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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Honorable Robert Lawrence Reibold
Beaufort County
Trial Court Case No. 2022ALJ0270033CC

Appellate Case No. 2023-001592

William P. Scurry and J & W Corporation of Greenwood, Appellant,

v.

South Carolina Department of Health and Environmental Control
and Simmons Family Holdings, LLC, Respondents.

INITIAL BRIEF OF RESPONDENTS

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Was the ALC's admission of testimony concerning an out-of-court statement by Mr. Scurry to a non-testifying DHEC staff member reversible error?

- II. Was the ALC's final decision clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?

COUNTER-STATEMENT OF THE CASE

Appellants' selective, and in some cases inaccurate, recitation of the facts in this case excludes a number of matters relevant to determination of the issues raised in this appeal. Respondents Simmons Family Holdings, LLC ("Simmons") and the South Carolina Department of Health and Environmental Control ("Department" or "DHEC") offer the below as further discussion of the relevant facts underlying the South Carolina Administrative Law Court's ("ALC") Final Order, which is under appeal.

Appellants are the J & W Corporation of Greenwood ("J&W") and its principal owner, William P. Scurry. They challenge a Final Order by the ALC upholding as modified a critical area permit (the "Permit") issued by DHEC to Simmons on November 12, 2021¹. (R. p. ___ (Permit).) The Permit authorizes Simmons to construct a marina extending from Simmons's property into Broad Creek, with slippage for up to 28 boats.² (R. p. ___ (Tr.³ 419:21-420:5); R. p. ___ (DHEC Ex. 1 at 95); R. p. ___ (Final Order at 6 ¶ 17).) The marina will primarily provide "dock and dine" access to the Fish Camp on Broad Creek, a seafood restaurant on Simmons's property. (R. p. ___ (Tr. 384).) Importantly, the

¹ Appellants' Initial Brief reflects an issuance date of November 12, 2018.

² Appellants inaccurately assert the Simmons Marina "will handle a total of 48 boats," with up to 24 on the southwest side of the marina adjacent to Appellants' barge dock (the "Area of Concern"). (Appellants' Br. at 9.) As depicted in the Permit drawings, however, as approved by DHEC the finger piers on the Area of Concern side will accommodate a maximum of 12 boats. (R. p. ___ (Permit at 10 of 13).) The modified "O'Quinn Design" approved in the ALC's Final Order reduces the length of the finger piers, and will likely accommodate fewer boats on the Area of Concern side.

³ References to "Tr." are to the transcript of the contested case hearing conducted on April 26 and 17, 2023.

Permit authorizes replacement of a dock which had served Simmons's property from at least 1989 until 2016, when it was severely damaged by a hurricane. (R. p. __ (Tr. 388:3-7; 264:9-21).) The prior dock was used for commercial purposes, including kayak tours, dolphin tours, shrimping, and serving prior iterations of the restaurant. (R. p. __ (Tr. 261:1-13).)

The Simmons Marina will be located east of the Broad Creek Marina ("BCM"), which is connected to the shore by a concrete pier running perpendicular to Broad Creek. (R. p. __ (Final Order at 3 ¶ 5); R. p. __ (Pet. Ex. 13).) Appellants have a lease on a BCM-owned barge dock which is located at the end of a tidal creek called "Barge Creek," which runs perpendicular to Broad Creek (R. p. __ (Final Order at 3 ¶ 6).) The barge dock lies between BCM's concrete pier and the permitted location of the Simmons Marina. The area between the barge dock and the southwestern side of the Simmons Marina has been referred to for convenience as the "Area of Concern." (R. p. __ (Final Order at 3 ¶ 7).)

Appellants have used Barge Creek and the barge dock for commercial barging operations since 1977, transporting various materials between Barge Creek and Freeport Marina on Daufuskie Island. (R. p. __ (Final Order at 3 ¶ 8).) Appellants' barge generally runs three days per week, usually Tuesdays, Wednesdays, and Fridays. (R. pp. __, __ (Final Order at 4 ¶ 10 & 12 ¶ 44).) From 1989 until 2016, the barge navigated a gap of less than 100 feet between the barge dock and the former Simmons dock. (R. p. __ (Final Order at 5 ¶ 13).) There is no evidence in the record that the barge ever collided with or damaged the former Simmons dock. (*Id.*)

Simmons submitted its permit application to DHEC in 2018. (R. p. __ (Final Order

at 6 ¶¶ 14-17). The application was under review by DHEC from 2018 to November 12, 2021. (R. p. ___ (Final Order at 7 ¶ 18).) During this review period the design of the Simmons Marina was modified by relocating it to Simmons’s eastern property line, increasing by 20 feet the distance between the barge dock and the Simmons Marina and widening the Area of Concern from 82 feet to 102 feet. (R. p. ___ (Final Order at 7 ¶ 20).) The design was also modified by adding several dolphin pilings⁴ to be constructed on the Area of Concern side of the Simmons Marina, just west of the finger piers. (R. p. ___ (Tr. 432:3-12).) DHEC approved the permit with these modifications. The location along the shared property line and the dolphin pilings were both required in the final Permit issued by DHEC. (R. p. ___ (DHEC Ex. 1 at 87).)

The record is also clear that the prior dock was located closer to the BCM concrete pier than the proposed Simmons Marina, creating a narrower pinch point within the “Area of Concern,” through which Appellants’ barge was required to navigate in and out of its berth. (R. p. ___ (Pet. Ex. 13); R. p. ___ (Tr. 430:16-431:17).) Mr. Scurry objected to construction of the prior dock in 1990, asserting essentially the same concerns he and J&W have raised in this matter. (R. p. ___ (Tr. 267:11-20); R. p. ___ (Simmons Ex. 9).) No evidence presented during the contested case hearing demonstrated that the historical Simmons dock interfered with the ingress or egress of the J&W barge. (R. pp. ___ (Final

⁴ “Dolphins” or “dolphin pilings” are “a cluster of closely driven piles used as a fender for a dock or a mooring or guide for boats.” See www.merriam-webster.com/dictionary/dolphin. Dolphin pilings are frequently made of wood, though other materials such as metal or concrete can be used, and multiple piles are often grouped together for additional strength.

Order at 5-6 ¶ 13).)

After DHEC issued the Permit, Appellants requested a contested case hearing, contending that construction of the Simmons Marina would restrict the reasonable navigation or public use of State lands or waters. *See* S.C. Code Ann. Regs. 30-12(E)(1)(j). After a period of discovery, the ALC conducted a hearing on April 26-27, 2023.

The evidence presented at the hearing showed that the J&W barge travels between BCM and Freeport Marina on Daufuskie Island. (R. p. __ (Final Order at 10 ¶ 37).) Freeport Marina and a nearby restaurant serving marina patrons are both owned by Mr. Scurry. (R. p. __ (Tr. 81:2-9).) Alcohol service is readily available to patrons there, and Freeport Marina itself accommodates significantly more boater traffic than the Simmons marina. (R. p. __ (Simmons Ex. 3).) J&W's current barge captain, Teron Daley, testified that they do not operate on weekends and holidays due to the high boater traffic at Freeport. (R. pp. __ (Tr. 82:23-83:3); R. p. __ (Tr. 79:6-10); R. p. __ (Tr. 109:23-25).) Moreover, on occasions when the barge approaches Freeport during higher than average boater traffic, Captain Daley testified that they call ahead to Freeport to have an employee go out on the dock and warn boaters of the barge's approach. (R. p. __ (Tr. 83:4-17).)

Brendan Reilley, the proprietor of Fish Camp at Broad Creek, testified based on his experience in other restaurants with "dock and dine" slippage that weekends would likely by the heaviest boating traffic times at the Simmons Marina. (R. p. __ (Tr. 399:10-14).) During the week, dinner hours from 6 P.M. to 8 P.M. would likely have the heaviest traffic. (R. p. __ (Tr. 380:16-25).) Both sides also testified that, because the barge schedule fluctuates with the tide, Appellants' barge often operates during hours that the Fish

Camp is not open, or during times when traffic to the restaurant is limited. (R. p. __ (Tr. 79:11-25 (Daley)); R. pp. __ (Tr. 381:16-382:13 (Reilley)).)

Mr. Scurry testified, without objection,⁵ to a proposed alternative design to the Simmons Marina which he created in the course of litigating the Permit before DHEC. (R. p. __ (Tr. 124:7); R. p. __ (Pet. Ex. 33).) The principal change in the “Scurry Alternative” was to move the central walkway in the permitted design to the west, effectively replacing the 45-foot finger piers on both sides of the walkway with 90-foot finger piers extending to the east of the walkway. (R. p. __ (Pet. Ex. 33).) Mr. Scurry testified that the Scurry Alternative would place the marina structure and dolphin pilings in essentially the same location and footprint relative to the Area of Concern as the design in the Permit, with the exception of a small reduction in the length of the most channelward finger pier on the Area of Concern side. (R. pp. __ (Tr. 145:16-146:17).) He further testified that he would be able to navigate around this alternative structure. (*Id.*) The ALC expressly relied on this testimonial admission by Mr. Scurry in determining that the barge could operate safely if the most channelward finger pier in the permitted design were shortened. (R. p. __ (Final Order at 19 ¶ 68).)

Duncan O’Quinn testified for Simmons as an expert in commercial and recreational navigation, barge captaining, navigation of tidal channels, and marina and dock construction. (R. pp. __ (Tr. 414:17-415:20).) After testifying to his concerns with the

⁵ Given the ALC’s express reliance on testimony about the Scurry Alternative, it is noteworthy that no portion of that testimony, or the ALC’s findings regarding the Scurry Alternative, has been challenged on appeal.

Scurry Alternative, Mr. O'Quinn presented a second alternative marina design (the "O'Quinn Alternative"). (R. pp. __ (Tr. 473:11-475:2); R. p. __ (Pet. Ex. 43).) The O'Quinn Alternative mirrored the permitted design with a central walkway, except that the landward finger piers in the Area of Concern were reduced from 45 to 40 feet, and the most channelward pier in the Area of Concern was reduced to 30 feet, reflecting a footprint the ALC noted was virtually identical to what was proposed in the Scurry Alternative. (R. p. __ (Final Order at 21 ¶ 74).) The O'Quinn Alternative also called for five-pile dolphins rather than the three-pile dolphins reflected in the permitted design.

Mr. O'Quinn also provided expert opinion testimony regarding the potential for successfully navigating a barge in and out of the Area of Concern after construction of the Simmons Marina. (R. pp. __, __ (Tr. 424:3-425:6, 432:25-433:5).) While Mr. O'Quinn admitted he had not navigated a barge into J&W's barge dock, he testified that he had made the exact docking maneuver described by Appellants numerous times, both elsewhere in Broad Creek and throughout the coastal waters of Beaufort County. (R. pp. __ (Tr. 418:21-419:17).) Appellants offered expert testimony from three former and current J&W barge captains, with cumulative experience of less than twenty years⁶ captaining the J&W barge, rarely varying from the route between BCM and Freeport. Mr.

⁶ Teron Daley received his commercial captain's license in 2019, and his navigational experience was limited to his employment with J&W. (R. p. __ (Tr. 47:1-17).) Eric Lundy, a former J&W captain, operated the J&W barge from 2006 to 2011. (R. p. __ (Tr. 172:22-23).) He obtained his license in 2006, to pilot the J&W barge, and ceased all commercial captaining in 2011 when he left the company. (R. pp. __ (Tr. 179:24-180:23).) While Mr. Scurry has overseen J&W's barge operations since the company originated in the 1970s, he testified that he had only captained the pushboat and barge personally for five or six years. (R. p. __ (Tr. 104:15-23).)

O'Quinn, by contrast, has over forty years of barge captaining experience in a variety of settings and conditions. (R. p. __ (Tr. 408:1-23).) The ALC specifically noted in its Order on Motions to Alter or Amend ("Rule 59(e) Order") that "[a]ll the witnesses, including those qualified as experts, who were called by Petitioners to testify regarding safe navigation of the barge were interested [in the outcome] in some manner." (R. p. __ (Rule 59(e) Order at 6).)

Based on the testimony and evidence presented at the hearing, the ALC determined that the Simmons Marina would not interfere with reasonable navigation or public use. (R. p. __ (Final Order at 31 ¶ 19).) Looking to the testimony of Mr. Daley and Mr. O'Quinn, the ALC "conclude[d] that the structure of the proposed marina presents no navigational issues when J&W is exiting Barge Creek." (R. p. __ (Final Order at 32 ¶ 23).) The ALC noted that Mr. Daley "testified that while he was concerned about boater safety, he was not concerned with hitting the marina." (*Id.*) The ALC also found that Mr. O'Quinn's testimony that Appellants would continue to be able to dock the barge was "compelling" and supported by other evidence in the record. (R. p. __ (Final Order at 32 ¶ 25).) Such evidence included the fact that J&W was able to navigate the barge in and out of Barge Creek during the 20+ years the prior Simmons dock existed. (*Id.*) The ALC also noted Mr. Scurry's admission that the addition of dolphin pilings would allow him to safely navigate the barge into and out of Barge Creek. (R. p. __ (Final Order at 32 ¶ 26).) The ALC's conclusion as to navigability was further supported by its requirement that the Permit be modified according to the O'Quinn design. (*Id.*)

The ALC also addressed the boater safety concerns raised by Appellants.

Although expressing doubt that recreational boaters capable of navigating away from another vessel could ever create a restriction on reasonable navigation, the ALC nevertheless considered the testimony presented during the hearing on this point. (R. pp. __ (Final Order at 33-35 ¶¶ 29-33).) The ALC rejected Appellants' assumption that recreational boaters using the Simmons Marina would act against their own interests by boating under the influence, failing to give way to the barge, or by disregarding the rules and regulations applicable to boaters. (R. p. __ (Final Order at 34 ¶ 28).)

STANDARD OF REVIEW

“The ALC presides over all hearings of contested DHEC permitting cases and, in such cases, serves as the fact-finder and is not restricted by the findings of the administrative agency.” *Bailey v. S.C. Dep’t of Health & Env’tl. Control*, 388 S.C. 1, 4, 693 S.E.2d 426, 428 (Ct. App. 2010). “[T]he ALC is authorized to make a final determination—after a final agency decision and subject to judicial review—as to whether an administrative agency should have granted or denied a particular permit.” *Engaging & Guarding Laurens Cty.’s Env’t (EAGLE) v. S.C. Dep’t of Health & Env’tl. Control*, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014).

This Court’s review of the ALC’s Order is governed by S.C. Code Ann. § 1-23-610(B), which provides:

The review of the [ALC]’s order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 199-200, 833 S.E.2d 451, 457 (Ct. App. 2019). "When the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder." *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014). "In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." *EAGLE*, 407 S.C. at 342, 755 S.E.2d at 448.

ARGUMENT

I. The Admission of Testimony Concerning Mr. Scurry's Out-of-Court Statement Was Not Reversible Error

Appellants first argue that the ALC should have excluded testimony by DHEC's witness, Blair Williams, regarding a statement by Mr. Scurry in May 2021 to the effect that the presence of dolphin pilings would enable safe navigation of the barge into and out of Barge Creek. (Appellants' Br. at 8, Argument 1.) Mr. Scurry made this statement to Josh Hoke, the DHEC project manager then working on the Permit, who then reported it to Mr. Williams and placed contemporaneous notes regarding the conversation into a call log associated with the agency's permitting file. (R. p. __ (DHEC Ex. 1 at 128).) Since Mr. Hoke was no longer employed at DHEC by the time of the contested case hearing, DHEC sought to elicit testimony from Mr. Williams regarding Mr. Scurry's statement. Appellants posit that even if Mr. Scurry's statement to Mr. Hoke could be considered an admission of a party opponent, *see* Rule 801(d)(2), SCRE, Mr. Hoke's statements to Mr. Williams were hearsay and not subject to any exception. (Appellants' Br. at 19.) Therefore, Appellants contend, admission of Mr. Williams's testimony on this point was error and prejudiced Appellants, warranting reversal of the Final Order.

A. Appellants Waived Any Error by Failing to Object and by Eliciting the Same Testimony on Cross-Examination

As the ALC pointed out in its Order denying Appellants' Rule 59(e) motion, Appellants objected when Mr. Williams began referring to a communication with Mr. Scurry regarding dolphin pilings. (R. p. __ (Rule 59(e) Order at 4).) The ALC overruled the objection based on DHEC's assertion "that it did not believe Mr. Williams was going

to testify as [Appellants] feared.” (*Id.*) “Immediately thereafter, Mr. Williams testified that Mr. Scurry represented to the Department that the barge would be able to navigate in and out safely if dolphin pilings were installed.” (*Id.* (citing Tr. 318:25-319:3).) Appellants did not object to this testimony, nor did they move to strike it. Moreover, as the ALC also found, on cross-examination Appellants elicited from Mr. Williams testimony regarding Mr. Scurry’s admission:

Q: ... [D]o you consider the 20 foot movement [of the Simmons Marina to the shared property line] just part of the mediating between two parties?

A: We, we in addressing the concerns that Mr. Scurry raised, and the applicant’s cooperation to move the structure to the northern extended property line, *along with the admission that Mr. Scurry said that the dolphin piles will help him navigate in and out safely*, I mean that helped us and aided in, in determining that it would be reasonable navigation.

Q: First, tell me who, to your knowledge, said Wic Scurry agreed that those dolphin pilings would cure the problem?

A: The project manager, Josh Hoke, and *I had a conversation when he got off the phone with Mr. Scurry on May 25th, 2021, I believe, and stated that he suggested the dolphin piles would have given the ability to move in and out safely, and that his lawyer would follow up with a letter.* And, and then Josh then coordinated that information with the applicant to get revised drawings.

(R. pp. __ (Tr. 345:10-346:6 (emphasis added)).) In further questioning, Appellants’ counsel himself restated the admission. (R. p. __ (Tr. 346:7-9).)

Under these circumstances, Appellants have waived any claim of error in the admission of Mr. Scurry’s statement. First, Appellants failed to object when testimony regarding Mr. Scurry’s admission was first offered during Mr. Williams’s direct examination. *See Campbell v. Jordan*, 382 S.C. 445, 453–54, 675 S.E.2d 801, 805–06 (Ct. App. 2009) (“The nieces’ failure to timely object when this testimony was initially offered

waives their right to argue error on appeal.”) (citing *City of Greenville v. Bryant*, 257 S.C. 448, 454, 186 S.E.2d 236, 238 (1972); *Parr v. Gaines*, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct. App. 1992)). Second, Appellants waived any error by affirmatively eliciting the same testimony on cross-examination. See *Miller v. City of W. Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 686 (1996) (“One who purposefully elicits testimony on a particular subject without reserving his objections and receives the relevant response waives any alleged error.”).

B. Admission of Mr. Scurry’s Statement, Even if Error, Was Cumulative and Not Prejudicial

Even if Appellants had not waived any error as discussed above, and assuming *arguendo* that testimony regarding Mr. Scurry’s admission was inadmissible hearsay, “improper admission of hearsay constitutes reversible error only when it results in prejudice.” *State v. Byars*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). The record before the ALC includes numerous unobjected-to references to the addition of dolphin pilings to the original proposed design, and witnesses for both DHEC and Simmons testified repeatedly that Mr. Scurry communicated a desire for those pilings to alleviate his concerns regarding navigation in and out of Barge Creek. (See, e.g., R. pp. ___ ___ (Tr. 263:16-22; 328:4-6).) In fact, Mr. Scurry *himself* offered testimony to the effect that he proposed adding the dolphin pilings to the permitted design. (R. pp. ___ ___ ___ (Tr. 110:4-5, 135:19-136:3, 149:10-17).) Since Mr. Williams’s testimony regarding Mr. Scurry’s admission was merely cumulative to other evidence, any error in its admission was not prejudicial and does not support reversal. See *Austin v. Stokes–Craven Holding Corp.*, 387

S.C. 22, 41, 691 S.E.2d 135, 145 (2010) (holding that even if the trial court erred in qualifying an expert witness, there was no prejudice because witness's testimony was cumulative to other testimony).

Appellants' principal issue with the admission of the subject statement is that the ALC purportedly misapprehended the statement to endorse the usefulness of the dolphin pilings to both the comings and goings of the barge, when other of Appellants' witnesses testified that the dolphins would only be beneficial when the barge is departing. The crux of Appellants' position is predicated on Appellants' theory that the barge can only operate on J&W's self-selected schedule—departing Broad Creek Marina on a flood tide and returning on an ebb tide. As Mr. O'Quinn testified, however, there is no reason Appellants could not install dolphins of their own on the opposite side of the Area of Concern (Tr. 439:16 - 21) to address the barge's return to dock and, more importantly, there is no reason Appellants could not operate on another schedule. (R. p. __ (Tr. 439:16-21); R. p. __ (Tr. 430:3-15).) Mr. Scurry testified in rebuttal to Mr. O'Quinn's schedule suggestion that it would be impractical to both leave and return to Broad Creek Marina on a flood tide because of the time the barge would have to remain at Daufuskie, but no reason was offered why any other combination of departure and return times (ebb tide to flood tide or mid-tide to mid-tide) would not work and mitigate against Appellants' concerns. Mr. O'Quinn made clear that if the barge can float, it can come in or out. (R. p. __ (Tr. 430:3-15); R. pp. __ (Tr. 477:21-478:15); R. p. __ (Tr. 480:13-15).) The ALC therefore had ample evidence supporting DHEC's determination that the dolphin pilings could be helpful on both ingress and egress, and Mr. Scurry's admitted statement to DHEC—

whether misunderstood or not—is cumulative to the remaining record.

Critically, when the ALC concluded that neither the location nor the shape of the Simmons Marina would interfere with barge navigation, the conclusion was not based principally on Mr. Scurry’s statement to Mr. Hoke, but was expressly predicated on Mr. O’Quinn’s expert testimony and Mr. Scurry’s live testimonial admissions regarding the Scurry Alternative Design. (R. p. __ (Final Order at 32 ¶ 25).) Mr. Williams’s testimony regarding the telephone conversation between Mr. Scurry and Mr. Hoke was therefore cumulative to other evidence in the record upon which the Final Order was based. “Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.” *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (citing *Long. v. Conroy*, 246 S.C. 225, 143 S.E.2d 459 (1965); *Marsh Plywood Corp. v. S. C. State Highway Dep’t*, 258 S.C. 119, 187 S.E.2d 515 (1972)). Where, as here, the ALC’s Final Order makes clear that its legal conclusion is based on testimony by Simmons’s expert witness and by Mr. Scurry himself, and where voluminous unobjected-to evidence in the record supports the underlying conclusion, it is abundantly clear that the purported hearsay is cumulative, and does not prejudice Appellants.

Finally, it is difficult to find any prejudice in admission of a statement that is consistent with Mr. Scurry’s own testimony at trial, and where there is no evidence that the statement has ever been refuted by Mr. Scurry. Mr. Scurry acknowledged on the stand that the dolphin pilings were added to the Permit because of his concerns, and that he had agreed to their installation. (R. p. __ (Tr. 110:4-5); R. pp. __ (Tr. 135:19-136:3); R. p. __ (Tr. 149:10-17).) Mr. Scurry testified at length regarding the “Scurry Alternative” marina

design, which he admitted kept the same basic footprint as the permitted design including the dolphin pilings, and that he could navigate around this design. (R. p. __ (Final Order at 19 ¶ 67).) The DHEC record also contains evidence that Mr. Hoke's statement (that is, his understanding of the May 2021 conversation with Mr. Scurry) was communicated via email to Appellants' counsel contemporaneous with the telephone conversation between Mr. Hoke and Mr. Scurry. (R. p. __ (DHEC Ex. 1 at 157).) No evidence appears in that record reflecting efforts by Mr. Scurry or Appellants' counsel to directly refute the statement or deny that the statement was made at that time or at any time after. Perhaps more telling, despite Mr. Scurry's presence in the courtroom, his use to rebut other witnesses for Simmons at trial, and the Appellants' overall burden of proof in the matter, no effort was made to directly rebut Mr. Williams' testimony regarding Mr. Scurry's admission. (R. p. __ (Final Order at 41 ¶ 92).)

Mr. Scurry's failure to refute the statement, either during the permitting process or at trial, may or may not rise to the level of "acquiescence" as our courts have examined that concept in criminal cases. *See, e.g., State v. Suddeth*, 74 S.C. 498, 54 S.E. 1013, 1013 (1906); *State v. McIntosh*, 94 S.C. 439, 78 S.E. 327, 329 (1913) ("Statements made in the presence of a party are generally admissible, if he remains silent, when they are made, and the circumstances are such that he can speak and naturally would or ought to respond to them. In such circumstances, his silence may afford ground for inferring that he acquiesces in the truth of the statements."). But the failure does illustrate a lack of prejudice in as far as the record reflects that Mr. Scurry never bothered to correct DHEC on what Appellants now assert was a profound misunderstanding regarding Mr.

Scurry's view of the usefulness of dolphin pilings at this location. Appellants have alleged that the Permit would cause them significant hardship. In the course of its decision-making process, DHEC communicated to Appellants that it understood Mr. Scurry to believe that dolphin pilings would allow him to move in and out of his berth safely, and then subsequently revised the Permit to include those elements based on that communication from Mr. Scurry. Had that modification been based on a misunderstanding or outright misstatement of Mr. Scurry's conversation with the agency representative, Mr. Scurry or his representative "naturally would or ought to respond" with a direct statement to that effect—particularly given the number of communications Appellants *did* make to DHEC during the course of the permitting decision. Under the circumstances, Appellants' silence clearly evidences a lack of prejudice (if not an adoption of the statement at issue).

II. The ALC's Final Order Is Supported by Substantial Evidence

As an initial matter, Respondents note that Issue Two as stated in Appellants' Brief appears to narrowly question whether the ALC's approval of the Permit as modified according to the "O'Quinn Alternative" was supported by substantial evidence. (Appellants' Br. at 4, 24.)⁷ Problematically, however, Appellants' actual arguments in this portion of their brief fail to even mention the O'Quinn Alternative. More critically, no issue related to the O'Quinn Alternative was raised in Appellants' Motion for

⁷ It is worth noting that Appellants, not Simmons, introduced the O'Quinn Alternative exhibit and elicited testimony regarding that design on cross-examination. (R. pp. __ (Tr. 473:6-475:2).)

Reconsideration before the ALC. Issues unaddressed by the ALC are generally not preserved for appeal if they are not raised to the trial court via a motion to alter to amend. *S.C. Coastal Conservation League, Inc. v. Charleston County*, 442 S.C. 409, 419, 899 S.E.2d 609, 614 (Ct. App. 2024). To the extent Appellants seek to raise any issue related to the O'Quinn Alternative at this stage, they are precluded from doing so.

The arguments actually raised by Appellants with respect to Issue Two amount to attempts to re-try the case to alter select determinations by the ALC relying only on a portion of the whole record the ALC had to consider. For the reasons set forth below, these arguments should be rejected, and the decision of the ALC upheld.

The ALC sits as the finder of fact in contested case hearings. This role affords the ALC significant discretion in a given case: to resolve conflicts in the evidence, assess the credibility of witnesses, and determine the weight and probative value of the evidence, *see Small v. Pioneer Mach. Inc.*, 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997); to determine the appropriate weight and credibility of an expert's testimony, *see Florence Cty. Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 73, 425 S.E.2d 61, 63 (Ct. App. 1992); to consider an agency staff's utilization of its specialized knowledge and expertise in making a determination, *see S.C. Code Ann. § 1-23-330(4)* ; and to judge the demeanor and veracity of an individual witness, *see S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992); *Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). "If there is any conflicting evidence of a probative nature in the record, a determination of the issue is for the [trier of fact].... It is within the prerogative of the trier of fact to decide what evidence is most dependable." 88 C.J.S. *Trial* § 401.

When the ALC's factual findings are reviewed on appeal, the appellate court must determine if the findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-610(B). "The Court may not substitute its judgment for the ALC's judgment as to the weight of evidence on questions of fact." *EAGLE*, 407 S.C. at 345, 755 S.E.2d at 450. "In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." *Id.* at 342, 755 S.E.2d at 448.

In light of the foregoing authorities, Appellants' preferred view of the preponderance of the evidence in this case is simply insufficient to demonstrate clear error in an ALC decision. Moreover, the instant appeal does not establish how, if at all, any of the specified findings have prejudiced the Appellants. "An error not shown to be prejudicial does not constitute grounds for reversal." *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997). As each instance of challenged fact appears cumulative to the greater weight of evidence in the record (the majority of which has not been challenged), there would appear to be no prejudice to Appellants.

A. The Freeport Marina Findings Are Supported by the Evidence

Appellants take issue with the ALC's Conclusion of Law 31, which states in part that Appellants' safety concerns regarding the Simmons Marina "are ... undermined by the Petitioners' operations at Freeport Marina," which also operates a restaurant that serves alcohol to "dock and dine" patrons. (R. p. __ (Final Order at 34 ¶ 31).) The

Conclusion of Law falls within a portion of the Final Order where the ALC specifically addresses Appellants' purported safety concerns vis-à-vis interactions with recreational boaters, as contrasted with their concerns about the structure of the marina itself. (R. p. __ (Final Order at 32 ¶ 27).) Appellants spent significant effort at trial attempting to show that the Simmons Marina, which would serve patrons of a waterfront restaurant, would present dangers to the barge because the boaters utilizing the Simmons Marina might over-consume alcohol at the restaurant and operate their boats while impaired, creating a danger for themselves or the barge as they are leaving the dock.

The core of the ALC's findings regarding Freeport amounted to the well-established fact that, at Freeport Marina, the barge was already successfully navigating in an environment with higher boater traffic than Simmons Marina would accommodate, with boaters that had access to alcohol service.⁸ Appellants incorrectly assert that the ALC relied solely on Mr. O'Quinn's testimony. In truth, the ALC's factual findings concerning the Freeport Marina expressly relied on the extensive and undisputed testimony of Brendan Reilly, based on his personal knowledge of alcohol service and boater traffic at Freeport, and the uncontested photographic evidence showing boats at Freeport Marina far in excess of what the Simmons Marina could ever hold. (R. p. __ (Final Order at 10 ¶¶ 32-36).) The ALC also explicitly relied on Captain Daley's testimony about the steps Appellants take to manage high boater traffic at Freeport, noting that no reason was ever

⁸ Despite Appellants' assertions to the contrary, the Final Order makes no finding regarding the relative ease or difficulty of the "approach" or navigation with respect to the Freeport structure, except for acknowledging Captain Daley's statement that the approach is easier because of the tide when the barge arrives at Freeport.

offered why similar steps would not be effective at Broad Creek Marina to manage potential recreational boater traffic and interactions with the barge. (R. p. __ (Final Order at 34 ¶ 31).)

B. The ALC Properly Considered the Location of the Former Simmons Dock

Appellants next take issue with the ALC's consideration of the position of the former Simmons dock as supporting a conclusion that construction of the Simmons Marina would not interfere with reasonable navigation. (R. p. __ (Final Order at 32 ¶ 25).) According to Appellants, the evidence actually shows that while the former Simmons dock was not within the barge's turning radius, the Simmons Marina will be constructed within the turning arc and thus will impede navigation. (Appellants' Br. at 27.)

Appellants' argument completely ignores the expert testimony of Mr. O'Quinn regarding the distance between the former Simmons dock and the existing BCM pier (R. pp. __ (Tr. 430:16 - 431:17)),⁹ as compared to the gap between the permitted Simmons Marina and the BCM pier. It was stipulated, by admission of a joint exhibit, that the former dock created a smaller "pinch point" for the barge to navigate through than will the permitted Simmons Marina. (R. pp. __ (Tr. 44:20-45:7); R. p. __ (Pet. Ex. 13).) Mr. O'Quinn testified extensively to alternative approaches and methods to navigate the barge through this gap, taking into account the structure's location relative to the Area of Concern, and addressed the "turning arc" assertions by Appellants' witnesses. (R. pp. __

⁹ Mr. O'Quinn's testimony echoed that of Mr. Williams, the DHEC witness, which is addressed further below.

(Tr. 430:16-431:17).)

Appellants' argument relies only on the testimony of Captain Daley and Mr. Lundy,¹⁰ ignoring that "[a] trier of fact is not compelled to accept an expert's opinion, but may give it the weight he determines it deserves." *Ward*, 310 S.C. at 72-73, 425 S.E.2d at 63. The ALC made specific findings based on each expert's own testimony regarding their relative qualitative and quantitative experience as barge captains. (R. pp. __ (Final Order at 14-15 ¶¶ 54, 56).) Based on the substance of the witnesses' testimony, the relative experience and personal interests of each of the witnesses, and the ALC's judgment of the demeanor and veracity of each witness, the ALC is well within its authority to give greater weight to a single expert than to two or more others with a contrary opinion.

C. The ALC Correctly Construed Captain Daley's Testimony

Appellants next take issue with the ALC's construction of Captain Daley's testimony that "I'm not worried about hitting the marina or anything like that. I'm more worried about hitting boaters. (R. p. __ (Tr. 92:7-9).) Appellants contend that the ALC misconstrued Captain Daley's reference to the "marina" as meaning the Simmons Marina,

¹⁰ Appellants appear to argue that the testimony of their witnesses is entitled to greater weight because they are the only witnesses who have "actually piloted the push boat and barge into Barge Creek[.]" (Appellants' Br. at 13, 27.) This is hardly surprising, as J&W is the exclusive user of Barge Creek (R. p. __ (Tr. 76:2 - 7)), making it unlikely that Simmons or DHEC could produce a witness with experience navigating into and out of Barge Creek. Mr. O'Quinn, however, made clear his extensive experience in all manner of tidal and weather circumstances, and his familiarity with the precise maneuver described by Appellants' witnesses over the course of his more than forty years as a barge captain. (R. pp. __, __ (Tr. 408:1-413:14, 418:1-419:7).) The weight and credibility the ALC assigned to Mr. O'Quinn's testimony is amply justified.

when he was actually referring to the BCM concrete pier. (Appellants' Br. at 28.) Appellants point to Captain Daley's testimony on re-direct, and their counsel's attempts to reform his prior testimony, in support of this argument. (R. pp. __ (Tr. 92:16-93:5).)

Assuming the ALC's construction of this testimony was erroneous, Appellants fail to explain how they were prejudiced by it, particularly in light of the myriad other findings and evidence supporting the ALC's conclusion that the Simmons Marina presents no unreasonable impediment to navigation. Moreover, despite Appellants' protestations to the contrary, the context of the transcript makes it abundantly clear that the ALC *did not* take this quote out of context, and correctly construed this testimony. The ALC's Rule 59(e) Order examined the relevant portion of the transcript at length. (R. pp. __ (Rule 59(e) Order at 9-12).) As the ALC concluded, the questioning surrounding the statement at issue make it plain that Simmons's cross-examination of Captain Daley was contrasting his concerns about recreational boaters with his concerns about "the existence of the structure itself." (R. p. __ (Tr. 92:2-3).) The term "structure" was used dozens of times at trial to refer to the permitted Simmons Marina, but *never* to refer to the BCM pier. Immediately before the statement at issue was made at trial, Captain Daley agreed that at his deposition he had stated his concern was "really about human error." (R. p. __ (Tr. 91:21-25).) As his deposition centered on a challenge to a permit allowing the construction of a new structure, the Simmons Marina, and not concerns about an existing concrete pier, it is plain what his testimony both in deposition and at trial referred to.

Appellants' counsel, obviously realizing that this testimony was unhelpful to their case, attempted on re-direct to reform Captain Daley's statement. But the ALC is not

bound to accept testimony at face value, and may assign it the weight and credibility it considers appropriate, after judging the demeanor and veracity of an individual witness. *S.C. Cable Television Ass'n*, 308 S.C. at 222, 417 S.E.2d at 589; *Woodall*, 322 S.C. at 10, 471 S.E.2d at 157. The ALC was well within its discretion to decline to accept Captain Daley's belated reversal in light of the overall context of his testimony.

D. The ALC Correctly Weighed the Evidence and Upheld DHEC's Decision

Lastly, Appellants assert that the evidence presented by Mr. Williams, "viewed in its totality ... was replete with errors and misunderstandings sufficient to show DHEC was mistaken in its approval of the permit." (Appellants Br. at 29.) Appellants then nitpick various aspects of Mr. Williams's testimony regarding the factors considered by DHEC in deciding to issue the Permit. This argument by Appellants amounts to little more than an attempt to re-litigate portions of the case, albeit by excluding all testimony by Respondents' expert witness, and with only selective portions of the remaining record, and to then substitute Appellants' view of the weight of evidence for that of the ALC.

The ALC reviews DHEC decisions *de novo*, and is therefore not limited to reviewing the information that DHEC had at its disposal during the permitting decision. *See generally EAGLE*, 407 S.C. at 344, 755 S.E.2d at 449. Appellants' argument again ignores completely Mr. O'Quinn's extensive testimony, which echoed and supported Mr. Williams in all of the matters with which Appellants take issue. As but one example, Mr. O'Quinn specifically cited the same factors Mr. Williams relied on in support of his own expert opinion that the Simmons Marina would not restrict reasonable navigation of the J&W barge. (R. pp. __ (Tr. 428:19-430:2 (comparing the size of barge compared to gap between

SFH Marina and BCM Pier)); R. pp. __ (Tr. 430:16-431:17 (comparing permitted gap to what J&W navigated with former SFH dock)); R. p. __ (Tr. 432:3-24 (considering the changes to the permitted design of the SFH Marina)); R. pp. __ (Tr. 432:25-433:5 (considering the width of Broad Creek as a mechanism for approaching safely)). Appellants also ignore Mr. Scurry's own testimony regarding the Scurry Alternative—that the footprint was the same as that of the permitted Marina, and such a structure would not restrict his ability to navigate. The ALC correctly concluded that the Scurry Alternative presents no material difference to the permitted design in terms of navigation vis-à-vis the Simmons Marina structure itself. (R. pp. __, __ (Final Order at 21 ¶ 74, 23 ¶ 25).) Even if the ALC had entirely disregarded Mr. Williams's testimony, it still would have ample evidence to support its conclusion that DHEC's decision to issue the Permit was correct.

More fundamentally, Appellants' premise that Mr. Williams' testimony demonstrates error in DHEC's permitting decision simply because that testimony conflicts with the testimony of Appellants' witnesses is unsupported by any legal authority. Appellants are effectively urging this Court to supplant the role of the fact-finder in assigning weight and credibility to the evidence presented. However, the ALC is entitled to consider DHEC's "experience, technical competence and specialized knowledge ... in the evaluation of the evidence." S.C. Code Ann. § 1-23-330(4). Mr. Williams testified regarding his experience making thousands of critical area permitting decisions over more than fifteen years with the agency (Tr. 330:17 - 331:7), and the frequency with which he must determine the effect of a project on reasonable navigation

(R. pp. __ (Tr. 334:21-335:12).) The ALC was entitled to give his testimony as much, if not greater, weight than that of the current and former J&W employees that testified for Appellants.

CONCLUSION

The ALC's decision should be affirmed. First, Appellants waived any claim of error as to the admission of Mr. Scurry's out-of-court statement that dolphin pilings would enable navigation both into and out of Barge Creek. Even if this argument had been preserved for appeal, Appellants cannot demonstrate prejudice because Mr. Scurry's statement was merely cumulative of the testimony presented at the hearing.

Second, Appellants fail in their attempts to demonstrate that the ALC's findings are not supported by substantial evidence. After hearing two days of testimony and admitting numerous exhibits, the ALC issued a thorough order comprehensively evaluating all of the evidence and testimony and carefully explaining its reasons for accepting or rejecting the evidence presented by the parties. Notwithstanding Appellants' efforts to fly-speck the ALC's findings, its determinations are amply supported by the evidentiary record.

Because Appellants have shown no reason to disturb the ALC's decision, this Court should affirm.

Respectfully submitted,

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