THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2024-001652

South Carolina Department of Consumer Affairs ..... Respondent,

v.

Lavisha Green ..... Appellant.

FINAL BRIEF OF RESPONDENT

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   b. Ms. Green failed to file a mandatory motion for reconsideration with the South Carolina Administrative Law Court prior to filing a Notice of Appeal; and

   c. Ms. Green failed to preserve the issues she now seeks appellate review of in this matter?

II. Was the Administrative Law Judge correct in upholding the Department's imposition of a fine where there was no evidence presented to support an argument that the fine was unconstitutional as applied to Fab Seven LLC?

III. Was the Administrative Law Judge correct in not ruling that the fine imposed upon Fab Seven LLC by the South Carolina Department of Consumer Affairs was unconstitutionally excessive in violation of the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution?

STATEMENT OF THE CASE

On August 8, 2023, Lavisha Green ("Ms. Green")[1] filed a request for contested case hearing with the South Carolina Administrative Law Court ("ALC") challenging the South Carolina Department of Consumer Affairs' ("Department") June 30, 2023, imposition of a $9,000.00 administrative fine for failure to submit an annual mortgage log for the 2022 calendar year as required by S.C. Code Ann. § 40-58-65(A) (Supp. 2023) and S.C. Code Ann. Regs. 28-400(D)(1) (Supp. 2023). R. p. 2; p. 4. A hearing was held on November 14, 2023, before the Honorable S.

[1] The Department assessed a fine against Ms. Green's limited liability company, Fab Seven LLC, which was the mortgage broker licensee. See S.C. Code Ann. § 40-58-65(A) ("The licensee shall pay a fine of one hundred dollars a day for late or incomplete data submissions"). However, she requested a contested case hearing regarding the Department's decision in her individual capacity.

Phillip Lenski ("ALJ"). R. p. 1. The Department was represented by Zachary Passmore and James Copeland. R. p. 1. Ms. Green represented herself. R. p. 1.

Ms. Green did not dispute that she failed to timely file the mortgage log. R. p. 1. At trial, Ms. Green maintained the failure to submit the log as required by law was an innocent mistake by a new broker[2] and the penalty imposed is excessive under the circumstances. R. p. 1. Notwithstanding the Department sending three reminders prior to the mortgage log's March 31 deadline, Ms. Green further argued the fine was unreasonable because she was not notified of the fine until after ninety (90) days had passed and $9,000.00 in penalties had accrued. R. pp. 2–3.

After the hearing, the ALJ took the matter under advisement. On August 2, 2024, the ALJ issued its final order upholding the Department's decision to impose a $9,000.00 administrative fine because Ms. Green offered no explanation for the failure to timely submit the mortgage log other than a lack of experience and some confusion regarding the filing requirements. R. p. 5. The ALJ concluded the court was without discretion to reduce or alter the penalty in any way given the statute's mandatory language. R. p. 5.

On August 2, 2024, the ALJ's clerk emailed the final order and decision to the Department and to Ms. Green. R. p. 6; p. 85. The ALJ's clerk also mailed Ms. Green a hardcopy of the final order and decision. R. p. 92. On September 6, 2024, Ms. Green served upon the ALC and the Department a Motion of Continuance.[3] R. pp. 95–96. Ms. Green did not file or serve a motion for reconsideration with the ALC at any time prior to filing the Notice of Appeal with this Court.

[2] Fab Seven LLC was first issued a mortgage broker license on July 1, 2021. R. p. 1. Ms. Green timely submitted Fab Seven LLC's 2021 mortgage log on March 31, 2022. R. p. 3.

[3] The Department never received an acknowledgement of receipt from the ALC and is basing the filing date upon the date provided in Ms. Green's cover letter.

On September 25, 2024, fifty-four days after the ALC emailed the order to the parties, Ms. Green filed a Notice of Appeal with this Court. The Department was served with an electronic copy of the Notice of Appeal on September 25, 2024.

STATEMENT OF FACTS

The Department is the state's consumer protection agency and accomplishes its mission through advocacy, mediation, enforcement, and education. R. p. 8, ll. 9–13. The Department also has regulatory authority over certain industries in South Carolina, including mortgage brokers. R. p. 8, ll. 13–17. In South Carolina, mortgage brokers must comply with the South Carolina Mortgage Broker Act, S.C. Code Ann. § 40-58-10, *et seq.*, and Regulation 28-400 of the South Carolina Code of Regulations. R. p. 8, ll. 18–22. The Department maintains an industry information page for mortgage brokers on the Department's website. R. p. 16, l. 20. The Department also provides a link on its webpage to the mortgage log instructions. R. p. 17, ll. 8–9.

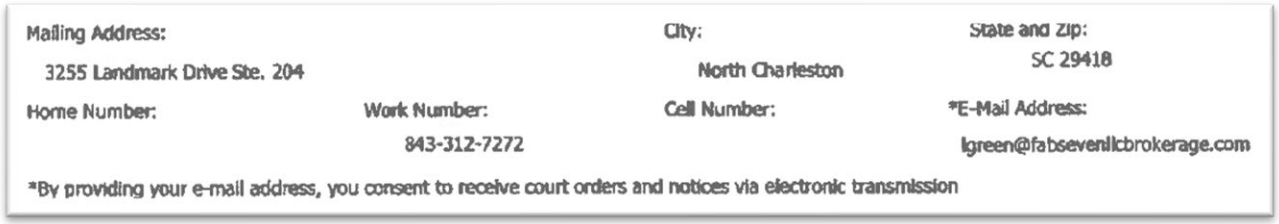
The Department initially licensed Fab Seven LLC as a mortgage broker on July 1, 2021, and, at the time of trial, it had been licensed continually since. R. p. 14, ll. 10–12. Licensed mortgage brokers are required to file mortgage log data with the Department by March 31 of each year. S.C. Code Ann. § 40-58-65(A) (Supp. 2023). Failure to do so results in a penalty of one hundred dollars a day for late or incomplete submissions. Id. Section 40-58-65(A) states "each licensee shall submit its mortgage loan log data and the data identified in 12 C.F.R. Part 1003, et seq., in a form determined by the administrator by March thirty-first of each year. The licensee shall pay a fine of one hundred dollars a day for late or incomplete data submissions." Id.

In South Carolina, mortgage licensing is processed through the Nationwide Mortgage Licensing System, now known as the Nationwide Multistate Licensing System ("NMLS"). R. p. 14, ll. 17–22. All applicants for a mortgage broker license file their applications through NMLS,

the Department reviews the applications through NMLS, and all communications with the licensee regarding the license are typically made through the system. R. p. 14, l. 25; p. 15, ll. 1–4.

Fab Seven LLC timely submitted an annual mortgage log for the 2021 calendar year. R. p. 31, l. 25; p.32, ll. 1–2. Starting in January 2023, the Department began sending a series of reminder emails to all mortgage broker licensees regarding the filing of the mortgage log and the deadline for the 2022 calendar year data. R. p. 27, ll. 17–23; pp. 62–64. These reminder emails were sent to the email addresses that licensees provide to the NMLS. R. p. 36, ll. 1–13. Additional reminder emails were sent out on January 23, February 15, and March 14, 2023. R. p. 28, ll. 1–13, 20–25; p. 29, ll. 6–9; p. 62–69. A final email was sent after the deadline on April 6. R. p. 30, ll. 6–10; pp. 70–71. On June 30, 2023, ninety days after the deadline for Fab Seven LLC to submit its mortgage log report, the Department assessed a fine of $9,000 because no mortgage log report had been submitted. R. p. 10, ll. 13–15; pp. 81–83.

In August 2023, Ms. Green filed a Request for Contested Case Hearing Form at the South Carolina Administrative Law Court ("ALC") requesting a hearing regarding the Department's assessment of a mortgage log penalty.[4] On the form, Ms. Green provided a mailing address and email address as follows:


Mailing Address: 3255 Landmark Drive Ste. 204
City: North Charleston
State and zip: SC 29418
Home Number:
Work Number: 843-312-7272
Cell Number:
*E-Mail Address: lgreen@fabsevenllcbrokerage.com
*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

[4] The Department assessed a fine against Ms. Green's limited liability company, Fab Seven LLC, which was the mortgage broker licensee. See S.C. Code Ann. § 40-58-65(a) ("The licensee shall pay a fine of one hundred dollars a day for late or incomplete data submissions"). However, she requested a contested case hearing regarding the Department's decision in her individual capacity.

R. p. 80. Notably, the email address section referred to a sentence on the subsequent line stating, "By providing your e-mail address, you consent to receive court orders and notices via electronic transmission." R. p. 80. Ms. Green used this email address several times during the pendency of the contested case to communicate with the ALC and the Department regarding the Prehearing Statement, the admission of certain evidence, and exhibits Ms. Green submitted to the court.

On August 2, 2024, the administrative law judge issued a final order and decision, which his clerk emailed to Ms. Green and the Department on that same day. R. pp. 85–91. In his order, the judge upheld the full amount of the fine, finding that the ordinary use of "shall" in S.C. Code Ann. § 40-58-65 (A) and S.C. Code Ann. Regs. 28-400(D)(1) (Supp. 2023) indicated that the payment of one hundred dollars per day late submissions is a mandatory requirement. R. p. 4.

On August 28, Ms. Green replied to the August 2 email, stating she had just received the email the previous day and did not receive a mailed copy of the decision. R. pp. 92–94. The administrative law judge's clerk responded that she had mailed a hard copy to the address that matched the mailing address provided by Ms. Green on the Request for Contested Case Hearing Form. R. p. 80; pp. 92–94.

On September 6, 2024, Ms. Green served upon the ALC and the Department a Motion of Continuance.[5] R. pp. 95–96. On September 25, fifty-four days after the court emailed the order to the parties, Ms. Green filed a Notice of Appeal with this Court, stating she received the ALC Order on August 27, 2024, via email. R. pp. 77–78. Ms. Green did not file or serve a motion for reconsideration with the ALC at any time prior to filing the Notice of Appeal with this Court.

[5] The Department never received an acknowledgment of receipt of Ms. Green's Motion for Continuance from the Court and is basing the filing date upon the dated provided in Ms. Green's cover letter to the motion.

The Department filed a Motion to Dismiss Appeal on November 13, 2024, arguing the Court lacked jurisdiction to hear the appeal on the grounds that the Notice of Appeal was served on the ALC and the Department well after the thirty days required by S.C. Code Ann. § 1-23-610 (Supp. 2024) and Rule 203(b)(6), SCACR. The Department further argued that the Court should dismiss the appeal because Ms. Green failed to file a motion for reconsideration with the ALJ, as required by SCALC Rule 29(D)(4) (2024). On November 14, 2024, Ms. Green filed her Appellant's Designation of Matter and Appellant's Initial Brief. She then filed her Return to the Department's Motion to Dismiss on November 25, 2024. The Department filed a Reply to Ms. Green's Return on December 4, 2024. On January 13, 2025, the Court issued an Order denying the Department's Motion to Dismiss without prejudice to the parties addressing the Court's appellate jurisdiction in their briefs.

STANDARD OF REVIEW

Section 1-23-610(B) of the South Carolina Code provides the standard of review in appeals from the Administrative Law Court:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge 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.

ARGUMENT

I. This Court lacks appellate jurisdiction in this matter.

As a preliminary matter, this Court lacks appellate jurisdiction to hear this appeal. Ms. Green failed to effectively file a Notice of Appeal because (a) she filed her Notice of Appeal fifty-four days after receiving the final order from the ALC; (b) Ms. Green failed to file the required motion for reconsideration with the ALC prior to filing a Notice of Appeal as required by ALC Rules; and (c) Ms. Green failed to preserve any issues for consideration by this Court.

a. Ms. Green failed to timely file and serve the Notice of Appeal upon the ALC and the Department.

As the Department has argued in its Memorandum in Support of Respondent's Motion to Dismiss Appeal, the Court does not have jurisdiction to hear this appeal because Ms. Green filed a Notice of Appeal fifty-four (54) days after receipt of the decision of the Administrative Law Court.

The ALJ issued a final order and decision for Ms. Green's contested case on August 2, 2024. The ALJ's law clerk emailed this order to Ms. Green and the Department; additionally, that same day, a hard copy of the order was mailed to the address Ms. Green provided on her Request For Contested Case Hearing Form. The Department received the email the day it was sent.

Ms. Green's appeal was not timely filed because she filed the notice more than thirty days after receipt of the ALC's decision. S.C. Code Ann. § 1-23-610 (Supp. 2024) and Rule 203(b)(6), SCACR, require that the notice of appeal be filed with this Court as well as served upon the opposing party and the ALC, all within not more than thirty days after the party receives the final decision of the administrative law judge. Section 1-23-610 provides:

> For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on

> the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

S.C. Code Ann. § 1-23-610(A)(1) (emphasis added). The Appellate Court Rules also provide that when a party appeals a decision of the ALC to the Court of Appeals, the notice of appeal shall be served on the agency, the ALC, and all parties of record "within thirty (30) days after receipt of the decision." Rule 203(b)(6), SCACR.

The South Carolina Supreme Court and the Court of Appeals have long recognized that timely service of a notice of appeal is a non-waivable requirement and failure to timely serve divests the Court of jurisdiction resulting in dismissal of the appeal. See Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999) (citing First Carolina Nat'l Bank v. A & S Enterprises, Inc., 272 S.C. 339, 251 S.E.2d 762 (1979); Burnett v. South Carolina State Highway Dep't, 252 S.C. 568, 167 S.E.2d 571 (1969)); see also Rule 203(d)(3), SCACR ("If the notice of appeal is not timely filed or the filing fee is not paid in full, the appeal shall be dismissed, and shall not be reinstated except as provided by Rule 260.").

The timeframe to serve a notice of appeal from the ALC decision begins when the appellant receives the actual decision. Thus, the question is when did Ms. Green receive the ALC decision? Ms. Green states in her Notice of Appeal that she received the ALC decision on August 27, 2024, via email. R. pp. 77–78. However, it is clear the ALC's email serving both parties with a copy of the final order was sent on August 2, 2024. R. pp. 85–91. Counsel for the Department received the email on August 2, 2024. Ms. Green responded to the August 2 email on August 28 indicating she received the email the previous day, on August 27. However, she provides nothing to support any reason why it took her email provider twenty-five days to deliver the email sent by the ALC on August 2, or why the Department would have received the email on the same day but she would

not have. The Supreme Court has clarified that "receipt" under Rule 203, SCACR is not synonymous with the requirements of service. Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 422 S.C. 211, 219, 810 S.E.2d 856, 860 (2018). The Court also made clear that Rule 203(b)(6), SCACR, does not mean that "receipt of the decision" requires receipt by mail or hand delivery in order to trigger the time to appeal. Id. In Wells Fargo, the Court held that an email, if sent from the court, an attorney of record, or a party, triggers the time to serve a notice of appeal. Id. at 217, 810 S.E.2d at 859. Here, 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.[6] See SCALC Rule 5 ("A party who furnishes an e-mail address to the Court consents to the service of documents issued by the Court via e-mail, and the date of the e-mail is the date of service.").

Ms. Green argues Wells Fargo does not support the Department's argument. However, she misconstrues the point the Department was making. In Wells Fargo, the Court addressed the novel issue of whether receipt of electronic correspondence is sufficient to trigger the time to appeal under Rule 203, SCACR. Id. at 217, 810 S.E.2d at 859. The Court considered the issue as applied to Rule 203(b)(1), SCACR in that case, but then went beyond Rule 203(b)(1) to apply its holding to timeliness of a notice of appeal from an ALC decision under Rule 203(b)(6) SCACR.

The Court discussed the case of White v. S.C. Dep't of Health & Envtl. Ctrl, 392 S.C. 247, 708 S.E.2d 812 (Ct. App. 2011), acknowledging the distinction between Rule 203(b)(1) and 203(b)(6), SCACR, and concluded, "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*,

[6] In addition to the court emailing the final decision to the parties on August 2, the administrative law judge's clerk also mailed Ms. Green a copy of the order to the address provided to the ALC. R. p. 92. SCALC Rule 5 provides, "Service is deemed complete upon mailing. Service that complies with Rule 5(b)(1), SCRCP, also shall satisfy this Rule." Rule 5(b)(1), SCRCP, also provides, "Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint."

not the date the party receives the written notice that an order or judgment has been entered." Id. (emphasis added). The Court also agreed with the White decision in that Rule 203(b)(1) and Rule 203(b)(6) require the receipt of different things to trigger the time to appeal but explained that "does not necessarily mean the manner in which a party receives those things must differ in order to trigger the time to appeal." Wells Fargo, 422 S.C. at 218–219, 810 S.E.2d at 860. The Court ultimately overruled the Court of Appeals' decision in White "to the extent it…interprets 'receipt of the decision' to require receipt of the decision by mail or hand delivery in order to trigger the time to appeal under Rule 203(b)(6), SCACR." Id. at 219, 810 S.E.2d at 860. Thus, since 2018, case law has established that receipt of the ALC decision by email, if sent from the court, an attorney of record, or a party, triggers the time to serve a notice of appeal under Rule 203(b)(6), SCACR.

Further, this Court has grappled with cases where litigants have maintained that the timestamp on the email message is not always the starting point because the timestamp does not conclusively determine the date a party received the email. See Lemmons v. Maced. Water Works, Inc., 431 S.C. 186, 847 S.E.2d 471 (Ct. App. 2020). Here, Ms. Green asserts she did not receive the court's email with the final decision until August 27, 2024. The Uniform Electronic Transactions Act, however, provides:

> Unless otherwise agreed between a sender and the recipient, an electronic record is received when it: (1) enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent from which the recipient is able to retrieve the electronic record; and (2) is in a form capable of being processed by that system.

S.C. Code Ann. § 26-6-150(B).

Ms. Green maintains the Lemmons case rejected the same argument the Department is now making. This is incorrect. The Lemmons court acknowledged that as of 2020, "the question of

whether the email's timestamp can be presumed to be the date of a party's receipt of the notice has not yet been addressed by our appellate courts." 431 S.C. at 194, 847 S.E.2d at 476. As such, the Lemmons court "look[ed] to the Record on Appeal to determine the date of receipt of the circuit court's e-mail notice according to the standards of section 26-6-150 (B)" of the Uniform Electronic Transactions Act. Id. Because there was no record establishing the date the court's email notice entered counsel's server, the court rejected the Utility's argument that the customer did not timely invoke the Court of Appeals' appellate jurisdiction. Id. The facts and circumstances of the Lemmons case are materially different from those of Ms. Green's, but the same logic and analysis applies.

In this case, Ms. Green provided the ALC with the email address used and the order was in a PDF format which is easily read by most devices in use today. Moreover, Ms. Green was able to open the email and view the decision as evidenced by her August 28 email acknowledging receipt of the decision. R. pp. 92–94. The ALC emailed the decision to the parties on August 2. Thus, Ms. Green received the decision via email on August 2 even if she was not aware she had received it until August 27. See S.C. Code Ann. § 26-6-150(E) ("An electronic record is received pursuant to subsection (B) even if an individual is not aware of its receipt"). Furthermore, the ALC mailed a copy of the final order via the United States Postal Service at the mailing address provided by Ms. Green. R. p. 80; p. 92. Though Ms. Green swears she did not receive the August 2 email until August 27 and she never received a hard copy of the order that was mailed to her by the court, she has not provided any cogent explanation – technical or otherwise – how two reasonably reliable sources of transmission failed simultaneously. No evidence has been provided that her email account was inaccessible or inoperable for the period between August 2 and 27. She also has not provided confirmation in the form of screenshots or other records of her email inbox to confirm

she actually received the email from the ALC on August 27, 2024, as opposed to a date and time closer to August 2, 2024, 11:04 AM. She also did not provide any indication that the attached order was inaccessible or unreadable for some period of time prior to August 27.

There is nothing in the record establishing any reason that would explain a complete failure of two reasonably reliable methods of communication. Therefore, with the information before this Court now, as it envisioned in Lemmons, there is more than enough to establish that Ms. Green received the ALC's final order on August 2 even if she did not see it until August 27, 2024. Unfortunately, that is not a sufficient excuse to relieve her of the duty to adhere to well-established court rules. Thus, contrary to what Ms. Green argues, the Department is not asking this Court to fundamentally alter Rule 203(b)(6). In fact, the Department's position is consistent with the application of Rule 203(b)(6), SCACR and established case law since 2018 and 2020. In conclusion, this appeal should be dismissed because Ms. Green did not file the Notice of Appeal until September 25, 2024, fifty-four days after the parties received the ALC's final decision.

b. Ms. Green failed to file a mandatory motion for reconsideration with the ALC prior to filing her Notice of Appeal.

Effective April 8, 2024, Rule 29, which applies to contested case hearings at the ALC, provides "***prior to*** filing a notice of appeal from the [ALC] decision, a party must file a motion for reconsideration." SCALC Rule 29(D)(4) (2024) (emphasis added). Since 2019, the Revised Notes to SCALC Rule 29 have explained, "[i]n accordance with applicable case law on issue preservation, 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." Thus, in order to preserve an issue for review by this Court, an appellant must have raised that issue in a timely motion for reconsideration as contemplated by SCALC Rule 29.

Though Rule 29 as written was effective recently, the requirement to file a motion for reconsideration is not new. In 2016, SCALC Rule 29(D)(4) included a sentence providing, "The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge."[7] This sentence, however, was removed when the ALC published its revised rules in 2019.[8] Since 2019, the Revised Notes for the rule have contained the explanation regarding the deletion of the previous statement.

Rule 29 is published on the ALC's official website, which is accessible to the public, including Ms. Green. Also included is an explanation from the court that notable changes for 2024 include "amending Rule 29 to *clarify* that in contested cases, a motion for reconsideration is required prior to filing a notice of appeal."[9]

In this case, Ms. Green did not file a motion for reconsideration at the ALC. By failing to file a motion for reconsideration, Ms. Green has not preserved any issues for this Court to review on appeal in this matter. See S.C. Dep't of Motor Vehicles v. Dover, 423 S.C. 153, 160 n3, 813 S.E.2d 532, 535 n3 (Ct. App. 2018) (citing Risher v. S.C. Dep't of Health & Envtl. Control, 293 S.C. 198, 208, 712 S.E.2d 428, 422 (2011) (appellant's failure to file a motion for reconsideration or motion to alter or amend pursuant to SCALC Rules 29 or 68 (or Rules 59(e) or 60, SCRCP) renders issues unpreserved for appellate review)). The Department will more fully address Ms. Green's additional issue preservation deficiencies *infra*.

c. Ms. Green failed to preserve any issues for consideration by this Court.

The Court lacks appellate jurisdiction in this matter as Ms. Green failed to preserve any matters for appeal of the ALC decision. During the hearing, the only objections she made were to

[7] https://www.scalc.net/Rules%20documents/officialrules2016.pdf, accessed on Dec. 3, 2024.
[8] https://www.scalc.net/Rules%20documents/officialrules2019.pdf, accessed on Dec. 3, 2024.
[9] https://www.scalc.net/rules.aspx?faqs=, accessed on Feb. 13, 2025.

the admission of certain Department exhibits based on their relevancy to the matter. Her objections were overruled, and the exhibits were entered into the record. At no time during the hearing, nor in any of her filings with the ALC, did Ms. Green put forth with the broadest of interpretation an argument that the fine was unconstitutional in violation of the Eighth Amendment's Excessive Fines Clause. Issues not raised to and ruled on by the ALJ are not preserved for appellate consideration. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002).

In Dorman v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002), neighbors challenged a homeowner's permit to build a boat dock on her property. On appeal from the initial hearing granting the permit, the petitioners argued the granting constituted a regulatory taking and presented due process and equal protection claims before the Court. None of these arguments were made before the ALC. This Court determined that while the ALC can rule on as-applied constitutional challenges, "[because] none of these constitutional arguments were presented to the ALJ, they are not preserved for appellate review and thus are not properly before us." Id. at 171, 565 S.E.2d at 125. The homeowner in Dorman argued she made repeated requests for equal treatment at every level; however, this Court found those requests insufficient. "The legal theory on which she seeks to prevail must be raised and ruled upon by the ALJ." Id.

Similarly, Ms. Green at the hearing before the ALJ did not articulate to any degree of specificity the argument that the administrative fine imposed upon her company violated the Excessive Fines Clause of the Eighth Amendment. The only reference she made to the amount of the fine was that she believed the fine was "unfair". R. p. 39, l. 25. Even under the broadest level of interpretation, she cannot reasonably argue now that this statement is sufficient for the ALJ to have understood that she was making a constitutional claim. Courts do allow pro se litigants a

degree of lenience in matters such as pleadings and specificity for grounds of objections that would not be allowed for parties represented by counsel. Elijah v. Dunbar, 66 F.4th 454, 460 (4th Cir. 2023). However, this lenience does not extend to the substantive or procedural requirements of the law. See State v. Burton, 356 S.C. 259, 265 n. 5, 589 S.E.2d 6, 9 n.5 (2003); State v. Policao, 402 S.C. 547, 558, 741 S.E 2d 774, 779–80 (Ct. App. 2013); State v. Bryant, 383 S.C. 410, 418, 680 S.E.2d 11, 15 (Ct. App. 2009). Furthermore, Ms. Green never obtained a ruling on this issue, even though she could have attempted to do so by filing a motion for reconsideration. Constitutional arguments are no exception to the error preservation rule. Travelscape, LLC v. S.C. Dep't of Revenue, 391 S.C. 89, 110, 705 S.E.2d 28, 39 (2011) (citing State v. Powers, 331 S.C. 37, 42, 501 S.E.2d 116, 118 (1998)).

In furtherance of the argument that Ms. Green's statements at the ALC hearing unmistakably conveyed a constitutional as-applied challenge to the fine, she cites State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). However, that case can be distinguished from this one. Russell moved for a directed verdict at the trial court, arguing the State failed to establish the *corpus delicti* of his DUI charge, though he did not use the precise legal term when putting forth his argument. This Court found that the argument was raised to the trial court and was preserved for appellate review. However, the Court came to this conclusion because there was sufficient information in the record to demonstrate the theory behind Russell's argument was understood – the State, in its opposing motion, used the words "*corpus delicti*" and cited the relevant case law. See id. at 132, 546 S.E.2d at 204.[10] In this case, Ms. Green's only reference to the amount of the fine was that it was "unfair". R. p. 39, l. 25. It is not clear from the record either that her intent in

[10] Though the Court found that Russell preserved this issue for appellate review, it rejected his argument, finding the State provided sufficient independent evidence to corroborate Russell's extrajudicial statements. See id. at 133.

stating the fine was unfair equated any constitutional argument, let alone an Eighth Amendment claim, or that the ALJ understood this statement to purport as such.

Interestingly, the Court's decision in Russell supports the Department's argument that Ms. Green did not raise *any* claims at the ALC that are preserved for appellate review. A second argument Russell made to the Court was that his extrajudicial statements to police at the time he was arrested should not have been admitted because, under the circumstances, they were inherently untrustworthy. The State argued, and this Court agreed, that this argument was not preserved because "[the] issue was not raised to the trial judge, nor was it ruled upon. Issues not raised to and ruled upon in the trial court will not be considered on appeal. A party cannot argue one ground for an objection at trial and an alternative ground on appeal." Id. at 133, 546 S.E.2d at 205. (internal citations omitted).

Ms. Green also cites the case of State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010) to support her claim that the ALJ should have understood her sole statement that the fine was unfair because of when she received the final notice as her properly arguing that the fine was excessive and in violation of her constitutional rights. Although the Court in Brannon did hold that error 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, it simply cannot be said that Ms. Green met that test. In Brannon, the Court said Mr. Brannon fairly raised a Fourth Amendment challenge when he argued at trial that an arrest was not being made when he ran from police. See State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 596 (Ct. App. 2001). Compare all of the statements made and evidence presented in Brannon's trial to Ms. Green's sole claim that the fine was unfair because of when she received the final notice. R. p. 39, ll. 22–25. Clearly, Ms. Green did not sufficiently raise the issue as it was raised in Brannon.

Another illustrative case is Carson v. Dep't of Natural Res., 371 S.C. 114, 638 S.E.2d 45 (2002). There, Carson, an officer with the Department of Natural Resources, challenged the termination of his employment for insubordination related to an incident four years prior where roofing tacks were thrown onto the driveway of his superior, causing damage to the superior's personal and state vehicles. After some time, evidence was discovered that indicated Carson was involved. The State Employee Grievance Committee determined the superior met with all DNR officers twice, before and after the incident, emphasizing the need for integrity and truthfulness and warned the officers that lying would jeopardize their jobs. Carson's subsequent claims during the internal investigation of the incident were determined to be false and insubordinate, defying the superior's previous order to be truthful. The Grievance Committee upheld the termination, which was overturned by this Court. Carson, 371 S.C. at 116–17, 638 S.E.2d at 46. The Supreme Court granted a writ of certiorari and reversed. Id. at 123, 638 S.E.2d at 49.

On appeal, Carson argued the Grievance Committee denied him due process because 1) the charges were vague and four years old, 2) DNR's procedure shifted the burden of proof to him, and 3) the Committee refused to hear from his character witnesses and limited the examination of other witnesses. Id. at 120, 638 S.E.2d at 48. Before the Grievance Committee, Russell commented that it was difficult to defend against an incident that occurred years prior and, in passing, mentioned that the burden of proof appeared to be on the employee. In the Court's determination, Carson never claimed these difficulties amounted to a violation of procedural due process, nor did he ever ask for or obtain a ruling on these claims. Accordingly, these issues were not preserved for review.[11] Id.

[11] The Supreme Court also determined that Carson failed to preserve his third claim that the Committee refused to hear his character witnesses because he failed to proffer the character witnesses and excluded

II. The ALJ was correct in upholding the Department's imposition of a fine in this case because Ms. Green did not present any evidence at trial to show the fine was unconstitutional as applied to Fab Seven LLC.

The concept of issue preservation discussed above is critical because the lower courts are in better position than this Court for gathering and ruling upon the facts of a case. See Travelscape, 391 S.C. at 109, 705 S.E.2d at 39 ("ALCs are better suited for making the factual determinations necessary for an as applied challenge […]"). It is incumbent upon parties to raise their arguments and any objections at the trial court level. This is no less so when pertaining to as-applied constitutional challenges. "Accordingly, [to the ALC's authority], all of our preservation and exhaustion of remedies rules apply before the ALC and other administrative tribunals with respect to an as applied challenge." Id.

It is clear from the ALJ's order Ms. Green's assertion the fine was "unfair" was not sufficient to articulate an as-applied constitutional claim. ALJs are aware of their authority on these matters. In the order, the ALJ does not confirm that Ms. Green made such a challenge, nor did he rule on such an issue. R. pp. 1–6. While he did mention in a footnote that he was inclined to believe the fine amount was disproportionate to Ms. Green's conduct, he never indicated he understood her statements at the hearing to be asserting an as-applied constitutional challenge. Had he found her statements at the hearing were sufficient to assert such a claim, he presumably would have addressed it in the order. It is also a possibility the ALJ *did* consider such an argument and determined it did not outweigh the clear and unambiguous language of S.C. Code Ann. § 40-58-65(A), which clearly sets a penalty of $100 per day a mortgage log report is late or incomplete.

testimony of the other witnesses at the Grievance Committee hearing. Carson, 371 S.C. at 121, 638 S.E.2d at 48.

As ALJs undoubtedly are aware, "'[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.' Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Travelscape, 391 S.C. at 98, 705 S.E.2d at 28 (quoting Hardee v. McDowell, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009), citing also Gay v. Ariail, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009)); see also Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In South Carolina, the language the General Assembly uses in the statute is generally considered to be the best evidence of the legislature's intent. See Cain v. Nationwide Prop. & Cas. Ins. Co., 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008).

There are many examples where the General Assembly has demonstrated certain scenarios where it grants the Department discretionary authority. Compare that language to other programs the Department regulates, to wit:

- For athlete agents, "the administrative law judge may assess a fine against an athlete agent not to exceed one hundred thousand dollars for a violation of this chapter." S.C. Code Ann. § 59-102-170 (2020).
- For continuing care providers, "the department may . . . impose an administrative penalty in an amount not less than one thousand dollars for each violation, but not more than ten thousand dollars." S.C. Code Ann. § 37-11-100(C)(3) (2015).
- For credit counselors, "[i]f a licensee fails to make a report required by this section, the department may require the licensee to pay a late penalty of fifty dollars for each day the report is overdue." S.C. Code Ann. § 37-7-115(E) (2015).

- For discount medical plan organizations, "the administrative law judge may assess an administrative penalty of not less than one hundred dollars nor more than ten thousand dollars for each violation." S.C. Code Ann. § 37-17-80(B) (2015).
- For pawnbrokers, the "administrator may also issue an administrative order imposing administrative penalties of up to seven hundred fifty dollars for each offense upon persons violating any of the provisions of this chapter up to a maximum of fifteen thousand dollars for the same set of transactions or occurrences." S.C. Code Ann. § 40-39-150(B) (Supp. 2023).
- For preneed funeral providers, "the department may initiate an action for a violation of this chapter in the Administrative Law Court for a cease and desist order or assess an administrative fine not to exceed ten thousand dollars, or both." S.C. Code Ann. § 32-7-110(B)(1)(b) (Supp. 2023).
- For prepaid legal services violations, they could be subject to, among other penalties, "administrative fines up to five thousand dollars." S.C. Code Ann. § 37-16-70(A)(2) (2015).

As demonstrated above, the General Assembly knows how to grant discretionary authority to the Department regarding the amount or criteria applicable to assessing an administrative penalty for noncompliance. Pursuant to Section 40-58-65(A), licensees "shall pay a fine of one hundred dollars a day for late for incomplete data submissions." S.C. Code Ann. § 40-58-65(A) (Supp. 2023). The language of Section 40-58-65(A) is clearly distinguishable from all the aforementioned examples of statutes where the General Assembly has delegated discretionary authority to the Department.

Thus, although Ms. Green relies on the ALJ's dicta regarding the judge's expressions that the fine was disproportionate to her conduct, she fails to put forth a convincing argument to support that the ALJ did not consider whether the application of the penalty was constitutional "as applied" to Fab Seven LLC. Nor did Ms. Green put forth enough evidence on the record to sustain such a defense even, assuming *arguendo*, that the judge would have addressed a full constitutional analysis in the ALC's order.

Lastly, by June 30 of each year, the Department is required by statute to make a report available to the public based on the data collected through the mortgage logs. S.C. Code Ann. § 40-58-65(A) (Supp. 2023). Knowing this, the General Assembly required mortgage brokers to submit their logs by March 31 of each year. Id. Further, the General Assembly specifically said licensees *shall* pay a fine of one hundred dollars a day for late or incomplete data submissions. Id. (emphasis added). The importance of the data submitted by the mortgage brokers is clear by the General Assembly's unambiguous language imposing such a penalty for failure to submit the log on time. Fab Seven LLC did not submit its log until July 2023, thereby precluding the Department's ability to include the company's information in the report. Clearly, the Administrator's report is not as accurate as it could be if companies fail to report their data. Thus, it seems the General Assembly thoughtfully imposed such a penalty to encourage mortgage brokers to submit their mortgage logs on time so that the Department can compile a meaningful report for the General Assembly.[12] Ms. Green also failed to put any evidence in the record to support an articulable correlation to any injury suffered by the government. See U.S. v. Bajakajian, 524 U.S. 321, 340 (1998) (holding that the $357,144 forfeiture was grossly disproportionate to the gravity of the offense and it bears no

[12] The South Carolina General Assembly implemented the requirement of the Mortgage Log in 2009 after the great financial crises of 2008. The report is of great importance to the legislators when they are considering laws affecting the mortgage industry and serves a serious purpose.

articulable correlation to any injury suffered by the Government). Unlike the case here, the articulable interest is an accurate report submitted to the General Assembly so that it is aware of the mortgage activity in the State of South Carolina.

III. The fine imposed by the Department was not unconstitutionally excessive and did not violate Ms. Green's constitutional rights.

Ms. Green asserts the fine imposed is "a grossly disproportionate penalty for not updating an email address." Appellant's Final Br. 13. However, this is not the case; Fab Seven LLC was fined in accordance with state law for not filing its required mortgage log report at a daily rate expressly mandated by statute. There is no ambiguity to the penalty. "The licensee shall pay a fine of one hundred dollars a day for late or incomplete data submissions." S.C. Code Ann. § 40-58-65(A) (Supp. 2023). Ms. Green was provided multiple reminders prior to the March 31 deadline about the requirement. R. pp. 62–71. In fact, two of those reminders even clearly informed her that fines would be accruing daily for failure to submit the mortgage log. R. pp. 68–71. Further, it is undisputed from the record that Ms. Green knew of the requirement because she timely submitted her mortgage log the year before. R. p. 31, l. 25; p. 32, ll. 1–2. Had a mortgage log been submitted sooner, the fine would have been less. Had Ms. Green heeded the Department's multiple reminders and submitted Fab Seven LLC's mortgage log on time, there would have been no penalty. Clearly, based on the construction and operation of § 40-58-65(A), Ms. Green was in total and complete control of the final amount the violation would cost her. Ms. Green chose to submit Fab Seven LLC's mortgage log 101 days late.

The South Carolina Supreme Court has established that a court's scope of review is "limited in cases involving a constitutional challenge to a statute 'because all statutes are presumed constitutional and, if possible, will be construed to render them valid.'" Doe v. State, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017) (citing Hendrix v. Taylor, 353 S.C. 542, 550, 579 S.E.2d 320, 324

(2003)). Simply put, Ms. Green, a licensed mortgage broker responsible for assisting consumers during the biggest financial decision of their lives, failed to heed multiple warnings that she would incur a penalty of $100 per day for each day Fab Seven LLC's report was late and would have this Court rule that she was treated unfairly or that the South Carolina General Assembly's clear and unambiguous language was unconstitutional as applied to her.

In arguing the fine before this Court was unconstitutionally excessive, Ms. Green relies on U.S. v. Bajakajian, 524 U.S. 321 (1998). This case can be distinguished from the present case as it challenged a criminal forfeiture statute whereas this case involves a civil penalty imposed upon a licensed mortgage broker. In Bajakajian, the defendant successfully argued that the forfeiture of $357,144 was disproportionate to the failure to report all money in his possession in excess of $10,000. The Supreme Court held "the amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish." Id. at 334. However, the Court declined to establish any factors for lower courts to consider to determine whether or not a forfeiture is proportional. In Timbs v. Indiana, 586 U.S. 146 (2019), another criminal forfeiture case, the Supreme Court held the forfeiture of a $40,000 SUV that was used to transport heroin was unconstitutionally excessive. However, in that case, the defendant provided evidence the vehicle was not purchased with ill-gotten funds but rather with money he received from an insurance policy when his father died. Id. at 149. The Supreme Court did not rule on the proportionality and instead vacated the Indiana Supreme Court's judgment and remanded for further proceedings. Id. at 156.

The cases Ms. Green relies on to make her points have one thing in common: they are criminal cases. Criminal defendants may often be completely unaware of the legal protections they have and have little or no control over the penalties assessed against them. Unlike those criminal defendants, Ms. Green is a *licensed* professional in this state and was in complete control of the

amount of the penalty that was levied against her. Further, she was warned of the penalty multiple times in advance, had training on the requirement, and properly filed the report the previous year.

When determining proportionality, there must be some evidence offered to show a disparity between the penalty and the conduct. There is nothing in the record showing Ms. Green presented anything toward this disparity. She did not present evidence she could not afford the fine or that she submitted her log sooner than the Department contends. Ms. Green also did not address that the fine imposed was for $100 per day and turning in the report sooner would have resulted in a reduced fine. She only said she filed the request for contested case hearing to get the fine reduced and that she felt the fine was "unfair". R. p. 39, l. 45. For this reason, there is no starting point from which to apply any kind of proportionality test.

For the sake of argument, even if there were sufficient facts in the record from which to evaluate the proportionality of the fine, it would still be found proportional. As stated above, the fine was not for $9,000, but rather $100 per day. The amount is directly proportional to Ms. Green's conduct. Furthermore, the total amount of the penalty is less than the statutory maximum defined by the Licensing of Mortgage Brokers Act:

> The administrator, by order, may impose an administrative penalty upon a licensee or any partner, member, officer, director, or other person occupying a similar status performing similar function on behalf of a licensee for violation of this chapter. The administrative penalty may not exceed ten thousand dollars for each violation.

S.C. Code Ann. § 40-58-80(C) (2011).

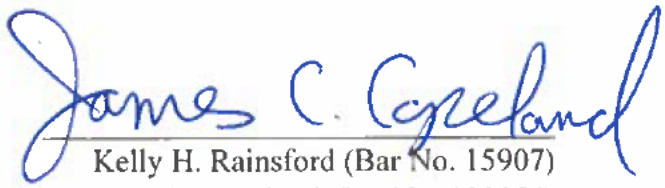
The $9,000 total penalty for not filing a mortgage log until July 10, 2023, which is 101 days overdue, is less than the maximum fine allowable under the Licensing of Mortgage Brokers Act. "The Ninth Circuit and other federal courts have consistently found that civil penalty awards in which the amount of the award is less than the statutory maximum do not run afoul of the Excessive Fines Clause." State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., 414 S.C. 33, 88,

777 S.E.2d 176, 205 (2015) (citations omitted). "This is so because legislative pronouncements regarding the proper range of fines 'represent the collective opinion of the American people as to what is and is not excessive. Given that excessiveness is a highly subjective judgment, the courts should be hesitant to substitute their opinion for that of the people.'" Id.

Furthermore, in South Carolina, licensed mortgage brokers are required to maintain a surety bond "for the use of the state for the recovery of expenses, fines, and/or fees levied pursuant to this chapter and for consumers who have losses or damages as a result of noncompliance with [the Licensing of Mortgage Brokers Act] by the mortgage broker." S.C. Code Ann. § 40-58-40 (2011). Given these conditions, coupled with the fact that Ms. Green's own conduct was the direct contributor to the accumulation of the fine, this Court should find that the fine imposed upon Fab Seven LLC is neither disproportionate to its conduct nor excessive under the Eighth Amendment of the United States Constitution or South Carolina Constitution.

CONCLUSION

For the reasons discussed above, this Court should not entertain Ms. Green's appeal because it lacks appellate jurisdiction. If this Court does entertain Ms. Green's appeal, it should affirm the ALC's finding that the Department's decision to impose a $9,000.00 fine for Ms. Green's failure to timely submit her mortgage log must be upheld because an as-applied constitutional challenge would not change the outcome of this matter, the fine was not disproportionate to Ms. Green's conduct, and the Department's imposition of the fine did not violate Fab Seven LLC's Eighth Amendment rights granted by the United States' Constitution or Section 15 of the South Carolina Constitution.



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May 6, 2025

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2024-001652

South Carolina Department of Consumer Affairs ..... Respondent,

v.

Lavisha Green ..... Appellant.

PROOF OF SERVICE

I, the undersigned employee of the South Carolina Department of Consumer Affairs, hereby certify that the Final Brief of Respondent in the above-referenced matter was served on the following counsel of record via email at the addresses listed below:

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CELEBRATING 50 YEARS OF SERVICE

May 06, 2025

Via email to ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
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RE: South Carolina Department of Consumer Affairs v. Lavisha Green
Appellate Case No. 2024-001652

Dear Ms. Kitchings:

Enclosed herewith for filing please find the Department's Final Brief of Respondent along with the Proof of Service in the above-referenced matter. As requested, a bound copy of Respondent's Final Brief will be delivered to the Court. If you have any questions or require additional copies, please do not hesitate to call me at (803) 734-0375.

Respectfully,

James C. Copeland

James C. Copeland
Chief Enforcement Attorney

CC: Adam S. Ruffin, Esquire (via email to adam@ruffinappeals.com)