THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Case No. 13-ALJ-07-0056-CC
Appellate Case No. 2014-000847

Supreme Court Case No. 2018-000137

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control ..... Petitioners,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control ..... Respondents.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S RESPONDENT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Standing requires a concrete, particularized, and imminent injury that is causally connected to the challenged conduct and that likely will be redressed by a favorable decision. There were no specific, admissible facts showing that Petitioners alleged injuries differed from those suffered by the general public; were causally connected to the critical area permit issued by DHEC; or would be redressed by denial of the critical area permit. Did the Appellate Court err in determining Petitioners lacked standing?

2. Absent court approval, the Administrative Law Court rules require completing discovery within 90 days after an Administrative Law Judge is assigned. The Administrative Law Court denied Appellants' Motion to Expand Discovery filed well after the 90-day period, but subsequently vacated the order and denied the motion as moot. May Petitioners appeal from this discovery order and, if so, did the Administrative Law Court abuse its discretion in denying the motion?

3. Petitioners moved to remand the critical area permit, arguing that the DHEC Board was required to hold a final review conference even though S.C. Code Ann. § 44-1-60 recognizes that a conference is discretionary by specifying what happens if a conference is declined in writing or not held. After denying that motion, the Administrative Law Court granted the Ports Authority's subsequent motion for sanctions, finding the motion frivolous. Did the Appellate Court abuse its discretion?

STATEMENT OF THE CASE

Following the issuance of the Critical Area Permit approving the installation of the five pile clusters, Petitioners filed a request for a final review conference of the Permit with the DHEC Board. (R.pp.000106-18). Pursuant to S.C. Code Ann. § 44-1-60(F), the DHEC Board declined in writing to conduct the final review conference. (R.pp.000006-7).

Thereafter, Petitioners filed a request for contested case with the ALC challenging the permit, (R.pp.000119-56), but then filed a motion to remand the Permit to the DHEC Board asserting that a final review conference by the DHEC Board is mandatory under § 44-1-60(F). (R.pp.000157-81). The ALC disagreed, denying the motion to remand ("Remand Order"), and later found that Petitioners' motion was frivolous under Rule 72 of the Rules of Procedure of the Administrative Law Court ("RPALC") and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 ("Sanctions Order"). (R.pp.000097-105). The Sanctions Order is one of three orders challenged by Petitioners.[1]

After filing in the ALC, the parties participated in extensive discovery and motions. Under Rule 21.A, RPALC, the deadline for completing discovery expired 90 days after the notice of assignment of the contested case request, as no party sought to expand the discovery period by motion. In response to the Ports Authority's notice that it intended to file a motion for summary judgment for lack of standing, Petitioners filed a belated motion to re-open and substantially expand discovery. The ALC found that Petitioners were unable to satisfy the good cause standard

[1] The Petitioners appealed the ALC's Order denying their Motion to Vacate DHEC's Critical Area Permit and Coastal Zone Consistency Certification ("MTV Order") to the Court of Appeals. (R.pp.000056-63). Petitioners have abandoned their appeal of the MTV Order before this Court, because they did not raise the issue in their Petition. See Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (holding that a failure to challenge a ruling is an abandonment of the issue and precludes consideration on appeal).

in the belated request to re-open discovery and denied Petitioners' motion ("Discovery Order") (R.pp.000064-68). However, the ALC later vacated the Discovery Order and alternatively found it to be moot in light of its decision on the Ports Authority's motion for summary judgment for lack of standing. (R.p.000095). Notwithstanding its vacatur, the Discovery Order is the second of the three orders challenged by the Petitioners.

The third of the three orders challenged by the Petitioners relates to the Ports Authority motion for summary judgment alleging Petitioners lacked standing to challenge the Permit. The ALC agreed, finding Petitioners could not demonstrate *any* of the three elements of constitutional standing (or statutory or public importance standing) and granted the Ports Authority's motion ("Standing Order"). (R.pp.000077-96). As explained below, Petitioners have challenged only portions of the Standing Order.

On April 21, 2014, Petitioners filed a Notice of Appeal challenging the MTV, Discovery, Sanctions, and Standing Orders. After the issues were fully briefed, the Ports Authority sought certification of the appeal to this Court on June 5, 2015, but the Court declined to exercise its discretion under Rule 204, SCACR. Oral argument before the Court of Appeals was held on February 15, 2017, and on October 18, 2017, the court issued Unpublished Opinion 2017-UP-403 ("Opinion"), affirming the Orders of the ALC. (App.pp.1-13). Following denial of the motion for reconsideration, (App.pp.75-76), Petitioners then sought review by this Court.

On August 21, 2018, South Carolina Supreme Court granted the Petitioner's writ of certiorari.

STATEMENT OF FACTS

It is important to emphasize that the permitting decision made by DHEC is not about continued cruise operations. Rather, this case is about whether DHEC properly applied its critical area statutes and regulations to the challenged permitting decision.

Current cruise operations in Charleston occur on Union Pier Terminal, which is a 63-acre property on the Charleston peninsula located along the Cooper River and which is owned and operated by the South Carolina State Ports Authority (Ports Authority) as a fully operational marine terminal. (R.pp.001544-46; 001631). As currently configured, the northern end of Union Pier Terminal can accommodate more than 200 cargo ships annually, in addition to the trains and trucks necessary to service those cargo ships, while the southern end of Union Pier Terminal consists of a designated cruise passenger terminal. (R.pp.001107-1110; 001492-98).

The Ports Authority has proposed improvements to portions of Union Pier Terminal, which would involve renovating existing buildings and warehouses within the terminal footprint, relocating certain port operations to other Ports Authority-owned terminals, and shifting passenger cruise operations within the existing terminal footprint, from their current location at the southern end of Union Pier Terminal to the northern end ("Project"). (R.pp.001182; 001184; 001544-46; 001631). The improvements would include upgrading cruise facilities in order to modernize and streamline the facilities and maintain compliance with terminal security requirements of the United States Customs and Border Protection and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101 *et seq.* The purpose of the additional five pile clusters permitted by DHEC is to support the construction of three elevators and two escalators in the renovated Building #322 in order to make the terminal more easily accessible to handicapped patrons.

To put this permit challenge into proper perspective, the only action proposed by the Ports Authority which implicates DHEC's OCRM permitting jurisdiction for the Project is the installation of the above-referenced five additional pile clusters, *see* (R.pp.003216, 003232), amongst the existing approximately 1,008 existing pile clusters that are a part of the support structure under Building #322. Id. The remainder of the proposed work associated with this Project occurs above-ground within the existing footprint of an already-developed and fully-functioning marine terminal.

The bottom line is, regardless of the outcome of this litigation and appeal, nothing in DHEC's Critical Area Permit impacts the Ports Authority's ability to continue cruise operations. If the permitting decision is *reversed*, cruise operations can continue. If the permitting decision is *affirmed*, cruise operations can continue.

ARGUMENT

Introduction to Issues I through IV on Standing

This Court should affirm the Appellate Court's decision because the Petitioners failed to establish *any* of the three elements of constitutional standing. The elements of standing are an indispensable part of the Petitioners' case and failure to demonstrate every element of constitutional standing requires an affirmation of the lower court decision. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 119 L. Ed. 2d 351 (1992). Additionally, the Petitioners' injury is a generalized grievance that is suffered, if at all, by the public as a whole and such claims are prohibited by the Court. Id. at 575.

Alternatively, the two-issue rule precludes this Court's consideration of the standing challenge because the Petitioners failed to seek this Court's review of the adverse "causation" and "redressability" holdings of the ALC, rendering those issues the law of the case.

Therefore, for the reasons articulated herein, this Court should find for the Respondents.

I. The Court of Appeals correctly held that the Petitioners failed to establish any genuine issue of material fact regarding the Petitioners' Constitutional Standing to challenge the critical area permit issued by the Department.

In order to satisfy Constitutional standing, a plaintiff must show all three elements throughout the litigation: "[f]irst, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest[; s]econd, a causal connection must exist between the injury and the challenged conduct[; and t]hird, it must be likely that a favorable decision will redress the injury." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citing Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001).

The party seeking to establish standing carries the burden of demonstrating each of the three elements [of standing]." Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). "Elements of standing ... are not mere pleading requirements but rather an indispensable part of the plaintiff's case; therefore, 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stage of the litigation.'" Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, 404 S.C. 515, 745 S.E.2d 385, 392-93 (Ct. App. 2013).

Despite bearing the burden to prove all three elements of Constitutional standing, the Petitioners failed to establish any genuine issue of material fact sufficient to satisfy each of the aforementioned elements. Therefore, the Petitioners lack Constitutional Standing to maintain this action.

A. The Appellate Court correctly held that the Petitioners alleged injuries were insufficient to meet the "injury-in-fact" element because the alleged injuries are not "actual or imminent," but are "hypothetical."

Both the Court of Appeals and the ALC correctly determined that the Petitioner-associations failed to satisfy the "injury-in-fact" requirement of Constitutional Standing. As stated above, to satisfy the injury-in-fact element, a plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally-protected interest. Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citing Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001).

Petitioners assert that the lower court Opinion stands for the proposition that "the decisions below would preclude standing if *more than one person* has particularized harm, and if *at least one* member of an association has particularized harm" Pet. Brief at 2. (Emphasis in original). Contrary to this assertion, the Opinion correctly holds that Petitioners failed to allege or identify any particularized injury and, instead, alleged or identified "only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses" and that such speculative claims do not "constitute actual or imminent harm." Op. at 9 (citing Sea Pines 345 S.C. at 601, 550 S.E.2d at 291). Because all of the alleged injuries derive from cruise operations that already occur at Union Pier Terminal today, the ALC and Court of Appeals correctly found that Petitioners never established a cognizable injury-in-fact that was actual and concrete, not conjectural or hypothetical as it relates to a proposed, but yet-to-be-built, cruise terminal. See Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 303, 551 S.E.2d 588, 590 (Ct. App. 2001) ("[p]rospective concern falls far short of the standard of 'concrete and particularized and ... actual or imminent' harm set forth in Lujan").

Furthermore, the Court of Appeals correctly held that Petitioners' assertions regarding alleged impacts to their properties and businesses, unsupported by expert testimony, were "only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses." Op. at 9; see also Carnival, 407 S.C. at 76–77, 753 S.E.2d at 851; Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291.

For the reasons listed herein, the Petitioners failed to meet the injury-in-fact requirement of Constitutional Standing. Accordingly, this Court should affirm the Appellate Court's decision.

B. The Appellate Court correctly held that the Petitioners failed to establish a causal connection between the Petitioners' alleged injuries and the critical area permit issued by DHEC.

Both the Court of Appeals and the ALC correctly determined that the Petitioner-associations failed to satisfy the "causal connection" requirement of Constitutional Standing by failing to sufficiently demonstrate that the alleged injuries are traceable to the challenged conduct of the Respondent.

Here, none of the Petitioners' affidavits are sufficient to establish a "causal connection." Christina Dodd, see Pet. Brief at 11, complains that she is concerned about breathing pollution from cruise ships, but she is not qualified to opine as to any connection between her concerns about alleged *present* medical diagnoses and assumed injuries related to *future* cruise operations at Union Pier Terminal. See Dodd Aff. at 2 (alleging current injuries with no admissible testimony connecting allegations to the Critical Area Permit), (R. p. 000399); see also Standing Order at 8 n.9 & 9 n.12. Marty Morganello's complaints, see Pet. Brief at 12, about cruise ship practices regarding waste are inadmissible personal opinion and unfounded speculation because there is nothing to show he is qualified to testify on these issues. Standing Order at 10-11 & n.15, (R. pp.000086-87). Finally, Stephen Gates' affidavit, see Pet. Brief at 10-11, also consists of

inadmissible personal opinion, legal conclusions, unsupported speculations, and hearsay repetition of purported medical opinions on which he is not qualified to testify. Standing Order at 7-8, 10 & n.13, (R. pp. 000083-84; 000086).

For the reasons listed herein, the Petitioners fail to meet the "causal connection" requirement of Constitutional Standing. Accordingly, this Court should affirm the Appellate Court's decision.

C. The Appellate Court correctly held that it is not "likely" that the alleged injuries will be "redressed by a favorable decision."

The Appellate Court correctly held that it is not "likely" that the alleged injuries will be "redressed by a favorable decision" because the Petitioners failed to provide *any* evidence that the denial of the permit would redress the Petitioner's alleged injuries. Specifically, the ALC stated the following in the Standing Order regarding redressability: "there is no evidence before this Court that the denial of the permit in this case would redress Petitioners' alleged potential injuries."[2] (R.000089). The manifest reason that reversing the permitting decision would not redress such "alleged potential injuries" articulated in the Petitioners' affidavits is that, regardless of whether the already-present cruise operations move to the north end or remain at the south end of the Union Pier Terminal, the circumstances supposedly causing those injuries will not cease with a permit reversal. The undeniable reality is that the challenged permit has zero impact on the Ports Authority's ability to *continue* cruise operations. As previously stated, if the permitting decision is *reversed*, cruise operations can continue. If the permitting decision is *affirmed*, cruise operations can continue.

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[2] The only competent evidence submitted on this point was provided by the Ports Authority through the sworn testimony of Peter Lehman. See Reply to Mot. to Dismiss, Ex. 1, Aff. of Peter Lehman. The Petitioners, who bear the burden of proof, have failed to offer any evidence to prove by a preponderance of the evidence that redressability exists.

For these reasons, the Petitioners failed to meet the redressability requirement of Constitutional Standing and this Court should affirm the Appellate Court's decision.

II. The Court of Appeals correctly held that the Petitioners lacked standing by asserting a generalized grievance that is "suffered by the public as a whole."

The ALC and the Court of Appeals correctly determined that the Petitioners' affidavits do not show an injury-in-fact[3] because "generalized grievances suffered by the public as a whole ... are insufficient to establish standing." Op. at 9 (citing Carnival, 407 S.C. at 76, 753 S.E.2d at 851. The affidavits Petitioners use to support their standing arguments are deficient. For example, the affidavit of Tommy Robertson, Pet. Brief at 10, conveys nothing more than general grievances that allegedly exist today as a result of *current* cruise operations and that have no established connection to a *future* cruise terminal or cruise ships, or any activity permitted by DHEC. See Op. at 3, Standing Order at 10 (R. p. 000086); Rule 56(e), SCRCP; see also, e.g., Bailey v. S.C. Dep't of Health & Envtl. Control, 388 S.C. 1, 11, 693 S.E.2d 426, 430 (Ct. App. 2010) (holding no causation because "potential of having boats mooring at the dock would still exist" regardless of the permitting decision).

Beyond the analysis of Petitioners' alleged injuries-in-fact, the Court of Appeals also correctly affirmed the ALC's holding that Petitioners were unable to "satisfy the third required element of associational standing, namely that 'neither the claim asserted nor the relief sought requires the involvement of individual members.'" Op. at 9 (quoting Hunt v. Wash. State Apple

[3] It also should be noted that, without a single expert affidavit, Petitioners tried to connect allegations of *present-day* health problems resulting from existing cruise operations to *future* exacerbations from the shift of cruise operations 600 yards to the north through the submission of generalized information concerning health issues that were wholly unconnected to the Cruise Terminal. Contrary to Petitioners' assertions, this was insufficient to meet their burden under Rule 56(e), SCRCP (i.e., "[s]upporting and opposing affidavits shall ... set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein").

Adver. Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441 (1977)). Simply put, the nature of the claims as framed by Petitioners require participation of their individual members. See Warth v. Seldin, 422 U.S. 490 (1975) (denying associational standing because individualized proof was required). Here, none of the alleged injuries identified by Petitioners have anything to do with or derive from the respective affiants' membership in the organizations. Warth, at 511 ("[T]he association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."). In essence, Petitioners are critical of the Opinion's application of the associational standing standard to their alleged injuries despite the fact that Petitioners chose to bring this action as associations, rather than individually. But the Court of Appeals and this Court are constrained to evaluating the claims Petitioners' actually advanced, not the claims they now wish they had advanced.

For the reasons listed herein, the Petitioners lacked standing by asserting "only generalized grievance suffered by the public as a whole."

III. The two-issue rule precludes this Court's consideration of the standing challenge because the Petitioners failed to seek this Court's review of the adverse "causation" and "redressability" holdings of the ALC, rendering those issues the law of the case.

In order to satisfy Constitutional standing, a plaintiff must show all three elements of the test throughout the litigation: "[f]irst, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest[; s]econd, a causal connection must exist between the injury and the challenged conduct[; and t]hird, it must be likely that a favorable decision will redress the injury." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citing Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001) ("The party seeking to establish standing carries the burden of demonstrating

each of the three elements.")). Even if a party shows a concrete and particularized injury, such proof is not enough to establish standing. The party must also show "causation" (i.e., that those injuries are traceable to the challenged conduct of the defendant), as well as put forward a sufficient showing of the likelihood that a favorable decision of the court would redress the injuries.

Before this Court, Petitioners can do neither because they did not appeal the ALC's analysis and express holdings regarding the causation and redressability of their alleged injuries at all. See ALC Order at 11-13 (R.pp.000087-89). Consequently, even if this Court were to agree with Petitioners that they have presented a cognizable injury-in-fact, Petitioners' failure to appeal from the ALC's additional adverse holdings on causation and redressability precludes this Court from reaching the issue of standing. Robinson v. Estate of Harris, 388 S.C. 616, 627, 698 S.E.2d 214, 220 (2010) ("where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals *all* grounds because the unappealed ground will become the law of the case") (emphasis added); Sheppard v. State, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (An "unchallenged ruling, right or wrong, is law the of the case") (citing State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); see also Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Significantly, the two-issue rule "is applicable under []circumstances on appeal [other than general jury verdicts], including affirmance of orders of trial courts ... if the plaintiff failed to appeal [all] grounds or if one of the grounds

required affirmance." Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996).

Here, the ALC's finding that Petitioners lacked standing was based alternatively upon the independent grounds and holdings listed in the Order Granting Summary Judgment for Lack of Standing; namely that Petitioners failed to demonstrate *any* of the three elements of standing.[4] Petitioners' failure to appeal the causation and redressability elements of standing from the ALC's Order means that those grounds independently support the ALC's Order and this Court is precluded from addressing Petitioners' standing arguments.

For the reasons listed herein, the two-issue rule precludes this Court's consideration of the standing challenge because the Petitioners failed to seek this Court's review of the adverse "causation" and "redressability" holdings of the ALC, rendering those issues the law of the case.

IV. The Court of Appeals correctly determined the issue of collateral estoppel regarding standing.

The Court of Appeals correctly recognized the discretionary nature of collateral estoppel and correctly affirmed the ALC's rejection of Petitioners' collateral estoppel claim as to standing. Contrary to Petitioners' argument (Pet. Brief at 30-34), the Opinion correctly holds that the issue of standing as it pertains to this case was not actually litigated before the federal district court. Petitioners had the burden of establishing that the federal court actually litigated the issue of their

[4] The ALC stated the following in the Standing Order regarding the three elements: (1) "this Court finds Petitioners have failed to show an injury-in-fact under Lujan for the purpose of establishing standing" (R.000087); (2) "[e]ven if Petitioners were able to show an injury-in-fact, this Court finds they cannot satisfy the second element of the Lujan test, which requires 'a causal connection between the injury and the conduct complained of—the injury has to be 'fairly...trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Lujan, 504 U.S. at 560 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976))." (R.000087); and (3) "there is no evidence before this Court that the denial of the permit in this case would redress Petitioners' alleged potential injuries." (R.000089).

Article III standing, but Petitioners failed to make any showing to meet that burden. Therefore, there can be no collateral estoppel. Accordingly, this Court should find in favor of the Respondents.

V. The Court of Appeals correctly determined that the ALC did not abuse its discretion in imposing sanctions against Petitioners for advancing a frivolous motion.

Reversal of the Court of Appeals' determination that the ALC did not abuse its discretion in sanctioning Petitioners is not warranted for the following reasons.

a. Petitioners' arguments regarding the merits of their motion to remand are unpreserved, as Petitioners did not appeal from the Remand Order.

Petitioners' appeal of the ALC's imposition of sanctions is based entirely on the claimed reasonableness of the arguments that they advanced in the motion to remand. Pet. Brief at 35. However, Petitioners did not appeal the Remand Order that denied the motion to remand—or the ALC's construction of § 44-1-60(F)—despite the fact that the Order expressly rejected the reasonableness of Petitioners' construction of the statute. (R.pp.000009-11). Petitioners were required to appeal the Remand Order because the findings in that order formed the basis of the Sanctions Order that they now want to challenge. See Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). Because they did not, the Remand Order's findings now are the law of the case. See Atl. Coast Builders, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."). Petitioners are therefore unable to challenge the ALC's construction of § 44-1-60(F), which determined, inter alia, that subsection (F) "obviously recognizes the existence of discretion," and the DHEC "Board could not decline to do a mandatory act," (R.p.000011), thus requiring affirmance of the ALC's imposition of sanctions.

b. The motion to remand was unreasonable and warranted the imposition of sanctions.

Even if the Court were inclined to allow Petitioners to make arguments contrary to the ALC's holdings from the unappealed Remand Order, Petitioners' argument that § 44-1-60(F) requires a mandatory final review conference is patently unreasonable given the plain language of the statute. S.C. Code Ann. § 44-1-60(F) provides as follows:

> No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. **If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court**. The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten calendar days' written notice of the conference; and advise the applicant that evidence may be presented at the conference.

§ 44-1-60(F) (Emphasis added). Not only does the statute contemplate the DHEC Board's discretion to decline review of a staff decision, it specifically provides for it. S.C. Code Ann. § 44-1-60(G)(1) also expressly recognizes the DHEC Board's discretion to decline to conduct a final review conference, providing the notice procedures that are required when "the board decline[s] to hold a final review conference." See Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

Further, although Petitioners now assert that "the meaning of the language at issue here has never been litigated before this case," Pet. Brief at 36, that statement is demonstrably incorrect. Both the ALC and the appellate courts of this state have expressly recognized the Board's discretion to decline to conduct a final review conference. The following ALC cases have

addressed the language at issue in § 44-1-60(F): Trident Medical Center, LLC, v. S.C. Dep't of Health & Envtl. Control, Docket Nos. 09-ALJ-07-0332-CC, 09-ALJ-07-0333-CC (Consolidated), 09-ALJ-07-0336-CC (Consolidated), 2012 WL 7187635, (Sept. 26, 2012) (J. McLeod) ("If the Department Board does not hold a final review conference, the staff decision becomes the final agency decision unless an applicant or affected person timely requests a contested case hearing before the Administrative Law Court."); Wise v. S.C. Dep't of Health & Envtl. Control, Docket No. 10-ALJ-07-0851-CC, 2011 WL 2413274 (Feb. 23, 2011) (J. McLeod) ("The Board can either conduct a review conference and issue a final agency decision, or decline to conduct a review conference, in which case the staff decision becomes the final agency decision.") (citing S.C. Code Ann. § 44-1-60(F)), rev'd on other grounds Op. No. 2013-UP-072 (Ct. App. Filed Feb. 13, 2013); Hill v. S.C. Dep't of Health & Envtl. Control, Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666, (Dec. 9, 2010) (J. Anderson) ("The DHEC Board [] has sixty days within which to hold a review conference. [] The Board *may* (1) hold a final review conference and issue a decision; (2) decline in writing to hold a final review conference; or (3) take no action within the sixty-day period. [] If the Board either declines in writing to schedule a final review conference or allows the sixty days to lapse without any action, then the staff decision becomes the final agency decision and an affected party may request a contested case hearing before the ALC pursuant to Section 44-1-60(0).") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); Pinckney Point, LLC v. S.C. Dep't of Health & Envtl. Control, Docket No. 08-ALJ-07-0363-CC, 2009 WL 6527323, (Nov. 13, 2009) (J. Anderson) ("A staff review does not require the presentation of evidence in a hearing, and *the Board's review is discretionary, not a matter of right.*") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)).

The DHEC Board's discretionary right to conduct a final review conference has also been recognized by multiple appellate courts of this State. See e.g., Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference rendering the staff decision the final decision); Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, No. 2010-159446 (March 6, 2013) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC).

Accordingly, the ALC was correct to find that Petitioner's motion to remand was unreasonable. In support of its determination, the ALC made three factual findings supported by reference to the statute, case law, and other pertinent materials: "Given [1] the clear statutory language, [2] the case law directly recognizing the discretionary nature of DHEC Board review and [3] prior affirmations by Petitioners, a reasonable attorney under these circumstances would not have filed the Motion to Remand." Sanctions Order at 6 (R. p. 000074). None of these findings are challenged by Petitioners on appeal. Accordingly, the Court of Appeal's affirmation of the imposition of sanctions should not be reversed.

VI. The Court of Appeals correctly determined that Petitioners are not entitled to relief from the denial of the motion to re-open discovery.

As an initial matter, Petitioners' challenge to the ALC's denial of their motion to re-open and expand discovery is not reviewable because the ALC expressly vacated the order. Standing Order at 19 n.23 (R. p. 000095) ("Therefore, the Order denying Petitioners' Motion to Expand Discovery is vacated."). Consequently, there is no order from which Petitioners can appeal. See Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (holding that custody order issued without notice "was clearly void, and of no effect whatever and no appeal therefrom was necessary to protect the rights of the father"). The attempted appeal from the Discovery Order should therefore be dismissed. Leviner v. Sonoco Products Co., 339 S.C. 492, 494, 530 S.E.2d

127, 128 (2000) (holding that the Court of Appeals should have dismissed an appeal from a void order).

Petitioners wholly ignore the ALC's vacatur of the Discovery Order and additional finding that the discovery issue was moot. Standing Order at 19 n.23 (R. p. 000095) ("[I]n light of the disposition of the summary judgment motion, the Motion for Expanded Discovery is moot and is thus denied."). Thus, Petitioners have abandoned the discovery issue by limiting their argument to the Discovery Order alone and failing to address the subsequent actions by the ALC. Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).

On the merits of the challenged Discovery Order, under Rule 21.A, RPALC, parties have 90 days to complete discovery in a contested case proceeding, or timely seek leave of the Court for an extension by presenting a good faith basis for enlarging the discovery period. In this case, the 90-day discovery period expired on May 20, 2013. Discovery Order at 2 (R.p.000065). Petitioners served interrogatories and requests for production during this 90-day period, but never asked the ALC to expand discovery before the period expired. Id. In fact, Petitioners did not file their motion to re-open or expand discovery until December 23, 2013, more than seven months after the 90-day period expired. (R.pp.001041-1045).[5] In the Petitioners' Brief, Petitioners advance only mistaken beliefs as to how the other parties and the ALC had conducted themselves in accordance with the Rules as an excuse for their failure to do likewise. Pet. Brief at 38. However, Petitioners' argument regarding the ALC's application of the Rules does not satisfy their

[5] Petitioners also largely miss the point that the ALC's denial of their motion resulted in large part from their failure to timely comply with the rules of procedure. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) (holding that lower court properly denied motion for additional discovery filed two months after the deadline for discovery expired); see Rivera-Almodovar v. Instituto Socioeconomico Comunitario, Inc., 730 F.3d 23, 26 (1st Cir. 2013) (holding that litigant must show excusable neglect rather than good cause for untimely motion to extend discovery deadlines).

burden of demonstrating good cause for filing a motion to re-open and expand discovery seven months late. Petitioners do not provide any adequate explanation for their failure to comply with the ALC's procedural rules, and reversal of the Opinion's affirmance of the ALC on this point is not warranted.

CONCLUSION

WHEREFORE, based on the foregoing, DHEC respectfully requests that this Court find in favor of the Respondents and affirm the Court of Appeals' Opinion.

Respectfully submitted,

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November 27, 2018
Charleston, South Carolina

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. 2018-000137

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation. and Charleston Communities for Cruise Control, ...Petitioners,

vs.

South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, ...Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on this date he has served the *Respondent South Carolina Department of Health and Environmental Control's Initial Brief* in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

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