

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM S. C. DEPARTMENT OF HEALTH & ENVIORN. CONTROL
Office of Coastal Resources

Catherine E. Heigel, Director

Opinion Number: 2020-UP-030
Appellate Tracking Number: 2017-000461
Case No. 2015-RFR-69, Sunset Cay, L.L.C.
DOCKET NO. 15-ALJ-07-0579-CC

RECEIVED

MAR 27 2020

SC Court of Appeals

Sunset Cay, L.L.C., Appellant,

vs.

South Carolina Department of Health and Environmental Control.....Respondent.

REPLY TO RESPONDENT'S RETURN

March 24, 2020

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TABLE OF CONTENTS

Table of Authorities..... 2

Reply No. 1.

THE APPELLANT’S SHARP PRACTICE IN FILING ITS RETURN SHINES A LIGHT ON THE “PROCEDURAL HELL” THAT HAS PLAGUED THIS CASE FROM THE OUTSET...3

Reply No. 2.

THE RESPONDENT’S RETURN IS PREMISED ON A MISREADING OF THE RECORD ON APPEAL 4

Conclusion.....5

TABLE OF AUTHORITIES

CASES:

Front Royal and Warren County Industrial Park v. Town of Front Royal,
135 F.3d 275 (4th Cir. 1998).....3

Marbury v. Madison, 5 (1 Cranch) U.S. 137 (1803).....6

OTHER AUTHORITIES:

S. C. Rules of Civil Procedure, Rule 5(b)(3).....3

§ 48-39-30, S. C. Code, ann. 4

As authorized by Rule 221(f) of the *South Carolina Appellate Court Rules*, the Appellant respectfully files this brief Reply to address two matters raised in the Respondent's Return.

1. THE APPELLANT'S SHARP PRACTICE IN FILING ITS RETURN SHINES A LIGHT ON THE "PROCEDURAL HELL" THAT HAS PLAGUED THIS CASE FROM THE OUTSET.

Lawyers who practice in the appellate courts of this state are aware that Replies are not favored by the Court, which is why the rules authorizing them place a 5-day, deadline on litigants. Also, the rules of procedure constrain the conduct of lawyers obligating them to adhere to a standard of practice designed to level the playing field. This is why the *S. C. Rules of Civil Procedure* require lawyers to serve pleadings on opposing counsel in the same way pleadings are provided to the Court. See Rule 5(b)(3) *Service of Proposed Orders and Other Papers*, which requires that parties filing pleadings with the Court "shall serve the same on all counsel of record at the same time and by the same means." Here, even though O.C.R.M.'s general counsel's office is 1.7 miles from opposing counsel's office on Cosgrove Avenue, which is also on the direct path to O.C.R.M, despite this close proximity, its access to e-mail or fax, O.C.R.M. hand delivered its Return to the Court of Appeals on March 17th and mailed a clocked-in copy to Appellant's counsel that same day from zip code 29201. Counsel made no attempt to provide timely notice by either hand delivery, electronic mail, or fax, knowing that its Return would not arrive in time for a timely response. This type of sharp practice illuminates O.C.R.M.'s treatment of the Appellant's deceased principal and counsel from the beginning of this torturous "procedural hell."¹

¹ *Front Royal and Warren County Industrial Park v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998)

2. THE RESPONDENT'S RETURN IS PREMISED ON A MISREADING OF THE RECORD ON APPEAL

The entire argument of Respondent's return is that the Appellant waived his appellate rights by either not requesting an "RFR" of O.C.R.M.'s October 26, 2015, letter, or by failing to appeal the Administrative Law Court's Second Amended Order: "Sunset Cay did not appeal the ALC's Second Amended Final Order regarding the March 3, 2015 Cease and Desist Directive, so this Directive is not before the Court." (Respondent's Return at page 1.) Respondent might be excused for its confusion because this case demonstrates how O.C.R.M. complicated the administrative procedure by failing to act in good faith. See South Carolina Code § 48-39-30 for O.C.R.M.'s duty of good faith to Appellant. The Second Amended Order of Dismissal is dated and filed January 4, 2017, and the Appellant's January 23, 2017, Notice of Appeal, found in the Record on Appeal at page 278, notifies the Respondent that: "Sunset Cay, L.L.C. appeals the decisions of the Honorable John D. McLeod dated January 4, 2017 and October 17, 2016. Appellant received the final Order dated January 4, 2017 on January 4, 2017." Respondent overlooked this Notice of Appeal in filing its March 17, 2020 return.

Moreover, the Respondent overlooks that this Record establishes two undisputed facts: the first is that the Appellant's original August 27, 2015, Petition for Declaration (R.O.A. page 22) put all the legal issues before the O.C.R.M. Board **before** the October 26th letter, and the O.C.R.M. Board refused to grant the Appellant relief, which the Appellant timely appealed to the Administrative Law Court. Appellant was, and is, under no obligation to do more. Moreover, the Respondent's assertion that the Appellant failed to invoke a "Request for Final Review" of the October 26, 2015, "Cease and Desist Directive" ignores or misrepresents the record. The October 26, 2015, letter, found in the Record on Appeal at page 193, is not a "Cease and Desist Directive." The Record shows the document is not a "Cease and Desist Directive." Rather, the record shows it is a "Notice of Violation,

Admission Letter,” which O.C.R.M. agreed to withdraw or modify at the November 18, 2015, meeting it called to discuss the allegations. The Record demonstrates that all the affected parties appeared before O.C.R.M. on Wednesday, November 18th, 2015, at the time, date and place O.C.R.M. convened to discuss its October 26th, 2015, letter, at which time O.C.R.M. withdrew the letter:

At that meeting we all agreed that the pending Declaration I filed on August 28, 2015, would resolve the issues, and once the department spoke on the definition of water dependent uses for Unit 301, we would amend the permit and transfer ownership of the marina to the Council of Co-Owners.

During the meeting, O.C.R.M. admitted that it was uninformed about the history of the marina, how long it had been operating, and appeared unsure about what the issues are. O.C.R.M. stated that it would await a clarification of water dependent uses for Unit 301, and either amend or withdraw its October 26, 2015, “cease and deist” letter. O.C.R.M. representatives at this meeting admitted that they had not researched the file and were not sure what I was or was not permitted for. They asked us for additional time to go and research their file. An almost exact quote is “we are going to research our file and get back to you.”

When I left the November 18, 2015, meeting, I left with the impression that the October 26, 2015 “cease and desist: letter had been resolved.

(Record on Appeal pages 237 – 238, Affidavit of Frances Clarke)

See also:

When I left the [November 18, 2015] meeting, I was under the impression that O.C.R.M. would revisit their October 26th cease and deist letter and either withdraw it or modify it after a review of their file since it was them (O.C.R.M.) who asked for more time to review their file in order to make a decision about their October 26th cease and desist letter.

(Record on Appeal, page 225, Affidavit of Willie Oglesby)

Therefore, the Respondent’s assertions about failure to conform to proper procedure or failure to preserve issues for review is wholly without evidentiary support and refuted by the record.


CONCLUSION

The Respondent’s Return brings into sharp focus the procedural nightmare in which Appellant is entrapped and the lengths to which O.C.R.M. will strive to prevent the Appellant from ever reaching any forum to hear the case on the merits. When government acts in bad faith, the only remedy is to the Courts, and as established at the dawn of this nation, the Supreme Court created the principle of

judicial review, establishing the Courts as the protector of the rights of citizens. “The province of the Court is, solely, to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have discretion.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) The premises on which the Respondent grounds its return is so much gossamer and nothing else. It does do one thing. It demonstrates why it is so important for the Court to hear this case and compel the Respondent to provide the remedy to which the Appellant is entitled as a matter of law.

For all the reasons set forth in its petition for rehearing, the Appellant prays that the Court will hear this case and revise its Opinion consistent with the requirements of law to do afford the Appellant his right to judicial review and an avenue for the Appellant to seek justice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T.R. Goldstein", written over a horizontal line.

March 24, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the appellant's Reply to Respondent's Return to Appellant's Petition for Rehearing upon respondent by serving a copy upon respondent's counsel of record, Bradley Churdar, General Counsel, Office of Coast Resources Management, 1362 McMillan Avenue, Suite 400, N. Charleston, S. C. 29405-2047, by mailing a copy addressed with sufficient postage affixed thereto this 24th day of March, 2020.



March 24, 2020

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March 24, 2020

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P. O. Box 11629
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Re: Sunset Cay, LLC vs. SCDHEC, Division of OCRM **MAR 27 2020**
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SC Court of Appeals

Dear Ms. Kitchings,

I enclose an original and six copies of Appellant's Reply to Respondent's Return along with a Certificate of Service. Technically, this filing was due yesterday, but since I received it today, and in light of Justice Beatty's Order regarding relaxation of time deadlines, I am assuming that you can file this without a separate motion to allow a one-day extension. On the other hand, if such a request is necessary, let me know, and I will file one. I thank you in advance to your attention to this request. I apologize for this error. With kind regards, I am

Very truly yours,
BELK, COBB, INFINGER & GOLDSTEIN, P.A.



Thomas R. Goldstein

TRG/
enclosure: Return to Respondent's Return, certificate of service
Bradley Churdar, Esq.



First Class Mail

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