

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal from the Administrative Law Court  
Honorable S. Phillip Lenski, Administrative Law Judge

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**Appellate Case No.: 2019-001282**

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Richard J. Hook,

Respondent,

v.

South Carolina Department of Health and Environmental Control  
and Philip Patterson,

Of Which South Carolina Department of Health and Environmental  
Control is the Appellant and Philip Patterson is a Respondent.

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**RESPONDENT'S PETITION FOR REHEARING AND INCORPORATED  
MEMORANDUM**

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## INTRODUCTION

Respondent Richard Hook respectfully files this Petition for Rehearing, asking this Court to reconsider its Opinion published March 15, 2023, wherein the Court reversed the Final Order and Decision of the S. C. Administrative Law Court. This Petition is filed in accordance with the requirements of SCACR 221(a) and 240(i), as this Opinion has the effect of finally deciding this matter. The crux of the Opinion is that Appellant's failure to abide by and enforce the terms of a Consent Order was not "willful." Therefore, the lower court erred in finding that Appellant's actions (or inaction, as was the case here) warranted a finding of contempt. This conclusion is based on what this Court considers to be a lack of evidence in the record below to demonstrate that there was an express intent on the part of Appellant to violate a consent order to which Appellant was a party. The following matters were misapprehended by the Court of Appeals.

## ISSUES FOR REHEARING AND RECONSIDERATION

1. *Regardless of whether Appellant's conduct was willful, Respondent is entitled to enforce a Judicial Consent Order.*

This Opinion overlooks that Respondent sought to enforce the consent order along with a request for attorney's fees. R. p. 351, R. p. 471 l. 1-7, p. 524, l. 1-8. The findings of contempt and monetary awards are subject to reversal but that fails to address that the relief sought by Respondent was simply to have Appellant enforce the Consent Order. SCRPC Rule 43(k) provides that "no agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record." These criteria were adhered to as is evident by the filed Consent Order of dismissal executed by Appellant's

counsel and the initial Permittee's counsel. R. 152-156. As is set forth more fully below, this Order is enforceable and should be enforced as Respondent requested, regardless of the disposition of the monetary awards. See Abel v. SCDHEC, 419 S. C. 434, 798 S. E. 2d 445 (Ct App. 2017). There this Court concluded that the ALC erred in interpreting a Consent Order to include temporal restraints. This Court acknowledged, however, that "settlement agreements are viewed as contracts" @ 437, 447 and are enforceable as such. Here the Court should have reached a similar conclusion that the consent order is enforceable, even if the monetary awards are not.

Enforcement of the Consent Order would require DHEC to revoke Patterson's permit and to reissue him the correct permit. That is at the heart of what Respondent was seeking. The fact that this Court believes that the ALC erred in determining willfulness, which allowed the ALC to establish financial mechanisms to make everyone (but DHEC) whole, does not limit the Court from granting Respondent his original request of enforcement of a valid consent order for which Respondent paid a substantial consideration and Appellant received a significant benefit through an agreement to record a Restrictive Covenant limiting any future changes to dock permits in Belle Terre.

As was noted by this Court in Galloway v. Regis Corp., 325 S. C. 541, 481 S. E. 2d 714 (Ct. App. 1997), "We hope our decision here underscores the importance of putting a settlement agreement on the record or immediately reducing the agreement to writing, and including in the writing all material terms and conditions of the agreement. Only then will an attorney be certain that his client's interests are fully protected." It is

unclear to Respondent as why this statement regarding full protection is not applicable to him, as the Consent Order of Dismissal satisfied the standards set forth by this Court.

The Supreme Court recognizes that an agreement is binding if it meets the requirements of SCRPC Rule 43(k). South Carolina Human Affairs Commission v. Zeyi Chen, 430 SC 509, 846 S. E. 2d 861 (Sup. Ct. 2020). In the cited case, the requirements of the rule were not adhered to as one party never signed the consent order. In this matter however, there is no basis upon which to conclude that the Consent Order is not binding upon DHEC and upon Ford and its predecessors.

2. *This Opinion violates public policy and establishes harmful precedent*

Here, Appellant DHEC conditioned its agreement to provide consent to movement of the dock located on Lot 9 by requiring the previous owner of Lot 10, Ford Development Corporation (“Ford”), to file Restrictive Covenants limiting the ability to request changes to the dock, which Ford willingly agreed to and complied. DHEC essentially had one job under the Consent Order – to issue the correct permit to whoever purchases Lot 9. As the ALC noted in conversation with counsel for DHEC “The problem here is, sadly and unfortunately, when Mr. Patterson was seeking to build his dock, he got the wrong schemata, the wrong plan.” R. p. 501 I. 2-5. DHEC’s counsel did not dispute this characterization, and in its Motion to Reconsider, described the failure to issue the correct dock alignment as a “permitting mistake.” As was noted repeatedly by Respondent, DHEC needed only to append the Consent Order to the existing Ford Development permit as related to Lot 9. A state agency charged by the S. C. Legislature to carry out certain duties cannot simply forget to do something it agreed to do or is required to do.

The South Carolina Department of Health and Environmental Control shall have the following powers and duties: E) To promulgate necessary rules

and regulations to carry out the provisions of this chapter. (F) To administer the provisions of this chapter and all rules, regulations and orders promulgated under it. (I) To enforce the provisions of this chapter and all rules and regulations promulgated by the department and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter.

S. C. Code Ann. Sec. 48-39-50.

Department only state agency authorized to permit or deny alterations or utilizations within critical areas.

(A) The department is the only state agency with authority to permit or deny any alteration or utilization within the critical area except for the exemptions granted under Section 48-39-130(D) and the application for a permit must be acted upon within the time prescribed by this chapter.

S. C. Code Ann. Sec. 48-39-210

DHEC does not have an option to simply ignore or forget its duties, including its duty to enforce the law and is duty to take action on permit requests.

What if DHEC forgot to keep track of Tuberculosis cases, resulting in false data regarding case numbers?<sup>1</sup> What if DHEC forgot to keep track of rabies cases, resulting in increasing incidences of a deadly disease?<sup>2</sup> Suppose DHEC failed to maintain vaccine records?<sup>3</sup> Or, DHEC neglected its duty under S. C. Code Ann. Sec. 44-20-10 and failed to monitor sexually transmitted diseases? Any of these examples is unacceptable, but if these commitments were embodied in a Consent Order or any other type of judicial determination, and there is no evidence of anything other than neglect of a duty, the precedent created here would make them unenforceable.

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<sup>1</sup> DHEC is statutorily required to comply with the "Contagious and Infectious Diseases Act," S. C. Code Ann. Sec. 44-29-10.

<sup>2</sup> DHEC is statutorily required to enforce the "Rabies Control Act," S. C. Code Ann. Sec. 47-5-10.

<sup>3</sup> DHEC is statutorily required to monitor the immunization status of school children. S. C. Code Ann. Sec. 44-29-180.

3. *This Court should not be swayed by DHEC's argument that Respondent has a remedy under the State Tort Claims Act.*

To the extent the Opinion was influenced by DHEC's ongoing argument that the correct remedy would be a negligence action under the Tort Claims Act, the Court must reconsider its Opinion. This is a very disingenuous argument for DHEC to continue to assert. S. C. Sec. 15-78-60, "Exceptions to waiver of immunity" provides as follows:

The governmental entity is not liable for a loss resulting from ... (12) licensing powers or function including, but not limited to, the issuance, denial, suspensions, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate... except when the power of function is exercised in a grossly negligent manner.

In continuing to assert that Respondent had other remedies, DHEC is either unaware or chose to ignore the exception for permit issuance.

4. *The Court of Appeals has improperly shifted the Burden of Proof to Respondent in the underlying ALC action.*

The Opinion results in shifting the burden of proof back to the Respondent when Respondent had satisfactorily carried his burden through demonstration of violation of the Consent Order. "The burden of proof is upon the party asserting the affirmative of an issue and, therefore, Petitioner bears the burden in this case of proving that the agency decision was in error under the statutory and regulatory standards." Leventis v. Dep't of Health & Env. Control, 340 S. C. 118, 530 S. E. 2d 643 (Ct. App. 2000.) DHEC opted to take a position of, essentially, silence, rather than explain the agency mistake. Clearly, DHEC violated an enforceable Consent Order, and this Court is unfairly shifting the burden to Respondent to present the facts associated with DHEC's mistake. "once the moving party has made out a prima facie case [for contempt], the burden then shifts to

the respondent to establish his ... defense and inability to comply with the order. ...If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt.” Ex parte Cannon 385 S. C. 643, 685 S. E. 2d 814(Ct. App. 2009) Here Appellant failed to demonstrate that it was unable to obey the court order, only that it made a mistake.

5. *The plain meaning of the term “willfulness” includes failure to take action.*

This Court ignores the meaning of the term “willfulness” when evaluating DHEC’s actions. As Respondent argued in its Brief presented to this Court “the well-settled definition of willfulness encompasses more than just a voluntary and intention act with specific intent. The definition also identifies willful acts as ‘those done with the specific intent to fail to do something the law requires to be done, that is to say with bad purpose either to disobey or disregard the law.” (Respondent’ Brief p. 14 – 15.) Here, the act of failing to account for the consent order is in complete disregard of the parties’ obligations assigned under the consent order. Failure to properly preserve a permit change can only be described as willful when the agency agreed to amend the permit accordingly. Record p. 22 - 29. This ministerial action of documenting the Consent Order and amending the permit as it related to Lot 9 should have been undertaken immediately. But it wasn’t handled properly in 2005 and Respondent should not have the burden of explaining why something did not happen in 2005 when the failure on the part of the DHEC staff was discovered twelve years later. DHEC failed to do something it was required to do. In light of no evidence, other than that it was a “mistake,” DHEC should not benefit from a conclusion that the action wasn’t willful.

6. *There is no relevant case law comparable to this matter where an agency forgot to discharge its legal duty.*

This Court cites a number of cases related to findings of contempt. In Cheap-O's Truck Stop, Inc v. Cloyd, 350 S. C. 596, 567 S. E. 2d 514 (Ct. App., 2002) this court noted compensatory contempt does support an award of attorney's fees and cost, "not [as] a punishment but an indemnification to the party who instituted the contempt proceeding." Importantly, Cheap-O's is an action between private parties and does not involve a State Agency charged with statutory duties.

Curlee v. Howle, 277 S. C. 377, 287 S. E. 2d 915 (Sup. Ct. 1982), also cited in this Court's Opinion, is a private dispute with no reference to a Consent Order at issue. Shillitani v. USA, 86 S. Ct. 1521, (1966) addressed the issues of civil vs. criminal contempt and factually has no similarity to this case. Stone v. Reddix-Smalls, 295 S. C. 514, 369 S. E. 2d 840 (Sup Ct. 1988) examined a finding of contempt where an attorney was disrespectful to the lower court. The case included the following finding – "a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion." As noted above, the definition of willful includes inaction that would warrant a finding of willfulness in this case. Importantly, Stone was a private dispute without the involvement of a State agency.

This Court cites Brasington v. Shannon, 288 SC 183, 341 S. E. 2d 130 (Sup. Ct. 1986.) There the Court found an Affidavit insufficient to demonstrate contempt. "in a proceeding for contempt for violation of a court order, the moving party must show the existence of the order and the facts establishing the respondent's noncompliance. The burden then shifts to the respondent to establish his defense and inability to comply with

the order. “@ 288, 130. This case related to a “Rule 53 proceeding” as provided for in the Family Court Rules. If the test cited in Brasington is applicable in this case, then Respondent Hook has proven the existence of the order and the lack of compliance. Appellant DHEC has made no demonstration regarding its lack of compliance. Failure on the part of DHEC to explain the circumstances to the lower court leading to noncompliance with the Consent Order should not operate to prejudice Respondent Hook who met his burden of proof and demonstration.

As with other authority upon which this Court relied, Brasington is a private dispute that does not involve a State agency charged with certain duties. As is Ex parte Kent, 379 S. C. 633, 666 S. E. 2d 921, (Ct. App. 2008). This Court relies on Ex parte Kent for the discussion regarding the necessity of sufficient evidence to show willfulness. The question before the Court in Ex parte Kent was whether there was evidence to demonstrate that Kent knew and understood that he was providing inadmissible testimony. In this case, the issue is whether Appellant knew and understood that it had certain responsibilities under a judicial consent order. Clearly, it did, as it is a signatory to the consent order and the implementer of the restrictions on modifications to docks in Belle Terre. R. p. 179-181, p. 479-480.

This Court cites Spartanburg County Department of Social Services v. Padgett, 296 S. C. 79, 370 S. E. 2d 872 (Sup. Ct. 1988) where a Family Court Judge held an attorney in contempt for underestimating the amount of time it would take for her to present her case. There the Supreme Court determined that the Family Court Judge had abused his discretion and also found that there was no evidence in the record to indicate

“intentional disobedience.” In this case, there is evidence of intentional neglect – failing to perform that which the agency had agreed to and was required to do.

7. *This Court Relies on Precedent that does not Involve Consent Orders and Misapprehends the Significance of Respondent’s Violation of a Consent Order.*

This Court has recently reinforced that “[i]t has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements. There can be no doubt that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court.” KInghorn as Trustee for the Mildred Ann Kinghorn Trust dated Aprils 28, 2004 v. Sakakini, 426 S. C. 147, 825 S. E. 2d 748 (Ct. App. 2019) @ 750, 152. The basis for enforcing a settlement agreement is solely if it complies with Rule 43(K).

Settlement agreements are reviewed by the circuit court in much the same way as contracts. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct.App.2007). When “an agreement is clear and capable of legal construction, the courts [sic] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.” *Messer v. Messer*, 359 S.C. 614, 628, 598 S.E.2d 310, 317 (Ct.App.2004). When an agreement is plain and unambiguous, the court does not have the authority to modify its terms. *Patricia Grand Hotel*, 372 S.C. at 640, 643 S.E.2d at 695. “However, where ‘the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intentions of the parties.’” *Id.* (quoting *Mattox v. Cassady*, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct.App.1986)).

*Vista Antiques and Persian Rugs, Inc. v. Noaha, LLC* 425 S. C. 413, 823 S. E. 2d (Ct. App. 2009)

In a case more relatable to this case, Abel v. SCDHEC, *Ibid*, the Abels appeared before the ALC to enforce a consent order that had resolved an earlier contested case in 2001. The dispute related to disturbance of a wetland area by Pawleys Island Community

Church. DHEC authorized the disturbance and Abel alleged such authorization was in violation of a 2001 consent order. The ALC found that while the consent order was an enforceable contract, it was inapplicable to the later dispute filed in 2014. This Court disagreed, finding that the ALC had erred in its interpretation of the 2001 consent order. In short, this Court enforced the 2001 consent order. This Court noted its duty to “enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” @ 438, 447.

Contracts should be liberally construed so as to give them effect and carry out the intention of the parties.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 497 (Ct. App. 2007) (quoting *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958)). Courts “are without authority to alter a contract by construction or to make new contracts for the parties.” *C.A.N. Enters. v. S.C. Health & Human Servs. Finance Comm’n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). “To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Ecclesiastes Prod. Ministries*, 374 S.C. at 498, 649 S.E.2d at 501. “The parties’ intention must be gathered from the contents of the entire agreement and not from any particular clause thereof.” *Id.* at 498, 649 S.E.2d at 502. However, “[d]ocuments will be interpreted so as to give effect to all of their provisions, if practical. *Ibid.* @ 440, 448.

### **CONCLUSION**

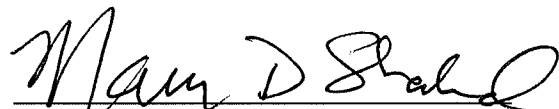
The undersigned Counsel never envisioned that a Judicial Consent Order would not be upheld or enforced by this Court. This admission is not made lightly, nor intended to be interpreted as criticism of the Court. Instead, it is a recognition of the undersigned’s naiveté and that the undersigned did not fully comprehend the possible impact of the lower court’s finding of contempt would have in this case. Counsel has always viewed Judicial Consent Orders as sacrosanct and not subject to challenge. Moreover, Counsel is vigilant regarding avoiding violation of a Judicial Consent Order, whether deliberate or

accidental. Learning that DHEC had simply ignored, forgotten, or failed to file the agreement the parties reached in 2005, even while being benefitted by the agreement with the restrictions on future dock modifications, was surprising to Counsel who has entered into numerous settlement agreements with DHEC over the past 25 years.

Regardless of Counsel's possibly unjustified assumptions, the following are grounds for reconsideration and rehearing: 1) willfulness can mean inaction; 2) an agency is mandated to carry out certain actions such that there is never an excuse for inaction; 3) none of the case law cited by the Court involves a situation where a State Agency entered into a Consent Order and enjoyed the benefit of that Order; 4) Once Respondent demonstrated the existence and validity of the consent order and its violation, the burden shifted to Appellant to provide information mitigating the violation. Instead, Appellant stayed silent which is tantamount to an admission, not a defense.

For these reasons and all arguments set forth above, Respondent seeks reconsideration of this case, a finding of willfulness through inaction, and enforcement of the Consent Order. Alternatively, Respondent seeks an enforcement of the Consent Order.

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