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**Mar 30 2023**

**SC Court of Appeals**

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

Appeal from the Administrative Law Court  
Honorable Milton G. Kimpson, Administrative Law Judge

**Appellate Case No.: 2023-000441**

Stephen Mueller, ..... Appellant,

v.

South Carolina Department of Health and Environmental Control, and  
Carla Varn DuPre and Jasper B. Varn, III, ..... Respondents.

**JOINT MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS  
PETITION FOR APPEAL AND FOR ATTORNEY'S FEES**

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Respondents seek dismissal of a newly filed appeal, challenging a final decision of the Administrative Law Court (“ALC”) issued June 7, 2022. Respondents’ rely on the following legal authority in seeking this dismissal.

### **PROCEDURAL HISTORY**

Appellant seeks to appeal a final order and decision issued by the Honorable Milton G. Kimpson, entitled Stephen Mueller, Petitioner v. SCDHEC, Carla Varn DuPre and Jasper B. Varn, III, Respondents. Docket No. 21-ALJ-07-0144-CC. A hearing on the merits of the underlying case was held at the ALC on November 8, 2021. Nearly five months after the completion of the hearing, but before the Final Order was issued, Appellant filed a Motion to Reopen the Record on March 22, 2022, based on newly discovered evidence. See, Order Denying Motion for Relief attached to Appellant’s Notice of Appeal, FN 2.

The ALC issued its Final Order in the underlying case on June 7, 2022, finding the action of Respondent S. C. Department of Health and Environmental Control (“Department”) in issuing the Permit that Appellant challenged, OCRM02808, is supported by the evidence and consistent with the applicable regulatory and statutory requirements.<sup>1</sup> Final Order, p. 17. The ALC also denied Appellant’s Motion to Reopen in the Final Order. Final Order, p. 2. Importantly, Appellant did not file a Notice of Appeal of the Final Order nor move for reconsideration of the Order under SCRCP 59(e) in compliance with the South Carolina Rules of Civil Procedure. Id. at FN 2.<sup>2</sup>

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<sup>1</sup> The Department’s permit issued to Respondents’ DuPre and Varn authorized construction of a residence on a beachfront lot located on Edisto Beach, South Carolina.

<sup>2</sup> In South Carolina, a motion to alter or amend a judgement must be made pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure in order to preserve error when the appellant has made an argument that the trial court has not explicitly ruled on in its trial order. See, *Elam v2004. SCDOT.*, 361

Subsequently, on November 28, 2022, Appellant attempted to move for Relief from the Final Order of the ALC, contending that the Final Order contained errors of law and that relief was warranted under SCRCP 60(b) because of newly discovered evidence. See, Order Denying Motion for Relief attached to Appellant's Notice of Appeal, p 1. Respondents Carla Varn DuPre and Jasper B. Varn, III, filed a Return to Appellant's Motion, arguing that the ALC lacked jurisdiction because the time to file any post-trial motion had already passed. Respondents argued that it was appropriate for the Court to deny Appellant's second attempt to introduce new evidence to the record for this reason, and because he had already tried the strategy, albeit applying a different title to the Motion, and been denied. See Appendix.

The ALC denied Appellant's Motion for Relief on March 3, 2023, on the grounds that Appellant's Motion was not timely filed as a motion for reconsideration under SCALC 29(D). Order Denying Motion for Relief, p. 3. As noted in the ALC's Order Denying Motion for Relief, Appellant did not file his Motion until one hundred and eighty-two (182) days after the deadline set by Rule 29(D) to file a motion for reconsideration, on June 17, 2022. In addition, the ALC specifically declined to exercise its discretion to reopen the case under SCRCP 60(b)(1) or (2), advising that the proper avenue for Appellant to pursue regulatory intervention he was seeking to address the condition of Edisto Beach was not through the Court but, rather, the Department and its regulatory staff. See, Order Denying Motion for Relief attached to Appellant's Notice of Appeal, p. 3.<sup>3</sup>

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S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

<sup>3</sup> The ALC has jurisdiction over contested cases. Appellant's observations of the sand dunes on Edisto Beach, months and years after the Department issued its permit, is not a contested case and only becomes a contested case if Appellant attempts to obtain administrative relief from the Department and the Department denies such relief.

## ARGUMENT

The South Carolina Supreme Court has stated on several occasions “[t]he word ‘jurisdiction’ does not in every context connote subject matter jurisdiction, but rather, is ‘a word of many, too many, meanings.’” *In re Estate of Hover*, 407 S.C. 194, 207, 754 S.E.2d 875, 882 (2014) (quoting *Limehouse v. Hulse*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013)). “Specifically, ‘[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court’s power to render the particular judgment requested.” *Id.* at 208, 754 S.E.2d at 882 (quoting *Limehouse*, 404 S.C. at 104, S.E.2d at 572). Here, the third form of jurisdiction is at issue due to Appellant’s failure to follow the proper procedure to invoke this Court’s jurisdiction.

The jurisdiction of the Appellate Court is established in S.C. Code Ann. § 14-8-200:<sup>4</sup>

a) Except as limited by subsection (b) and Section 14-8-260, the court has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers’ Compensation Commission. This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case.

Arising from the ALC, this case is subject to S.C. Code Ann. § 1-23-610:

(A)(1) For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court **not more than thirty days** after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.<sup>5</sup>

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<sup>4</sup> Copied from <https://www.scstatehouse.gov/code/t14c008.php>.

<sup>5</sup> Bold emphasis added.

Rule of Appellate Practice 203 addresses Notices of Appeal, and subsection (6) requires such notice to be served on all respondents when appealing from the ALC within thirty (30) days after receipt of written notice of entry of the order or judgment:

*(6) Appeals From Administrative Tribunals.* When a statute allows a decision of the administrative law court or agency (administrative tribunal) to be appealed directly to the Supreme Court or the Court of Appeals, the notice of appeal shall be served on the agency, the administrative law court (if it has been involved in the case) and all parties of record within thirty (30) days after receipt of the decision. If a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the decision granting or denying that motion. If a decision indicates that a more full and complete decision is to follow, a party need not appeal until receipt of the more complete decision.

Accordingly, Appellant had until July 5, 2022 to serve a Notice of Appeal of the ALC's Final Order in this case. As noted above, Appellant did not follow the Appellate Court Rules to bring an appeal during this period nor file any post-trial motion that would have tolled the deadline. Despite his failure to properly file for an appeal, in line with his prior pattern, Appellant has attempted to email a Notice to institute an appeal of the ALC's Final Order two hundred and forty-seven days (247) after expiration of the deadline.

Appellant's attempt to appeal the Final Order is clearly untimely. Further, the Motion for Relief filed by Appellant was an improper attempt to get around his failure to appeal the ALC's decision. A party may not invoke Rule 60(b), SCRCP, where it could have pursued the issue on appeal. *Tench v. South Carolina Department of Education*, 347 S.C. 117, 553 S.E.2d 451 (S.C. 2001), *citing Smith Companies of Greenville v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993) (finding relief from judgment is not a substitute for appeal from final judgement, particularly when it is clear that the party seeking relief could have litigated at trial and on appeal claims he now makes by motion).

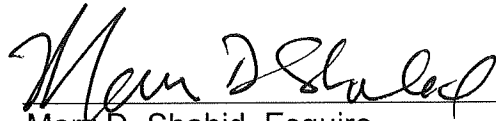
At this point, this Court has no jurisdiction to review Appellant's filing initiating an appeal. As stated by the ALC, Appellant asserted physical changes occurring on the Edisto Beach/Dune System after the hearing and asked that they be considered as new evidence to the case. However, as the ALC correctly instructed, Appellant's assertions presented new regulatory information that constituted subject matter for the Department's consideration, not the Court's. In short, the ALC lacked jurisdiction to consider Appellant's assertions. The ALC would have jurisdiction only after the Department makes a final decision capable of being challenged through a contested case.

Should this Court agree with Respondents and dismiss Appellant's untimely filing, Respondents Carla Varn DuPre and Jasper B. Varn, III respectfully request that they be awarded attorney's fees permitted by Rule of Appellate Practice 222(b). Respondents Carla Varn DuPre and Jasper B. Varn, III. are concerned about a pattern of behavior established by Appellant consisting of multiple court filings without any legal bases and multiple emails – some very disparaging and aggressive– to the ALC and copied to multiple parties, specifically on February 21, 22, and 26 and March 6, 10, 13, 2023. On February 27, 2023, Appellant was instructed by Judge Kimpson's law clerk to leave the Court off of the emails exchanged between the parties. Despite that request, Appellant continued copying the Court on emails. See Appendix. Respondents contend that the excessive filings made and emails sent by Appellant constitute extraordinary circumstances that would support an award covering the amount of their actual attorney's fees paid in connection with the filing of this motion. Respondents again respectfully assert that this case is over. Appellant's time for appeal passed over eight months ago, and Appellant's conduct borders on abuse of process.

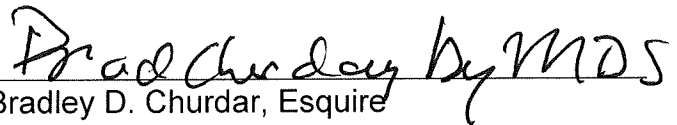
Finally, this Court extended the courtesy to Appellant to correct his pro se filings within 10 days of March 17, 2023. Appellant ignored this deadline, as he has all other deadlines, and didn't address deficiencies identified in his initial filing until March 28, 2023.

### **CONCLUSION**

For the foregoing reasons, Respondents SCDHEC and Varn and DuPre jointly request that Appellant's filing, styled as a Notice of Appeal, be denied. Respondents Carla Varn DuPre and Jasper B. Varn, III further request an award of attorney's fees as well as any amount of actual fees paid exceeding the amount of \$2,500 allowed by Rule 222(b).



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