RECEIVED
AUG 21 2019
SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Richard J. Hook, Petitioner, v. South Carolina Department of Health and Environmental Control and Phillip Patterson, Respondents.	)	Docket No. 17-ALJ-07-0085-CC **AMENDED ORDER GRANTING PETITIONER'S MOTION TO ENFORCE THE CONSENT ORDER AND DENYING RESPONDENT DHEC'S 60(b)(5), SCRCP MOTION**

APPEARANCES: For the Petitioner: Mary D. Shahid, Esq.

For Respondent DHEC: Bradley D. Churdar, Esq.

For Respondent Phillip Patterson: Christopher McG. Holmes, Esq.[1]

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or court) pursuant to a request for a contested case hearing filed by Richard J. Hook (Petitioner) on February 7, 2017. The Petitioner seeks to enforce a Consent Order of Dismissal (Consent Order) issued by this court in the case *Ford Dev. Corp. v. S.C. Dep't of Health and Envtl. Control*, Docket No. 05-ALC-07-0031-CC (S.C. Admin. Law Ct. February 9, 2005). Specifically, the Petitioner alleges that the South Carolina Department of Health and Environmental Control (Department or DHEC) failed to amend and conform dock P/N 2002-1E-322-P (Permit) in accordance with the Consent Order and that Phillip Patterson (Patterson), an adjoining property owner, built a noncompliant dock based on the alignment depicted in the unamended version of the Permit. Accordingly, on October 20, 2017, the Petitioner filed a Motion to Enforce the Consent Order (Motion). Both Patterson and the Department filed returns to the Petitioner's Motion, opposing the Petitioner's request for the court to enforce the Consent Order. Along with its return, the Department also filed a motion for relief under Rule 60(b)(5) of the South Carolina Rules of Civil Procedure (SCRCP)

FILED
JUL 02 2019
SC ADMIN. LAW COURT

[1] On May 23, 2019, Patterson informed the court that Mr. Holmes had been relieved as counsel for Mr. Patterson. Accordingly, Patterson appeared *pro se* thereafter.

asking the court to allow the Patterson dock to remain in place as constructed on the basis that it is not equitable for the Consent Order to have prospective application.

A motions hearing was held on December 6, 2017, at the ALC in Columbia, South Carolina. On May 3, 2019, the court issued an Order Granting Petitioner's Motion to Enforce the Consent Order and Denying Respondent DHEC's 60(b)(5), SCRCP Motion, finding that (a) the Department violated the Consent Order; and (b) an equitable analysis in this matter did not support granting the Department relief from enforcement of the Consent Order when the alleged inequities largely resulted from the Department's failure to abide by the order in the first place. Consequently, the court granted the Petitioner's Motion and denied the Department's Rule 60(b)(5), SCRCP Motion.

On May 23, 2019, Patterson filed a Motion to Alter or Amend Judgment under Rule 59(e), asserting that (a) the res judicata and/or collateral estoppel defenses raised in this case had merit; (b) the Consent Order is not in compliance with the special conditions in the original dock master plan (DMP), which were are binding and should have been enforced; (c) any removal and reconstruction of his dock will negatively impact the environment; and (d) he was entitled to equitable relief in this matter under Rule 60(b)(5) as well, and the Department's Rule 60(b)(5) motion should have been imputed to him. On June 3, 2019, the Department filed a return in support of Patterson's motion, arguing that equity demands the parties to the 2003 contested case be joined in this matter. Also, on June 4, 2019, the Petitioner filed a return in opposition to the Patterson's motion.

Moreover, on May 28, 2019, the Department filed a Motion to Reconsider pursuant to SCALC Rules 29 & 68, and Rules 52, 59, and 60, SCRCP. In its motion, the Department asserts, *inter alia*, that (a) there are no clear and specific acts cited by the court for its finding that the Department willfully violated the Consent Order; (b) the Department was not adequately notified of the possibility of a compensatory contempt award in this case, and, therefore, was unable to provide any arguments or evidence against such an award; and (c) the court erred by extending its compensatory contempt award to Patterson. On June 7, 2019, the Petitioner filed a return in opposition to the Department's motion. This amended order follows to address the issues raised by the Department and Patterson in their motions.[2]

[2] The issuance of this amended order hereby vacates and replaces the court's May 3, 2019 order.

PROCEDURAL HISTORY

Ford Development Corporation (Ford) was the developer of the Belle Terre subdivision on James Island in Charleston County, South Carolina. After designing the subdivision, Ford sought approval from the Office of Ocean and Coastal Resources Management (OCRM) for a DMP for Belle Terre. The DMP for Belle Terre was approved in March of 2002. Thereafter, in July of 2002, Ford submitted an application to OCRM for a general permit to authorize the construction of docks for the twenty-seven (27) waterfront lots located within Belle Terre.

On August 21, 2002, while Ford's general permit application was still pending, the Petitioner executed an Agreement to Buy and Sell with Parrot Point, LLC, under which the Petitioner was to purchase Lot 10, Parrot Point Drive, in Belle Terre for $1,000,000. At or around this time, the Petitioner was shown a drawing of Ford's general permit application depicting a dock for Lot 9, which was adjacent Lot 10, emanating straight through the property at a length of approximately 556 feet and located completely within Lot 9's extended property lines (Amended Alignment). The Petitioner proceeded with the purchase agreement in reliance of the depiction of Lot 9's proposed dock alignment.

On January 21, 2003, Ford was issued a general permit authorizing the construction of docks for the aforementioned waterfront lots. This general permit was the subject of a protracted contested case before this court in *James Island Pub. Serv. Dist., Mr. and Mrs. Douglas Patterson, et al. v. Ford Dev. Corp. and S.C. Dep't of Health and Envtl. Control, Office of Ocean and Coastal Res. Mgmt.*, Docket No. 03-ALJ-07-0105-CC.[3] Among the permits included in the general permit was Lot 9's Permit, P/N 2002-1E-322-P, which is at the heart of the dispute in this matter. In accordance with the terms of the general permit issued to Ford after the permit challenges had concluded, the dock authorized for Lot 9 was aligned so that it crossed over Lot 10, at a length of approximately 200 feet (Original Alignment). Therefore, the Permit as issued under the general permit authorized the construction of a dock on Lot 9 was vastly different from the dock initially

[3] On September 23, 2003, the case was settled by stipulation between the petitioner, James Island Public Service District, and the Respondents, Ford and DHEC, and the court dismissed the petitioner as a party to the action with prejudice. However, the individual petitioners continued with the contested case, then captioned *Mr. and Mrs. Douglas Patterson, et al. v. Ford Dev. Corp. and S.C. Dep't of Health and Envtl. Control, Office of Ocean and Coastal Res. Mgmt.*, Docket No. 03-ALJ-07-0105-CC. A Final Order and Decision was issued by the court in that matter on November 13, 2003. In its order, the court upheld the Department's permitting determinations with regard to all twenty-seven (27) individual permits under the general permit, including those for Lots 1 through 5, and Lots 7 through 28. The individual petitioners appealed the court's decision but limited the scope of their appeal to the permits for Lots 12 through 23. On May 28, 2004, the South Carolina Coastal Zone Management Appellate Panel affirmed the court's Final Order and Decision with respect to those twelve (12) appealed permits.

depicted to the Petitioner at the time he entered into the purchase agreement for Lot 10.

Thereafter, the Petitioner informed Ford that he would not purchase Lot 10 if the authorized dock for Lot 9 would have the Original Alignment. Ford then assured the Petitioner that it would remedy the discrepancy and have Lot 9's dock alignment altered to the position depicted in the original renderings. Accordingly, on August 13, 2004, Ford sent the Department a request to amend the Permit for Lot 9 so that the dock would have the Amended Alignment.

On December 13, 2004, the Department informed Ford that it had denied the requested amendment. The Department cited the following three reasons for the denial: (a) the Original Alignment was the "least damaging environmental alignment"; (b) the Original Alignment was located within the "approved dock corridor as identified by the approved [DMP]," and that the Amended Alignment was not keeping with the "spirit" or "intent" of the DMP; and (c) the Original Alignment would not "negatively affect the value and enjoyment" of Lot 10's owner because "the use would be identical at the authorized alignment" and "improved navigation" would not occur with the Amended Alignment. Consequently, on January 5, 2005, Ford initiated contested case proceedings before the Administrative Law Court challenging the Department's denial of its Permit amendment request.

On or about January 12, 2005, while Ford's contested case on the Permit was still pending, the Petitioner closed on Lot 10 for a purchase price of $1,000,000. The Petitioner closed only after being advised by Ford that it had reached a settlement in principle with the Department of its pending contested case that would amend the Permit for Lot 9's dock so that it would have the Amended Alignment. The Petitioner has been the owner of record for Lot 10 since January 12, 2005.

On February 9, 2005, this court issued a Consent Order (which the Petitioner seeks to enforce in this case) between Ford and the Department, wherein the Permit for Lot 9 was to be amended so that the authorized dock was realigned to the Amended Alignment.[4] As a part of the Consent Order, Ford agreed to adhere to the terms and conditions of the general permit going forward and to seek no further amendments to the Permit, or any other permits for Belle Terre, with the exception of amendment requests seeking the construction of handrails, boatlifts, or roofs at

[4] The Consent Order is signed by both counsel for Ford and counsel for the Department.

individual docks.[5] Ford also executed a "First Amendment to Declaration of Covenants, Conditions and Restrictions for Belle Terre" to ensure that that the agreement contained in the Consent Order would be binding on Ford's successors in title to the lots at Belle Terre. The Consent Order was not appealed by either party.

On October 14, 2011, Lot 9 was conveyed to Jessica Blitch Patterson, the wife of Respondent Patterson. Likewise, on or about October 19, 2011, the Permit was transferred to Mrs. Patterson. Thereafter, on July 25, 2012, Patterson acquired an ownership interest in Lot 9 from Mrs. Patterson for five (5) dollars, love, and affection.

On or about August 29, 2014, Patterson submitted a Permit amendment request to the Department for the addition of a roof to the dock's pierhead and a 12.5' x 12.5' four-pile boatlift to the Permit. Included with the request were survey drawings depicting the dock in the Original Alignment, as shown in the general permit issued January 21, 2003.[6]

On September 8, 2014, as a result of Patterson's amendment request, a Permit Amendment Public Notice was purportedly mailed to the Petitioner. The notice states that:

> The permittee has requested an amendment to the issued permit. Specifically, the permittee seeks to add a roof to the 10' x 12' pierhead and add a 12.5' x 12.5', four-pile boatlift floodside of the pierhead. The amendment is for modifications to a private, recreational dock.

Additionally, the notice states that "[p]lans depicting the proposed work are available and will be provided upon receipt of a written request or may be viewed on the Department website . . . ." However, the Petitioner asserts that he never received this notice, and that even if he had, he would have had no reason to think that the ancillary amendments, to which he had no objection, would modify a dock permit that was noncompliant with the Consent Order.

On October 3, 2014, the Department issued Patterson an amendment to the Permit authorizing the addition of a roof over the fixed pierhead and a 12.5' x 12.5' four-pile boatlift floodside of the pierhead. The DHEC Project Manager assigned to process Patterson's amendment request was unaware of the Consent Order at the time and, consequently, the Permit drawings issued to Patterson depict Lot 9's dock in the Original Alignment. In November 2014, construction

[5] The Consent Order provided, however, that other permit amendment requests would be considered if "the applicant can demonstrate either 1) material and substantial changes to Parrot Creek or the Belle Terre property since the time of issuance of the General Permit or 2) consistency with the spirit and intent of the original General Permit."

[6] Patterson also asserted that several months prior, on June 19, 2014, he acquired a copy of the Permit from the Department that also depicted Lot 9's dock in the Original Alignment.

of the dock at Lot 9 began.[7] The dock's construction was completed by the end of that year.

The Petitioner, a resident of Lexington, South Carolina, visited his property in early 2017. At that time, he discovered the noncompliant dock crossing over his undeveloped Lot 10. On February 7, 2017, the Petitioner requested a contested case hearing with this court seeking to enforce the Consent Order.

In his Motion, the Petitioner asserts that he has third-party standing to enforce the Consent Order since Ford initiated the 2005 contested case in order to obtain the Amended Alignment for Lot 9's dock and secure his purchase of Lot 10. As a part of his standing argument, the Petitioner asserts that he could not have intervened in the 2005 contested case because his interests were already being adequately represented by Ford. Accordingly, the Petitioner argues that he could not have demonstrated compliance with the second prong of SCALC Rule 20(B), which requires a movant to show that his interests "are not being adequately represented by existing parties, or that [he] is otherwise entitled to intervene." He further argues that the terms of the Consent Order are clear and unambiguous, and that the Department acted in disregard of the Consent Order when it issued the noncompliant version of the Permit – depicting the Original Alignment – to Patterson.

Patterson, on the other hand, contends that the outright validity and enforceability of the Consent Order is uncertain. In doing so, he argues that the location of the docks was litigated in the 2003 contested case on the general permit and that *res judicata* or collateral estoppel would preclude Ford and DHEC from relitigating the Lot 9 dock location in the 2005 contested case. Moreover, Patterson asserts that the Permit amendment requested by Ford in the 2005 contested case, as set forth in the Consent Order, was an impermissible workaround to the final order from the 2003 contested case in that it is not in keeping with the spirit of the DMP. However, to the extent that the Consent Order is valid and enforceable, Patterson argues that the Petitioner lacks standing to enforce the Consent Order because he was not a party to the Consent Order. In support of that argument, Patterson asserts that the Petitioner, who was not party to the 2005 contested case, would have been able to show that he was "otherwise entitled to intervene" under SCALC Rule 20 but failed to do so. Moreover, Patterson argues that the Petitioner did not assert any cognizable right in his Motion. Specifically, Patterson argues that there is no evidence that the

---

[7] While the Permit listed an expiration date of January 21, 2008, pursuant to two (2) Joint Resolutions by the General Assembly, the expiration of the Permit was extended such that it was valid at the time the dock was constructed. *See* H. R.J. Res. 4445, 118th Gen. Assemb., Reg. Sess. (S.C. 2010); H.R.J. Res. 3774, 120th Gen. Assemb., Reg. Sess. (S.C. 2013).

value of the Petitioner's lot is diminished by the current alignment of Lot 9's dock and that the Petitioner only alleges interference with the view from his property, which is not protected under the applicable law.

Likewise, the Department argues in its response and motion that the court should grant it relief from enforcement of the Consent Order and that Lot 9 dock should be allowed to remain in place under Rule 60(b)(5), SCRCP because "it is no longer equitable that the judgment should have prospective application." The Department asserts that the circumstances of this case fall within the purview of Rule 60 because the DHEC Project Manager in charge of Patterson's Permit amendment request was unaware of the Consent Order. In arguing that the equities in this case favor granting it relief from the Consent Order, the Department asserts that the Petitioner entered into an agreement to buy Lot 10 before the general permit was issued, that he closed on Lot 10 before the Consent Order had been finalized, and that he never contacted the Department after the notice of Patterson's amendment request had been sent to him to see what changes were being requested. Thus, the Department asserts that this demonstrates an inconsistent effort to protect his view corridor, to which there is no prescriptive right in South Carolina. Moreover, the Department contends that allowing the dock to remain is in keeping with the spirit of the DMP and would prevent "substantial negative impact" to the critical area that would be caused by removing the existing dock and rebuilding a longer dock under the Amended Alignment, which would provide no navigational benefit over the existing dock.

ISSUES

1. Is the Consent Order valid and enforceable by the Petitioner?
    a. Does the Petitioner have standing to enforce the Consent Order?
    b. Do the principles of *res judicata* and/or collateral estoppel invalidate or otherwise bar enforcement of the Consent Order?
    c. Does the Consent Order impermissibly deviate from the spirit of the DMP?
2. Does Rule 60(b)(5), SCRCP, entitle the Department to relief from the Consent Order?

STANDARD OF REVIEW

Motion to Enforce the Consent Order

A "trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court." *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93,

419 S.E.2d 841, 842 (Ct. App. 1992) (citation omitted). To that end, "[i]n South Carolina jurisprudence, settlement agreements are viewed as contracts." *Abel v. S.C. Dep't of Health and Envtl. Control*, 419 S.C. 434, 438, 798 S.E.2d 445, 447 (Ct. App. 2017) (citation omitted) (internal quotation marks omitted). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Bruning v. S.C. Dep't of Health and Envtl. Control*, 418 S.C. 537, 552, 795 S.E.2d 290, 298 (Ct. App. 2016) 447 (citation omitted) (internal quotation marks omitted).

"In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (citation omitted) (internal quotation marks omitted). To that end, "interpretation of a contract 'is governed by the objective manifestation of the parties' assent at the time the contract was made,' rather than 'the subjective, after the fact meaning one party assigns to it.'" *Nichols Holding, LLC v. Divine Capital Grp., LLC*, 416 S.C. 327, 335, 785 S.E.2d 613, 617 (Ct. App. 2016) (citation omitted). Thus, "[c]ontracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Abel*, 419 S.C. at 440-41, 798 S.E.2d at 448 (citation omitted) (internal quotation marks omitted). "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court." *Abel*, 419 S.C. at 438, 798 S.E.2d at 447 (citation omitted) (internal quotation marks omitted). As such, "[w]here the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Padgett v. S. C. Ins. Reserve Fund*, 340 S.C. 250, 254, 531 S.E.2d 305, 307 (Ct. App. 2000) (citation omitted) (internal quotation marks omitted).

Additionally, with regard to third-party beneficiaries:

> Where the contract does not specifically state that a certain third party shall receive certain described benefits, and that it was the intention of the contracting parties that this should be the result of the contract, the question of intent is generally regarded as one of construction of the contract. To determine intention by means of construction, the terms of the contract as a whole must be considered, and must be construed in the light of the circumstances under which the contract was made and the apparent purpose that the parties were trying to accomplish.

16 AM. JUR. 2D *Proof of Facts* § 5 (August 2018 Update).

"The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Abel*, 419 S.C. at 438, 798 S.E.2d at 447 (citation omitted) (internal quotation marks omitted). Consequently, "[t]he judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. S.C. Dep't of Parks, Recreation and Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997) (citation omitted).

Rule 60(b)(5), SCRCP Motion

Rule 60(b)(5), SCRCP, states in pertinent part that: "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding" if "it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5), SCRCP; *see also* SCALC Rule 68 (stating that the SCRCP may be applied in contested cases to resolve questions not addressed by the SCALC Rules). Rule 60(b)(5) is based on the historical power of a court of equity to modify its decree 'in light of subsequent conditions.'" *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003) (citation omitted). Thus, a Rule 60(b)(5) motion "addresses the right of the trial court to modify the final judgment . . . in light of subsequent conditions that make it inequitable that the judgment should have prospective application." *Saro Invs. v. Ocean Holiday P'Ship*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994) (citations omitted).

"Generally, the standard to be applied in determining whether an order or judgment has prospective application within the meaning of Rule 60(b)(5) is whether it is executory or involves the supervision of changing conduct or conditions by the court." *Id.* at 120, 441 S.E.2d at 838 n.3 (citation omitted). Accordingly, "[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 433, 706 S.E.2d 501, 503 (2011) (quoting *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989)) (internal quotation marks omitted). To this end, "[p]rospective application is required when liability is created where formerly none existed." *Id.* at 433-34, 706 S.E.2d at 503 (quoting *Toth*, 298 S.C. at 8, 377 S.E.2d at 585) (internal quotation marks omitted).

"When determining whether to grant relief, the factors to consider are: (1) the timing of the motion for relief, (2) whether the party requesting relief has a meritorious defense, and (3) the degree of prejudice to the opposing party if relief is granted." *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 918 (Ct. App. 2009) (citations omitted). To that end, a Rule 60(b)(5) motion "shall be made within a reasonable time." Rule 60(b), SCRCP. Additionally, factors to be considered when conducting an equitable analysis under Rule 60(b)(5) include: whether the judgment "ought not, in equity and good conscience, to be enforced"; whether there is "a good defense to the alleged cause of action on which the judgment is founded"; "the absence of fault or negligence on the part of the defendant"; and "the absence of any adequate remedy at law." *See Mr. T v. Ms. T*, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008) (citation omitted).

However, Rule 60(b)(5) "has limited application and has rarely been applied." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595, 748 S.E.2d 781, 786 (2013) (citation omitted). Judgments or orders entered by consent are ordinarily "binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding." *Johnson v. Johnson*, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) (citation omitted). However, "consent judgments are subject to [a Rule 60(b)(5)] attack under particular circumstances." *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 n.3 (2004). In determining whether to grant relief under this rule, "a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute," in recognition of the longstanding policy favoring final judgments and the important benefits that are achieved by the preservation of final judgments. *Raby*, 358 S.C. at 20, 594 S.E.2d at 483 (citation omitted). Equitable relief under a Rule 60(b)(5) motion may, nevertheless, be appropriate when it is based on "rare, special, exceptional or unusual circumstances . . . ." *See Mr. T*, 378 S.C. at 135, 662 S.E.2d at 417 (citation omitted). Though "[a] party may not invoke this rule where it could have pursued the issue on appeal" or "could have litigated at trial . . . the claims [] now [made] by motion." *Tench v. S.C. Dep't of Educ.*, 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001) (citation omitted); *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 359, 428 S.E.2d 900, 902 (Ct. App. 1993). Likewise, a judgment or order entered by consent cannot "be set aside in part so that one party is absolved from the duty imposed by it, while the same party retains the benefit it confers." *Johnson*, 310 S.C. at 47, 425 S.E.2d at 48 (citation omitted).

The "party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." *Perry*, 357 S.C. at 46-47, 590 S.E.2d at 504 (citation omitted). The decision "to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial judge." *Id.* at 47, 590 S.E.2d at 504.

DISCUSSION

Motion to Enforce the Consent Order

Standing

The court must first determine whether the Petitioner has standing to enforce the Consent Order. As set forth *supra*, the Consent Order is viewed as a contract under South Carolina law. Moreover, the evidence demonstrates that Ford brought the 2005 contested case and entered into the resulting Consent Order for the purpose of obtaining the Petitioner's desired dock alignment for Lot 9. By necessary implication, it is unmistakable that the resulting benefit to the Petitioner was within the contemplation of the Department. It is evident, therefore, that the Consent Order was executed for the direct benefit of the Petitioner. Accordingly, the Petitioner has standing to enforce the Consent Order as a third-party beneficiary.

To that end, the Petitioner's failure to intervene in the 2005 contested case does not bar him from enforcing the Consent Order now. Pursuant to Rule 20(B) of the Rules of Procedure for the Administrative Law Court, any person *may* intervene in any pending contested case hearing upon a showing that:

> (1) the movant will be aggrieved or adversely affected by the final order;
> (2) the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene;
> (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.

SCALC Rule 20(B). A party seeking to intervene bears the burden of demonstrating compliance with each of the required elements for intervention. *See In re Horry Co. State Bank*, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004) (citation omitted). In is indisputable that the Petitioner's interests were "being adequately represented" by Ford in the 2005 contested case, as Ford brought the contested case solely to obtain the Petitioner's desired dock alignment for Lot 9. Moreover, while Patterson asserts that even if his interests were being adequately represented the Petitioner

would have been "otherwise entitled to intervene" because he would have been "adversely affected by an order upholding" the Original Alignment, this argument ignores the fact that those are separate requirements under SCALC Rule 20(B). That is, an intervenor must demonstrate that he or she will be "aggrieved or adversely affected by the final order" and that his or her interest is "not being adequately represented" or that he or she is not "otherwise entitled to intervene." Contrary to Patterson's assertions, therefore, the Petitioner would not have satisfied the second requirement for intervention simply because he satisfied the first one.

Even assuming *arguendo* that the Petitioner could have intervened in the original action, the intervention process is permissive rather than compulsory. Moreover, the court is not aware of any authority that would bar a party with independent third-party beneficiary standing from later enforcing a consent order from this court merely because the beneficiary did not also intervene during the original contested proceedings.

Res Judicata and Collateral Estoppel

Next, the court must determine whether the Consent Order is unenforceable by the Petitioner under the doctrines of *res judicata* and collateral estoppel. Specifically, Patterson argues that one or both of those doctrines essentially nullifies the Consent Order from the 2005 contested case because the issue of Lot 9's dock alignment was actually litigated and determined in the protracted 2003 contested case.

However, to the extent that Lot 9's dock alignment was actually litigated in the 2003 contested case, *res judicata* and collateral estoppel are both affirmative defenses that must be pled and proved during the action which the movant seeks to bar due to a prior adjudication of the matter. *See S.C. Dep't of Soc. Servs. v. Thompson*, 273 S.C. 569, 571, 257 S.E.2d 747, 748 (1979) (citation omitted) ("Res judicata is an affirmative defense and must be pleaded to be established."); *Duckett v. Goforth*, 374 S.C. 446, 465-66, 649 S.E.2d 72, 82 (Ct. App. 2007) (citation omitted) ("[C]ollateral estoppel is an affirmative defense which must be pled . . . ."). Thus, if there was a time for those defenses to be raised, it was in response to Ford's filing of the 2005 contested case. Since there is no evidence that the Department raised either defense in the 2005 contested case, the Consent Order is conclusive on the Department and it cannot assert those defenses in the first instance now to invalidate it.[8] *See Sciarrone v. Life Ins. Co. of Va.*, 280 S.C. 446, 448, 313 S.E.2d

[8] In his motion to reconsider, Patterson also argues for the first time that "the petitioners in the 2003 contested case were excluded from any chance to plead the defenses of [r]es [j]udicata and [c]ollateral [e]stoppel which should have

322, 324 (Ct. App. 1984) (citations omitted).

But even if the Department had raised the defense of *res judicata* or collateral estoppel in the 2005 contested case, it relinquished the right to any interest in those defenses – or to any challenge Ford's Permit amendment request – when it voluntarily entered into the Consent Order with the terms contained therein. *See, e.g., Freeman v. McBee*, 280 S.C.490, 492-93, 313 S.E.2d 325, 326 (Ct. App. 1984) (citation omitted).

Compliance with DMP

Patterson further argues that the Consent Order was an impermissible workaround to the final order from the 2003 contested case, in that the Amended Alignment set forth in the Consent Order is not in keeping with the spirit of the DMP as required.[9] In making this argument, Patterson paradoxically asserts that Ford could have challenged the dock alignment during the 2003 contested case, but failed to appeal the court's final order, thus making it the law of the case, while simultaneously asserting that the un-appealed Consent Order from 2005 contested case – during which the Department could have challenged Ford's request to amend Lot 9's dock alignment – should not be followed. Likewise, Patterson argues that the timing of the Consent Order is suspect and may not have complied with public notice requirements. In any event, Patterson – who was not party to, involved with, or otherwise privy to either case – did not move for relief from the Consent Order and presented no evidence or authority evincing a right to otherwise collaterally attack the merits or validity of the un-appealed Consent Order here. Consequently, Patterson failed to show that he has the capacity to now challenge the Consent Order.

Even if Patterson could challenge the merits of the Consent Order and even if the Permit

been their right." Patterson's Mot. to Reconsider, at 1. Similarly, with its return to Patterson's motion to reconsider, the Department filed a supplement to its motion arguing for the first time that "[w]hether characterized as *res judicata*, collateral estoppel, equity or due process, the Department agrees that the convoluted history of this case from 2004 to present, raised the potential of a 'miscarriage of justice' unless the parties to the 2003 litigation (Docket No. 03-ALJ-07-0105-CC) are given an opportunity to be heard." Department's Mot. to Reconsider, at 1. Accordingly, the Department urges the court to allow the parties in the 2003 contested case to be joined in the present matter under Rule 19(a), SCRCP, or at least be given an opportunity to be heard. *Id.* at 2-3. However, "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (citation omitted); *see also Raby*, 358 S.C. at 20, 594 S.E.2d at 483 (citation omitted); *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 252 481 S.E.2d 706, 708 (1997) (citation omitted) ("Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation.").

[9] As a part of this argument, Patterson references the Department's initial denial of Ford's amendment request for Lot 9, in which the Department determined that the request did not comply with certain requirements set forth in S.C. Code Ann. Regs. 30-11 and S.C. Code Ann. Regs. 30-12, including consistency with the DMP.

amendment set forth in the Consent Order did stray from the provisions in the DMP, the Department agreed to amend the Permit, and thus deviate from the DMP, when it entered into the Consent Order. While Patterson may ardently disagree with the Department's decision to enter into the Consent Order, thereby amending the Permit and dock alignment for Lot 9, he presented no evidence or authority demonstrating that the agreement to amend the Permit by the Department – the State agency charged with administering dock permits – was impermissible or unlawful under the circumstances. *See Romanus v. Biggs*, 214 S.C. 145, 152, 51 S.E.2d 503, 505 (1949) (citation omitted) ("In determining whether a contract is void for illegality, it will be presumed that it only involves the doing of a lawful and proper act. Illegality is never presumed but must be proved, or must clearly appear upon the face of the contract."). To the contrary, the Department is imbued with a degree of flexibility and discretion in making determinations regarding compliance with its regulations. While this court can only speculate, it is possible that, at the time, the Department determined that the Permit amendment was proper in light of the benefits conferred to it by Ford in the agreement. Regardless of the rationale, Patterson failed to show that the purported deviation was improper under those circumstances.

<u>Rule 60(b)(5), SCRCP Motion</u>

Having established that the Consent Order is valid and enforceable by the Petitioner, the court must now determine whether the Department[10] is entitled to relief from the Consent Order on the basis that it is no longer equitable that it should have prospective application. To the extent that the Department's motion was timely filed,[11] the court finds that the Department failed to carry

---

[10] In his motion to reconsider, Patterson argues for the first time that, despite not moving for relief from the Consent Order, he was entitled to equitable relief from it under the Department's Rule 60(b)(5), SCRCP motion. This issue is not preserved. *See Johnson*, 381 S.C. at 177, 672 S.E.2d at 570 (citation omitted). Nevertheless, while the court acknowledges that Patterson, an innocent party in this case, may have had a stronger equitable basis for relief from enforcement of the Consent Order, it would appear that Patterson has an adequate remedy under the South Carolina Tort Claims Act. *See Mr. T*, 378 S.C. at 135, 662 S.E.2d at 417 (citation omitted).

[11] The timeliness of the Department's motion is questionable. While the Department's motion is framed as a Rule 60(b)(5) motion, the Department conceded that it "comes within the scope" of Rule 60(b) due to the mistake, inadvertence, or excusable neglect of the DHEC Project Manager assigned to Patterson's amendment application who failed to account for the Consent Order during processing. Rule 60(b) provides that motions for relief from an order or judgment due to "mistake, inadvertence, surprise, or excusable neglect" shall be made within a reasonable time but "not more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b)(1), SCRCP. Thus, to the extent that the Department seeks relief from the Project Manager's failure to account for the Consent Order, a Rule 60(b)(1) motion filed twelve years after the Consent Order was executed is not properly before the court and is untimely. Even the timeliness of a Rule 60(b)(5) motion is uncertain, as the Department failed to provide any legitimate basis for why it neglected to account for the Consent Order for over a decade or how it took nearly three years to discover its Project Manager's error after the fact. Thus, it would seem as though the Department did not take issue with the equities in this matter until after the Petitioner sought to enforce his rights. To that end, the court

its burden of establishing that the Consent Order at issue here is subject to an attack under Rule 60 (b)(5), or that it is otherwise entitled to relief under the rule.

In its motion, the Department presented no evidence or legal authority in support of the proposition that the Consent Order has prospective application, that is "whether it is executory or involves the supervision of changing conduct or conditions by the court," under the facts of this case. Moreover, in both his response to the Department's motion, as well as at the motions hearing, the Petitioner disputed the prospective nature of the Consent Order and provided authority in support of that position. Despite this challenge, however, at the hearing, counsel for the Department still failed to provide any authority or facts to support the applicability of Rule 60(b)(5) to the Consent Order, or even respond to the Petitioner's challenge on its prospective application.[12] As such, the Department failed to demonstrate that, under the facts of this case, it is entitled to relief from enforcement of the Consent Order under Rule 60(b)(5).

Even if the court were to find that the Consent Order has prospective application and is subject to an attack under Rule 60(b)(5), the Department's motion still must fail, as the equitable considerations do not favor granting the Department relief from enforcement of the Consent Order. In support of its contention that the equities weigh in its favor, the Department first argues that the Petitioner's primary motivation for pursuing the Amended Alignment was to safeguard the pristine view from his lot, which there is not a prescriptive right to in this State pursuant to *Young*.[13] While the Petitioner asserts that it was the protection of his substantial investment, rather than merely his view, which he sought to safeguard, the court fails to understand how the Petitioner's motivations warrant any equitable consideration against enforcement of the order. If the Petitioner had a prescriptive right to an uninterrupted view, the DMP and general permit would have been mandated to reflect the Amended Alignment, and there would have been no need for Ford to file the 2005 contested case that resulted in the Consent Order and Permit amendment reflecting the Amended Alignment in the first place. One of the primary purposes of contracting is to secure a

---

questions whether the Department would have even moved for relief on this basis had the Petitioner never moved to enforce the Consent Order. In any event, the Department failed to establish the timeliness of its motion.

[12] At a minimum, the court shares the Petitioner's concerns over the applicability of Rule 60(b)(5) under the facts of this case. Had the Department simply complied with the Consent Order it entered into, there would have been no ongoing requirements or continued enforcement by this court. Thus, the only arguable prospective application here is the result of a wholesale failure to comply with the Consent Order by the movant who now seeks to prevent its enforcement.

[13] *See Young v. S.C. Dep't of Health and Envtl. Control*, 383 S.C. 452, 461, 680 S.E.2d 784, 789 (Ct. App. 2009) (citation omitted).

right to something that is otherwise not required by or provided for under the law. Thus, even if the Petitioner's view would not be protected under the law as a prescriptive right, it is protected under the law by the Consent Order entered into by the Department and made for the benefit of the Petitioner.

Second, the Department argues that the Petitioner demonstrated inconsistent efforts to protect his investment and his view because he closed on the Property before the Consent Order was finalized, and because he did not investigate the Department's notice regarding Patterson's dock amendment request. However, the Petitioner did not close on the Property until after Ford, the subdivision's developer, had assured him that a settlement had been reached and that the Amended Alignment for Lot 9's dock would be part of that agreement. In view of Ford's assurances, the Petitioner's decision to close on the Property prior to the Consent Order being finalized does not support the Department's allusions of inconsistency or lack of diligence in protecting his interests.[14] Likewise, the Petitioner asserts that he never received the Department's notice regarding Patterson's amendment request. However, even if he had received it, the Petitioner had no objection to the proposed amendments and nothing in the notice would have given the Petitioner reason to believe the Consent Order was not being followed or that the proposed amendments were for a noncompliant dock. Moreover, while the Department contends that the Petitioner would have discovered the noncompliant nature of the Permit upon further inspection, the Petitioner had no affirmative obligation to investigate the amendment request – which the Petitioner had no objection to under the correct Permit – whereas the Department had an affirmative obligation to comply with the Consent Order.

Finally, the Department argues that the existing dock is in keeping with the spirit of the DMP, and that removing and rebuilding Patterson's dock would cause "substantial negative impact" to the environment. As explained *infra*, irrespective of whether the Permit amendment in the Consent Order was in keeping with the spirit of the DMP, the Department agreed to amend the Permit and to deviate from the spirit of the DMP when it entered into the Consent Order, which was never appealed. Thus, the Department waived any right it may have had to take issue with, or assert an equitable objection to, its deviation. *See, e.g., Freeman*, 280 S.C.at 492-93, 313 S.E.2d at 326 (citation omitted). Additionally, while the environmental impact of removing and

---

[14] In that vein, it is likely that the Petitioner would have had a claim against Ford for breach of contract or promissory estoppel had the settlement not gone through as promised.

rebuilding Patterson's dock may have been worthy of consideration, the Department failed to submit any evidence to support its assertion that removing and rebuilding the dock would cause "substantial negative impact" to the environment. Statements and opinions of counsel alone do not constitute evidence upon which this court can rely. *See McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("[S]tatements of fact appearing only in argument of counsel will not be considered."); *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted) ("Arguments made by counsel are not evidence."). Moreover, despite the Departments concerns over this dock's removal, it is notable that the Department has the authority to order the removal of a noncompliant dock as a part of a standard enforcement action. *See* S.C. Code Ann. § 48-39-170(C) (Supp. 2017) ("Whenever the [D]epartment determines that any person is in violation of any permit, regulation, standard, or requirement under this chapter, the [D]epartment may issue an order requiring such person to comply with such permit, regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by the [D]epartment . . . .").

Consequently, even if the Department had carried its burden of demonstrating the applicability of Rule 60(b)(5) in this matter, the equities in this matter do not favor granting the Department relief from the Consent Order. The Department has not demonstrated "rare, special, exceptional or unusual circumstances" sufficient to justify providing it relief, as the alleged inequities largely resulted from the Department's inexplicable failure to follow the Consent Order. In fact, the events that transpired in this case reasonably foreseeable consequences of a breach such as the one committed by the Department. Likewise, the Department failed to demonstrate or even allege a good-faith, or, for that matter, any effort to comply with the Consent Order from which it now seeks relief from its enforcement. As such, it would be inequitable to now provide the Department relief from the consequences of its failure to comply with the Consent Order and allow it to retain the benefits that were conferred to it in the order while stripping the Petitioner of the sole right and benefit provided to him under its terms.[15] Consequently, because the Department is not without fault in this matter, has no legitimate defense to enforcement, and since granting the Department relief from the Consent Order would substantially prejudice the Petitioner, the

[15] To be certain, under the Department's theory, it would be inequitable to enforce – or provide a remedy for a violation of – seemingly every court order that was not complied with under Rule 60(b)(5). The court refuses to hold that Rule 60(b)(5) stands for that proposition.

Department's motion must be denied.[16][17]

Relief

The court now turns to the remedy that can be granted when enforcing the Consent Order.[18] Here, the Petitioner asserts that the Department is in contempt of the Consent Order. "The power to punish for contempt is inherent in all court, and is essential to the preservation of order in judicial proceedings." *State v. Haveika*, 285 S.C. 388, 389, 330 S.E.2d 288, 288 (1985) (citation omitted). To that end, where the purpose of a proceeding as revealed by the petition for relief is to enforce orders of the court, civil contempt is sought. *See State ex rel. Love v. Howell*, 285 S.C. 53, 54-55, 328 S.E.2d 77, 78 (1985).

"Contempt results from the willful disobedience of an order of the court . . . ." *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982) (citations omitted). "In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." *Miller v. Miller*, 375 S.C. 443, 454, 652 S.E.2d 754, 760 (Ct. App. 2007) (citations omitted) (internal quotation marks omitted). Accordingly, "[c]ivil contempt must be proven by clear and convincing evidence." *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998) (citations omitted).

"A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 607-08, 567 S.E.2d 514, 520 (Ct. App. 2002) (citation omitted) (internal quotation marks omitted). Thus, "the record must be clear and specific as to the acts or conduct upon which [a finding of willfulness] is based." *Curlee*, 277 S.C. at 382, 287

---

[16] The Department also argued in its motion that, to the extent that the Petitioner's Motion asserts a negligence claim against the Department, the South Carolina Tort Claims Act is the exclusive remedy available to the Petitioner and the ALC does not have jurisdiction over such an action. While the Petitioner did remark that "the Department was negligent in executing its duty to Respondent Patterson and the Petitioner," it is clear that the Petitioner's action is not a negligence claim against the Department but, rather, an enforcement action seeking enforcement of the Consent Order issued by this court in 2005.

[17] In its supplemental response to the Petitioner's Motion, the Department also argued that it is immune from liability under Regulation 30-4, which states that "[i]n no way shall the State be liable for any damage as a result of the erection of permitted works." S.C. Code Ann. Regs. 30-4(E) (2011). However, that provision is inapposite; the dock that was erected was never properly permitted and the damage in this case did not result from erection of the dock itself but, rather, the Department's issuance of the wrong permit in violation of the Consent Order.

[18] While not discussed herein, the court notes that it also has the authority to provide relief in this matter under S.C. Code Ann. § 1-23-630(A) (2005).

S.E.2d at 918 (citations omitted).

The court acknowledges, however, that direct evidence of a willful intent to disregard a court order frequently doesn't exist. Thus, our courts recognize three (3) instances where a violation of a court order does not rise to the level of "willful disobedience." First, "[w]here a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." *Smith-Cooper v. Cooper*, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001) (citations omitted). Second, where there is "[a] good faith attempt to comply with the court's order, even if unsuccessful," a finding of contempt is not warranted. *Ex parte Lipscomb*, 398 S.C. 463, 470, 730 S.E.2d 320, 324 (Ct. App. 2012) (citation omitted). Finally, one may not be held in contempt "for violating a court order which fails to tell him in definite terms what he must do." *See State v. Sowell*, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (citation omitted).

"Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *Id.* at 386, 287 S.E.2d at 920 (quoting *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 304–305, 67 S.Ct. 677, 701–702, 91 L.Ed. 884 (1947)); *see also Poston*, 331 S.C. at 112, 502 S.E.2d at 89 (citations omitted) ("If the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine or if the contemnor can avoid the fine by complying with the court's order."). Thus, regarding the former, a contemnor may be ordered to pay a fine to the court, provided that it may purge itself of the fine by complying with the court's prior order. *Poston*, 331 S.C. at 114-15, 502 S.E.2d at 90. In that instance, "the sanctions are conditioned on compliance with the court's order." *Id.* at 112, 502 S.E.2d at 89 (citations omitted).

However, the contemnor may also be "ordered to pay a fine/damages to the complainant." *Id.* at 115, 502 S.E.2d at 90. To that end, "[c]ompensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order." *Curlee*, 277 S.C. at 386, 287 S.E.2d at 919 (citation omitted). "[T]he compensatory award should be limited to the complainant's actual loss." *Id.* at 387, 287 S.E.2d at 920. "Included in the actual loss are the costs in defending and enforcing the court's order, including litigation costs and attorney's fees." *Id.* "The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding. Thus, the court is not required to provide the contemnor with an opportunity to purge himself of these attorney's fees in order to hold him in

civil contempt." *Poston*, 331 S.C. at 114, 502 S.E.2d at 90 (citations omitted). "The burden of showing what amount, if anything, the complainant is entitled to recover by way of compensation should be on the complainant." *Curlee*, 277 S.C. at 387, 287 S.E.2d at 920. "The determination of the amount of the award is within the court's discretion." *Cannon v. Ga. Att'y Gen.'s Office*, 397 S.C. 541, 549, 725 S.E.2d 698, 702-03 (citations omitted).

Finally, "[w]hen . . . property of an individual is taken or destroyed in contempt of the court's order, those interested have a right to ask of the court its restoration or payment of its value at the hands of the offender, and the court requires such restoration as part of the punishment." *Curlee*, 277 S.C. at 386, 287 S.E.2d at 920 (quoting *Lorick & Lowrance v. Motley*, 69 S.C. 567, 48 S.E. 614 (1904)).

In this case, the Department does not dispute that it entered into the Consent Order in February 2005, or that it was aware of its specific obligations thereunder. The Department also does not dispute that it, as the State agency charged with administering dock permits, had the duty and the power to comply with the Consent Order. However, there is no evidence of any legitimate effort by the Department to comply with the Consent Order, and no justifiable explanation for its inability to comply after its issuance in 2005. In fact, the Department failed to even allege a good-faith effort to comply with the Consent Order from which it now seeks relief. While the Department appears to place blame solely on its Project Manager, it was the Department's failure to amend the Permit in accordance with the Consent Order in the nearly ten years after its issuance that culminated in the Project Manager's purported inadvertent actions. Moreover, even after this failure was specifically brought to the Department's attention by way of the Petitioner's Motion, the Department failed to take any steps to remedy its noncompliance.

In light of the foregoing, the court finds that the Department's failure to comply with the Consent Order, despite having the power and ample ability to do so, rises to the level of contempt. *See Cheap-O's Truck Stop, Inc.*, 350 S.C. at 608, 567 S.E. 2d at 520 (holding that a party's failure to make a legitimate effort to comply with the court's order approving a settlement agreement, despite having the power to do so, constituted contempt); *Curlee*, 277 S.C. at 382, 287 S.E.2d at 919 (upholding a finding of contempt where the trial court found that the contemnor knew of his obligations under the court's order, yet provided no justifiable explanation for his failure to comply); *accord Gertz v. Md. Dep't of Env't*, 199 Md. App. 413, 431, 23 A.3d 236, 247 (Md. Ct. Spec. App. 2011) (citations omitted) ("[E]vidence of an ability to comply . . . may, depending on

the circumstances, give rise to a legitimate inference that the defendant acted with the requisite willfulness and knowledge."). While the court does not take this position lightly, there is simply no evidence of any effort by the Department to comply with or remedy its noncompliance. It would be unjust to allow the Department to ignore its obligations under the Consent Order to the detriment of others without repercussion, while reaping the benefits conferred by it for well over a decade. The court further finds that such a conclusion best serves the interests of equity and judicial economy as well.

Accordingly, the Department must, within six (6) months from the issuance date of this order, comply with the Consent Order and, at its own expense, take such remedial measures as are necessary to effectuate the Consent Order. Such compliance may be accomplished by retroactively amending the Permit, reflecting the Amended Alignment with a postdated expiration date, and bringing an enforcement action against Patterson for the removal of the existing noncompliant dock. Additionally, the court finds that the Petitioner has suffered actual losses due to the legal fees he incurred enforcing the Consent Order, and that Patterson has suffered actual losses by building a noncompliant dock in reliance on the version of the Permit issued to him by the Department, as well as by incurring legal fees defending this action.[19] Thus, the Department must pay legal fees to the Petitioner in the amount of $29,226.19. Likewise, upon removal of the noncompliant dock at its expense, the Department must pay a fine in the amount of $56,299.90, to Patterson for the original cost of his noncompliant dock and his legal fees.[20]

ORDER

IT IS THEREFORE ORDERED that the Petitioner's Motion to Enforce the Consent Order is **GRANTED** and the Departments Rule 60(b)(5), SCRCP Motion is **DENIED**.

IT IS FURTHER ORDERED that the Department is in contempt of the Consent Order and must:

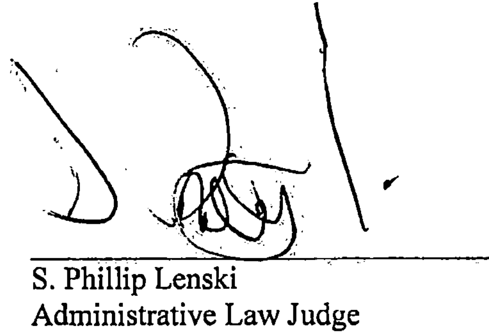
---

[19] In its motion to reconsider, the Department also argues that – even if compensatory contempt damages were appropriate – the court's award of compensatory contempt damages should be limited to Hook's damages only. Department's Mot. to Reconsider, at 11-12. This argument ignores the fact that, irrespective of Patterson's procedural designation, he is an injured party and the court may restore him to the position he was in prior to the Department's contemptuous conduct. *See Curlee*, 277 S.C. at 386, 287 S.E.2d at 920 (quoting *Lorick & Lowrance v. Motley*, 69 S.C. 567, 48 S.E. 614 (1904)); *see also* 17 Am. Jur. 2d Contempt § 206 (2019 Update) ("A majority of jurisdictions allow compensatory damages or fines payable to the injured party, either on the ground that there exist in such states statutes that specifically authorize compensatory fines for civil contempt or that, regardless of statute, a court may, under proper circumstances, impose a fine payable to an aggrieved party as compensation for damages sustained as a result of contumacious conduct by the contemnor.").

[20] These figures were provided by the parties following a telephonic conference with the court on August 22, 2018.

1. Within six months from the issuance of this order comply with the Consent Order and take such remedial measures, including removal of the noncompliant dock, as are necessary to effectuate the Consent Order, all at the Department's expense;
2. Pay to the Petitioner the amount of $29,226.19, representing the attorney's fees incurred in bringing this action; and
3. Pay to Patterson the amount of $46,936.00 representing the construction cost of his noncompliant dock, and $9,363.90 representing attorney's fees incurred in this case.

AND IT IS SO ORDERED.

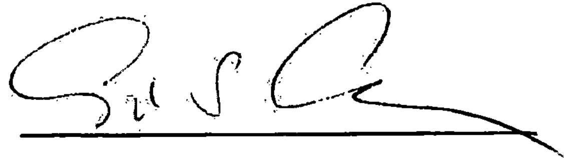


S. Phillip Lenski
Administrative Law Judge

July 2, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Erika S. Easler, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Erika S. Easler
Judicial Law Clerk

July 2, 2019
Columbia, South Carolina

RECEIVED
AUG 21 2019
SC Court of Appeals

FILED
JUL 02 2019
SC ADMIN. LAW COURT