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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

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South Carolina Department of Consumer Affairs, Respondent,

v.

Lavisha Green, Appellant.

Appellate Case No. 2024-001652

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# FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENTS IN REPLY

1.

This Court has appellate jurisdiction over this appeal because the notice of appeal was timely served and filed.

The Department filed a motion to dismiss this appeal two days before the initial brief of appellant was due. The Department argued that Ms. Green's notice of appeal was untimely and that she was required to file a motion to reconsider with the ALC prior to filing her notice of appeal, which she did not do.[1] Ms. Green filed a Return with three attached exhibits in support of her argument against dismissal of her appeal. This Court denied the motion to dismiss but allowed the parties to address appellate jurisdiction in their briefs. Ms. Green was given permission to address appellate jurisdiction in her reply brief because she had already filed her opening brief.

Ms. Green served and filed her notice of appeal within thirty days of receiving the ALC's final order. 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 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. BOR, 7-8. The

[1] Although the Department styled its argument regarding Ms. Green's failure to file a motion to reconsider under the heading of appellate jurisdiction, the Department does not claim that the failure to file a motion to reconsider deprives this Court of appellate jurisdiction. Instead, it argues that the failure to file a motion to reconsider renders *all issues* unpreserved for appellate review.

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. BOR, 8-9. *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." BOR, 9. 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.

The Department admits that Ms. Green acknowledged receiving the decision on August 27, 2024. BOR, 8. Additionally, Ms. Green signed an affidavit which was attached as Exhibit 1 to her Return to the Department's motion to dismiss this appeal attesting that she received the decision from the ALC on August 27, 2024. The Department implicitly seeks to impute a kind of "constructive receipt" to Ms. Green by arguing that because email is generally considered to be a reliable form of communication, an email should be considered to have been received on the same day that it was sent for purposes of calculating the time for serving a notice of appeal under Rule

203(b)(6) of the South Carolina Appellate Court Rules. BOR, 11-12. This Court should decline the Department's invitation.

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. BOR, 10. 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. BOR, 10-11. But this Court's decision in *Lemmons* rejected the exact argument the Department makes 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 agree with the Department, 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*. This Court should reject such a dramatic change to the South Carolina Appellate Court Rules. But, if this Court adopts the Department's position and holds 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 this 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 both the Department's and Ms. Green's exhibits as attached to their filings in this Court along with the motion to dismiss, show that the date Ms. Green "actually received" the ALJ's final decision in this case was on August 27, 2024. R. 77 – 79; R. 92 – 94; R. 97 – 98. 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's arguments are preserved for appellate review.

The Department argues that Ms. Green's arguments are not preserved for appellate review because she failed to file a motion to reconsider with the ALC prior to filing her notice of appeal and because she failed to make her as-applied constitutional arguments with sufficient specificity to the lower court.

**A. Ms. Green was not required to file a motion to reconsider in the ALC to preserve her arguments for appeal because the Rule was changed after her contested case hearing.**

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 this was in fact not a rule change because, since 2019, the Revised Notes to the Rule indicated that the "the last sentence of subsection (D), which stated a motion for reconsideration is not a prerequisite to filing a notice of appeal, has been deleted." BOR, 12-13. However, it wasn't until April 8, 2024 that the language

requiring the filing of a motion to reconsider before filing a notice of appeal with this Court was added. As such, the rule was changed on April 8, 2024.

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. R. 92 – 94. Ms. Green also sent a letter to the ALC Clerk of Court informing them of her desire to appeal the decision. R. 95 – 96. 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. R. 97 – 99. The call log 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] R. 100. Ms. Green was never informed by anyone of the recent rule change regarding motions to reconsider. Green Affidavit.

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

[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.

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.

Ms. Green cannot be required to comply with a procedural rule that went into effect after her hearing in the ALC. This is especially true because as soon as she received the decision, she informed the ALJ's law clerk and the ALC Clerk of Court that she wished to appeal, and she was informed that in order to appeal the decision she had to file a notice of appeal 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. The ALC rule change requiring a motion to reconsider be filed before filing a notice of appeal with this Court should not apply 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.

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 cuts the time for seeking appellate review of an adverse decision by the ALC from thirty days to ten days because if a party in the ALC doesn't file a motion to reconsider within ten days, all issues become unpreserved. 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. *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").

**C. Ms. Green's as-applied constitutional challenge was made with sufficient specificity to, and was ruled on, by the ALJ.**

The Department argues that Ms. Green's as-applied constitutional argument was never made to the ALC and that it is therefore not preserved for appellate review. BOR, 14. Admittedly, Ms. Green never used the phrase "unconstitutional as applied" and never cited to the Eighth

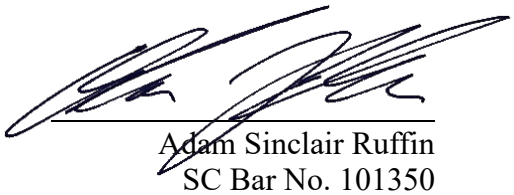
Amendment. But the import of her arguments made throughout the case were that the fine was excessive in comparison to her conduct. Ms. Green did not ask the ALJ to strike down the entire statute, but rather asked the ALJ to find that the fine imposed against her was excessive, i.e., that it violated her right to be free from excessive fines under the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. R. 39, ll. 3 – 25; R. 45, l. 16 – 46, l. 8; R. 72 – 76.

As our Supreme Court noted in *State v. Brannon*, "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). The *Brannon* Court indicated that a "litigant is only required to fairly raise the issue to the trial court, thereby giving it *an opportunity to rule* on the issue. *Id*. at 502, 697 S.E.2d at 595-96 (emphasis added). The Court went on to find that the defendant's Fourth Amendment issue was preserved for appeal even though the defendant never cited to the Fourth Amendment or used the word "seizure" in his arguments to the trial judge. *Id*.

Although Ms. Green did not directly cite to the Eighth Amendment, her argument was fairly made to the ALJ that the fine being imposed against her was excessive when applied to her. As such, she gave the ALJ a fair opportunity to rule on the issue. Furthermore, the ALC did rule on this issue, and ruled incorrectly. The ALC agreed with Ms. Green that the fine was excessive but erroneously found that it lacked the authority to reduce it. R. 4 – 5. Ms. Green's arguments complied with the four issue preservation requirements as articulated by former Chief Justice Toal and are preserved for this Court's review.

## CONCLUSION

For the reasons argued in Ms. Green's opening brief, and this reply brief, this Court should find that Ms. Green's notice of appeal was timely filed, that her as-applied constitutional challenge is preserved for appellate review, and reverse the order of the ALJ.



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This 18th day of April 2025.