

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court
Honorable S. Phillip Lenski, Administrative Law Judge JUL 13 2020

SC Court of Appeals

Appellate Case No.: 2019-001282

Richard J. Hook,

Respondent,

v.

South Carolina Department of Health and Environmental Control
and Philip Patterson,

Of Which South Carolina Department of Health and Environmental
Control is the Appellant and Philip Patterson is a Respondent.

**RESPONDENT RICHARD J. HOOK'S RESPONSE TO APPELLANT'S
MOTION TO STRIKE MATERIALS FROM RESPONDENT'S DESIGNATION OF
MATTER**

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*Attorneys for the Respondent,
Richard J. Hook*

I. INTRODUCTION

Appellant South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") has moved the Court to strike Exhibit A attached to item # 11 of Respondent Richard J. Hook's ("Hook") Designation of Matter and to strike Hook's argument referencing Exhibit A. The Department claims that Item # 11, a File Memo from a member of Appellant's staff, Bill Eiser (the "Eiser Memo"), is irrelevant to the issues before this Court.¹ Hook acknowledges the Eiser Memo addresses the location of the origination of the walkway constructed as part of the dock that is the subject of the case underlying this appeal and that a survey referenced in the Eiser Memo was not submitted to the lower Court.

II. ARGUMENT

Rule 210(c), SCACR prohibits the Record on Appeal from including any matter which was not presented to the lower court or tribunal. Accordingly, Hook does not object to the Department's request for the survey referenced by the Eiser Memo to be stricken from the Record because it was not included with the Eiser Memo when Respondent attached it as Exhibit A to Petitioner's Return to Respondent SCDHEC's Motion to Reconsider.

However, Hook does object to the Department's additional request to strike Appellant's *argument* based on the Eiser Memo. The Eiser Memo was presented to the

¹ Initially, counsel for Appellant voiced concern over six items that were designated by Respondent Hook. The undersigned and Appellant's counsel were able to reach agreement and resolution with regard to five of these matters which included the undersigned agreeing to remove one reference and corresponding argument from Hook's Initial Brief.

lower Court as an Exhibit to the above-mentioned Return to Respondent SCDHEC's Motion to Reconsider. Importantly, the Eiser Memo was not referenced in either the Return to Motion for Reconsideration or the Initial Brief filed by Respondent to support any argument regarding its actual content, *i.e.*, the permission given by Bill Eiser to move the originating point of the walkway, but rather, to support and confirm the fact that the Department allowed an amendment to the permit at issue in this case, without requiring any of the regulatory procedures applicable to requests for amendment to issued permits to be followed. The Eiser Memo confirms another failure by the Department to follow its own regulatory procedures. This is significant to Hook's position, which is based on the Department's failure to follow a Consent Order the Department itself agreed upon, because it did not have sufficient procedures in place to ensure the Consent Order was properly filed so the permitting staff would be aware of it.

As such, Hook is not using the Eiser Memo regarding the change in position it allowed for the Patterson dock, as was illustrated by the survey referenced in the Memo. Rather, Hook refers to the Eiser Memo because it illustrates the Department's persistent failure to abide by its own procedures. This is clearly and unambiguously established by the content of the Eiser Memo alone, in Mr. Eiser's statement confirming verbal approval of the requested amendment without any insistence of compliance with the Department's public notice procedure.

With regard to Rieb v. Stevenson, No. 1, 2010 U.S. Dist. LEXIS 104070, at *47 (D.S.C. Aug. 4, 2010), cited in Appellant's motion, Respondent notes that the South Carolina District Court recognized the reliance by the PCR (lower) court on Rule 209(b), SCACR, for confirming that "...only relevant portions of the Transcript are to be included

in the Record on Appeal.”² Appellant’s Motion to Strike does not argue that the Eiser Memo alone is irrelevant to the argument actually raised by Hook – that the Department consistently failed to follow its own procedures in the processing of the subject permit. As stated by Hook in his Return to DHEC’s Motion to Reconsider and Initial Brief, if the regulatory procedural process had been required, public notice of the request would have occurred. It is possible that Hook may have been made aware of construction of the Patterson dock if another public notice had been made, and this entire situation may have been avoided. After all, the Department’s regulatory procedures were enacted specifically to ensure the public in general, and adjacent property owners in particular, are informed of projects and afforded an opportunity to raise objections to potential negative impacts.


III. CONCLUSION

Wherefore, Respondent Richard Hook respectfully requests that this Court deny Appellant’s Motion to Strike to the extent it requests removal of Hook’s arguments related to the Eiser Memo and striking the Eiser Memo from the Record on Appeal.

² The parallel cite for Westlaw is Rieb v. Stevenson, No. 1, 2010 U.S. Dist. WL 3893759, at *17 (D.S.C. Aug. 4, 2010).

Respectfully submitted,

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9 July 2020

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**STATE OF SOUTH CAROLINA
IN THE
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The Honorable S. Phillip Lenski
Case No.: 2017-ALJ-07-0085CC
Appellate Case No.: 2019-001282

South Carolina Department of Health and Environmental Control,

Appellant,

v.

Richard J. Hook and Phillip Patterson,

Respondents.

**Proof of Service for the
RESPONDENT'S RESPONSE TO APPELLANT'S MOTION TO STRIKE
MATERIALS FROM RESPONDENT'S DESIGNATION OF MATTER BY THE
RESPONDENT, RICHARD J. HOOK**

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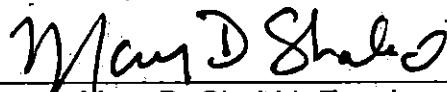
*Attorneys for Respondent,
Richard J. Hook*

I, Mary D. Shahid, Esquire, hereby certify that on July 9, 2020, I served a copy of the **Response to Appellant's Motion to Strike Materials from Respondent's Designation of Matter** submitted by the Respondent, Richard J. Hook, on counsel for the Petitioner and Respondent, Phillip Patterson, via electronic mail and the United States Mail, postage pre-paid, and addressed as follows:

Bradley D. Churdar, Esquire
SC Department of Health and Environmental Control
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Mary D. Shahid, Esquire

Charleston, South Carolina
July 9, 2020

Mary D. Shahid
Member
Admitted in SC

July 9, 2020

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JUL 13 2020

SC Court of Appeals

VIA EMAIL AND U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

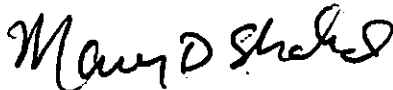
Re: Richard J. Hook v. SCDHEC and Phillip Patterson
Appellate Case No. 2019-001282

Dear Ms. Kitchings:

Please find enclosed the original and six copies of *Respondent Richard Hook's Response to Appellant's Motion to Strike Materials from Respondent's Designation of Matter* in the above-referenced case along with proof of service. One additional copy is provided, along with a self-addressed stamped envelope, for you to stamp and return.

Please contact me if you have any questions or if I can be of assistance.

Very truly yours,



Mary D. Shahid

Enclosure

cc: Bradley Churdar, Esq.
Brent Patterson

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

