

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Lower Court Case No. 23-ALJ-30-0335-CC

South Carolina Department of Consumer Affairs, Respondent,

v.

Lavisha Green, Appellant.

Appellate Case No. 2024-001652

RETURN TO DEPARTMENT'S
MOTION TO DISMISS

The Department filed a motion to dismiss the appeal in this case arguing that this Court lacks jurisdiction because the notice of appeal was not timely served, and that no issues are preserved because Ms. Green did not file a motion to reconsider in the ALC prior to filing the notice of appeal.¹ The Department's arguments are without merit and this Court should deny the motion to dismiss.

1. The notice of appeal was timely served and filed.

Rule 203(b)(6) of the South Carolina Appellate Court Rules provides that in appeals from the ALC "the notice of appeal shall be served on the agency, the administrative law court (if it has

¹ The Department waited until two days before the initial brief of appellant was due to file its motion to dismiss. While filing the motion to dismiss automatically stayed the deadlines under Rule 240, SCACR, undersigned served and filed the initial brief of appellant and designation of matter the following day.

been involved in the case) and all parties of record within thirty (30) days after *receipt of the decision.*” (emphasis added). Section 1-23-610 of the South Carolina Code provides that appeals from the ALC are to this Court and that the notice of appeal must be served in compliance with the Appellate Court Rules.

The Department argues that the time for serving the notice of appeal in this case began to run on August 2, 2024, the date that the final order was emailed to Ms. Green. Res.’s mot. 4. The Department relies on *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 422 S.C. 211, 810 S.E.2d 856 (2018) in support of its argument that for purposes of calculating the time for serving the notice of appeal under Rule 203(b)(6), Ms. Green “received” the decision of the ALC on the same day that it was sent. Res.’s mot. 4-5. *Wells Fargo* does not support the Department’s position.

In *Wells Fargo*, the Supreme Court dealt with the “novel issue of whether an email that provided written notice of entry of an order or judgement triggers the time for serving a notice of appeal for purposes of Rule 203(b)(1).” *Wells Fargo*, 422 S.C. at 213, 810 S.E.2d at 857. Rules 203(b)(1) and (b)(6) differ in one significant respect. As the Court noted in *Wells Fargo*, “when determining whether the service of a notice of appeal from the ALC is timely, the court is concerned with the date the party *actually receives the decision*, not the date the party receives written notice that an order or judgment has been entered.” 422 S.C. at 218, 810 S.E.2d at 859 (emphasis added).

Contrary to the plain language in Rule 203(b)(6), the Department contends that “the ALC *sent* the final decision to the parties via email on August 2, 2024, which triggered the time for Ms. Green to serve the notice of appeal.” Res.’s mot. 4-5. The date the order was sent is not the triggering event for the time to serve the notice of appeal. It is the date the order was received by Ms. Green. As the Department acknowledges, Ms. Green acknowledged receiving the decision on

August 27, 2024. Res.'s mot. 4. Ms. Green has also signed an affidavit attached as Exhibit 1 attesting that she received the decision from the ALC on August 27, 2024.

The Department cites to this Court's decision in *Lemmons v. Maced. Water Works, Inc.*, 431 S.C. 186, 847 S.E.2d 471 (Ct. App. 2020) as an example of this Court "grappl[ing]" with a party arguing that the date an email is sent is not necessarily the date the email is received. Res.'s mot. 5. The Department then goes on to argue that under the South Carolina Uniform Electronic Transactions Act—appearing in Chapter 6 of Title 26 of the South Carolina Code—that an email is received on the same day that it is sent. Res.'s mot. 5. The Department's argument is unavailing.

This Court's decision in *Lemmons* rejected the exact argument the Department makes in its motion now. In *Lemmons*, a utility company argued the appeal should be dismissed because it was served untimely. Specifically, and as relevant here, the company argued that the time for filing the Rule 59(e) motion under the Rules of Civil Procedure began on the date that the circuit court emailed the final decision to the parties. *Lemmons*, 431 S.C. at 192, 847 S.E.2d at 475. The company specifically premised its argument—just as the Department does here—on their incorrect view that "the time-stamp on the circuit court's e-mail providing the parties notice of the entry of its summary judgment order was the starting point for calculating the ten-day deadline." *Id.*

The company in *Lemmons* relied on *Wells Fargo*, just as the Department does here. But as this Court noted in *Lemmons*, the appellants in *Wells Fargo* did not dispute the date on which they received the email. *Lemmons*, 431 S.C. at 193, 847 S.E.2d at 475. The issue in *Wells Fargo* was thus limited to whether email may be used as a method of notifying parties of the judgment. *Wells Fargo* did not address any question about when such an email is "received" for purposes of calculating the deadline under Rule 203(b)(6), SCACR.

This Court found that the appellant in *Lemmons* “credibly asserts, Emails, although commonly used, are nonetheless subject to unpredictable and unexplainable travels and delayed and sometimes failed delivery.” 431 S.C. at 193, 847 S.E.2d at 475 (internal quotations and alterations omitted). This Court acknowledged that “[t]he question of whether the email’s time-stamp can be presumed to be the date of a party’s receipt of the notice has not yet been addressed by our appellate courts.” *Id.* at 194, 847 S.E.2d at 476. In the absence of precedent, this Court decided it best to look to the evidence in the Record on Appeal to determine when the email was received. *Id.* This Court went on to find that the company in *Lemmons* failed to establish that the date the email was sent was the same as the date the email was received and therefore denied the company’s motion to dismiss the appeal as having been untimely. *Id.*

If this Court were to grant the Department’s motion it would fundamentally alter Rule 203(b)(6), SCACR by starting the clock on serving a notice of appeal from a decision by the ALC from the date they *send* the email instead of the date the decision is *received*. Undersigned urges this Court to reject such a dramatic change to the South Carolina Appellate Court Rules. However, if this Court is to adopt the Department’s position and hold that the deadline for serving a notice of appeal from the ALC begins to run when the ALC sends the email with its final order attached, this Court should apply such a dramatic rule change prospectively only and allow Ms. Green’s appeal to proceed on the merits. That is exactly what the Supreme Court did in *Wells Fargo*: “fairness dictates that our holding on this issue be applied prospectively given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistency in the case law interpreting Rule 203, SCACR, which creates confusion as to whether receipt of electronic correspondence is sufficient to trigger the time to appeal.” 422 S.C. at 217, 810 S.E.2d at 859.

The evidence presented through the Department’s exhibits and Ms. Green’s affidavit show that the date Ms. Green “actually received” the ALJ’s final decision in this case was on August 27, 2024. Res.’s Exs. A and D; App.’s Ex. 1. That is when the deadline for serving the notice of appeal began to run under Rule 203(b)(6), SCACR. Ms. Green, through undersigned counsel, served the notice of appeal on the Department and the ALC and filed the notice of appeal with this Court all on September 25, 2024—one day before it was due. Thus, Ms. Green’s notice of appeal was timely served and filed, and this Court has appellate jurisdiction to hear this appeal.

2. Ms. Green was not required to file a motion to reconsider in the ALC before filing her notice of appeal with this Court because the new ALC Rule went into effect after her contested case hearing was held, and the ALC’s rule change is inconsistent—and therefore void—with the statutes governing the ALC, the Rules of Civil Procedure and the Appellate Court Rules.

Ms. Green’s contested case hearing was heard in the ALC on November 14, 2023. Nearly five months later, the ALC changed their rules on April 8, 2024. One of the rule changes requires that “prior to filing a notice of appeal from [a contested case] decision, a party must file a motion for reconsideration.” SCALC Rule 29(D)(4). The Department argues that Ms. Green’s failure to file a motion to reconsider renders all issues unpreserved for appellate review. The Department takes a footnote from this Court’s decision in *S.C. DMV v. Dover*, 423 S.C. 153, 813 S.E.2d 532 (Ct. App. 2018) outside of its proper context and asserts that the failure to file a motion to reconsider renders issues unpreserved for appellate review.

A. The ALC Rule change should not apply to Ms. Green’s case because it went into effect after her hearing was held before the ALJ.

The ALC Rule requiring the filing of a motion to reconsider as a prerequisite to filing a notice of appeal with this Court was enacted after Ms. Green’s case was heard by the ALJ. Additionally, as soon as Ms. Green received the final decision by the ALJ, she informed the ALJ’s law clerk that she wished to appeal the decision. Res.’s Ex. D. Ms. Green also sent a letter to the

ALC Clerk of Court informing them of her desire to appeal the decision. Res.'s Ex. E. In response to that letter, Ms. Green received a call from the ALC Clerk's Office informing her that if she wanted to appeal the decision of the ALJ, she had to file a notice of appeal with this Court. App.'s Exs. 1 and 2. Exhibit 2 shows highlighted an incoming call Ms. Green received from the ALC on September 9, and an outgoing call she made to this Court just minutes later which corroborates her affidavit.

After Ms. Green was informed by the ALC Clerk's Office that she had to file a notice of appeal with this Court, Ms. Green called this Court and sent this Court a letter indicating her desire to appeal.² App.'s Ex. 3. Ms. Green was never informed by anyone of the recent rule change regarding motions to reconsider. App.'s Ex. 1.

Our Supreme Court has found "a presumption that statutory enactments are to be given prospective rather than retroactive effect. *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990). This Court has likewise extended that principle to rule changes. *Graham v. Dorchester Cty. Sch. Dist.*, 339 S.C. 121, 124, 528 S.E.2d 80, 81 (Ct. App. 2000). And while there is an exception to the presumption of prospective only effect when the rule change is procedural in nature, "[t]hese are merely rules of construction . . . and are subject to the paramount rule that the intent of the legislature determines whether a statute [or rule] will have prospective or retroactive application." *Jenkins*, 302 S.C. at 146, 394 S.E.2d at 319.

It would work a fundamental injustice to fault Ms. Green for not complying with a procedural rule that went into effect after her hearing before the ALJ. This is especially true in light of the fact that as soon as she received the decision, she informed the ALJ's law clerk and the

² While Ms. Green's letters could be literally construed as requests for continuances to file her notice of appeal, they clearly indicate her desire to appeal the ALJ's decision and her good faith effort to comply with the rules governing appeals to this Court from the ALC.

ALC Clerk of Court that she wished to appeal, and she was informed that in order to appeal the decision she had to file with this Court. No one informed her of the recent rule change requiring parties to file a motion to reconsider prior to filing a notice of appeal. This Court should deny the Department's motion to dismiss this appeal because the ALC rule change should not apply retroactively to Ms. Green in these circumstances.

B. The ALC rule change is inconsistent with the South Carolina Appellate Court Rules, the Rules of Civil Procedure, and the statutes governing the ALC and is therefore void.

The new rule change requiring a motion to reconsider as a prerequisite to filing a notice of appeal puts the ALC at odds with every other trial court in South Carolina, at odds with the South Carolina Appellate Court Rules, and at odds with the statutes which create the ALC. Section 1-23-650(B)(1) of the South Carolina Code authorizes the ALC to create rules regarding practice and procedure before the ALC which are "consistent with the rules of procedure governing civil actions in courts of common pleas." The ALC however has no authority to create rules regarding the practice or procedure before this Court. No other trial court in South Carolina, including the court of common pleas, requires a motion to reconsider as a prerequisite to filing a notice of appeal. The Appellate Court Rules also do not require motions to reconsider as prerequisites to appeal.

Additionally, section 1-23-610 of the South Carolina Code which provides for judicial review of decisions made by the ALC provides that: "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 . . . not more than thirty days after the party received the final decision." "Appeal in these matters is by right." S.C. Code § 1-23-610.

It is notable that the Department couches its argument in terms of issue preservation as opposed to administrative exhaustion or appellate jurisdiction. The ALC has no authority to

promulgate rules regarding issue preservation or judicial review of its own decisions. Rules regarding issue preservation are well established by our Supreme Court. As this Court is aware, “[i]n order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity.” Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 185 (3d ed. 2016). Post trial motions, like motions to reconsider, “are not necessary to preserve issues that were ruled upon at trial; they are used to preserve those issues that were raised to the trial court but not ruled upon.” *Id.* 188.

The ALC’s rule change effectively cuts the time for filing a notice of appeal from thirty days to ten days because if a party in the ALC does not file a motion to reconsider within ten days, the appeal is forever waived. Respectfully, this rule change should be struck down by this Court as being inconsistent with the Rules of Civil Procedure, the Appellate Court Rules, sections 1-63-610 and 650, and the numerous opinions of this Court and the Supreme Court repeatedly holding that a motion to reconsider is not necessary to preserve an issue that has already been ruled on by the trial judge. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it”).

- 3. To the extent that this Court construes the new ALC rule change as an administrative exhaustion requirement, the proper remedy is to hold this appeal in abeyance and allow Ms. Green to file the motion to reconsider in the ALC and upon receiving an unfavorable ruling proceed to the merits of the appeal.**

Under the Administrative Procedure Act, a party seeking judicial review of a decision by the ALC must first exhaust all administrative remedies. S.C. Code § 1-23-380. Judicial review then can only occur if the ALC’s order is “final.” “The doctrine of exhaustion of administrative remedies is a rule of policy, convenience and discretion, rather than one of law, and is not

jurisdictional.” *Vaught v. Waites*, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (Ct. App. 1989) (internal quotations omitted). The doctrine of administrative exhaustion is applied flexibly and is not required if the pursuit of an administrative remedy would be futile. *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010).

Ms. Green made every effort to notify both the ALJ through his law clerk, and the ALC Clerk’s Office that she intended to appeal the ALJ’s decision. No one told her of the rule change requiring the motion to reconsider and pursuing such a motion would have been futile. Therefore, Ms. Green was not required to file a motion to reconsider and she has exhausted her administrative remedies. However, if this Court determines that a motion to reconsider was required to exhaust her administrative remedies, this Court should hold the appeal in abeyance, allow Ms. Green to file the motion to reconsider in the ALC, and appeal when that motion is denied.

Respectfully submitted,



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Attorney for Lavisha Green

EXHIBIT

1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Lower Court Case No. 23-ALJ-30-0335-CC

South Carolina Department of Consumer Affairs, Respondent,

v.

Lavisha Green, Appellant.

Appellate Case No. 2024-001652

AFFIDAVIT OF LAVISHA GREEN

Personally appeared before me, Lavisha Green, after first being duly sworn, do hereby swear, make oath, and affirm as follows:

1. I represented myself in the contested case hearing before the Administrative Law Judge in this matter and did not have a lawyer.
2. I received the final decision of the ALJ on August 27, 2024, via email only.
3. I have never received a paper copy of this final decision through the U.S. mail or otherwise. The final order has never been personally delivered to me.
4. On August 28, 2024, the day after I received the ALJ's final order via email, I emailed Judge Lenski's law clerk, Erika Easler, to inform her that I wished to appeal the decision of the ALJ.
5. On 9/9/24 @ 10:34am, ^{Jana Shealy called me and I} ~~I called the Administrative Law Court~~ ^{to} inform ~~them~~ ^{her} that I wanted to appeal the decision of the ALJ and asked them what steps needed to be taken to do that. I

BW / 11/15/2024

was informed by Jana Shealy, the Clerk of Court for the Administrative Law Court, that if I wanted to appeal the decision of the ALJ I had to do so with the South Carolina Court of Appeals. The Clerk did not inform me that I had to file a motion to reconsider with the ALJ before I could file a notice of appeal with the Court of Appeals.

6. On September 6, 2024, I mailed a letter to the ALC asking for additional time to file an appeal so that I could hire an attorney.
7. I was never informed that I had to file a motion to reconsider with the ALJ prior to appealing the decision to the Court of Appeals. I was never informed that the ALC changed its rule to require motions for reconsideration prior to appealing the decision to the Court of Appeals.
8. Based on the information I received from Jana Shealy, On September 9, 2024, I sent a letter to the South Carolina Court of Appeals requesting an extension of time to file the notice of appeal while I sought legal counsel.
9. I retained Adam Ruffin on September 24, 2024 to represent me in my appeal to the Court of Appeals.

Lavisha Green 11/15/24
Lavisha Green Date

Sworn to before me this 15th day of November, 2024

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission expires: 01/24/2025



EXHIBIT

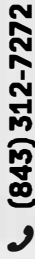
2



T-MOBILE FOR BUSINESS

USAGE DETAILS

For information only - charges are shown in the One-Time Charges section.



(843) 312-7272

Fab Seven Lic | Voice

TALK

Table with columns: When, Who, Description, Type, Min, Cost. Contains call logs for August 22-29, including blocked numbers and various incoming/outgoing calls.

...CONTINUED- (843) 312-7272, TALK

...CONTINUED- (843) 312-7272, TALK

Bill period

Aug 22, 2024 - Sep 21, 2024

Account

996035835

Invoice

996035835-8

Page

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Continuation of call log table from the previous page, showing call details for August 22-29.

EXHIBIT

3

Lavisha Green
3236 Landmark Dr.Ste.108
North Charleston, SC 29418
843-312-7272
sevenmortgagelg@gmail.com

September 9, 2024

Court of Appeals
1220 Senate St.
Columbia, SC 29201

Subject: Request for Extension of Time to Submit Appeal Due to Improper Service of Final Decision

Dear Court of Appeals,

I hope this letter finds you well. I am writing to formally request an extension of time to submit an appeal regarding the decision in Case Number: 23-ALJ-30-0335-CC.

South Carolina law under Section 1-23-380 of the South Carolina Code of Laws requires that a final decision be served to all parties in a proper and timely manner. However, I believe that I was not properly served with the final decision as required by law. I only recently became aware of the decision, and therefore, I have not had the opportunity to file an appeal within the normal timeframe.

Due to the improper service of the final decision, I am currently in the process of securing legal counsel to represent me in this matter. As such, I am respectfully requesting an extension of time to ensure that I can adequately prepare and submit my appeal with the assistance of my attorney.

I kindly ask that you confirm the extension as soon as possible and provide guidance on any additional documentation or steps required to formalize this request.

Thank you for your time and understanding. I look forward to your prompt response.

Sincerely,

Lavisha Green

RECEIVED

Nov 25 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Lower Court Case No. 23-ALJ-30-0335-CC

South Carolina Department of Consumer Affairs, Respondent,

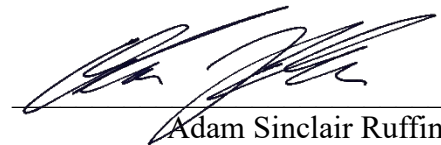
v.

Lavisha Green, Appellant.

Appellate Case No. 2024-001652

PROOF OF SERVICE

Pursuant to Rules 262(a)(3) and 262(c)(3), SCACR, undersigned counsel hereby certifies that a true copy of the return to the Department's motion to dismiss in the above-referenced case has been served upon Zachary Passmore and James Copeland at the primary e-mail address listed in the Attorney Information System (AIS) on November 25, 2024.



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Attorney for Lavisha Green