

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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Shirley C. Robinson, Administrative Law Judge

APR 12 2017

SC Court of Appeals

Appellant Case No. 2015-000602

Dan Abel and Mary Abel,

Appellants,

vs.

South Carolina Department of Health and Environmental Control and
Pawleys Island Community Church,

Respondents.

**APPELLANTS' RETURN TO
PETITION FOR REHEARING**

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April 10, 2017

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, the Appellants Dan and Mary Abel (the “Abels”) submit this Return in opposition to the Respondent Pawleys Island Community Church’s (the “Church”) Petition for Rehearing (the “Petition”) and respectfully request that this Court deny the Petition as set forth more fully below.

The Petition points to nothing new, either legally or factually, that this Court overlooked or misapprehended. Rather, the Petition is simply a regurgitation of the arguments raised in Respondents’ Brief. All of the issues raised have been fully briefed, argued, and considered. The Petition fails to point to any basis, let alone one that was overlooked or misapprehended, upon which the ALC’s analysis and decision could be affirmed such that would warrant this Court’s reconsideration. This Court’s reversal of the Administrative Law Court’s (“ALC”) decision was based on a clear error of law: the improper construction of the plain and unambiguous language of a settlement agreement and consent order between the parties, which was filed as a final order of the ALC (the “Consent Order”). Fundamental to the Court’s review under the Administrative Procedures Act (“APA”) is whether the ALC decision is based on an incorrect interpretation of the relevant law and, if so, to correct such error. See S.C. Code Ann. § 1-23-610(B) (“The court of appeals [] may reverse or modify the decision [of the ALC] if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . (d) affected by other error of law”). Accordingly, the Petition fails to identify a valid basis for rehearing and should be denied.

I. LACK OF GROUNDS FOR REHEARING

South Carolina Appellate Court Rule 221 provides that a party may petition the court for rehearing by stating “with particularity the points supposed to have been overlooked or

misapprehended by the court.” Rule 221, SCACR. Our courts have long recognized the very narrow and specific purpose served by a petition for rehearing, as well as the difficult standard upon which relief can be granted. Ex parte Dial, 14 S.C. 584 (1881) (“A judgment rendered by this court, after full argument, should not be disturbed under petition for re-hearing, except for the strongest reasons.”); Thompson v. Brown, 34 S.E. 411 (S.C. 1899) (“A rehearing will be denied where it does not appear that the court has overlooked any material fact or important principle of law.”)

Here, the Church’s Petition does not identify a single material fact or important principle of law that was overlooked or misapprehended by this Court. The Petition serves no purpose other than to rehash arguments already made, evidenced most notably by the repeated references to the Respondents’ Brief throughout; however, there is no basis for rehearing upon such grounds. As set forth below, a petition for rehearing is not a second opportunity for the losing party to make its case.

Our Supreme Court has recognized the frequency with which petitions for rehearing are filed and without proper basis, for purposes other than intended:

Petitions for rehearing are filed in at least three-fourths of the cases decided by this court. Many of them, we fear, some time, are filed just for delay. It is a rare thing when the court grants such a petition. Usually, they are dismissed with a simple order to that effect, 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.

Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1993). Similarly, in Hicks v. Hicklin, 187 S.C. 355, 197 S.E. 390 (1938), the Supreme Court determined that a petition for rehearing must be denied where the court has already considered the matters

presented in the petition. 197 S.E. at 393 (“These propositions have already been presented to this Court in the printed briefs and in the oral argument [and] have been considered by this Court in the preparation of the filed opinion.”).

More recently, our Court has clarified this point: “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.” Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, Appellate Practice in South Carolina 309 (1999)). Yet, that is precisely what the Church seeks to do in its Petition – rehash once more the arguments it has already made and which this Court has already considered and found unconvincing.

Many of the points raised in the Petition were made previously in Respondents’ Brief and responded to in Appellants’ Reply Brief,¹ while others are simply inaccurate or misguided assertions. First, the 2014 stormwater permit and coastal zone consistency certifications, which gave rise to the challenge before the ALC below, explicitly authorize alteration of the protected wetlands in violation of the Consent Order. (R. p. 89, 384-87, 390-98, 402-417). Thus, whether or not the Abels challenged the additional authorizations for the Church’s construction project is irrelevant. (Petition p. 2). The Church next asserts that its failed attempt to have the Consent Order modified should not be considered as evidence of just that (Petition pp. 2-3); however, it is written in plain language in the proposed modification that the Church “desires to modify its site plan and mak[e] further modifications to the Church property not in compliance with the original Order” and that its project cannot move forward until modification is approved by the ALC. (R.

¹ See Appellants’ Reply Brief pp. 1-16.

pp. 393-98). This statement is an admission that the project violates the Consent Order and thus is very probative of the issues directly before the Court.

The third through seventh points made in the Petition are simply without merit. (Petition pp. 3-5). The applicable rules of contract construction were discussed at length in briefing and cited in this Court's opinion. It is the Church and the ALC below, not this Court, who misapprehends these legal principles. Moreover, the ALC certainly has jurisdiction to enforce the terms of a settlement agreement between the parties that was adopted as a final order of its own court. See State v. Bevilacqua, 316 S.C. 122, 128, 447 S.E.2d 213, 216 (Ct. App.1994) ("Courts have no more important function to perform in the administration of justice than to ensure their orders are obeyed."); Kumar v. Third Generation, Inc., 324 S.C. 284, 289-90, 485 S.E.2d 626, 629 (Ct. App.1995). The plain language of the Consent Order contains no language limiting its applicability to the Church's 2000 construction project and associated permits. "The parties have the right to make their own contracts, and when such contracts are capable of clear interpretation, the Court's province is confined to the enforcement thereof. The Court cannot exercise its discretion as to the content of such contract or substitute its own construction for the agreement clearly entered into between the parties." Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962).

Additionally, the Petition renews the Church's assertion that the laws governing restrictive covenants are applicable here (Petition pp. 5-6), despite this argument being rejected both explicitly by the ALC (R. p. 9) and implicitly by this Court. Meinhard v. Youngblood, 37 S.C. 231, 16 S.E. 771, 771 (1892) ("[W]hile it may be true that every question presented by the argument may not have been specifically referred to in the opinion, yet it is clear that the

principles laid down in the opinion as controlling the decision necessarily imply that all these questions were considered and determined”). And once again, the Church selectively recites the law regarding contracts with perpetual provisions (Petition p. 5), ignoring the exception to the rule that such contracts will be upheld where the perpetual nature of the agreement is an express term or can be implied from the nature or circumstances surrounding the contract, which is the case with the Consent Order and requisite wetland protection. Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98, 447 S.E.2d 199, 200 (1994); Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296, 298 (1911). Appellants discussed S.C. Dep’t of Natural Res. v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001) at length on reply (See Reply Brief pp. 10-12), which contrary to the Church’s assertion (Petition pp. 5-6) is consistent with this Court’s Opinion that the Consent Order prohibits the Church from disturbing the natural state of the remaining wetlands into the future.

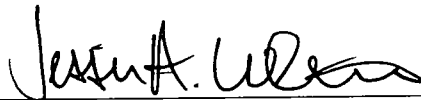
The Abels’ standing arises from their status as parties to the Consent Order and, thus, is based on principles of contract law rather than property law as the Church continues to assert. (Petition p. 6). As contracting parties to the Consent Order, the Abels retain express rights to enforce its terms and where they presently reside is entirely irrelevant. Finally, the Abels indeed did not formally seek an injunction from the ALC; however, in bringing the challenge to the 2014 permits as violating the Consent Order and seeking to have that agreement enforced, the challenge effected the same result: prevention of harm to the protected wetland. Even if this Court were to amend its Opinion to remove the word “injunction,” it would have no substantive effect on the matters at issue.

The Church's Petition seeks nothing more than to rehash arguments already made, considered and decided upon. Therefore, in the absence of any valid basis for granting rehearing, the Church's Petition must fail.

CONCLUSION

Based on the foregoing reasons, the Appellants Dan and Mary Abel respectfully request that the Respondent Pawleys Island Community Church's Petition for Rehearing be denied.

Respectfully submitted,



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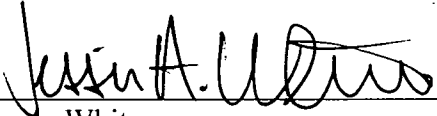
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Return to Petition for Rehearing of Appellants on Respondents SCDHEC and Pawleys Island Community Church by placing copies of same in the U.S. Mail addressed to:

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Re: Dan Abel and Mary Abel v. SCDHEC and Pawleys Island
 Community Church;
 Appellate Case No. 2015-000602

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the Appellants' Return to Petition for Rehearing, along with my Certificate of Service and filing fee.

Please return a clocked-in copy in the self-addressed, stamped envelope provided.

Thank you very much for your kind cooperation and assistance.

Yours very truly,

Jessie A. White

CC: Nathan M. Haber, Esq.
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