STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No.: 13-ALJ-07-0395-CC
Appellate Case No. 2015-000700

Rick Still, Donice Still, Christine Orr and Terry Orr, ...Appellants,

vs.

South Carolina Department of Health and Environmental Control
and Lisa Sumerel and Sumerel Poultry Farm, ...Respondents.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S RETURN TO PETITION FOR REHEARING

Respectfully submitted,

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March 20, 2017
Columbia, South Carolina

INTRODUCTION

Respondents respectfully submit this Return in response to Appellants' Petition for Rehearing ("Petition"). In their Petition, Appellants claim that this Court's affirmation of the Final Order and Decision of the Administrative Law Court ("ALC") upholding the decision of Respondent South Carolina Department of Health and Environmental Control ("Department") to issue Bureau of Water Agricultural Permit No. 19647-AG (the "Permit") to Respondent Lisa Sumerel for the Operation of Respondent Sumerel Poultry Farm was in error. Specifically, Appellants' claim that 1) the Court's *per curiam* memorandum order fails to give substantive treatment or indication of the specific ground of the affirmance; and 2) in issuing the *per curiam* memorandum the Court misapprehended the basis for the ALC's Final Order law and Appellants' arguments. As discussed below, Appellants' claims are without merit and are merely a veiled attempt to reargue the same claims reviewed, considered, and rejected by this Court. In the interests of brevity, Respondents respectfully refer the Court to the Statements of Facts and the Case contained it their Final Brief for a full and complete recitation of the facts and procedure applicable to this case.

LEGAL ANALYSIS

I. THE COURT'S *PER CURIAM* MEMORANDUM DECISION PROPERLY ADDRESSES THE SUBSTANTIVE ISSUES AND THE BASIS FOR THE COURT'S AFFIRMANCE OF THE LOWER COURT'S DECISION.

Appellants' claim that Unpublished Opinion No. 2017-UP-068 ("UP Opinion 068") provides "no substantive treatment or induction of the specific grounds for affirming the ALC's holding," is without merit. Appellants' Br. at 7. Black's Law Dictionary defines "memorandum opinion" as "[a] **unanimous** appellate opinion that **succinctly states the decision** of the court; an opinion that briefly reports the court's conclusion . . . **without elaboration because the decision**

follows a well-established legal principle or does not relate to any point of law." *Black's Law Dictionary* 1125 (8th ed. 2004) (emphasis added). The issuance of memorandum decisions by appellate courts in South Carolina is governed by statute. The applicable statute, in pertinent part, provides that:

> When a judgment or decree is reversed or affirmed by the Supreme Court . . . the Court may file memorandum opinions in **unanimous** decisions when the Court determines that the a full written opinion would have no precedential value **and any one or more of the following** circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the trial court is based is based on findings of fact which are not clearly erroneous; . . . (3) that the order of an administrative agency is supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; (4) that no error of law appears.

S.C. Code Ann § 18-9-280 (Rev. 2014) (emphasis added). The right to issue memorandum decisions has been extended to the Court of Appeals by the South Carolina Supreme Court in *In re Memorandum Decisions by the Court of Appeals,* 322 S.C. 53, 471 S.E.2d 456 (1993). In that case, the Supreme Court clarified the scope of the statute and held that the Court of Appeals may also issue memorandum opinions so long as the decision is unanimous and utilized the following format:

> Per Curiam. Affirmed pursuant to Rule 220(b)(1), SCACR and the following authorities: Issue 1: *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (a party cannot argue one ground at trial and another on appeal); Issue 2: S.C. Code Ann. § 19-5-510 (1985); *Kershaw County DSS v. McCaskill*, 276 S.C. 360, 278 S.E.2d 771 (1981); *Peagler v. Atlantic Coast Line Railway Co.*, 234 S.C. 140, 107 S.E.2d 15 (1959).

In re Memorandum Decisions by the Court of Appeals, 322 S.C. at 54-55, 471 S.E.2d at 457.

Further, use of this format complies with the legislative mandate in S.C. Code Ann. § 14-8-250 (Supp. 2016) that decisions of the Court of Appeals address every distinct point not

manifestly without merit that are necessary to render a decision in each case. *In re Memorandum Decisions by the Court of Appeals,* 322 S.C. at 55, 471 S.E.2d at 457.

Moreover, the Supreme Court has stated although "a case is disposed of without a full written opinion [this does] not intimate that the issues are not important or justiciable." *Golston v. Gunter*, 275 S.C. 389, 391, 271 S.E.2d 601, 602 (1980) (constructing former Rule 23, SCRAP). "The use of Rule 23 does not minimize the time required to review a record; it does minimize the time devoted to the writing of an opinion and, accordingly, permits the court to keep its docket more current than it would otherwise be." *Id.* 275 S.C. at 391-92, 271 S.E.2d. at 602. Thus, in order for Appellants' claim to prevail they must show that UP Decision 068 does not comply with the requirements set forth in *In re Memorandum Decisions by the Court of Appeals.*

Here, UP Decision 068 complied with all the requirements set forth in *In re Memorandum Decisions by the Court of Appeals.* First, as a *per curiam* decision, UP Decision 068 was unanimous.[1] Second, the decision followed the format approved by the Supreme Court for providing parties with an understanding of the basis for the decision.

Nevertheless, Appellants' claim that UP Opinion 068 provides "no substantive treatment or induction of the specific grounds for affirming then ALC's holding." Appellants' Pet. at 7. Appellants cite no authority to support this claim, which is a fatal to their argument. *Hunt v. S.C. Forestry Com'm*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) ("Issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal."). Indeed, no authority supports Appellants' claim. UP Decision 068 expressly identifies the issues raised in this appeal and succinctly explains that Appellants cannot prevail because to do so would

[1] The term "*per curiam*" is defined in *Black's Law Dictionary* as meaning "by the whole court." *Black's Law Dictionary* 1172 (8th ed. 2004).

contravene well-established authority. In particular, the opinion addresses the primary argument in Appellants' Brief that the exit weight listed in the Comprehensive Nutrient Management Plan for the birds was inaccurate. This argument centered around the testimony of Appellants' expert, Dr. Carmen Parkhurst, Ph.D.. UP Opinion 068 discussed this argument by splitting the argument into three issues. *See* Appellants Br. at 8-23; *see also* UP Decision 068 at 2-3. For each of these issues the opinion sets forth pin cites for the applicable standard of review and/or the general standard of proof, and the well-established legal principles that prevent Appellants from prevailing. For example, "[a]s to Appellants' expert's testimony regarding the live weight issues," the opinion cites 1) S.C. Code Ann. § 1-23-610(B)(a) for the standard of review; 2) *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194-95 (2012) for the standard and level of proof to overturn ALC findings; and 3) *Olsen v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008); *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 136. 530 S.E.2d 643, 653 (Ct. App. 2000); and *Bryant v. Levy*, 196 S.W.3d 166, 173 (Tex. App. 2006) for the well-established legal principles that bar ruling for Appellants. *See* UP Decision 068 at 2. Accordingly, Appellants' claim is without merit and the Petition should be denied.

II. THE PETITION SHOULD BE DISMISSED BECAUSE IT PRESENTS NO NEW ARGUMENTS OR LEGAL AUTHORITY TO SHOW THAT THE COURT MISAPPREHENDED THE RECORD OR MADE AN ERROR OF LAW.

Appellants' Petition should be dismissed since it constitutes nothing more than an attempt to relitigate arguments that this Court reviewed, considered, and dismissed because they were in contradiction of well-established legal principles. "'The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, **nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a**

second time.'" *Heron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) *citing Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)). The South Carolina Supreme Court long ago noted that most petitions for rehearing are filed just for delay. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). In *Arnold*, the Supreme Court noted further that " [u]sually . . . [a petition is] dismissed with a simple order . . . for the reason that they contain nothing but a 'rehash' of what the losing party has said before, matters which the court has already considered well and disposed of." *Id.* Here, Appellants have rehashed their claims. Not only have they restated the claims as set forth in their brief, they have used identical language and phrasing. Indeed, the first issue in the Petition, which is set forth on pages 8-10 of the Petition regarding the purported strength of Dr. Parkhurst's testimony on the weight of birds is a verbatim recitation of pages 17-19 of their brief. Neither the statement nor the argument contains any citation to authority that would support their arguments that Dr. Parkhurst's testimony was credible and should have been considered dispositive. This failure was fatal to the issue during the pendency of the appeal and again in this petition for rehearing. *Hunt*, supra. Further, the fact that the language is identical is irrefutable proof that the Petition is nothing more than a rehashing of the arguments that this Court correctly rejected as against the weight of clearly established law. *Heron*, 395 S.C. at 466, 719 S.E.2d at 643; *Arnold*, 168 S.C. 163, 167S.E. at 238. Accordingly, the Petition should be dismissed as it fails to provide any grounds upon which a rehearing can be granted.

CONCLUSION

For the reasons set forth in this Return, Respondents' Final Brief, and Respondents oral argument, Respondents respectfully request that the Court deny Appellants' Petition for Rehearing.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No.: 13-ALJ-07-0395-CC
Appellate Case No. 2015-000700

Rick Still, Donice Still, Christine Orr and Terry Orr, ...Appellants,

vs.

South Carolina Department of Health and Environmental Control
and Lisa Sumerel and Sumerel Poultry Farm, ...Respondents.

Certificate of Service

I, Donna K. Hellerman, Legal Assistant for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **20th day of March, 2017,** served a copy of ***Respondent South Carolina Department of Health and Environmental Control's Return to Petition for Rehearing*** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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Donna K. Hellerman

March 20th, 2017
Columbia, South Carolina

dhec
Healthy People. Healthy Communities.

March 20, 2017

The Honorable Jenny Abbot Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: *Rick Still, Donice Still, Christine Orr and Terry Orr vs. South Carolina Department of Health and Environmental Control and Lisa Sumerel and Sumerel Poultry Farm*
Lower Court Case No. 2013-ALJ-07095-CC
Appellate Case No. 2015-000700
OGC#: 21908

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Respondent, South Carolina Department of Health and Environmental Control's Return to the Petitioner's Petition for Rehearing and Certificate of Service in the above referenced matter. Please file the original and return the clocked copy to our office in the enclosed self-addressed stamped envelope. Should you have any questions regarding this matter please contact the under signed counsel at your earliest convenience.

Very truly yours,

Donna K. Hellerman
Legal Assistant to Stephen P. Hightower
Assistant General Counsel
Office of General Counsel

Enclosures as stated
cc: Joseph O, Smith, Esquire
Thomas E. Hite, III, Esquire