

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-23-3206
Appellate Case No. 2013-001607

International Paper Company, Inc.,Appellant,

v.

South Carolina State Energy Office,.....Respondent.

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Case No. 12-ALJ-30-0086-CC
Appellate Case No. 2013-000114

International Paper Company, Inc.,Appellant,

v.

South Carolina State Energy Office,.....Respondent.

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REPLY ARGUMENTS

The Respondent (SEO) argues that its tax credit decisions are never subject to review by the Administrative Law Court (ALC) in either a contested case hearing or an appeal. (Init. Resp. Br. at Args. I-III). The SEO argues further that its tax credit decisions cannot be reviewed by the Department of Revenue. (Init. Resp. Br. at 29). The SEO seems to argue that its tax credit decisions could be reviewed by the circuit court, but nevertheless argues this Court should affirm the dismissal of the circuit court action for that review. (Init. Resp. Br. Arg. IV). The SEO continues to argue that the circuit court action should be dismissed due to the pendency of the ALC action, even though the SEO now argues the ALC can never have any type of jurisdiction over any tax credit determination by the SEO.

The SEO's assertion that the circuit court might have jurisdiction is a marked change in position. In proceedings before the ALC, the SEO argued that it had very broad discretion, more discretion than any other agency, and its decisions were not subject to any type of judicial review except possibly a writ of mandamus requiring the SEO to issue a determination on an application. (ALC Hrg. Tr. at 15, 19, 21, 28-29).

Most of the SEO's arguments suffer from a common fatal flaw. The SEO made the same arguments to the ALC – the ALC rejected those arguments – and the SEO did not appeal the ALC's decisions. It is axiomatic that the unappealed rulings of a lower court are the law of the case and, right or wrong, require affirmance. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). It is equally axiomatic that the law of the case doctrine applies to the unappealed rulings of the ALC. *South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envntl. Control*, 610 S.E.2d 482, 487 (S.C. 2005).

I. IP is entitled to notice and an opportunity to be heard pursuant to S.C. Const. Art. I, § 22.

The SEO argues that S.C. Const. Art. I, § 22 does not apply to it. (Init. Resp. Br. at 30-42). The ALC, however, held to the contrary (Order at 5-6), and the SEO did not appeal this ruling. Thus, the ALC's ruling is the law of the case and, right or wrong, requires affirmance. *Buckner*, 177 S.E.2d at 544; see also *Sanders v. South Carolina Dep't of Corrections*, 665 S.E.2d 231, 234 (S.C. App 2008) (ALC's unappealed ruling that plaintiff had sufficient property interest to trigger due process rights to notice and opportunity to be heard is the law of the case). In any event, the SEO's arguments have no merit.

Article I, § 22 was added to the Constitution in 1970 in recognition of the fact that governmental powers were increasingly being delegated to administrative agencies. *South Carolina Ambulatory Surgery Center Assoc. v. South Carolina Workers Compensation Comm'n*, 699 S.E.2d 146, 152 (S.C. 2010). The purpose of Article I, § 22 is to serve "as a safeguard for the protection of liberty and property of citizens" from the actions of administrative agencies like the SEO. *Id.*

The SEO argues that IP does not have a sufficient property interest in the biomass tax credit to trigger Article I, §22 because: (1) a tax credit is a matter of legislative grace; and (2) the General Assembly has reserved the right to alter the allowable tax credit. (Init. App. Br. 30-35). The SEO, however, is not the General Assembly. Unless and until the General Assembly exercises its authority to eliminate or modify the allowable tax credit, IP is entitled to receive any tax credit for which it qualifies under the statute, and the SEO does not have any discretion to deny the tax credit if IP qualifies under the statute.

To support its argument, the SEO cites three South Carolina cases and argues that these cases demonstrate IP has no right that is protected by Article I, §22. (Init. Resp. Br.

at 30-31, *citing Centex, SCANA, and Ambulatory Surgery, all infra*). None of these cases support the SEO.

In *Centex Int'l, Inc. v. South Carolina Dep't of Rev.*, 750 S.E.2d 65 (S.C. 2013), the issue was whether a statute granting a tax credit to corporations could be claimed by a partnership. The Supreme Court held that the plaintiff taxpayer, a partnership, which had incurred expenses that otherwise qualified for the tax credit, could not claim the credit because it was not a corporation. In reaching this conclusion, the Court simply applied the statutory construction rule that, because tax credits are a matter of legislative grace, statutes granting a tax credit were not construed liberally in favor of the taxpayer. Since the statute expressly granted the tax credit to corporations, the Court concluded the statute could not be construed to include a partnership – rather, it must be applied according to its plain terms. *Id.* at 69.

The ruling in *Centex* is irrelevant here. There is no issue about whether IP is a proper entity to claim the tax credit, and there is no question on the meaning of the tax credit statute at issue in this appeal. Moreover, were it true that *Centex* stood for the proposition advocated here by the SEO, there would not have been any right to judicial review in *Centex* and the Court would not have reached the merits of the questions presented. It would have simply ruled as the SEO advocates here, *i.e.*, the denial of a tax credit is not reviewable.

In *SCANA Corp. v. South Carolina Dep't of Rev.*, 683 S.E.2d 468 (S.C. 2009), the Supreme Court addressed the meaning of a tax credit carry-forward statute. The Court applied the same statutory construction rule as in *Centex, supra*. The majority and dissent simply disagreed on whether the statute was ambiguous – the majority found that it was

not – the dissent found that the statute was ambiguous, *i.e.*, could be read in two ways, and the dissent chose the reading that was less favorable to the taxpayer. 683 S.E.2d at 469-471. Thus, as with *Centex, supra*, the ruling in *SCANA* is irrelevant here.

In *South Carolina Ambulatory Surgery Center Assoc. v. South Carolina Workers Compensation Comm'n*, 699 S.E.2d 146 (S.C. 2010), the plaintiffs challenged the Workers Compensation Commission’s issuance of a new price schedule for Outpatient Services. The principal issue was whether the Commission had to adopt a new regulation in order to issue the new price schedule. The Court held that it did not, because an existing regulation authorized the issuance of the new price schedule. The Court also rejected the plaintiff’s argument that the issuance of the new price schedule was a “contested case” under the APA such that the plaintiffs were entitled to notice and a hearing before the Commission could issue the new price schedule – no law gave the plaintiffs the right to notice and hearing.

As to Article I, § 22, the plaintiff claimed a protected property interest in “receiving future income based on desired future work.” 699 S.E.2d at 153. The Court held that [t]he mere desire for future work, however, is not sufficient to constitute a private right,” particularly when the decision to provide care to worker’s compensation claimants in the future was entirely voluntary. *Id.* Finally, the Court also noted that the plaintiff was afforded due process protections by a different regulation whereby the plaintiff could challenge the new prices as being a denial of a claim. *Id.*

Here, there is no issue over the issuance of a regulation – the SEO is prohibited by statute from acting as a regulatory body. S.C. Code Ann. § 48-52-410 (Rev. 2008). Here, the right at issue is expressly granted by the General Assembly in the tax credit statute rather than being denied by a regulation that operates only in the future. Here, Article I, §

22 is the only authority for protecting the right granted by the General Assembly and, as noted earlier, the express purpose of Article I, § 22 is to protect citizens from the actions of administrative agencies like the SEO. *Id.* at 152.

The SEO also argues that, if Article I, § 22 applies to its biomass tax credit determinations, it should not be required to conduct a trial-type hearing, because “there is limited value – and great expense involved – in conducting a trial-type hearing.” (Init. Resp. Br. at 42). IP agrees that the SEO will incur substantial expense in affording the notice and opportunity to be heard required by Article I, § 22 – indeed, this expense, coupled with the SEO’s limited financial and personnel resources, is one of the reasons argued by IP that the General Assembly intended that the SEO’s determinations should be reviewed in a “contested case” before the ALC as with all other tax matters. (App. Br. at 7-12).

IP disagrees that a trial-type hearing would be of “limited value,” unless the SEO intends to afford a meaningless opportunity to be heard, *e.g.*, a process that simply rubber-stamps its initial determination. As argued in its Brief of Appellant, IP submits that a trial-type hearing is necessary due to the number and complexity of issues involved, including technical issues, tax principles, and accounting principles. (App. Br. at 12-13).

In short, Article I, § 22 of the South Carolina Constitution requires that IP be given notice and an opportunity to be heard on the denial of its biomass tax credit application. IP has a protectable right to be granted a tax credit for which it qualifies under the tax credit statute – a right expressly granted by the General Assembly. The only question is whether that notice and opportunity must be afforded by the SEO, the ALC, or the circuit court.

II. The ALC has “contested case” jurisdiction over the SEO’s biomass tax credit determinations.

The SEO argues that the ALC does not have “contested case” jurisdiction, because the SEO is not listed in S.C. Code Ann. 1-30-10 (Supp. 2012). This is true but, as argued in IP’s Brief of Appellant, the relevant statutes demonstrate a legislative intent for the ALC to have “contested case” jurisdiction over the SEO, because the SEO is acting for and on behalf of the DOR, which is listed in § 1-30-10. The SEO makes no specific response to IP’s arguments on legislative intent. This is tantamount to not filing a respondent’s brief and, therefore, this Court may take whatever action it deems appropriate, including reversal for the failure to respond. Rule 208(a)(4), SCACR.

The SEO certifies the amount of the allowable tax credit *to the DOR*, not the taxpayer (who only receives notice of the certified amount), and this demonstrates that the SEO is acting on behalf of the DOR in making a tax credit certification under the statute, which itself is part of the South Carolina Income Tax Act administered by the DOR. This certification to the DOR is the first step in the DOR’s administration of the tax credit pursuant to § 12-6-3620(D)(1) (Supp. 2012).¹ In short, as more fully argued in IP’s Brief of Appellant, the SEO acts for and on behalf of the DOR in making tax credit determinations and, therefore, the General Assembly intended that the SEO’s decision would be subject to the ALC’s “contested case” jurisdiction like all decisions by the DOR.

¹ As noted earlier, the SEO argues that its tax credit decisions are not “subject to review by the Department of Revenue.” (Init. Resp. Br. at 29). This is simply wrong. Section 12-6-3620(D)(1) specifically grants the DOR the power to request additional information in its administration of the tax credit. If, as the SEO contends, its tax credit decisions are binding upon and not reviewable by the DOR, then the statutorily granted power to request additional information would be meaningless and a nullity. It is axiomatic that the courts will not interpret statutes so as to render them meaningless. *Florence County Democratic Party v. Florence County Republican Party*, 727 S.E.2d 418, 420 (S.C. 2012). The only reason that the General Assembly would give the DOR the power to request additional information is so that it could review the SEO’s tax credit decision in its role as the sole administrator of tax matters.

A recent amendment to the biomass tax credit statute further demonstrates this legislative intent.

The General Assembly recently amended the biomass tax credit statute (§ 12-6-3620) to provide that applications for the credit shall be submitted directly to the DOR rather than the SEO, with the DOR to “consult with the State Energy Office [SEO] or any other appropriate state and federal officials on standards for certification.” Act No. 279, 2014 S.C. Acts ___, ___. Amendments to tax credit statutes may be used to interpret the intent of the General Assembly that existed prior to the amendment. *Centex Int’al, Inc. v. South Carolina Dep’t of Rev.*, 750 S.E.2d 65, 72 (S.C. 2013). Act No. 279 further demonstrates that the General Assembly, as argued in IP’s Brief of Appellant, intended that the SEO was acting for and on behalf of the DOR and the DOR’s statutory authority to administer all tax matters. (See n.1, *supra*). Thus, the SEO’s decisions should be reviewed in the same manner as the DOR’s decisions, to-wit: by a contested case hearing before the ALC.

III. Assuming the ALC does not have “contested case” jurisdiction, it has appellate jurisdiction to review the SEO’s biomass tax credit determinations.

A. The SEO’s determinations in this case are not “final agency decisions” so as to trigger IP’s right to appeal to the ALC.

The SEO argues that its determinations in this case were final agency decisions that triggered IP’s right to appeal to the ALC and, since IP did not appeal these decisions, the ALC cannot have appellate jurisdiction over the SEO’s decisions in this case. The ALC, however, held that the SEO’s determinations were not final agency decisions and, the SEO did not appeal these rulings. Thus, right or wrong, they are the law of this case *Buckner*, 177 S.E.2d at 544. In any event, the ALC ruled correctly.

A “final agency decision” arises in only one way: (1) the agency makes an initial determination; (2) the agency then gives notice and an opportunity to be heard; (3) upon request after giving notice, the agency conducts a contested case hearing; and (4) thereafter, the agency issues a final agency decision, which triggers the right to appeal the decision to the ALC. It is uncontested that the SEO has never given IP notice and an opportunity to be heard so that IP could challenge the SEO’s initial denials of IP’s biomass tax credit applications. Thus, the SEO has not issued a final agency decision that could be appealed to the ALC.

B. IP is not “judicially estopped” to argue that the SEO has not issued a final agency decision.

The SEO argues that “judicial estoppel” precludes IP from arguing that the SEO’s determinations were not final decisions subject to appeal. (Init. Resp. Br. at 20-22). This argument is not preserved for appeal, because the SEO did not make it to the ALC. *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006). Assuming the SEO made this “judicial estoppel” argument to the ALC, the SEO has not appealed the ALC’s rejection of that argument and, therefore, the ALC’s ruling is the law of the case. *Buckner*, 177 S.E.2d at 544.

Moreover, as noted earlier, the SEO has not appealed the ALC’s ruling that the SEO’s determinations were not final decisions and, therefore, that ruling is the law of this case. *Buckner*, 177 S.E.2d at 544. Thus, IP has no need to argue that the SEO’s determinations were not final decisions – IP is simply relying on the ALC’s unappealed ruling. In any event, the SEO’s “judicial estoppel” argument has no merit.

The SEO's argument reflects a fundamental misunderstanding of the judicial estoppel doctrine. Judicial estoppel arises and precludes a party from taking inconsistent *factual* positions upon satisfaction of a five-part test:

- (1) two inconsistent positions taken by the same party or parties in privity with one another;
- (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another;
- (3) the party taking the position must have been successful in maintaining that position and received some benefit;
- (4) the inconsistency must part of an intentional effort to mislead the court; and
- (5) the two positions must be totally inconsistent.

State v. McCall, 612 S.E.2d 453, 455 (S.C. App. 2005). Judicial estoppel is triggered “when the court is forced to take a position based on a *factual* assertion.” *Hawkins v. Bruno Yacht Sales, Inc.*, 577 S.E.2d 202, 208 (S.C. 2002) (emphasis added), *aff’g as modified*, 536 S.E.2d 698 (S.C. App. 2000). When the court rules in favor of the party making the *factual* assertion, that party cannot thereafter present a contrary *factual* position. *Id.* at 209, quoting *Zimmerman v. Central Union Bank*, 8 S.E.2d 359, 365 (S.C. 1940).

Here, the question of whether the SEO's determinations were final agency decisions is a question of law, not fact, so the doctrine of judicial estoppel does not apply. Moreover, IP did not prevail on this issue or receive any benefit – the ALC vacated its prior intermediate order that the SEO's determinations were final decisions and held to the contrary in the appealed order. Thus the doctrine of judicial estoppel does not apply. Additionally, there is no evidence (and the SEO does not argue) that IP intended to mislead the court and, therefore, the doctrine does not apply. Finally, there is no inconsistency in IP's positions. IP asserted the SEO's determinations were “final” in the context of arguing that the ALC had “contested case” jurisdiction, *i.e.*, the determinations were sufficiently final to permit IP to request a contested case hearing before the ALC. IP also argued, and

the ALC found, that the SEO's determinations were not "final agency decisions" for purposes of the ALC's appellate jurisdiction. (See ALC Hrg. Tr. at 54-55). These two positions are not "totally inconsistent" and, therefore, the doctrine of judicial estoppel does not apply.

C. The ALC properly remanded this case, and its remand order is not unclear or void.

The SEO seems to argue that the ALC's remand order is unclear for lack of express remand instructions. (Init. Resp. Br. 16-17). There is nothing unclear about the remand by the ALC and, assuming there were, the SEO's arguments are not properly before this Court for two reasons. First, the SEO did not seek clarification of the order as it was required to do. *Revis v. Barrett*, 467 S.E.2d 460, 462-463 (S.C. App. 1996) (absent motion to clarify discrepancy in order, issue cannot be addressed on appeal); *Nellums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991) (if order unclear, must move to clarify or issue is not preserved for appeal). Second, the SEO did not appeal the ALC's order, thereby making it the law of this case, *Buckner*, 177 S.E.2d at 544. In any event, there is nothing unclear about the ALC's remand order – the ALC plainly remanded the case so that the SEO could give IP notice and an opportunity to be heard and then issue a final agency decision that would be appealable by IP.

A lower court's judgment is to be construed like any other written instrument. *Petition of White*, 385 S.E.2d 211, 215 (S.C. App. 1989); *Weil v. Weil*, 382 S.E.2d 471, 474 (S.C. App. 1989). The controlling inquiry is the intent of the authoring judge. *O'Banner v. Westinghouse Elec. Corp.*, 459 S.E.2d 324, 327 (S.C. App. 1995). That intent must first be gleaned from the judgment itself, read as a whole and giving effect to every word in the judgment, not just isolated parts. *Eddins v. Eddins*, 403 S.E.2d 164, 166 (S.C. App. 1991);

Management Recruiters, Inc. v. R.J.R. Mechanical, Inc., 404 S.E.2d 908, 909 (S.C. App. 1991). If the judgment is not ambiguous, there is no room for construction and the judgment must be enforced as written. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474. If the judgment is ambiguous, then the court may go beyond the four corners of the judgment to determine the authoring judge's intent. *Id.*

Here, a plain reading of the ALC's order permits no conclusion other than the ALC remanded the case so that the SEO could give IP notice and an opportunity to be heard and then issue a final agency decision that would be appealable by IP. Assuming there is anything unclear about this, resort to the record reveals comments and rulings by the ALJ that make it crystal clear that he ordered a remand for this purpose. (ALC Hrg. Tr. at 54-55).²

The SEO also argues that the remand order is void, because IP did not appeal the SEO's determinations and therefore the ALC did not have jurisdiction to order a remand. Every court has jurisdiction to determine its jurisdiction. *Bailey v. Owen Elec. Steel Co. of S.C., Inc.*, 392 S.E.2d 186, 187 (S.C. 1990). Here, IP requested that if the ALC did not have "contested case" jurisdiction, then the ALC should treat the matter as an appeal. In denying this request, the ALC ruled *inter alia* that it could not have appellate jurisdiction, because the SEO had not yet issued an appealable decision, *i.e.*, the SEO had not yet given the notice and opportunity to be heard that is the predicate to the SEO issuing a final agency decision that was subject to appeal. The ALC therefore properly remanded the case for the

² The SEO also argues that IP cannot raise the issue of not being given notice and an opportunity to be heard for the first time on appeal. (Init. Resp. Br. at 26). This argument has no merit for two reasons. First, IP has no need to make any such argument on appeal – the ALC held that IP was entitled to and had not yet received notice and an opportunity to be heard – the SEO did not appeal the ALC's ruling and, therefore, this ruling is the law of the case. *Buckner*, 177 S.E.2d at 544. Moreover, the record clearly demonstrates that IP raised this issue to the ALC, and it was the basis for the ALC remanding the case to the SEO. (ALC Hrg. Tr. at 54-55).

SEO to comply with its constitutional obligation under Article I, § 22 to give IP notice and an opportunity to be heard in a contested case so that the SEO could issue a final agency decision that was subject to appeal.³

D. The SEO’s “abandonment of process” argument is not properly before this Court and has no merit.

The SEO argues that IP “abandoned the process” before the SEO and, therefore, the remand was improper and IP lost any right to appeal. (Init. Resp. Br. at 24-27, 34). This argument relates only to the application for tax year 2010 – the SEO does not make any “abandonment” arguments regarding the application for tax year 2011, which the SEO denied in its entirety on March 1, 2012, without requesting any additional information and without giving notice of any opportunity to be heard on the denial. (March 1, 2012 Determination).

The SEO’s argument is premised upon the following facts: (1) on March 1, 2011, the SEO sent a letter to IP stating that it appeared some 2010 projects would qualify for the tax credit and some would not; (2) the letter requested additional information; and (3) IP sought review by the ALC rather than respond to the letter. (Init. Resp. Br. at 25). This argument fails for several reasons.

³ The SEO correctly observes that, if the ALC does not have “contested case” jurisdiction, and if the ALC has appellate jurisdiction and properly remanded the case to the SEO for IP to be given notice and an opportunity to be heard, then ordinarily this appeal must be dismissed and the case remanded to the SEO. The ALC’s denial of a contested case hearing, however, is immediately appealable and, therefore, this Court has discretion to consider the issues related to the question of whether the ALC has appellate jurisdiction in order to avoid unnecessary litigation on remand, *e.g.*, the type of hearing (opportunity to be heard) that must be afforded IP by the SEO. *Roberts v. Recovery Bureau, Inc.*, 450 S.E.2d 616, 618 n.2 (S.C. App. 1994). Judicial economy would be best served by exercising this discretion and reviewing such issues so that the parties need not appeal the same issues later. Doing so is particularly appropriate in this case, because the SEO has made it clear that it will not provide a trial-type hearing and, as argued in its Brief of Appellant, IP contends that a trial-type hearing is necessary in this case.

First, the ALC rejected this argument, and the SEO did not appeal that ruling. Thus, it is the law of this case that IP did not “abandon the process,” a term that the SEO uses as the equivalent of a failure to exhaust administrative remedies. *Buckner*, 177 S.E.2d at 544.

Second, the process for the initial determination by the SEO had ended by force of law. Section 12-6-3620(D)(1) mandated that the SEO make its initial determination on or before March 1, and nothing in the statute permitted the SEO to extend the period for doing so or to request additional information.⁴ Thus, the SEO’s March 1, 2011 letter, which did not certify or allow any tax credit for tax year 2010, was a denial of the application in its entirety.

Third, contrary to the SEO’s representation, IP provided and offered much more information than accompanied the application for the 2010 tax credit. IP first contacted the SEO in late 2009 regarding the biomass tax credit and later advised the SEO that IP would be seeking a tax credit for tax year 2010. From that point forward during 2010, IP offered to provide the SEO with any information that the SEO wanted, and IP provided all information requested by the SEO. Indeed, on January 26, 2011, after receiving all information requested from IP, the SEO and the DOR inspected IP’s facility and the equipment for which IP was claiming a 2010 tax credit. IP thereafter filed its application for the 2010 tax credit on January 31, 2011. On that same day, IP spoke with the SEO about the application – the SEO requested some additional information and IP provided the requested information. IP heard nothing further from the SEO until the March 1, 2011 letter, which was the statutory deadline for the SEO to make its initial determination. (See

⁴ The March 1 deadline for the SEO’s initial determination is part of a critical timeline, because corporate tax returns must be filed on or before March 15. S.C. Code Ann. § 12-6-4970(B) (Rev. 2000).

12/28/11 Bolger Aff., ¶¶ 5-28; see also Pet. Memo. in Response to Resp. Second Memo. in Support of Motion to Dismiss, dated 10/31/12 at pp. 5-10 and cited exhibits).

Fourth, complying with the SEO's request would have been futile as demonstrated by the facts of this case. During the proceedings before the ALC, and with the permission of the ALC, the SEO issued an amended determination for tax year 2010 based on the discovery in the ALC action, and rejected the application for a 2010 tax credit in its entirety. (Mar. 15, 2012 Amd. Determination). Thus, complying with the request for additional information would have been futile. *Storm v. Charleston County Bd. of Trustees*, 735 S.E.2d 492, 497 (S.C. 2012) (failure to exhaust administrative remedies irrelevant if pursuit of them would have been a futile act).⁵

IV. Assuming the ALC does not have any jurisdiction to review the SEO's biomass tax credit determinations, the circuit court has jurisdiction to do so.

The SEO makes two arguments that the circuit court properly dismissed IP's action for review of the SEO's determinations. First, the SEO argues that the circuit court properly dismissed the action under Rule 12(b)(8), SCRPC, because there was another action pending between the parties, *i.e.*, the ALC proceedings. As demonstrated in IP's Brief of Appellant, the circuit court should have stayed the action rather than dismiss it. (App. Br. at Arg. II).

⁵ The failure to exhaust administrative remedies does not affect the subject matter jurisdiction of a court – it goes only to the prematurity of a case. *Storm*, 735 S.E.2d at 497. The question of whether administrative remedies must first be exhausted is a matter within the discretion of the trial court, and the trial court's decision will not be disturbed on appeal absent an abuse of that discretion. *Id.* Here, the SEO has not appealed the ALC's order and, therefore, the SEO manifestly has not and cannot demonstrate an abuse of discretion. Here, as in *Storm*, the SEO's determination was certain to be unfavorable and, therefore, IP was not required to pursue the remedies, assuming there were any. *Id.* And here, as in *Storm*, this case presents important issues of public concern, and a resolution of the issues would promote judicial economy. Thus, any failure to exhaust administrative remedies does not preclude appellate review. *Id.*

Second, the SEO argues as an additional sustaining ground that the ALC and the circuit court have concurrent jurisdiction and, since IP filed first with the ALC, the circuit court properly declined jurisdiction under the “principle of priority.” (Inti. Resp. Br. at 45-46). The SEO makes this argument despite contending that the ALC can never have any type of jurisdiction over the SEO’s biomass tax credit determinations.

The ALC and circuit court do not have “concurrent” jurisdiction. The circuit court has jurisdiction as the court of general jurisdiction if, and only if, the General Assembly did not grant the ALC “contested case” or “appellate” jurisdiction. Thus, the SEO’s “concurrent jurisdiction” argument has no merit.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in IP’s Brief of Appellant, it is respectfully submitted that this Court should reverse the ALC and remand for a contested case hearing before the ALC. Assuming the ALC does not have contested case jurisdiction, then this Court should affirm the ALC and remand for notice and a contested case hearing before the SEO. Assuming the ALC has no jurisdiction over the SEO, then this Court should reverse the circuit court and remand for further proceedings.

Respectfully Submitted,



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July 23, 2014
Columbia, SC



THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-23-3206
Appellate Case No. 2013-001607

International Paper Company, Inc.,Appellant,

v.

South Carolina State Energy Office,.....Respondent.

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Case No. 12-ALJ-30-0086-CC
Appellate Case No. 2013-000114

International Paper Company, Inc.,Appellant,

v.

South Carolina State Energy Office,.....Respondent.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Initial Reply Brief of Appellant by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel of record at the addresses shown below, on July 24, 2014:

Keith McCook, Esq.
Frank S. Potts, Esq.
Office of General Counsel
State Budget and Control Board
1201 Main Street, Suite 410
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July 24, 2014

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Honorable Jenny Abbott Kitchings
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Re: International Paper Company, Inc. v. South Carolina State Energy
Office
Appellate Case Nos. 2013-000114 and 2013-001607

Dear Madam Clerk:

Please find enclosed for filing, the original and two copies of the *Initial Reply Brief of Appellant*. Appellant has no additional designations. Please file the Reply Brief in your office, and return the file stamped extra copy to me via our courier. By copy of this letter, we are serving counsel for the Respondent with a copy of the Reply Brief.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

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