a BFC in an amount that is reasonably proportionate to the value of services rendered. Respondent meets this standard.

The question of whether the funds collected represent a rational nexus between what customers are paying, the definition of a user fee, relative to what they are receiving is answered in the affirmative. To the extent the rates in question are user or service fees, which Respondent denies, Respondent's BFC meets the requirements of S.C. Statute § 6-1-300(6).[13]

II. The Trial Court Did Not Err in its Application of the Standard of Review in Ruling on the Affirmative Defenses

The trial Court correctly addressed Respondent's affirmative defenses in accordance with the summary judgment standard. Appellant's claims were correctly barred, for a variety of reasons, including the applicable statute of limitations, Appellant's voluntary payment of the funds it claims are damages, and Appellant's failure to mitigate its damages.

[13] Respondent objects to Appellant's citation of a newspaper article in this case. In fact, it is not clear exactly why Appellant cited to The Post & Courier opinion piece by Tony Bartelme, Glenn Smith, Joseph Cramey and Avery G. Wilks entitled "UNCOVERED: News deserts and weak ethics laws allow corruption to run rampant in SC" dated February 13, 2021. This opinion article regarding public corruption, which does not reference Respondent or water utility rates for that matter, is wholly irrelevant to the legal issues at hand. Oddly, this is not the first time Appellant has tried to insert newspaper articles into this case as some type of authority. The article referenced should not be considered by this Court as it is wholly unrelated to the matter either factually or legally and is not a part of the record on appeal.

a. The Circuit Court Did Not Err in Dismissing the Complaint on the Grounds That it Was Barred by the Statute of Limitations.

Appellant states in its own Initial Brief that Appellant, "had **long been charged excessive BFCs** relative to their actual use and demand records." (Appellant Initial Brief, p. 13) (emphasis added). The trial court correctly ruled that the statute of limitations bars Appellant's claims. Appellant's monthly bills contained the number of REUs assigned to Appellant as well as the gallons consumed in the billing cycle and the back of each bill noted that one REU equaled 9,200 gallons. A cause of action accrues at the time a plaintiff has a legal right to sue on it. *Brown vs. Finger,* 240 S.C. 102, 124 S.E.2d 781 (1962). "Under the discovery rule, 'the three-year clock starts ticking on the 'date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.'" *Kimmer v. Wright,* 396 S.C. 53, 58, 719 S.E.2d 265, 268 (Ct. App. 2011) (citations omitted). The genesis of Appellant's claim is that MPW assigned excessive REUs to each customer prior to establishing service or at a change in use and that these assignments were incorrect. Appellant claims that because of the alleged incorrect REU assignments, MPW charged Appellant excessive BFC each month. The BFC, based on the REU assignment, is the exact same every month. Therefore, the statute of limitations began to run when Appellant knew or should have known that it had been assigned allegedly excessive REUS; said differently, the statute of limitations began to run at the time the REU assignment was made or at least when the Appellant began receiving its bills, decades ago.

Of note is Appellant's citation to *State ex re. Wilson v. Ortho-McNeil-Janssen Pharm., Inc*., 414 S.C. 33, 79, 777 S.E.2d 176, 200 (2015) to support its contention that "[o]ur courts have recognized that in cases such as this involving ongoing violations 'the statue of limitations begins

to run anew with each violation." To be clear, this statement is wholly unsupported by the case law Appellant cites. Indeed, the case cited is specifically based on the statute of limitations as it relates to South Carolina's Unfair Trade Practices Act (SCUPTA) and therefore it is inapplicable to this Court's evaluation of the Statue of Limitations as it relates to Appellant's claims.

Additionally, Appellant argues that even though it employs a property management company, that it should not be the management company's responsibility to determine whether Appellant should apply for a reduction in REUs.[14] Appellant's ***professional property manager*** testified she knew that MPW charged a basic facility charge based on the assigned REUs, but she had never attempted to calculate the BFC and compare it to the total water gallon usage listed on the bills. This admittance illustrates Appellant's lack of regard for the issue. Simply put, it appears Appellant never took the time to calculate its bill versus Appellant's volumetric usage to determine if Appellant should reduce its REUs. Appellant had all necessary information and professional staff to start asking questions and determine if it should reduce its REUs.

Although, Respondent objects Appellant cited to a settlement between Respondent and a commercial customer settlement agreement whereby Appellant claims the customer "discovered that although it had been using only four REUs, Respondent had been charging it for fifteen REUs." Appellant's Initial Brief, p. 12. Introduction of evidence relating to settlement is generally not admissible to prove liability under SCRCP Rule 408. Without waiving its objection, Respondent notes that this description is contrary to the documents Appellant submitted as Exhibit 14 to Commissioner Rick Crosby's deposition. For instance, MPW (Confidential) – 09511, an

[14] Notably, Appellant conveniently neglects to mention its management company admitted that it was aware of another property in Mount Pleasant, Bay Club, which it manages, that reduced its REUs with Respondent. (R. p. 704 (p. 118), lines 10-23).

MPW internal memorandum references the reasoning for the settlement and noted that the customer had previously requested a reduction in their REUs and MPW determined that the prior request went unanswered. Further, MPW (Confidential)-09538, is a letter from the customer to MPW claiming that he had called multiple times over the years complaining about his bill. The fact that this particular customer knew how many REUs he was assigned and that the number was higher than his regular REU usage contradicts Appellant's claims that they did not understand or were not aware of Respondent's billing practices or their water usage compared with the number of REUs assigned – especially when Appellant employed a professional manager.

Appellant also argues that its bills did not provide an explanation as to how Appellant could reduce its assigned REUs. However, again, Appellant had the information at its fingertips to determine that it was being allegedly overcharged for the BFC – its assigned number of REUs and the volume of water used each month. Respondent had policies (cited in Appellant's brief) in place describing how a customer could reduce its REUs. Most importantly though, Appellant admitted that it never made an inquiry as to how it could reduce its assigned REUs. (R. p. 703 (p. 46), lines 13-23). To the extent Appellant had a claim regarding excessive BFC rates, Appellant knew or should have known that it had a claim but failed to initiate the claim within three years from the date of being put on notice.

Even assuming Respondent's rates violated state law, Appellant's claims are barred by the statute of limitations.

b. The Circuit Court Correctly Held that the Complaint was Barred by the Voluntary Payment Doctrine.

The trial court correctly held that the voluntary payment doctrine bars Appellant's claims. Under the voluntary payment doctrine an individual cannot recover payments that were voluntarily

made, even under a mistake of law. *Hardaway v. Southern Ry. Co*., 90 S.C. 475, 488-89, 73 S.E. 1020, 1025 (1912). In this action, Appellant has not put forth a single South Carolina case supporting its argument that the voluntary payment doctrine is inapplicable to services provided by Respondent, citing instead to an Illinois case involving telephone service. In fact, there are no South Carolina cases that distinguish between services for which the voluntary payment doctrine applies. In *Self Storage Ass'n vs. City of Aiken*, WL 10862806 (Ct. App. 2012), the Court of Appeals affirmed a trial court ruling that the voluntary payment doctrine bar provided the grounds for summary judgment in favor of the City of Aiken regarding paid taxes. While this is an unpublished opinion that did not discuss the merits of the voluntary payment doctrine decision, the Court of Appeals did not strike down the voluntary payment doctrine application simply because it was asserted by a government entity. The voluntary payment doctrine applies to Appellant's claims because, Appellant made payments to Respondent since its account inception in 1982 and has never made any attempts to reduce its BFC, which it was entitled to do.

Appellant's argument that because "you can't live without water and sewer," payment for water and sewer services is never voluntary misconstrues the principals behind the voluntary payment doctrine and the facts in this case and ignores the fact that the Class is made up of commercial customers rather than residential customers. The point is not that Appellant is paying for a service it needs, but rather Appellant never did anything to reduce, or attempt to reduce, the fixed charge portion of its bill based on assigned REUs even though Appellant had the ability to do so and other commercial customers did just that. Appellant does not take the position that it should not have to pay for water and sewer services or even that there is an inherent problem with a fixed rate charge proponent to water and sewer utility rates (see testimony of Appellant's expert cited throughout this brief). Rather, Appellant claims that the BFC should be calculated in a

different manner. However, Appellant has paid the BFC for years (decades) without question or attempting to lower its BFC, which again, Appellant has the ability to do.

For the *first time* in its appellate brief, Appellant alleges that "[t]he threat of losing water and wastewater services, which would render a home unoccupiable and business inoperable is duress." In South Carolina, duress "has been defined as the condition of mind produced by the wrongful conduct of another rendering a person incompetent to contract with the exercise of his or her free will power, or as the condition of mind produced by an improper external pressure destroying free agency so as to cause the victim to act or contract without use of his or her own volition, or as unlawful constraint whereby a person is forced to do some act against his or her will." *Holler v. Holler*, 364 S.C. 256, 266, 612 S.E.2d 469, 475 (Ct. App. 2005) (citing 17A C.J.S. Contracts § 175 (1999)). It is not clear how Appellant was forced to pay BFC under "duress" when Appellant could have reduced its REUs and thus its BFC.

The fact that Appellant never attempted to reduce its REUs even as of the filing of the summary judgment Order speaks volumes. To now claim duress is disingenuous when Appellant, even after filing the lawsuit, never attempted to reduce its REUs until just recently. Appellant could have lowered its REUs just as other commercial customers have done, but Appellant chose not to. This is the definition of voluntary payment doctrine, which bars Appellant's claims regarding Respondent's rate structure.

c. The Circuit Court Did Not Err in Granting Summary Judgment Based on Appellant's Failure to Mitigate Damages.

The trial Court correctly granted summary judgment based on Appellant's failure to mitigate damages. Appellant claims that it is not required to mitigate damages because forfeiting REUs "prejudices its other rights". Here, if Respondent's water meter size structure is reasonable

and legal, as testified to by Appellant's expert, then Respondent's system cannot be the basis for Appellant's refusal to mitigate its alleged damages.

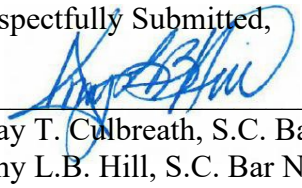
Appellant contends that the trial Court misapplied the proper standard of review because it compared Respondent's water system with a water meter system. This argument is unsubstantiated, as the point of the comparison is to show that in either Respondent's water system, or a water meter system, both customers may choose in the future to go back to a larger water meter, or in Respondent's case, purchase more REUs, is the same. Said differently, if someone purchases something but then decides to give up that asset, it cannot be illegal for the person to then be required to pay to repurchase the same asset. Similarly, it cannot be illegal, or as Appellant states, "inapposite," to require a water meter customer who may chose in the future to go back to a larger water meter, to purchase the larger meter. These are all business decisions that sophisticated commercial customers, like Appellant with the help of its employed property manager, must make to determine what is best for their own business and individual future needs. *See e.g.* (R.at pp. 182-184). Giving up REUs would presumably benefit the business by reducing their BFC. So, determining whether to reduce REUs even if it means possibly repurchasing the same in the future is not an illegal choice, but rather a business decision similar to the accepted policy of paying to purchase and installing a smaller water meter. Appellant should not be allowed to seek "damages" from Respondent that Appellant, itself, chose to incur.

CONCLUSION

In summary, Appellants are dissatisfied with the rate structure Respondent lawfully established in order to properly maintain a water and sewer system for the Town of Mount Pleasant. However, simple dissatisfaction with a rate structure does not make it violative of the applicable statues. For all of the reasons stated herein, Respondent respectfully requests that the

Court deny the appeal and affirm the decision of the trial court.

Respectfully Submitted,



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