

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No. 2019-000074

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control,
KDP, II, LLC, and KRA Development, LP, Respondents

**RETURN BY RESPONDENTS KDP, II, LLC AND KRA DEVELOPMENT, LP
TO APPELLANT’S MOTION TO STRIKE MATERIALS
FROM RESPONDENTS’ DESIGNATIONS OF MATTER**

Respondents KDP, II, LLC, and KRA Development, LP (collectively “KDP”) submit this Return in opposition to the Motion to Strike Materials Contained in Respondents' Designation of Matter filed by Appellant South Carolina Coastal Conservation League (“the League”). In particular, the League seeks to strike from the Record on Appeal KDP’s designation of the Amended Order and Decision on Remand filed March 22, 2016 (the “2016 Amended Order”). The 2016 Amended Order constituted the final decision of the Administrative Law Court that this Court affirmed as modified in Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 422 S.C. 632, 813 S.E.2d 691 (2018) (“KDP-II”).

The 2016 Amended Order is directly pertinent to the res judicata and collateral estoppel arguments that the League contends constitute a ground for reversal in its Initial Briefs in the appeal now before this Court. KDP referred to and relied upon the 2016 Amended Order in its opposition to the League's post-trial motions below and in its Initial Brief in this appeal. The determination of what was finally decided in the other proceedings cannot be determined without review of the 2016 Amended Order entered in the other proceedings. Contrary to the League's assertions, the 2016 Amended Order is relevant, and it was before the ALC such that inclusion in the Record on Appeal is proper. As more fully explained below, KDP respectfully submits that the League's Motion to Strike the designation of the 2016 Amended Order be denied.

Discussion

This appeal is from the final decision of the Honorable Ralph King Anderson, III, chief judge of the Administrative Law Court ("ALC"), upholding water, sewer, and stormwater permits issued by the South Carolina Department of Health and Environmental Control (the "Department") in 2015 for the construction of the site and utility improvements for 26 lots on Captain Sams Spit on the western end of Kiawah Island, known as Phase 1 of Cape Charles. The ALC also approved the Department's associated Coastal Zone Consistency Certification for the project.

After the extended contested case hearing in August 2017 and after the ALC issued its initial order of decision on September 24, 2018, the League filed a Motion for Reconsideration, copy attached as Exhibit 1. In its Motion for Reconsideration, the League argued for the first time that the ALC was bound under principles of collateral estoppel and res judicata to the "findings" of the Department staff and this Court in Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 411 S.C. 16, 766 S.E. 2d 707 (2014) ("KDP-I"). Exhibit 1, pp. 6-13.

KDP filed a Response to the League's Motion for Reconsideration, copy attached as Exhibit 2. In its Response addressing the collateral estoppel arguments made for the first time in the League's Motion to Reconsider, KDP specifically referred to the 2016 Amended Order as being dispositive of the actual factual findings decided in the other case. Exhibit 2, p. 6.

In his Order Denying Motion for Reconsideration dated December 14, 2018, copy attached as Exhibit 3, the ALC started his discussion of the collateral estoppel arguments of the League by commenting on their timing as follows:

Now, for this first time in this Motion, Coastal presents the legal arguments of collateral estoppel and res judicata. The Court reviewed Coastal's prehearing statement, the entire trial transcript, and Coastal's proposed order and found no mention whatsoever of collateral estoppel, estoppel, res judicata, or preclusion (claim or issue).

Exhibit 3, p. 8.

In footnote 8 to the Order Denying the Motion for Reconsideration, the ALC noted that the new collateral estoppel arguments of the League made relevant the proceedings on remand in the bulkhead-revetment case, including this Court's opinion in Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control and South Carolina Coastal Conservation League, 422 S.C. 632, 813 S.E.2d 691 (2018) ("KDP-II") (identified by the ALC as "Kiawah Remand"):

8. In its Motion, Coastal alleges inconsistency with the Supreme Court's 2014 decision, Kiawah II. However, it is clear from some of the arguments in its Motion that some of its preclusion arguments are based upon the Supreme Court's most recent decision in this case issued this year: Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 422 S.C. 632, 636, 813 S.E.2d 691, 693 (2018) (Kiawah Remand).

Exhibit 3, p. 8, n. 8.

In his Order Denying Motion for Reconsideration the ALC devoted eight pages to discussing the League's new arguments based on res judicata and collateral estoppel, referring at

various times to this Court’s Opinions in KDP-I and KDP-II. Exhibit 3, pp. 8-16. Among the points made by the ALC is that this Court did not act as the “fact finder” in the other proceeding; the ALC was the fact finder. Exhibit 3, p. 13. (“The Supreme Court, as an appellate court, was concerned with whether substantial evidence supported the decision it was reviewing—it obviously was not acting as a fact finder. See S.C. Const. art. V, § 5.”).

That brings us to the Initial Briefs the League has filed in this appeal. The Initial Brief of Appellant repeatedly refers to KDP-I and KDP-II arguing that the ALC was bound by certain facts that the League contends were finally determined in the other proceeding. The League’s Initial Brief devotes at least six consecutive pages to arguing that “DHEC and the ALC are Collaterally Estopped from Arriving at a Decision Inconsistent with KDP I and KDP II.” App. Initial Brief, pp. 38 to 43. The discussion includes multiple references to matters the League asserts were decided in KDP-II’s review of the 2016 Amended Order. Id.

In its Initial Brief, KDP counters these arguments of the Appellant by discussing the particular facts that were finally adjudicated. See Resp. Initial Brief, pp. 36 to 40. In responding to the League’s argument that the ALC in this case was bound by the findings of the Department’s staff in the other case, KDP notes that the Department staff was not the fact finder for purposes of collateral estoppel and naturally refers to the 2016 Amended Order as the dispositive order for determining which facts were necessarily and finally decided:

In fact, the opposite of Eiser’s [Department Staff] assessment was ultimately adjudicated. In his final order on remand, the ALC found that “that the general character of the area around the Spit is residential, with some commercial development.” **Amended Final Order and Decision on Remand, p. 12.** The ALC further found that “the residential development of the portion of the upland intended to be developed will not have deleterious impacts for the reasons set forth above.” **Amended Final Order and Decision on Remand, p. 14.** If anything, this essential factual finding that the upland development is consistent with the policies in the CZMP that the Court affirmed but modified in other respects collaterally

estops the League in this case from arguing any development at all on Captain Sams is inconsistent with the CZMP.

Resp. Initial Brief, p. 38.

Application of the doctrine of collateral estoppel requires a determination of whether an issue or fact was actually litigated and decided. That can only be determined by analysis of the final decision of the trial court, subject to any modification on appeal. The Record on Appeal is the source of this Court's information to decide the collateral estoppel issues the League has raised. See S.C. State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 181 (1962) (The Record on Appeal "is the source of our information as to what occurred in the trial of the case below; its very object is to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto.")

The doctrine at issue here --collateral estoppel-- is itself premised upon "equitable principles." Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). Considering that the ALC in this case found the League did not even properly raise res judicata and collateral estoppel at trial, it would be inequitable for this Court to require KDP to have anticipated the arguments that the League would make on reconsideration. See Exhibit 3, p. 8 ("The Court reviewed Coastal's prehearing statement, the entire trial transcript, and Coastal's proposed order and found no mention whatsoever of collateral estoppel, estoppel, res judicata, or preclusion (claim or issue).").

It is axiomatic that the analysis required to consider the League's res judicata and collateral estoppel arguments requires a determination of what was actually decided in the 2016 Amended Order and KDP II. See Exhibit 3, p. 11 (collateral estoppel can only apply "if the precluded party has had a full and fair opportunity to litigate the issue in the first action.")(citing Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (2011)) Clearly, the 2016 Amended Order was relevant to the ALC's

consideration of collateral estoppel; the 2016 Amended Order was specifically identified and cited by the ALC as relevant to its analysis of the collateral estoppel arguments raised by the League in this appeal. Having been considered by the ALC, the Amended Order is properly included in the Record on Appeal pursuant to the SCACR Rules 209 and 210.

In its Motion to Strike the League contends the “relevance of the [2016] Amended Order is questionable” because “this Court’s Opinion [in KDP-II] modified the [2016] Amended Order on the basis that it was not supported by substantial evidence...” In KDP-II, this Court held only that there was no expert testimony to support the ALC’s approval of a bulkhead without the revetment. This Court affirmed the rest of the 2016 Amended Order, as so modified:

In reviewing the evidence presented by the parties, including lay and expert witness testimony, we affirm the ALC's decision to authorize the 270-foot bulkhead and revetment along the Beachwalker Park parking lot. However, we find there is no evidence in the record to support the authorization of the 2,513-foot bulkhead without a revetment. *Therefore, we modify the ALC's order and delete the portion authorizing a permit for the bulkhead only.*

AFFIRMED AS MODIFIED.

813 S.E.2d 695 (Double emphasis added).

The League is incorrect in asserting that the other findings in the 2016 Amended Order that were not set aside are questionable and of no relevance. The Amended Order is critical to the disposition of the issues the League raised after the hearing and now raises in this appeal. Rule 209(b), SCACR, states, in part, that a “party shall not include any matter in his Designation which is not relevant to the appeal.”

KDP was in full compliance with Rule 209(b) in designating the 2016 Amended Order. Not only is the 2016 Amended Order relevant, KDP submits that this Court cannot rule on the res judicata and collateral estoppel grounds argued by the League in its briefs in this appeal without

the 2016 Amended Order. Pursuant to SCACR 209(c), KDP's counsel properly certified "that the Designation contains no matter which is irrelevant to the appeal." KDP Designation of Matter, p.3

Finally, Appellant's Motion also cites SCACR Rule 210, asserting that the Amended Order was "not presented to the Administrative Law Court and thus should not be included in the record on appeal." Mtn. at 1. See Rule 210 (c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.").

The League is correct only insofar as the 2016 Amended Order was not introduced into evidence before the close of the hearing. Why? The League did not make the arguments of res judicata and collateral estoppel until after the hearing. Instead, it merely argued that the decisions of the Department in the other proceeding and in this proceeding were "inconsistent." Nowhere in the trial transcript does the League argue or refer to res judicata or collateral estoppel.

The League, however, is incorrect insofar as it is asserting that KDP never brought up the 2016 Amended Order before the ALC. KDP specifically references it in its Response to the League's Motion for Reconsideration. Exhibit 2. The 2016 Amended Order is in many respects no different from the opinions of this Court upon which the League relies. Those opinions were never introduced into evidence, because they did not have to be.

KDP would further point out that the 2016 Amended Order would have been subject to judicial notice by the Administrative Law Court as an order of the Administrative Law Court. It would not have had to be introduced into evidence to be considered. "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct.App.1984).

In sum, the League's position with respect to the 2016 Amended Order is clearly contradictory. If the League wants to argue res judicata and collateral estoppel, then it cannot


exclude this Court from determining the actual final factual findings in the other proceedings that are the basis for the League's pending appeal premised on res judicata and collateral estoppel.

Conclusion

The 2016 Amended Order was properly included in Respondent KDP's Designation of Matter. The Amended Order and Decision on Remand, entered by the ALC on March 22, 2016, in consolidated cases #09-ALJ-07-0029-CC and 09-ALJ-07-0039-CC, should be included in the Record on Appeal and was properly designated by KPD.

WHEREFORE, the Motion to Strike Materials from Respondent KDP's Designation of Matter should be denied.

Respectfully Submitted,

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