THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

The Honorable Bentley D. Price, Judicial Circuit Court Judge
Trial Court Case No.: 2018-CP-10-2764

RECEIVED
OCT 23 2019
SC Court of Appeals

Appellate Case No. 2019-001482

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

v.

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

INITIAL BRIEF OF APPELLANT THE COMMISSIONERS OF PUBLIC WORKS FOR THE TOWN OF MOUNT PLEASANT D/B/A MOUNT PLEASANT WATERWORKS

Gray Thomas Culbreath (S.C. Bar No. 11907)
Amy L. B. Hill (S.C. Bar No. 68541)
Janice Holmes (S.C. Bar No. 75038)
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Telephone: 803.779.1833
Facsimile: 803.779.1767

and

James Atkinson Bruorton, IV (S.C. Bar No. 71300)

David G. Jennings (S.C. Bar No. 2986)
Timothy James Muller (S.C. Bar. No. 74601)
ROSEN HAGOOD
Post Office Box 893
Charleston, South Carolina 29402
Telephone:
Facsimile:
ATTORNEYS FOR APPELLANT THE COMMISSIONERS OF PUBLIC WORKS FOR THE TOWN OF MOUNT PLEASANT D/B/A MOUNT PLEASANT WATERWORKS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Secondary Sources

STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN DETERMINING THAT SNEE FARM IS AN ADEQUATE REPRESENTATIVE OF THE PURPORTED CLASS?

II. DID THE CIRCUIT COURT ERR IN DETERMINING THAT SNEE FARM MADE THE REQUIRED SHOWING OF COMMONALITY REGARDING THE ALLEGED CLAIMS?

III. DID THE CIRCUIT COURT ERR IN DETERMINING THAT SNEE FARM MADE THE REQUIRED SHOWING OF TYPICALITY REGARDING THE ALLEGED CLAIMS?

IV. DID THE CIRCUIT COURT ERR IN DETERMINING THAT SNEE FARM HAS STANDING TO SUE MPW?

STATEMENT OF THE CASE

The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks ("MPW") is a public entity established in 1934 pursuant to state law and town ordinance that provides water and wastewater services to the Town of Mount Pleasant. On June 1, 2018, Snee Farm Lakes Homeowner's Association, Inc. ("Snee Farm") filed a Summons and Complaint against MPW alleging that it is entitled to receive a refund of alleged excessive Basic Facility Charges ("BFC") that MPW allegedly charged its commercial customers in MPW's service area and seeking a declaration regarding MPW's method of collecting and imposing fees. Snee Farm's Complaint includes causes of action for declaratory judgment, breach of contract, conversion, unjust enrichment/money had and received, and constructive trust. In summary, Snee Farm claims that MPW charged excessive BFC because the charge is not based on actual usage but rather assigned water usage allocation. There is no specific ordinance or law that requires such a charge to be based on actual usage. Snee Farm seeks to bring the action against MPW on behalf of a class defined as follows:

> All current and former MPW commercial customers who paid BFC but whose metered water and wastewater usage in any month was less than that customer's number of assigned REUs ["Residential Equivalent Units"].

This class definition is different than the class definition Snee Farm included in its Motion to Certify a Class.

On June 7, 2018, counsel for MPW accepted service on behalf of MPW, and on July 5, 2018, MPW filed a Motion to Dismiss Snee Farm's Complaint.[1] MPW filed its

[1] As the basis for its Motion, MPW argued: 1) the plaintiffs were not similarly situated, did not have claims arising from the same nucleus of operative facts; and each

Answer to the Complaint on November 19, 2018 alleging the following defenses 1) failure to state a claim under 12(b)(6), SCRCP; 2) failure to mitigate damages; 3) waiver; 4) laches; 5) statute of limitations; 6) economic loss rule; 7) state of the art/acceptable practice; 8) beneficial use doctrine; 9) lack of standing; and 10) lack of damages, among other things. The Circuit Court denied the Motion to Dismiss by Order filed on November 30, 2018.

On January 24, 2019, Snee Farm filed its Notice of Motion and Motion for Class Certification seeking to certify the following Class:

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

Again, this description of the Class differs from the class definition included in the Complaint. The Motion for Class Certification identified the common questions of law and fact to include:

> a. Whether, under the facts and circumstances of this case, state law prohibits MPW from imposing and collecting excessive BFC based on REU estimates that exceed actual usage.

---

plaintiff had not suffered damages alleged to be in excess of $100.00; 2) the Court lacked subject matter jurisdiction under South Carolina Rule of Civil Procedure 12(b)(1) because the Public Service Commission of South Carolina had exclusive jurisdiction over regulation of utility rates based on arguments of unreasonableness; 3) the conversion and money had and received claims were barred by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60(4) and (5), among others; 4) the breach of contract and unjust enrichment claims were barred by the exclusive remedy prescribed and limited by the contract; 5) MPW did not violate any legal obligation concerning water and wastewater charges; 6) the plaintiffs had the right to request a reduction of the assigned number of REUs assigned to their accounts and failed to make such a request; and 7) the BFC is a charge for the reservation of capacity (an asset) based on the total active REUs assigned to a property and all BFCs must be paid to ensure the purchased capacity remains available to the customer.

b. Whether Plaintiff and the Class members have suffered financial damages and MPW owes refunds associated with its imposing and collecting excessive BFC based on REU estimates that exceed actual usage.

c. Whether MPW can continue charging BFC, based on REU estimates that exceed actual usage, as it has traditionally done.

Snee Farm filed its Memorandum of Law in Support of Motion for Class Certification on May 30, 2019.

On May 30, 2019, MPW filed its Memorandum of Law in Opposition to Snee Farm's Motion for Class Certification ("Opposition Memo") with supporting evidence showing that the BFC is different for each individual commercial customer based on descriptions of property use provided by the customer to MPW, that customers can request a reduction in REUs upon which the BFC is based, and that customers have individual reasons for pursuing and maintaining a certain level of REUs even if the REUs are not needed at that time.

On May 31, 2019, the Circuit Court held a hearing on Snee Farm's Motion for Class Certification. Despite an acknowledgment by Snee Farm that the number of REUs selected and maintained by a particular customer is an individual decision requiring an individual investigation, the Circuit Court granted the Motion for Class Certification by order filed on June 14, 2019. (Opposition Memo, p. 6) In the Order, the Circuit Court stated that the "case involves [Snee Farm]'s refund claim for excessive Basic Facility Charges ("BFC") charged by" MPW, which "is a municipal water and sewer authority established pursuant to ordinance of the Town of Mount Pleasant and governed by Sections 5-31-210-270 of the South Carolina Code." (Order, p. 1) Further, the Circuit

Court determined that Snee Farm "is the MPW customer, not the individual owners in the Snee Farm Lakes development." (Order, p. 2) The Circuit Court described the lawsuit as involving a claim "that MPW owes a non-delegable duty to charge just and reasonable rates based on actual use, and [MPW]'s practice of overcharging customers based on inaccurate, outdated REU assignments is unlawful." (Order, p. 3) (citing S.C. Code Section 5-31-250 and *Simons v. City Council of Charleston*, 181 S.C. 353, 187 S.E. 545 (1936)). The Circuit Court determined that Snee Farm had standing to sue and met the requirements for class certification.

First, the Circuit Court determined that Snee Farm had standing to sue MPW because it "is a MPW customer that receives monthly water bills" and that "[t]he individual unit owners in the Snee Farms [sic] Lake development, however, are *not* MPW customers, have no direct relationship with MPW, and therefore have no standing to bring this case." (Order, p. 6) The Circuit Court explained "[w]hatever other contractual agreements [Snee Farm] may have with its members do not undermine [its] standing as an overcharged MPW customer for purposes of this case and class certification." (Order, p. 6). In a footnote, the Circuit Court also determined that if it were to accept MPW's analysis that the individual owners, not Snee Farm, made the complained of payments, Snee Farm "would have associational standing to bring suit for its member owners." (Order, p. 6, n. 3) (citing *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014)). The Circuit Court reasoned that Snee Farm's "purpose is to provide amenities to its owners, including water and wastewater services, and therefore, the claims are aligned with its function" and "the claims asserted do not require the involvement of any owner, because the issue raised is the charge

relative to [Snee Farm]'s overall usage rather than use by a single owner." (Order, p. 6, n. 3)

Next, the Circuit Court determined that "[c]ommon questions of law and fact exist as to all members of the Class" and that "[t]he critical issues dominating the claim of every Class member are (1) whether MPW can legally charge BFC based on REU assignments inconsistent with actual use, and (2) who has the burden of periodically adjusting each customer's REU assignment to ensure customers are not overcharged."[2] (Order, p. 8) The Circuit Court further found that Snee Farm's claims were not atypical of the Class and determined that the "case does not involve an attack on the initial REU assignment or seek any impact fee funds" and the claims do not "relate to whether certain Class members decided to purchase additional REU at the impact fee stage for business purposes." (Order, p. 10) The Circuit Court also determined that Snee Farm "will adequately represent and protect the interests of the Class" and "[a]ll members of the Class sustained damages arising out of [MPW]'s uniform conduct toward [Snee Farm] and all members of the Class" and that Snee Farm "need not be in a position to declare what other Class members' REU assignments ought to be" and that "[a] core legal, and disputed, issue in this case is whether customers even have this responsibility at all." (Order, p. 12) The Court found "that the overarching issues predominating the class are whether (1) MPW can legally charge BFC based on REU assignments inconsistent with actual use and (2) whether MPW is required to monitor and adjust REU assignments as part of its duty to charge reasonable BFC." (Order, p. 14)

[2] The Circuit Court also found that the proposed class met the numerosity requirement as well as the requirement of class member damages exceeding $100 each.

On July 20, 2019, MPW filed a Notice of Motion and Motion Pursuant to Rule 59(e) and Rule 60 SCRCP arguing, among other things, that the Circuit Court erred in 1) finding that Snee Farm had standing; 2) failing to consider MPW's arguments regarding commonality, typicality, and the existence of conflicts among the Class; and 3) dismissing the information contained in an affidavit from one of MPW's commercial customers that defeated class certification. MPW filed its supporting memorandum of law on August 23, 2019. Snee Farm filed a Memorandum in Response to MPW's Motion to Alter and Amend Order Granting Class Certification on August 26, 2019. A hearing on the Motion Pursuant to Rule 59(e) and Rule 60 SCRCP was held on August 26, 2019, and by Order dated and filed on August 27, 2019, the Circuit Court denied the motion. MPW timely filed a Notice of Appeal on September 4, 2019.

STATEMENT OF FACTS

A. Background on MPW

MPW was established to serve the growing town of Mount Pleasant in 1934. It continues to serve the ever expanding needs of Mount Pleasant, one of the largest growing municipalities in South Carolina. As a part of its continued quality of service, MPW must anticipate and plan for future water and wastewater needs. The Basic Facility Charge or BFC provides funds to maintain current water service facilities as well as to plan for and to construct new facilities.

While Plaintiff likes to describe MPW as having a "monopoly" this simplistic description ignores the history of public water service entities like MPW that were formed to insure that residents would have access to water. MPW is a non-profit entity and is able to provide water to Mount Pleasant at cost rather than at an amount meant to generate profits. However, in order to meet its financial obligations and plan for future financial needs, MPW set up the current system decades ago in order to distribute its administrative costs among all Mount Pleasant residents, both residential and commercial. The BFC is meant to do just that based on information reported to MPW by customers as to their desires and intended use for a particular piece of property. The BFC was never intended to be linked directly to exact use, but rather to an estimated and assumed possible use based on information provided by the customer.

MPW is not unique in the way it calculates it BFC. Many other municipalities calculate a basic facility charge in the same manner as MPW including Columbia, Greenville, Myrtle Beach, Rock Hill, and Summerville here in South Carolina.

1. Setting of Rates

MPW is governed by Section 6-1-330 of the South Carolina Code of Laws, which provides, in pertinent part:

> (A) A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. A local governing body must provide public notice of any new service or user fee being considered and the governing body is required to hold public hearing on any proposed new service or user fee prior to final adoption of any new service or user fee....
>
> (B) The 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....
>
> ****

Per the requirements of Section 6-1-330, each month MPW holds a Commissioners Meeting where opportunity for public comments is given. (Opposition Memo., p. 8)

Given MPW's status as a public water and wastewater service provider, MPW is required to comply with Section 5-31-670 of the South Carolina Code of Laws, which provides:

> Any city or town or special service district may, after acquiring a waterworks or sewer system, furnish water to persons for reasonable compensation and charge a minimum and reasonable sewerage charge for maintenance or construction of such sewerage system within such city or town or special service district.

As required under South Carolina law and the ordinances of the Town of Mount Pleasant, MPW has established its rates through implemented, publicly heard policies that are constitutional, fair, and reasonable.[3] (Opposition Memo., p. 9)

---

[3] Snee Farm was informed about these public hearings. *See, e.g.*, Response to Motion to Alter or Amend, Ex. I, Snee Farm 00213, 00214, 00216, 00228, 02229.

2. *Review of Allocated REUs and Impact on BFC.*

Revenues that MPW receives from the BFC are used to recover the fixed costs that MPW incurs in providing services to its customers, including Renewal and Replacement (R&R) debt service, billing and collection, and general administrative costs. (Opposition Memo., p. 8) BFCs are base charges that are to be paid by all customers, not just commercial customers. (Opposition Memo., pp. 8-9) These charges are paid each month to recover MPW's fixed costs and to provide equity to the cost-recovery system. (Opposition Memo., p. 9) Section 5.3.3., entitled "Impact Fee Management," of MPW's Policy describes REUS and the BFC as follows:

Residential Equivalent Unit (REU)	An REU is equal to 300 gallons per day. REUs are allocated to all MPW customers. When REUs are calculated, MPW will round up to the next whole number.
Basic Facility Charge (BFC)	MPW incurs "fixed costs" for providing services to its customers, including Renewal and Replacement R&R debt service, billing and collection, and general administration costs. Basic facilities charges are base charges that are to be paid by all customers of the utility each month to recover these fixed costs and provide equity to the cost recovery system.

The allocation of REUs is established using information provided by the customer. (Opposition Memo., p. 3, Deposition of Clay Duffie ("Duffie Depo."), p. 46). The individual MPW customer provides pertinent information regarding the individual

---

However, Snee Farm did not send anyone to attend these public hearings.

customer's anticipated use, potential for growth, and capacity needs to MPW, and then MPW is able to calculate the REU allocation. (Duffie Depo., p. 47) Therefore, while MPW has approximately 3,160 commercial customer accounts[4] and each of the commercial customer accounts are charged the same BFC rate, the number of REUs allocated to each varies based on the individual customer's specific proposed needs. (Opposition Memo., p. 3) Again, MPW's fee structure is not unique and is similar to other local municipalities and water service providers throughout the United States.[5] (Opposition Memo., pp. 4-5) South Carolina municipalities that utilize a similar fee structure include Columbia, Greenville, Myrtle Beach, Rock Hill, and Summerville. *Id.*

MPW has a policy in place to review and update assigned BFC to ensure that its customers are being charged fairly and accurately based on their water use and wastewater generation estimates.[6] If it appears the customer's assigned REUs are more than what a specific customer actually needs, the customer is able to seek a reduction of

---

[4] The commercial customer accounts include businesses such as homeowners associations, churches, apartment complexes, breweries, professional offices, schools, shopping centers, restaurants, gas stations, box stores, recreation facilities.

[5] The other cities across the nation that follow a similar fee structure include Tucson, Arizona; San Diego and San Francisco, California; Jacksonville and Marathon, Florida; Indianapolis, Indiana; Baltimore, Maryland; Detroit, Michigan; Charlotte, North Carolina; Memphis, Tennessee; El Paso and Houston, Texas; Virginia Beach, Virginia; and Milwaukee, Wisconsin.

[6] This policy is reflected in a letter sent by Raftelis Financial Consultants, Inc. ("Raftelis"), MPW's rate consultant, dated July 21, 2014. (Response to Motion to Alter or Amend, Ex. B). In the letter, Raftelis explains that it was retained to assist MPW "in determining updated water and wastewater residential equivalent units (REUs) for utility planning and rate making purposes" and that MPW had reviewed its commercial customer's accounts to determine the measurement of those customers' demand to identify the future capacity necessary to accommodate the demand of new customers.

their assigned REUs. Specifically, Section 5.3.3, entitled "Impact Fee Management," of MPW's policy states:

> **Request for Reduction in REUs**
> If a property uses less water than allowed by the number of REUs that were assigned to the property or for which impact fees were paid, the property owner may request in writing to MPW for a reduction in the REUs applicable for the property in order to reduce the monthly water and wastewater BFC that must be paid for each REU applicable to the property....

(Opposition Memo., p. 4) REUs create the maximum number of gallons a customer can use on a monthly basis before being subject to excessive use charges, which are far greater than the BFC. Once REUs are reduced, additional impact fees must be paid to increase the REUs or back BFCs can be paid, whichever is less. Those impact fees are required to be paid at today's impact fee rate versus the impact fee rate from when the account was established, which in all likelihood is less than today's impact fee rate. This likelihood is not desirable for most commercial account holders. Each customer's average monthly usage over the past 3 years varies significantly. Therefore, some customers purchased additional REUs to reserve capacity for future development and communicated with MPW the intent to pay for those additional REUs until the property is developed. (Opposition Memo., pp. 6-7) And, MPW works with each customer independently to meet the customer's needs and to fairly charge the commercial customer for the number of REUs that each customer requests. (Opposition Memo., 7)

For example, one of MPW's commercial customers, Landmark Enterprises, Inc. ("Landmark") purchased additional REUs to reserve capacity for future development. (Opposition Memo., p. 7) Landmark is a local developer and purchased REUs for multiple undeveloped properties. (Opposition Memo. p. 7, Affidavit of Jason Ward

("Ward Aff.") ¶ 3) Landmark made a conscious decision to maintain the level of REUs because it believed it was more economical to pay for available reserve capacity/BFC's monthly for a number of years rather than paying impact fees at the current rate. (Opposition Memo., p. 7, Ward Aff. ¶ 5) Landmark chose to transfer capacity between its properties as the properties were sold to match the capacity that the new owner requested. (Opposition Memo., p. 7, Ward Aff. 6) Then Landmark requested that MPW allocate the wastewater capacity/REUs accordingly. (Opposition Memo., p. 7, Ward Aff. ¶ 6) Landmark knowingly sought extensions from MPW and paid capacity charges to keep reserved capacity on its property until development was complete and/or the property had been sold. (Opposition Memo., p. 7, Ward Aff. ¶ 7)

Landmark made these decisions to avoid paying impact fees at the rates applicable to the date of development versus the day of purchase in the 1980s. (Opposition Memo., p. 7, Ward Aff. ¶ 7) Further, to make the property more valuable for future marketability, Landmark made a business decision to maintain reserve capacity for future development in furtherance of its business interest. (Opposition Memo., p. 7, Ward Aff. ¶ 8) Landmark made this decision with the understanding that Landmark did not need that particular level of wastewater capacity or REUs at the time. (Opposition Memo., p. 7, Ward Aff. ¶ 4)

B. Background on Snee Farm

Snee Farm is a non-profit homeowners' association formed pursuant to South Carolina law and owns, manages, and maintains common elements established pursuant to restrictive covenants. (Complaint ¶ 1) By letter dated February 24, 1982, MPW sent a letter to Snee Farm stating that Snee Farm submitted plans and specifications to the

Commission for approval. (Vest Depo., Ex. 5) The letter specifically stated that Snee Farm sought "approval for 148 units on 14.34 acres." Id. The plan was approved.

In February 2018, MPW sent letters to 288 of its 3,160 commercial customers informing them that based on historical data they were not using the full capacity of their assigned gallons. (Opposition Memo., p. 5, Ex. 5, Deposition of Nicole Bates, 30(b)(6) Designee ("Bates Depo."), pp. 52, 64-65) These letters only pointed out what commercial customers could have determined themselves by reading the back of their bills. The letters provided a recommended number of REUs that a commercial customer might consider optimal based on their historical water usage. Of course, there is no requirement that the 288 commercial customers receiving the letter reduce their REUs as the customers may have other individual and unique reasons for maintaining the level of REUs currently in place. In fact, as of the time the Motion for Class Certification, more than a year after the letters were sent, eighty-five percent of the commercial customers that received the letter pointing out to them that they were not using their full allotted REU capacity, did **not** reduce their REU allocation. (Opposition Memo., p. 5, Bates Depo., p. 65) And, of those commercial customers that decided to reduce the REU allocation, 22 of the 43 customers did not reduce to the amount recommended by MPW. (Opposition Memo., p. 5) Oddly enough, despite the allegations asserted in this action, Snee Farm is a member of the 85% who chose not to reduce their REUs even after the letter bringing their REU capacity to its attention.

Lona Vest, who is an owner of Property Management Services, Inc., is the regime manager for Snee Farm and was designated as the person most knowledgeable about Snee Farm's account with MPW and the payment for the provision of water and

wastewater services that MPW provides to Snee Farm's residents. (MPW's Opposition Memo, Ex. 1, Deposition of Lona Vest ("Vest Depo., pp. 9, 15). Snee Farm brought suit after receiving the February 2018 letter, claiming that it wanted to recover the previous amounts that were paid as a result of the alleged overcharging, asserting that it should only be charged for actual water usage rather than any attempt at estimating future water needs. (Vest Depo. p. 10) Specifically, the February 2, 2018 letter stated:

> Mount Pleasant Waterworks (MPW) is currently conducting an audit to compare the number of allocated Residential Equivalent Units (REUs) with the number of REUs ***each commercial customer is using***. An REU is an equivalent assignment of capacity in gallons per day. An audit of your account has revealed that you are underutilizing your assigned REUs or assigned capacity. You may want to consider lowering your assigned REUs which will result in lower monthly Basic Facility Charges (BFC).
>
> A [] REU is a unit of measurement used to calculate the amount of water/wastewater a customer uses. One REU is equal to 300 gallons per day (GPD). The proposed water and wastewater demand is divided by 300 GPD to calculate the REU allocation. ***In many cases, the allocated REUs to an account is determined based upon anticipated use data provided by the customer's own design team.*** This allocation tells [MPW] how much capacity must be available for our customers to use each day.
>
> ****
>
> Your average monthly consumption for your highest quarter is 697,383 gallons. You may want to lower to 76 REUs which are more closely aligned to your usage.[7]

(Opposition Memo., Ex. 5) (emphasis added) Snee Farm conceded that sending the February 2, 2018 letter fulfilled MPW's alleged obligation to notify its customers when they are not using their full-allocated capacity. (Opposition Memo., p. 10, Vest Depo. p.66) However, following receipt of the February 2, 2018 letter, Snee Farm did not

[7] (Opposition Memo., p. 5)

change its allocation and made a conscious decision to continue to authorize the payments to MPW continue for 148 REUs per month. (Vest Depo. pp. 29, 30)

Other commercial customers who received the February 2018 letter contacted MPW and chose to reduce their REUs. Of the 288 commercial customers that received letters, 43, customers chose to reduce the number of allocated REUs on their accounts. (Opposition Memo, p. 5, Bates Depo., pp. 51-52) Of the customers that chose to reduce their REUs, not all reduced them to the level recommended by MPW, choosing instead to maintain an REU level in excess of what MPW recommended. For example, Bay Club Homeowners Association only reduced its REU allocation to 70 REUs even though MPW's recommendation was 58 REUs. (Opposition Memo., pp. 5-6) Vest acknowledged in her deposition that another HOA for Bay Club in Mount Pleasant chose to reduce their REUs. (Vest Depo., p. 45)

Unlike these customers, Snee Farm has never communicated a request for a change in the allocated number of REUs to its property and has never met with MPW to discuss the REU allocation. (Vest Depo., p. 85) Importantly, Snee Farm has never read the back of its water bill, which explains to the individual customer the number of assigned REUs and the BFC calculation and provides the formula to determine whether the number of REUs is in line with the individual customer's reserved capacity. (Opposition Memo., p. 8, Vest Depo., p. 47)

Fatal to its request for class certification, Snee Farm concedes that each commercial customer would have to make a conscious decision regarding whether the individual customer wanted to reduce the allocated number of REUs to the individual customer's account. (Vest Depo., p 56) Further, Snee Farm concedes that to find out

why an individual customer made a particular decision regarding the REU allocation would require asking each individual customer. (Vest Depo., p. 142) Finally, Snee Farm conceded that whether a customer has been overcharged must be decided on a customer-by-customer basis. (Vest Depo., p. 100)

ARGUMENT

I. Standard of Review

Under South Carolina law, to satisfy the certification of a class, the proponent must prove the following five prerequisites set forth in South Carolina Rule of Civil Procedure 23(a), which provides:[8]

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

The first four requirements are identical to the requirements contained in Federal Rule of Civil Procedure 23(a) and are referred to as requirements of 1) numerosity;

[8] For the reasons stated in MPW's Return to Snee Farm's Motion to Dismiss this appeal, MPW states that the issue of the Circuit Court's grant of Snee Farm's Motion to Certify is properly before this Court. In addition, based on prior South Carolina precedent, MPW must be allowed to challenge the Circuit Court's Order to prevent the certification from becoming the law of the case. *See O'Quinn v. Beach Assocs.*, 272 SC. 95, 104, 249 S.E.2d 734, 738 (1978) (explaining that "[t]his action was certified a class action by the lower court under Section 15-5-50 and no appeal has been taken from that certification. Whether right or wrong, the lower court's certification is now the law of the case, *Priester v. Brabham*, 230 S.C. 201, 95 S.E. (2d) 167 (1956), and we must consider this as a proper class action.") (citing *Meyerson v. Malinow*, 231 S.C. 14, 97 S.E.2d 88 (1957)).

2) commonality; 3) typicality; and 4) adequacy of representation. Fed. R. Civ. P. 23(a). The failure of just one of the requirements is fatal to class certification. *See Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003) (explaining that "failure to satisfy even one prerequisite is fatal to class certification . . . ."); *Waller v. Seabrook Island Prop. Owners Assoc.*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990) (explaining "[t]he failure of the proponents to satisfy any one of the prerequisites is fatal to class certification."). "In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied." *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200. These requirements all flow from the same considerations of fairness to the unnamed class members and efficiency in the management of resolution of large numbers of claims. Additionally, courts must decide whether the class action mechanism is a superior procedure for adjudicating the issues involved. *See* J. Flanagan, South Carolina Civil Procedure, at 189 (3rd Ed. 2010).

In determining whether a request to certify a class should be granted, courts must look beyond the pleadings and make factual findings as necessary. *Gen. Tel Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) (explaining that "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."). Further, "[a] court may not look to the merits when determining whether to certify a class." *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 43, 508 S.E.2d 16, 21 (1998). And, the court must not simply the allegations of the complaint as being true. *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 367 (4th Cir. 2004) (explaining that "[b]ecause the district court concededly failed to look beyond the pleadings and conduct a rigorous analysis of whether Keystone's shares traded in an efficient market, we must remand the

case to permit the district court to conduct the analysis and make the findings required by Rule 23(b)(3).").

Here, the Circuit Court failed to properly conduct this rigorous analysis of the facts in the record and erred in granting Snee Farm's Motion for Class Certification. Because Snee Farm lacks standing and has failed to meet the prerequisites set forth in Rule 23, the Circuit Court should be reversed and Snee Farm's Complaint should be dismissed.

II. The Circuit Court Erred in Granting Snee Farm's Request for Class Certification.

The Circuit Court's determination that Snee Farm met its burden of demonstrating the appropriateness of class certification was incorrect based on South Carolina law and the facts of the case. Therefore, the Circuit Court's determination should be reversed.

A. The Record Does Not Support the Determination that the Adequacy of Representation Requirement Has Been Met.

In determining that Snee Farm's met the requirement of showing adequacy of representation, the Circuit Court found that Snee Farm "aided by its experienced counsel, will adequately represent and protect the interests of the Class" because it 1) "understands the basis of the BFC refund claim and the Class it seeks to represent;" 2) "[a]ll members of the Class sustained damages arising out of [MPW]'s uniform conduct toward [Snee Farm] and all members of the Class;" 3) Snee Farm "is committed to pursuing this action;" and 4) Snee Farm's "claims benefit and are coextensive with those of all Class members." *See* Order, p. 12. Again, the Circuit Court has erroneously focused on the wrong issue and should be reversed.

As courts have acknowledged, adequate representation is the capstone of the Rule 23(a) requirements because it ensures that a class representative will pursue its interests sufficiently well so as to produce a judgment that can fairly bind all members of a group who cannot appear before the court individually. *See Fond Du Lac Bumper Exch., Inc. v. Jui Enter. Co., Ltd.*, Case No. 9-CV-852, Case No. 13-CV-987, Case No. 14-CV-1061, 2017 U.S. Dist. LEXIS 142470, *10-11 (E.D. Wis. Aug. 8, 2017) (quoting *Newberg on Class Actions* § 3:50)). Logically, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Falcon*, 457 U.S. at 156 (quoting *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977)). Courts should not certify a class action where the proposed class representative does not prove it will adequately represent the interest of the putative class members. *See* Rule 23(a); *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. This factual question depends on the circumstances of each case. *Waller*, 200 S.C. at 468, 388 S.E.2d at 801. *See also Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983) (stating that proposed class representatives are inadequate unless they demonstrate that they do not have "antagonistic or conflicting interests to the unnamed members of the class" and they "will vigorously prosecute the interests of the class through qualified counsel."); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 923 (E.D. Pa. 1983) (explaining that the "plaintiffs' efforts to certify a class by abandoning some of the claims of their fellow class members have rendered them inadequate class representatives.").[9]

[9] The United States Supreme Court has acknowledged the relationship among adequacy, typicality, and commonality and has stated that both commonality and typicality "tend to merge with the adequacy of representation requirement," such that the Circuit Court's determination with regard to these prerequisites influenced its erroneous determination regarding Snee Farm's adequacy as a class representative. *See* Order, pp.

The decision in *Valley Drug Company v. Geneva Pharmaceuticals*, 350 F.3d 1181 (11th Cir. 2003) illustrates the problem with the Circuit Court's erroneous determination that Snee Farm is an adequate class representative. In *Valley Drug*, a fundamental conflict existed among the class members in which some benefited from the conduct that was the subject of the lawsuit and others were harmed. Ultimately, the Eleventh Circuit concluded that certification under those circumstances was inappropriate. The court held:

> A fundamental conflict exists where some party members claimed to have been harmed by the same conduct that benefited other members of the class. In such a situation, the named representatives cannot vigorously prosecute the interests of the class through qualified counsel because their interests are actually more potentially antagonistic to, on conflict with the interests and objectives of other class members.

Valley Drug, 350 F.3d at 1189 (citations omitted).

The court then considered other decisions wherein courts prohibited a finding of adequacy where the "class collapses into distinct groups of winners and losers." *Id.* at 1189. The *Valley Drug* court also noted that it was "not alone in interpreting Rule 23(a)(4) to preclude class certification when the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of the unnamed class members." *Id.* at 1190; *see also Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280-1281 (11th Cir. 2000) (concluding that under the circumstances of the case, the plaintiffs "could not possibly provide adequate representation to a class that includes producers who willingly entered into forward contracts and marketing agreements [] as well as those who complain of and claim harm from the practice" and concluding "the district court erred in certifying the class.").

11-12; *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n. 5 (2011).

Based on Snee Farm's testimony and the allegations of its Complaint, it is clear that Snee Farm in seeking a "refund" on behalf of itself and the class members seeks to require a reduction of REUs regardless of the individual commercial customer's wishes regarding the number of REUs that the individual commercial customer wishes to maintain. However, the record clearly demonstrates that Snee Farm is not an adequate class representative. In addition to failing to meet the other prerequisites for class certification, Snee Farm's testimony demonstrates the subjective nature of the class and the necessity of conducting individualized determinations regarding why an individual commercial customer would choose to not reduce its REUs, choose a partial reduction of its REUs, purchase more REUs, or even whether any customer would even be a member of the purported class. *See* Vest Depo., pp. 44, 83. Further, Snee Farm's testimony demonstrates that conflicts exist among the proposed members of the purported class because not all members have a claim and desire the same alleged "relief." *See* Vest Depo., pp. 100-101. Where the proposed class representative's interests are not aligned, there is not adequate representation. *See AmChem Prods. v. Windsor*, 521 U.S. 591, 626 (1997) (determining the proposed class representative was not proper where there "interests of those within the single class are not aligned."). Additionally, fundamental conflicts exist between current commercial customers and former customers members of the class because a former customer has no interest in the impact on MPW or the impact on the current customers' REUs. Such a conflict makes class certification inappropriate. *See AmChem Prods.*, 521 U.S. at 627; *Pipes v. Life Investors Insurance Company of America*, 254 F.R.D. 544, 550 (Ed. Ark 2008). Therefore, the Circuit Court's grant of the

certification of the class should be reversed.[10]

B. The Record Does Not Support the Determination that the Commonality Requirement Has Been Met.

The record does not support the Circuit Court's determination that "[c]ommon questions of law and fact exist as to all members of the Class." *See* Order, p. 7. The South Carolina Supreme Court has explained that "[t]o establish commonality, a party must show that 'there are questions of law or fact common to the class'" and "[i]n practical terms this means the party must articulate the existence of 'significant common, legal, or factual issues' which bind the proposed class together." *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (quoting Rule 23, SCRCP; *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D. Ohio 1991)). The Circuit Court did not complete the required analysis to determine whether this requirement was met, and, therefore, it should be reversed.

In addressing the issue of commonality in *Gardner*, the South Carolina Supreme Court determined that the plaintiffs did not demonstrate commonality. Specifically, the Court noted that while there were at least two common questions of law in the case, the case was "not a typical class action where minor factual differences exist[ed] among the individualized cases of class members" because "the factual differences (whether

[10] In addition, Snee Farm has taken positions that would be antagonistic to unnamed class members, which is impermissible. *See Bates v. Tenco Servs., Inc.*, 132 F.R.D. 160 (D.S.C. 1990); *Runion*, 98 F.R.D. 313; *Sullivan v. Winn-Dixie Greenville Inc.*, 62 F.R.D. 370 (D.S.C. 1974). Further, Snee Farm's interests conflicts with the economic interests of other class members, which weighs in favor of the proposed class not being certified. *Waller*, 300 S.C. at 468-469, 388 S.E.2d at 801-802; *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F. 3d 331 (4th Cir. 1998). And, the proposed class cannot be certified because the proposed members "have opposing interests" and the proposed class "consists of members who benefit from the same acts alleged to be harmful to other members of the class." *Pickett*, 209 F.3d at 1280.

prejudice exists) are the crux of a predominate legal issue." *Id.* at 22, 577 S.E.2d at 201. In determining that certification of the class was not proper, the Court reasoned "[a] representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case" because "[r]equring such individualized examination negates the benefits of a class action suit." *Id.*, 577 S.E.2d at 201 (citing *O'Quinn*, 272 S.C. at 104, 249 S.E.2d at 738 ("The very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action.")). *See B.L.H. v. S.C. Dep't of Soc. Servs.*, 423 S.C. 422, 431, 814 S.E.2d 638, 643 (Ct. App. 2018) (reversing the grant of class certification and explaining that the issues in the cases required individualized inquiry, which would negate the benefits of a class action suit); *see also Peoples v. Wendover Funding Inc.*, 179 F.R.D. 492 (D. Md. 1998) (explaining "a representative plaintiff cannot establish commonality . . . if the court must investigate each plaintiff's individual claim.'").[11]

Here, the record clearly demonstrates that the proposed class claims and the defenses that are available to MPW will require an individualized examination of each customer's facts and circumstances, which negates the benefits of the class action suit. As Snee Farm acknowledges and the record supports, the crux of the predominant legal

[11] A related issue was addressed in a recent article, Vivian M. Quinn and Tracey B. Scarpello, *"Ascertainability" in Pharmaceutical and Medical Device Cases*, For the Defense pp. 46-48 (2019). In the article, the authors note that federal circuit courts have also considered the necessity of determining whether the members of the proposed class are ascertainable before certifying the class. The authors specifically note that the Fourth Circuit has stressed that while "'plaintiffs need not be able to identify every class member at the time of certification,'" "'[i]f class members are impossible to identify without extensive and individualized fact finding or 'mini-trials', then a class action is inappropriate.'" *Id.*, p. 47 (quoting *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014)).

issue in this lawsuit requires the consideration of the individual preference of each of MPW's commercial customers regarding the number of requested REUs and why each of the individual commercial customers would either chose to retain its current level of REUs or reduce the number either to the number recommended by MPW or some other number of its choosing. *See* Vest Depo., p. 142. In other words, a case-by-case analysis if necessary to determine whether the BFC charges were "excessive" such that any individual commercial customer would receive a "refund."

This point is perfectly demonstrated by the affidavit of Landmark's president, which would be a member of the proposed class. In the affidavit, Ward states that Landmark was well aware that it purchased more capacity than what was needed and has been paying for unused capacity on its properties based on Landmark's business decision to make these payments rather than pay impact fees at current rates. Landmark did not pay "excessive" fees based on MPW's understanding of that term as used in the context of Snee Farm's alleged claim.

The BFC is calculated based on the allocation of REUs. The REUs assigned are unique to a particular customer and that customer's circumstances and are the result of discussions between the customer or an engineer representative of the customer and MPW. *See* Duffie Depo. pp. 45-47. The question of the amount of the REUs is one of reasonableness not only for MPW but also the individual customer who is a proposed class member. *See id.* p. 37. The number of REUs that are reasonable for one customer may be unreasonable for another customer and its intended use of its property. Customers, at the time of construction, bring their own engineer to provide an estimation of use and to work with MPW to allow that customer enough capacity so that it will not

have to pay an excessive use fee. *See id.* pp. 45-47. And, as noted by *Lewis and Sullivan on Class Actions*, class actions that implicate issues of reasonableness do not possess communality. A. Camden Lewis, et. al., *Lewis and Sullivan on Class Actions* (pp. 42-44) (2005).

There is no question that this suit would require evaluating each of the proposed class members' claims in an individualized manner, which defeats the purpose of a certifying the class. Given this undisputable fact, the Circuit Court erred in determining otherwise and in certifying the proposed class.

C. The Record Does Not Support the Determination that the Typicality Requirement Has Been Met.

The record does not support the Circuit Court's determination that Snee Farm's claims were not atypical of the Class. *See* Order, p. 10. Under South Carolina law, "[t]o establish the typicality requirement, the 'claims or defenses of the representative parties [must be] typical of the claims or defense of the class.'" *Pope v. Heritage Cmtys., Inc.*, 395 S.C.404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011) (quoting Rule 23(a)(3)). Further, "'[t]he premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.'" *Broussard*, 155 F. 3d at 340 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)). Typicality requires that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). The typicality requirement is only met if a plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is

based on the same legal theory. *See Moody v. Kiawah Island Inn Co., LLC*, 309 F.R.D. 370, 378 (D.S.C. 2015). The facts of this case clearly demonstrate that the typicality requirement has not been met.

The Circuit Court erroneously focused on the wrong issue in certifying the class and failed to properly consider MPW's arguments regarding the absence of typicality in Snee Farm's claim compared to the claims of the proposed class members. In its Complaint, Snee Farm contends that it is seeking a refund for alleged excessive BFC charges based on the assignment of REUs. In order to determine whether there are excessive BFC charges, the individual reasons that each of MPW's commercial customers chose the initial REUs and the individual reasons that each of MPW's commercial customers choose to either keep their current REUs or change is not typical to the class. The Circuit Court's Order, like Snee Farm's Complaint and proposed class definition, presupposes that the BFC charges were "excessive." However, for those customers who choose not to reduce their REUs, the charge is not "excessive." Contrary to this finding, the evidence in the record is that the purported class members voluntarily paid the charges at issue as a cost of doing business. Snee Farm seeks to force adjustments in the REUs notwithstanding the individual intent or motivation of the potential class members.[12] Accordingly, typicality does not exist, this Court should reverse the Circuit Court's determination because the Circuit Court's failure to consider this evidence is reversible error.

In addition, the Circuit Court ignored the evidence in the record that demonstrated

[12] Notably, the Circuit Court's Order uses the term "implicated customer" but the Circuit Court does not define who or what is an implicated customer.

the origin of REUs and how that may differ from customer to customer based on the needs of the individual customers.[13] The evidence demonstrates that Snee Farm selected 148 REUs through its engineer when it was founded.[14] As evidenced by Landmark's affidavit, its choice of the number of REUs was selected by that business, not by MPW. In fact, the evidence in the record is that REUs are set through a variety of means. These factual differences that the Circuit Court ignored invalidate a finding of typicality. Typicality is not met when the named plaintiff's claims do not arise out of the same course of events as the other class members. If the purported class member "did not suffer a cognizable injury similar to the injury suffered by the other class members", then that plaintiff's claims are not typical. *MacLaine v. South Carolina Nat'l. Bank*, 105 F.3d 898, 903 (4th Cir. 1997). Here, Snee Farm's claims are not typical.

The evidence demonstrates that the way Snee Farm has handled its REU reduction is not typical of the proposed class. For instance, even more than a year after receiving the letter from MPW regarding seeking a potential reduction in REUs, Snee Farm has not spoken to anyone at MPW about reducing its REUs, which it could have

---

[13] The Circuit Court improperly ignored the evidence that the class of MPW's commercial customers includes restaurant owners, breweries, gas stations, or other independent stand-alone business property. Snee Farm's status as an homeowners association means that it is subject to the whim of its Board and its owners such that its participation in this action could change, unlike the other commercial customers.

[14] The Circuit Court also failed to consider the fact Snee Farm is very different from the other proposed members of the class. Snee Farm is a homeowners association, not a commercial customer owned by a single or joint business owner such that there are particular issues with Snee Farm that may not apply to other commercial customers. For example, the 148 REUs that were selected presumably were chosen because the development has 148 units with each of these units paying a percentage of a budgeted water bill for the whole development. Therefore, the owners are not paying their water bill charged by Snee Farm based on their actual usage and are instead being charged a flat regime fee based on the size of the owner's unit. *See* Vest Depo., pp. 71-73; Vest Depo., Ex. 14.

easily done. The evidence shows that 43 of the 289 commercial customers who received the February 2018 letter contacted MPW and reduced their REUs, with only 25 commercial customers reducing their REUs to the numbers recommended by MPW. This fact demonstrates that Snee Farm's claim will be subject to a unique defense, which defeats the typicality requirement. *See In re Schering Plough Corp. ERISA Litig*, 589 F.3d 585, 598-599 (3d Cir. 2009) (explaining that "[i]t is well established that a proposed class representative is not 'typical' under Rule 23(a)(3) if 'the representative is subject to a unique defense that is likely to become a major focus of the litigation.'") (quoting *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006)); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (refusing to grant class certification where the putative class representative had unique defenses against which to defend); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (explaining "there is danger that absent class members will suffer if their representative is occupied with defenses unique to it."); *J.H. Cohn & Co. v. Am. Appraisal Assocs.*, 628 F.2d 994, 999 (7th Cir. 1980) (reasoning "the presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class . . . .The fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer." (internal citations omitted)); *Wiseman v. First Citizens Bank & Trust Co.*, 212 F.R.D. 482, 488 (W.D.N.C. 2003). The facts giving rise to Snee Farm's alleged claims are very different when compared to the other members of the proposed class. The resolution of Snee Farm's claim is not the

same as the other proposed class members, and the Circuit Court's determination should be reversed. *Broussard*, 155 F. 3d at 340.

D. Snee Farm Lacks Standing to Bring this Lawsuit and Cannot Serve as a Class Representative.

Under South Carolina law, "[s]tanding may be acquired (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception."[15] *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Further, "[t]he principal of standing under the United States Constitution is 'an essential and unchanging part of the case-or-controversy requirement of Article III.'" *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The United States Supreme Court has established the following test to determine whether a party has standing to sue:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical'," Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 195, 669 S.E.2d at 339 (quoting *Lujan*, 504 U.S. at 560-561) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). *See also Edisto Fleets, Inc. v. S.C. Tax Com.*, 256 S.C. 350, 182 S.E.2d 713 (1971) (reasoning that "[i]t is

[15] The Circuit Court noted that it was not considering whether Snee Farm has standing pursuant to statute or the public importance exception because there was no suggestion that Snee Farm had such standing. *See* Order, p. 5. Therefore, MPW does not address these two methods for acquiring standing here.

fundamental that one without interest in the subject matter of a lawsuit has no legal standing to prosecute it.") (quoting *Furman Univ. v. Livingston*, 244 S.C. 200, 136 S.E.2d 254 (1964)). The Circuit Court erred in determining that Snee Farm has such standing, and this determination should be reversed.

1. Snee Farm does not have constitutional standing because it is not the proper party to receive a refund.

In the Order, the Circuit Court erroneously determined that Snee Farm had standing to bring suit against MPW. Specifically, the Circuit Court explained that Snee Farm is a customer that receives monthly water bills from MPW and that Snee Farm contends that these bills included excessive BFC for years and that it is Snee Farm that is entitled to a refund for this overcharge. *See* Order, p. 6. Further, the Circuit Court determined that the individual unit owners were not customers of MPW, did not have direct relationship with MPW, and therefore, do not have standing to bring suit. *See id.* And, the Circuit Court stated that the unit owners' contractual agreements with Snee Farm do not undermine Snee Farm's alleged standing as an overcharged customer for purposes of the case and class certification. The Circuit Court's determination is not supported by the facts of the case or South Carolina law and must be reversed.

The South Carolina Supreme Court's decision in *Edisto Fleets* mandates a determination that Snee Farm does not have standing to sue MPW. The plaintiff was organized to purchase vehicles and then lease them to a dairy, and both the plaintiff and the dairy were incorporated under South Carolina law. *Edisto Fleets*, 256 S.C. at 352, 182 S.E.2d at 714. The defendant was the agency responsible for collecting taxes under the Sales and Use Tax Act, and it examined the plaintiff's records and assessed a tax

based upon the amount of consideration paid to the plaintiff by the dairy for the lease or rental of the motor vehicles. *Id.* at 352-353, 182 S.E.2d at 714. The plaintiff sued the defendant on its own behalf and on behalf of other similarly situated tax payers. *Id.* at 353, 182 S.E.2d at 714. The special master found and concluded that the plaintiff did not have standing to bring suit as a class.

In affirming the master's decision, the Court explained that "[u]nder well settled rules of law, the plaintiff has no standing to prosecute this as a class action." *Id.*, 182 S.E.2d at 714. The Court noted that the "[t]he record does not show the existence of a class of taxpayers that have submitted applications to the defendant for the refund of a tax paid upon the lease or rental or tangible personal property and the denial of such refund claims by the defendant...." *Id.*, 182 S.E.2d at 714. Further, the Court reasoned "[i]t is equally apparent that the plaintiff has no financial interest in taxes paid by other persons upon the proceeds from the rental or lease of tangible personal property, and in the absence of such interest, may not prosecute this action for their benefit." *Id.*, 182 S.E.2d at 714. Finally, the Court determined that "'[i]t is fundamental that one without interest in the subject matter of a lawsuit has no legal standing to prosecute it'" and "'a person who has no financial interest in taxes alleged to have been erroneously collected has no legal standing to sue for their refund.'" *Id.*, 182 S.E.2d at 714 (quoting *Furman Univ. v. Livingston*, 244 S.C. 200, 136 S.E.2d 254 (1964)[16] (citing *Asmer v. Livingston*, 225 S.C.

[16] In *Furman University*, the Court concluded that the university, while it sold the tickets and collected the alleged improper tax, was not the tax payer based on the facts revealed in the record. *Furman Univ.*, 244 S.C. at 205, 136 S.E.2d at 256. The Court explained that "[t]he admissions tax so imposed is not paid by [the] University, but by the persons who saw fit to attend the football games to which an admission fee was charged. The only duty enjoined on the [University] was to collect and remit the tax; it had no burden otherwise. The [University] here was merely a collection agent for the State Tax

341, 82 S.E.2d 465 (1954))[17]; *Desoto Gold-Min. Co. v. Smith*, 49 S.C. 188, 27 S.E. 1 (1897); *Wilder v. S.C. Highway Dep't*, 228 S.C. 448, 90 S.E.2d 635 (1955) (concluding that the plaintiff did not have standing to sue and also explaining that this conclusion "makes it unnecessary to determine whether a class action could be maintained" but also noting that it "ha[d] no hesitancy in saying that it could not") (citing *Earle v. Webb*, 182 S.C. 175, 188 S.E. 798 (1936)).

There is no question that Snee Farm has not suffered an injury in fact based on the conduct alleged in its Complaint. Snee Farm's representative testified that Snee Farm does not pay the water bills. Rather, Snee Farm is merely a pass-through entity for the payment of the bills and merely collects the funds from the unit owners, which the South Carolina Supreme Court has previously determined does not afford standing. Snee Farm did not state that it has lost any money as the result of the BFC/REU calculation. *See* Vest Depo., p. 77. Therefore, Snee Farm has not suffered an injury in fact, and the Circuit Court's determination should be reversed.

2. Snee Farm does not have associational standing.

As an alternative basis to support its erroneous finding of standing, in a footnote, the Circuit Court stated that Snee Farm "would have associational standing to bring suit for its member owners" if it accepted MPW's argument that Snee Farm did not pay its

---

Commission." *Id.* at 203, 136 S.E.2d at 255-256.

[17] The *Asmer* Court explained that the party paying the complained of tax was the only party who could sue for a refund. The Court reasoned the word "refund" means "'[t]o pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid.'" *Asmer*, 225 S.C. at 345, 82 S.E.2d at 467 (citations omitted). The Court determined that "[a]s the tax was paid by the wholesaler to the Tax Commission, we think it was intended that such refund should be to him alone and not to a retail licensee." *Id.* at 345, 82 S.E.2d at 467.

own money. *See* Order, p. 6. In reaching this determination, the Circuit Court relied on *Carnival Corporation v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014). This decision does not support the Circuit Court's determination.

The *Carnival Corporation* Court explained that an association "may possess standing by virtue of associational standing on behalf of its members" and has such standing "'if one or more of its members will suffer an individual injury by virtue of the contested act.'" *Carnival Corp.*, 407 S.C. at 75-76, 753 S.E.2d at 850-851 (quoting *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600-601, 550 S.E.2d 287, 291 (2001)). Further, the Court explained:

> The three part test for associational standing requires that an association's members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 76, 753 S.E.2d at 851 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001)). Further, the Court reasoned that "to possess standing, either Plaintiffs alone must have suffered a concrete, particularized injury or their members must have suffered such an injury and the other elements of associational standing must be satisfied." *Id.*, 753 S.E.2d at 851.

The record clearly demonstrates that Snee Farm does not have associational standing to bring suit. The Circuit Court's own findings support the determination that Snee Farm cannot maintain this action because it determined that the individual unit

owners in the Snee Farm development "are *not* MPW customers, have no direct relationship with MPW, and therefore have no standing to bring this case." *See* Order, p. 6. Therefore, the first requirement under *Carnival Corporation* that Snee Farm's members would otherwise have standing to sue in their own right is not met. *Carnival Corp.*, 407 S.C. at 76, 753 S.E.2d at 851. The failure to meet this requirement is fatal to Snee Farm's lawsuit against the MPW, and the Circuit Court erred in determining otherwise.

In addition, Snee Farm lacks associational standing because the requested relief requires the participation of the individual members in the lawsuit. *Id.* at 76, 753 S.E.2d at 851. While Snee Farm Lakes Homeowner's Association is the putative class representative in this case, the members of that association have never voted to bring or maintain this lawsuit. In fact, as evidenced by the deposition testimony of Snee Farm's representative, this lawsuit and this class action is a creation of the property manager and her company and not the homeowner's association. The record is clear that Vest brought the lawsuit to the three members of the governing board of the HOA who unilaterally gave Vest carte blanche to bring this action. To date, there has been no vote of the board of Snee Farm Lakes to pursue this matter. In fact, Snee Farm's master deed and bylaws are silent regarding the ability to bring suit such that there is no mechanism for a homeowner to even protest or challenge Vest's decision and the three board members to bring this action. Of course, Vest, who is not a resident of the development has no personal stake in the outcome and is not a member of the class that she seeks to represent. However, for all intents and purposes, Vest is the class representative because no one has come forward from the development to speak on its behalf other than Vest. The Circuit

Court erred in determining that Snee Farm has standing to bring suit and this determination should be reversed.

CONCLUSION

For the reasons stated above, MPW respectfully requests the reversal of the Circuit Court's Order and dismissal of Snee Farm's Complaint. South Carolina law and the facts developed on the record before the Court clearly demonstrates that Snee Farm has failed to meet all of the prerequisites for class certification under Rule 23 such that the Circuit Court improperly certified the proposed class. In addition, Snee Farm lacks standing to maintain suit against MPW because it has suffered no injury. Therefore, the Circuit Court's Order granting class certification should be reversed.

October 23, 2019

By: _____

Gray T. Culbreath, S.C. Bar No. 11907
Amy L.B. Hill, S.C. Bar No. 68541
Janice Holmes, S.C. Bar No. 75038
GALLIVAN, WHITE & BOYD, P.A.
1201 Main Street, Suite 1200
Post Office Box 7368
Columbia, South Carolina 29202
Telephone: 803-779-1833
Facsimile: 803-779-1767
gculbreath@GWBlawfirm.com
ahill@GWBlawfirm.com
jholmes@GWBlawfirm.com

and

James A. Bruorton, IV
David G. Jennings

Timothy J.W. Muller
ROSEN HAGOOD
151 Meeting Street, Suite 400
Charleston, SC 29401

Attorneys for Appellant The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
OCT 23 2019
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

The Honorable Bentley D. Price, Judicial Circuit Court Judge
Trial Court Case No.: 2018-CP-10-2764

Appellate Case No. 2019-001482

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

v.

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

PROOF OF SERVICE

I certify that I served copies of the Initial Brief of Appellant The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks by United States mail, postage prepaid, addressed to:

Clayton B. McCullough
Ross A. Appel
McCULLOUGH KHAN, LLC
359 King St., Ste 200
Charleston, SC 29401
(843) 937-0400
Attorneys for Respondent

James L. Ward, Jr.
Ranee Saunders
McGOWAN HOOD & FELDER, LLC
321 Wingo Way, Ste 103
Mt. Pleasant, SC 29464
(843) 388-7202
Attorneys for Respondent

October 23, 2019

By:_____
Gray T. Culbreath, S.C. Bar No. 11907

Amy L.B. Hill, S.C. Bar No. 68541
Janice Holmes, S.C. Bar No. 75038
GALLIVAN, WHITE & BOYD, P.A.
1201 Main Street, Suite 1200
Post Office Box 7368
Columbia, South Carolina 29202
Telephone: 803-779-1833
Facsimile: 803-779-1767
gculbreath@GWBlawfirm.com
ahill@GWBlawfirm.com
jholmes@GWBlawfirm.com

and

James A. Bruorton, IV
David G. Jennings
Timothy J.W. Muller
ROSEN HAGOOD
151 Meeting Street, Suite 400
Charleston, SC 29401

Attorneys for Appellant The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks

GWB
GALLIVAN WHITE BOYD
Complex experience for complex matters

AMY L. B. HILL
A member of the South Carolina Bar
Direct Dial: 803.724.1716
ahill@GWBlawfirm.com

October 23, 2019

RECEIVED
OCT 23 2019
SC Court of Appeals

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
SC Court of Appeals
1015 Sumter Street
Columbia, SC 29211

RE: Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated v. The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks
Charleston County Case No.: 2018-CP-10-02764
GWB File No.: 8117-16

Dear Ms. Kitchings:

Enclosed for filing please find the original and two (2) copies of Appellant's Initial Brief in regards to the above-referenced matter. I would appreciate you returning a clocked copy to me via our courier. Thank you for your assistance with this matter.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.

Amy L.B. Hill

ALBH:amo
Enclosure
cc: All Counsel of Record (via email only)