THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2019-000074

Case No. 2015-ALJ-07-0579-CC

South Carolina Coastal Conservation League..... Appellant,

v.

South Carolina Department of Health and Environmental Control, KDP, II, LLC, and Kiawah Development Partners, II..... Respondents.

SCDHEC'S RETURN TO COASTAL CONSERVATION LEAGUE'S MOTION TO STRIKE MATERIALS FROM RESPONDENT SCDHEC'S DESIGNATIONS OF MATTER AND MOTION TO TAKE JUDICIAL NOTICE OF CASE NO. 2009-CP-10-2847 PLEADINGS AND ORDER

The South Carolina Department of Health and Environmental Control ("SCDHEC" or "the Department") submits: (1) Respondent's Return to Appellant South Carolina Coastal Conservation League's (SCCCL) *Motion to Strike Materials from Respondents' Designations of Matter* and (2) *Respondent's Motion to Take Judicial Notice of the Summons and Complaint and Third Amended Stay Order for Case No. 2009-CP-10-2847.*

In SCCCL's Motion to Strike, the Appellant stated that three documents in the Department's Designation of Matter should be excluded from the Record on Appeal.[1] Opposing counsel cites Rule 209, SCACR and Rule 210(c), SCACR as the basis for excluding these documents.[2] While Rule 210(c) states that "[t]he Record shall not ... include matter which was not presented to the lower court or tribunal," Appellant has failed to cite to and Respondent is unable to locate any appellate authority addressing what "*presented* to the lower court or tribunal" means. SCCCL argues that this requires documents to be either *offered* (presumably into evidence) or *admitted* into evidence at trial.[3] However, such an interpretation of Rule 210(c) is too narrow and excludes relevant matter of which the Court can take judicial notice without prejudice to the Appellant.

The cases to which the Appellant cites in support of its narrow interpretation of what "*presented* to the lower court" means, do not stand for the proposition asserted; namely, that Rule 210(c), SCACR requires documents to be either *offered* into evidence or *admitted* into evidence at trial. These cases simply reiterate the language of Rule 210(c) without further commentary or analysis. Fountain v. Fred's, Inc., No. 5714, 2020 S.C. App. LEXIS 9, at *24 n.18 (Ct. App. Feb. 12, 2020) (the Court of Appeals merely restated the language of Rule 210(c) in striking a settlement agreement from the record on appeal "because the settlement agreement was never presented to the circuit court"); State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (during

---

[1] Item #1, a Planned Unit Development, dated December 5, 2013; Item #31, a 2009 Summons and Complaint in Case No. 2009-CP-10-2847; and Item #32, a third Amended Consent Order for Stay in case No. 2009-CP-10-2847.

[2] Appellant's reference to Rule 209, SCACR is primarily focused on subsection (c) which states that "[t]he Designation shall be accompanied by a certificate signed by the party's counsel of record that *the Designation contains no matter which is irrelevant to the appeal.*" (Emphasis added).

[3] SCCCL states that "Respondent DHEC's Designation of Matter lists three documents that were *never offered or presented to the Administrative Law Court, much less admitted into evidence.*" (*Motion to Strike*, page 3) (Emphasis added).

the pendency of appeal, co-defendant Anthony Morris wrote a statement retracting his trial testimony against Gary White claiming he was not at the scene of the crime. White's attorney submitted the retraction to the Court of Appeals, but failed to file a Circuit Court motion for a new trial based on this after-discovered evidence, per Rule 29(b), SCRCrimP. Id., 372 S.C. at 387, 642 S.E.2d at 619. In disallowing the post-trial retraction into the Record on Appeal, the Court of Appeals cited Rule 210(c), SCACR without analysis and found that "Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal." Id., 372 S.C. at 387, 642 S.E.2d at 619); Croft v. Town of Summerville, 428 S.C. 576, 837 S.E.2d 219 (Ct. App. 2019) (in the context of an issue-preservation analysis, the Court of Appeals cited Rule 210(c), SCACR in footnote 5 without examination of what "presented to the lower court" requires. Id., 428 S.C. at 597 n.5, 837 S.E.2d at 230); Argabright v. Argabright, 398 S.C. 176, 179 n.3, 727 S.E.2d 748, 750 (2012) ("[w]e are, of course, bound by the record established at trial. See Rule 210(c), SCACR 'The Record shall not . . . include matter which was not presented to the lower court or tribunal'").

Rather than interpreting Rule 210(c), SCACR so as to require documents be either *offered* into evidence or *admitted* into evidence at trial, the Department asserts that the three challenged documents satisfy the *presented*-to-the-lower-court standard. During SCCCL's direct examination of its expert witness, Mr. Alan Wood[4] *presented* testimony about his familiarity with the "back and forth litigation with trying to develop [Captain Sam's Spit]." (Transcript page 595, lines 23-24). Mr. Wood's reference to this "back and forth" litigation history certainly would include the regulatory takings litigation filed by Kiawah Development Partners ("KDP") as a result of the

[4] The Administrative Law Court recognized Mr. Wood as an expert in wetland science and critical line delineations. (Transcript page 594, lines 23-24).

Department's critical area permitting decision related to the bulkhead and revetment along the banks of the Kiawah River at Captain Sam's Spit. On pages 14 and 15 of the Department's Respondent's Brief, Respondent SCDHEC pointed out that the consequences of following the Appellant's interpretation of the CMP's barrier islands section would be a complete prohibition on KDP developing their own private property and thus would expose the State to possible regulatory takings liability per Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Footnote 15 of the Department's Respondent's Brief cited the 2009 Summons and Complaint in case No. 2009-CP-10-2847 and the Third Amended Consent Order for Stay in Case No. 2009-CP-10-2847 as proof that this regulatory takings liability exposure is currently pending before the Court of Common Pleas and is not merely a theoretical concern.

Likewise, the Department's first designation of matter to which the Appellant objects (i.e., Planned Unit Development, dated December 5, 2013) is referenced numerous times in the Coastal Zone Consistency Certification Number CZC-13-0336 that was offered and admitted into evidence at trial. Accordingly, the referenced Planned Unit Development was also "*presented* to the lower court" in accordance with Rule 210(c), SCACR.

The Department's interpretation of Rule 210(c), SCACR is also in accord with this Court's "judicial notice" authority. Rule 201(f), SCRE provides that judicial notice may be taken at *any* stage of the proceeding. (Emphasis added). State v. Squires, 311 S.C. 11, 426 S.E.2d 738 (1992) (the South Carolina Supreme Court took judicial notice that an infrared spectroscopy process had gained general acceptance in the scientific community); Masters v. Rodgers Dev. Grp., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (an appellate court can take judicial notice of matters which are *indisputable*) (Emphasis added); Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (the Court of Appeals again affirmed that "an appellate court can take

judicial notice of something that was not before the trial court if it is *indisputable*" and "the summons and complaint and default judgment show that Claimant did file an action and recover against Employer...") (Emphasis added). While the Department believes the three challenged documents *were* before the Administrative Law Court for the previously-stated reasons, the Summons and Complaint and third Amended Consent Order for Stay in Case No. 2009-CP-10-2847 are both indisputably authentic and are a matter of public record that can be corroborated on the Charleston County Clerk of Court website. Therefore, these documents should be included in the Record on Appeal and this Court should take judicial notice of them.

For the foregoing reasons, the three above-referenced documents were properly included in the Department's Designation of Matter and should be included in the Record on Appeal. The Department opposes the relief sought in the Appellant's Motion to Strike and requests that the Motion be denied and further moves that the Court take judicial notice of the documents associated with Case No. 2009-CP-10-2847.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By: _____

Bradley D. Churdar, Chief Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorney for Respondent SCDHEC

April 22, 2020
Charleston, South Carolina