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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2019-001282

Richard J. Hook,

Respondent,

vs.

South Carolina Department of Health and Environmental Control
And Phillip Patterson,

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

Appellant South Carolina Department of Health And Environmental Control's *Final Brief of Appellant*

Bradley D. Churdar, SC Bar # 12829
Associate General Counsel
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL
1362 McMillan Ave., Ste. 400
Charleston, SC 29405
Tel: (843) 953-0213
Fax: (843) 953-0201
Email: churdabd@dhec.sc.gov

Attorney for Respondent South Carolina Department of Health and Environmental Control

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

This case involves a dock on Parrot Creek owned by Mr. Phillip Patterson in a development known as Belle Terre on James Island, Charleston County, SC.

On August 21, 2002, Mr. Patterson's neighboring land owner, Mr. Richard J. Hook, entered into an agreement with Parrot Point, LLC to purchase Lot 10 in Belle Terre.

On January 21, 2003, the Department issued a Dock Master Plan general permit to the developer of Belle Terre (Ford Development Corporation, hereinafter "Ford") for 27 docks on waterfront lots in the development.

The original Dock Master Plan proposed by Ford depicted a dock corridor for Lot 9 which extended 556 feet to Parrot Creek within Lot 9's extended property lines. However, the Department changed that trajectory by adding Special Condition 1.B to the Dock Master Plan general permit stating that "Lot 9 dock will angle to Parrot Creek rather than extend straight from upland property thereby reducing the walkway length from 595' (sic) to 200'." (R 534, Dock Master Plan general permit). On February 18, 2003, the James Island Public Service District and eleven property owners with homes on the opposite side of Parrot Creek filed a Request for Contested Case before the Administrative Law Court ("ALC") challenging all 27 individual dock permits issued under the Dock Master Plan general permit. Generally, the challenges raised in the Request for Contested Case addressed the impact these 27 docks would have on (1) the navigability of Parrot Creek, (2) the cumulative impacts of boat traffic, and (3) the negative impact these 27 docks would have on the adjacent property value and the eleven property owners' enjoyment of their property.

On September 23, 2003, the James Island Public Service District reached a settlement agreement with Ford and was dismissed as a party to this action.

On November 13, 2003, the ALC issued a *Final Order and Decision* affirming the Department's permitting decision regarding all 27 individual permits under the Dock Master Plan general permit (i.e., Permit #'s 2002-IE-316-P through 2002-IE-341-P; 2002-IE-322-P through 2002-IE-341-P and 2002-IE-434-P). (R. p. 275, Exhibit B to *Department's Return to Petitioner's Motion to Enforce Consent Order*). The ALC Order was final as to lot decisions that were not further appealed, including Lot 9.

On December 16, 2003, the eleven property owners who filed the February 18, 2003 Request for Contested Case filed an appeal of the ALC Final Order and Decision to the South Carolina Coastal Zone Management Appellate Panel ("CZ Appellate Panel"). This appeal was limited in scope. These eleven property owners only appealed the ALC Order regarding the docks at Lots 12 through 23. They did not appeal the remainder of the individual dock permits under the Dock Master Plan general permit (including Lot 9, eventually purchased by Mr. Phillip Patterson). Thus, the ALC Order was final as to the remaining lots, including Lot 9.

As of December 2003, the part of the Dock Master Plan general permit not under appeal and final provided "Lot 9 dock will angle to Parrot Creek rather than extend straight from upland property thereby reducing the walkway length from 595' (sic) to 200'."

On May 28, 2004, the CZ Appellate Panel issued a *Final Administrative Order* affirming that portion of the ALC Order that was challenged by the eleven property owners. (R. p. 293, Exhibit C to *Department's Return to Petitioner's Motion to Enforce Consent Order*).

On August 13, 2004, Ford's agent requested an amendment to the permit for the dock at Lot 9 to change the alignment from 200 feet back to 556 feet. The 200-foot dock was as provided for under the Dock Master Plan general permit, and as had been approved by the ALC.

(R. p. 280, November 13, 2003 *Final Order and Decision*, page 6 [Exhibit B to *Department's Return to Petitioner's Motion to Enforce Consent Order*]).

On December 13, 2004, the Department denied Ford's permit amendment request to realign and more than double the length of the dock permitted for Lot 9 for several reasons. First, the permitted alignment was located within the approved dock corridor as identified by the approved Dock Master Plan for Parrot Point. Second, the amendment request was inconsistent with S.C. Regulation 30-12(A)(J)(b), which provides that "amendments to the general permit must be in keeping with the spirit of the original Dock Master Plan to the maximum extent feasible." Staff concluded that "maintaining the 'spirit' or 'intent' of the Dock Master Plan and general permit is to retain the original alignment." Third, the proposed new location for the Lot 9 dock would have no positive impact on navigation. (R. p. 296, [denial letter from Curtis Joyner - Exhibit E to *Department's Return to Petitioner's Motion to Enforce Consent Order*]).

On January 5, 2005, Ford submitted a Request for Contested Case based on the Department's December 13, 2004 denial letter.

On January 11, 2005, the permitted dock alignment for Lot 9 remained the angled 200-foot trajectory rather than the 556-foot alignment that had recently been denied by the Department on December 13, 2004. Knowing this, Hook nonetheless closed on the purchase of Lot 10 on this date (January 11, 2005) with the existing dock alignment on Lot 9. Mr. Hook stated in his Affidavit (R. p. 188, [attached to *Petitioner's Motion to Enforce Consent Order*]) that he "closed on the purchase of Lot 10 after Ford advised that it had worked out a settlement with the Department that restored the original alignment of the Lot 9 dock. As such, my entire interest was being adequately represented by Ford, since it was already asking for the exact

outcome that I wanted - re-alignment of the Lot 9 dock." There is no evidence in the record that a settlement had been worked out as of January 11, 2005.

On February 9, 2005, the Department entered into a *Consent Order of Dismissal* with Ford modifying the Lot 9 dock alignment to the 556-foot trajectory. (R. p. 298, [Exhibit F to *Department's Return to Petitioner's Motion to Enforce Consent Order*]).

On September 2, 2009, Branch Banking and Trust Company ("BB&T") acquired from the prior owner of Lot 9 a Deed in Lieu of Foreclosure. Subsequently, Wesley J. Patterson purchased Lot 9 at auction and the associated Critical Area Permit (# 2002-IE-322-P) was transferred from BB&T to Wesley J. Patterson.

On October 19, 2011, the Critical Area Permit was transferred from Wesley J. Patterson (not a present owner) to Jessica B. Patterson. She is a co-owner of Lot 9 with her husband, Phillip Patterson (co-Respondent with DHEC before the ALC in Docket No. 17-ALJ-07-0085-CC).

On August 29, 2014, Phillip Patterson submitted a permit amendment request to the Department to add a roof to the pierhead and a 12.5' x 12.5' four pile boatlift to Permit 2002-lE-322-P. (R. p. 307, [Exhibit G to *Department's Return to Petitioner's Motion to Enforce Consent Order*]). The permit amendment request provided survey drawings depicting the dock at the angled 200-foot trajectory as shown in the January 21, 2003 Dock Master Plan general permit.

On September 8, 2014, the Permit Amendment Public Notice was mailed to Mr. Hook at his home at 176 Sharon Lake Court, Lexington, SC, notifying him of this application as well as the availability of the plans depicting the proposed work. (R. p. 308, [Exhibit H to *Department's Return to Petitioner's Motion to Enforce Consent Order*]). According to the August 21, 2002 purchase agreement, Mr. Hook is a "licensed S.C. Real Estate Agent," yet he never exercised

diligence by reviewing the plans or inquiring as to what changes his next-door neighbor was requesting to the Lot 9 dock that he asserts was so pivotal in his decision to purchase Lot 10.

On October 3, 2014, the Department issued an amendment to Permit 2002-IE-322-P authorizing the addition of a roof over the fixed pierhead and a 12.5' x 12.5' four pile boatlift floodside of the pierhead on the 200-foot dock. The Department Project Manager assigned to process this amendment request was unaware of the 2005 *Consent Order* modifying the Lot 9 dock alignment to the 556-foot trajectory.

Construction of the dock at Lot 9 began in November 2014 and, even though Hook lives in South Carolina, he asserts that he did not learn of or observe the dock construction until 2017.

On March 30, 2017, Mr. Hook filed a Request for Contested Case (*pro se*) in the Administrative Law Court requesting that the ALC "require DHEC to *revoke the permit* and require the removal of the dock." (R. p. 171-172). Albeit extremely untimely, this Request for Contested Case raised the issue of revocation of the Patterson permit and thus the automatic stay applied.[1]

On June 23, 2017, Mr. Hook filed his *Prehearing Statement* (*pro se*). (R. p. 117).

On October 17, 2017, Mr. Hook's then-retained Counsel filed an *Amended Prehearing Statement*. (R. p. 120). Instead of continuing to challenge the three-year prior October 3, 2014 amendment to Permit 2002-IE-322-P, the *Amended Prehearing Statement* asserted that "[t]he

[1] S.C. Code Annotated Section 1-23-600(H)(2) provides that "[a] request for a contested case hearing for an order to *revoke* or suspend a license *stays* revocation or suspension." (Emphasis added).

issue presented and relief sought by the Petitioner is enforcement of the Consent Order."[2] (R. p. 121, [Hook *Amended Prehearing Statement*, page 2]).

On October 20, 2017, Mr. Hook filed a *Motion to Enforce* the 2005 Consent Order. In the cover letter accompanying the *Motion to Enforce* (R. p. 161), Mr. Hook's counsel plainly contemplated that the requested hearing was only a Motion Hearing and not a hearing on the merits with the direct and cross-examination of witnesses, introduction of documentary evidence, etc.[3]

On November 10, 2017, Mr. Patterson filed a *Return to the Motion to Enforce* the 2005 Consent Order based on *res judicata*, collateral estoppel and Mr. Hook's lack of standing. (R. p. 192). His objective was to keep the dock in its current location crossing the commonly-shared Lot 9/Lot 10 extended property line.

On November 13, 2017, the Department filed a *Return to the Motion to Enforce* the 2005 Consent Order based on (1) the exclusive and sole remedy provisions of S.C. Code Ann. § 15-78-200 ("South Carolina Tort Claims Act") and (2) on the applicability of Rule 60, SCRCP (b)(5). (R. p. 239).

On November 30, 2017, the Department filed a *Rule 19A Motion* (R. p. 344) stating that "[a]t this point, *the Final Hearing of this matter has been continued* and the December 6, 2017 hearing date is for the Petitioner's Motion." (Emphasis added). The significance of this

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[2] The thirty-day clock to challenge the permit amendment decision had expired long ago (per S.C. Code Ann. § 44-1-60(F)(2)) and the ALC had no jurisdiction over such an untimely-filed Request for Contested Case.

[3] Ms. Mary Shahid represented Mr. Hook for the Motion Hearing and her cover letter stated "[e]nclosed please find Motion to Enforce Consent Order, Affidavit of Richard Hook, and check in the amount $25.00 as filing fees for the Motion to Enforce Consent Order and accompanying Affidavit." Ms. Shahid's cover letter further stated to Judge Lenski that "it may be appropriate to reassign the referenced contested case to Judge Anderson to conduct a hearing on this Motion." (R. p. 577).

statement is that it is in accord with the statements of the ALC[4] as well as Mr. Hook's counsel; namely, that the December 6, 2017 Motion Hearing was not a hearing on the merits with the direct and cross-examination of witnesses, introduction of documentary evidence, etc.

On December 6, 2017, the ALC held a Motion Hearing on Mr. Hook's *Motion to Enforce.* There was no testimony and compensatory contempt damages was not part of the hearing.

On August 22, 2018, the ALC initiated a conference call and told Counsel for the parties to submit supplemental briefs addressing (1) whether the ALC has authority to order DHEC to reimburse Mr. Patterson for the costs of materials and construction of his dock and (2) whether the ALC has authority to resolve a reimbursement claim (despite the fact that Mr. Patterson had never made such a claim). No Court Reporter was present to transcribe this August 22, 2018 conference call. No hearing was held.

On September 27, 2018, as requested by the ALC during the August 22, 2018 conference call, DHEC submitted the *Department's Supplemental Brief Addressing the ALC's Scope of Authority to Order DHEC to Reimburse Costs for Dock Removal.* (R. p. 389).

On September 28, 2018, Chris Holmes submitted the *Respondent Patterson's Supplemental Brief.* (R. p. 393). As mentioned above, up until this time, Mr. Patterson's efforts were focused on keeping his 200-foot dock rather than seeking reimbursement for his out-of-pocket labor/material costs and attorney fees. This fact will be addressed in the Department's due process argument below and is significant because the Department was given no notice of

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[4] At the beginning of the December 6, 2017 Motion Hearing, the ALC acknowledged this was only a motion hearing and not a hearing on the merits. Specifically, he said "[g]ood morning, everyone. I am Phil Lenski, the administrative law judge assigned to this matter, and this is the Richard Hook, petitioner, versus South Carolina Department of Health and Environmental Control and Phillip Patterson, respondents, Docket Number 17-ALJ-07-0085-CC. It is the 6th of December. We are here on a -- *I think this is just a motions hearing today, we've decided*." (R. p. 455, Transcript Page 4:2 to 4:10). (Emphasis added).

this issue (i.e., DHEC's reimbursement/payment of Patterson's labor/material costs and attorney fees).

On September 28, 2018, Mary Shahid submitted the *Petitioner's Response to Court's Request for Information Regarding Petitioner's Attorney's Fees*. (R. p. 400).

On May 3, 2019, the ALC issued an *Order Granting Petitioner's Motion to Enforce the Consent Order and Denying Respondent DHEC's 60(B)(5), SCRCP Motion.* (R. p. 30). The ALC found that the Department willfully disobeyed the 2005 Consent Order thereby finding the Department in contempt and (1) awarding attorney's fees to both Mr. Hook and Mr. Patterson as well as (2) the labor/material costs Mr. Patterson incurred in building the 200 foot dock and (3) ordering the Department to effectuate the removal of Mr. Patterson's dock from the critical area.

On May 22, 2019, Mr. Patterson filed a *pro se Motion to Reconsider* (since Chris Holmes was no longer Counsel for Patterson). (R. p. 405).

On May 28, 2019, the Department filed a *Motion to Reconsider*. (R. p. 408).

On June 3, 2019, DHEC filed the *Department's Return to Respondent Patterson's Motion to Reconsider and Supplement to Department's Motion to Reconsider.* (R. p. 436).

On June 6, 2019, Mary Shahid filed the *Petitioner's Return to Respondent DHEC's Motion to Reconsider.* (R. p. 440).

On July 2, 2019, the ALC issued its *Amended Order Granting Petitioner's Motion to Enforce the Consent Order and Denying Respondent DHEC's 60(B)(5), SCRCP Motion.* (R. p. 62).

On July 31, 2019, the Department filed its *Notice of Appeal* to this Court. (R. p. 449).

ARGUMENT

Summary Overview

The Department admits that it made mistakes regarding the Lot 9 dock.[5] However, the ALC's July 2, 2019 *Amended Order Granting Petitioner's Motion to Enforce the Consent Order and Denying Respondent DHEC's 60(B)(5), SCRCP Motion* (R. p. 62 - hereinafter "Order") is erroneous as a matter of law. In an effort to "fix" the problems resulting from these mistakes, the ALC erred in applying remedies unsupported by either the law or the facts. All of the ALC's compensatory contempt remedies (attorney's fees for both Hook and Patterson as well as Patterson's dock construction costs) flow from the erroneous conclusion that the Department's mistakes were willful rather than negligent. Without such a willfulness finding, the ALC had no basis to find the Department in contempt. Without a contempt finding, the ALC had no basis to award compensatory contempt damages. This willfulness finding was the linchpin for the award of damages. Remove this linchpin and the ALC's basis for awarding compensatory contempt damages collapses in on itself.

In Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005), the Court of Appeals held that "[c]ivil contempt must be proved by clear and convincing evidence." Id., 365 S.C. at 74 (citing Durlach v. Durlach, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004)). The facts of Floyd involved the appeal of a Circuit Court Order (1) removing Laurens W. Floyd, Jr. as trustee from a trust set up for his step-mother and (2) awarding attorney's fees after a merits hearing where the Circuit Court found that Laurens W. Floyd, Jr. acted in bad faith and breached his fiduciary duties to his step-mother as trust beneficiary. Id., 365 S.C. at 70. At that hearing on the merits,

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[5] The Department's mistakes arguably constitute a tort and the remedy for a tort by a state agency is under the South Carolina Tort Claims Act with jurisdiction in the Circuit Court (i.e., S.C. Code Ann. § 15-78-100(b) states "[j]urisdiction for any action brought under [the South Carolina Tort Claims Act], is in the circuit court").

testimony and evidence was presented; objections were made; and evidence was either admitted or rejected from the trial record. Id., 365 S.C. at 70. In contrast, Judge Lenski made his willfulness finding in this case without a hearing on the merits. No witness testimony. No cross-examination. No opportunity for the Department to offer documentary evidence addressing willfulness. This was error. Without a hearing on the merits where evidence is received, the clear and convincing evidence standard required by Floyd cannot be satisfied.

The July 2, 2019 Order should be reversed for the following reasons:

(1) the Department's actions do not rise to the level of willful disobedience of a Court Order;

(2) requiring removal of the 200-foot dock and authorizing the potential replacement with a 556-foot dock, ignores the competing interest under the 2003 Final Order and the 2005 Consent Order;

(3) the Department was deprived of due process of law and substantially prejudiced by that deprivation.

(4) A compensatory contempt award to Mr. Phillip Patterson is improper, because compensatory contempt awards should be limited to the *complainant's* expenses only and should not be extended to non-complainants;

(5) the South Carolina Tort Claim's Act's ("SCTA") is the "exclusive remedy" provision per S.C. Code Ann. § 15-78-200. Otherwise, there is no waiver of sovereign immunity per S.C. Code Ann. § 15-78-20(b).

I. The ALC erred in finding that the Department's actions amounted to "willful disobedience of an Order of the Court."

In Spartanburg County Dep't of Social Services v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988), the Supreme Court held that when deciding the "willfulness"[6] element of a contempt analysis,

> "[a] willful act is defined as one 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with *the specific intent to fail to do something the law requires* to be done; that is to say, with bad purpose either to disobey or disregard the law.' Black's Law Dictionary 1434 (5th Ed. 1979). The court recently held that contumacious behavior[7] which tends to bring the authority and administration of the law into disrespect may also support a finding of contempt."

Spartanburg County, 296 S.C. at 82-83, 370 S.E.2d at 874. (Emphasis added.) Using the Supreme Court's definition of willfulness, there is no evidence in the record to support a finding that the Department *willfully* disobeyed the 2005 Consent Order, and therefore, the ALC erred in holding the Department in civil contempt.

A. There were no clear and specific acts or conduct in the record to support a finding of willful failure to comply with the ALC's Order.

The ALC quotes Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982) for the proposition that "the record must be clear and specific as to the acts or conduct upon which [a finding of willfulness] is based." (R. p. 79, Order, p. 18). Yet, the Order identifies no "clear and specific" acts or conduct that amount to *willful* disobedience of the 2005 Consent Order. Instead, the ALC points to the fact that the Department entered into the Consent Order and "was *aware of* its specific obligations thereunder." (R. p. 81, Order, p. 20). (Emphasis added.) The

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[6] "Contempt results from the *willful disobedience* of an order of the court." Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 919 (1982) (Father held in contempt for willfully disobeying a Court Order to return children to their mother on a certain day). (Emphasis added).

[7] Contumacious means "stubbornly disobedient." *Merriam-Webster Dictionary*.

ALC then relies on Cheap-O's Truck Stop, Inc. v. Cloyd 350 S.C. 596, 608, 567 S.E.2d 514, 520 (Ct. App. 2002) to conclude the Department was in contempt of the 2005 Consent Order (i.e., "there is no evidence of any legitimate effort by the Department to comply with the Consent Order, and no justifiable explanation for its inability to comply after its issuance in 2005"). (R. p. 81, Order, p. 20). This case, however, is dissimilar to Cheap-O's in that (1) the automatic stay provision[8] did not apply to that case; and (2) the Cheap-O's respondent, unlike the Department, did not have two conflicting Orders to reconcile. Nor did the Cheap-O's respondent have a third party challenging one of those Orders with compelling *res judicata*, collateral estoppel and standing arguments. Rather, in Cheap-O's, the parties settled before trial and put on the record that the defendants would pay $60,000 immediately and $20,000 in two weeks. Cheap-O's, 350 S.C. at 601, 567 S.E.2d at 516. Upon the Cheap-O's respondents' willful failure to pay, there was a rule to show cause hearing where the judge found that one of the respondents was in contempt for refusing to comply with the settlement agreement, willfully disobeying a subpoena, and willfully disregarding the Court's only order approving the settlement.

The reason the ALC Order cited no "clear and specific" acts or conduct amounting to *willful* disobedience of the 2005 Consent Order is because no such willful defiance exists. The ALC asserts on page 20 of the Order that "there is no evidence of any legitimate effort by the Department to comply with the Consent Order, and no justifiable explanation for its inability to comply after its issuance in 2005." (R. p. 81). However, no permitting activity was taking place at all at Lot 9 that would have generated "evidence of any legitimate effort by the Department to comply with the Consent Order." After the February 9, 2005 Consent Order was issued, neither

[8] S.C. Code Ann. § 1-23-600(H)(2).

of the two prior owners attempted to build a dock. During the timeframe of the Great Recession, Lot 9 (along with most of the other lots in Belle Terre) remained undeveloped for *more than nine and a half years* after the litigation was completed. Finally, on August 29, 2014, Mr. Patterson submitted a dock permit amendment application and then began construction of his dock in November 2014. Mr. Hook asserts that he did not learn of or observe the dock construction until 2017 and then he filed his request for contested case in March 2017. (R. p. 171). The Department's October 3, 2014 permitting mistake was *not* willful disobedience of the 2005 Consent Order, nor was it part of a *pattern* of willful disobedience for over a decade as the ALC seems to imply. Rather, without minimizing the Department's error, this was the only time a permit amendment was issued for Lot 9 ever since the Consent Order was issued on February 9, 2005. Thereafter, because the Project Manager was unaware of the 2005 Consent Order, the issue before the ALC (i.e., location of the Patterson dock) only came to the Department's attention when Mr. Hook contacted the Department in 2017. When he informed the Department of his complaint regarding the Patterson dock location, the Department was faced with the Solomonic task of reconciling Mr. Hook's claim with the competing rights of Mr. Patterson and the parties to the 2003 Order.[9] Then within two months of his contacting the Department, Mr. Hook filed a request for contested case to revoke Mr. Patterson's permit.[10] (R. p. 171). Nonetheless, the ALC faults the

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[9] This is when the Department first had to face the inescapable dilemma that the 2005 Order was issued without regard for the rights of the other parties to the 2003 Order. It is assumed that the parties who presented the 2005 Consent Order of Dismissal, issued after a "protracted contested case" (R. p. 64, Order, p. 3), did not inform Judge Anderson that the other parties to the prior litigation (Docket No. 03-ALJ-07-0105-CC) had not been notified or consulted in any way.

[10]The issue of whether to initiate revocation and removal proceedings became a moot point for the Department once Mr. Hook filed his request for contested case in March 2017. The automatic stay provision of S.C. Code Ann. § 1-23-600(H)(2) precluded the Department from

Department by finding that "even after this failure [to enforce the 2005 Consent Order] was specifically brought to the Department's attention by way of the Petitioner's Motion, the Department failed to take any steps to remedy its noncompliance." (R. p. 81, Order, p. 20). This assertion incorrectly assumes the Department could ignore the automatic stay imposed by S.C. Code Ann. § 1-23-600(H)(2) and immediately initiate remedial action, and that the Department's failure to do so is willful disobedience.

The ALC's failure to articulate "clear and specific" acts or conduct by the Department to support a finding of willfulness was error.

B. The ALC failed to provide sufficiently-detailed factual findings of the Department's alleged willful disobedience of the 2005 Consent Order "to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings" per the Supreme Court's *Able Communications* Opinion.

An additional ALC error closely associated with its failure to identify "clear and specific" acts or conduct amounting to *willful* disobedience (per Curlee v. Howle) was its failure to provide sufficiently-detailed factual findings "to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Able Communications, Inc. v. South Carolina Public Service Com., 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (citing Hill v. Jones, 255 S.C. 219, 178 S.E. (2d) 142 (1970)). The Supreme Court held in Able Communications that "[i]mplicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make *specific, express findings of fact.*" Id. at 411, 351 S.E.2d at 152 (citing Aristizabal v. Woodside-

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initiating removal of the dock after that time. The point is, the thirteen-year length of time the ALC points to as a failure to comply with the 2005 Consent Order is neither thirteen years of non-compliance nor is it proof of *willful disobedience* of the Consent Order justifying a contempt finding. The vast majority of this time period, nothing was happening at Lot 9 because of a bad economy.

Division of Dan River, 268 S.C. 366, 234 S.E. (2d) 21 (1977)). (Emphasis added). In this matter, the issue of the Department's supposed "willfulness" regarding the 2005 Consent Order is certainly "material" and is undoubtedly in dispute. The ALC's entire analysis in the Order recognizes that without "willfulness", the Department's behavior cannot be contemptuous. At the Motion Hearing, the ALC made the following statement regarding *all* parties' lack of intent to violate that Order and specifically referred to the Department's permitting actions as an "error" and a "mistake":

> "*the Department made an error by providing the wrong information to Mr. Patterson, who then acted on that.* And then all information that went subsequent to that was wrong because it didn't -- it wasn't in accordance with the [2005] consent order, which was -- which created this 500-foot-long dock. So everything's wrong. It's all -- *it starts off on the whole wrong foot and that's because an error, sadly and unfortunately, not -- nobody necessarily intended to do. But just a mistake was made at the Department*, and everything that went forward from there was based on this error." (R. p. 501 - Transcript Page 50:8 to 50:21).[11] (Emphasis added).

The ALC plainly was including the Department in his statement that "*nobody* necessarily intended" to be out of compliance with the 2005 Consent Order. In order to satisfy the "willfulness" element of contempt, Spartanburg County Dep't of Social Services v. Padgett, requires "*the specific intent to fail to do something the law requires* to be done." Id. at 79, 370 S.E.2d at 872. Accordingly, without such intent, the Department's handling of the August 2014 Patterson permit amendment application, even though based on mistake, was prima facie not "willful" disobedience subject to contempt. Id. The ALC's further conclusion that the Department simply made an "error" and a "mistake" is fundamentally at odds with its finding of "willfulness." **There is no evidence in the record to support a finding of willfulness.**

[11] The ALC's above-referenced conclusions about lack of intent to disregard the 2005 Consent Order and the Department's "error" and "mistake" were made *after* Ms. Shahid (Counsel for Mr. Hook) had already made her argument to the Court.

Accordingly, the issue of Departmental "willfulness" regarding compliance with the 2005 Consent Order is a material fact in dispute requiring the ALC to provide sufficiently-detailed factual findings to enable this Court to "determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Able Communications, 290 S.C. at 411, 351 S.E.2d at 152.

The ALC's findings on page 20 of the Order are the basis for his conclusion that the Department supposedly "willfully" failed to comply with the 2005 Consent Order. (R. p. 81). However, these findings do not address the Department's "willfulness", but rather the Department's mistake. The ALC points out the following at page 20 of the July 2, 2019 Order (R. p. 81):

> (1) "[t]he Department does not dispute that it entered into the Consent Order in February 2005, or that it was aware of its specific obligations thereunder;"[12]
>
> (2) "[t]he Department also does not dispute that it, as the State agency charged with administering dock permits, had the duty and the power to comply with the Consent Order;"
>
> (3) "there is no evidence of any legitimate effort by the Department to comply with the Consent Order, and no justifiable explanation for its inability to comply after its issuance in 2005;"
>
> (4) "the Department failed to even allege a good faith effort to comply with the Consent Order from which it now seeks relief;"

[12] As stated earlier on page 6 of this Brief, on October 3, 2014, the Department Project Manager assigned to process the Patterson's permit amendment application was unaware of the 2005 Consent Order when issuing the amended permit and the Department only became aware of the problem with the trajectory of the Patterson dock in 2017 when Mr. Hook brought it to the Department's attention. This was a mistake, not willful disregard of the 2005 Consent Order.

(5) "it was the Department's failure to amend the Permit in accordance with the Consent Order in the nearly ten years after its issuance that culminated in the Project Manager's purported inadvertent actions;"

(6) "even after this failure was specifically brought to the Department's attention by way of the Petitioner's Motion, the Department failed to take any steps to remedy its noncompliance."

None of these findings and conclusions paint a picture of Departmental "willfulness." The ALC's failure to provide such sufficiently-detailed factual findings of "willfulness" is reversible error.[13]

C. The Department was unable to comply with the 2005 Court Order before the ALC issued a decision in this matter in that there is an automatic stay on the Department's permitting of Mr. Phillip Patterson's dock by operation of S.C. Code Ann § 1-23-600(H)(2).

As an initial matter, it is noteworthy that, despite the Department bringing the automatic stay issue before the ALC, the lower court's July 2, 2019 Order did not even mention the statutory ban on revoking the Patterson permit imposed on the Department by S.C. Code Ann § 1-23-600(H)(2).

S.C. Code Annotated Section 1-23-600(H)(2) provides that "[a] request for a contested case hearing for an order to revoke or suspend a license *stays* revocation or suspension." (Emphasis added). The purpose of the automatic stay is to preserve the status quo until a decision is rendered in the contested case. See Graham v. Graham, 301 S.C. 128, 130,390 S.E.2d 469, 470 (Ct. App. 1990); Sisters of Charity Providence Hosps. v. S. C. Dep 't of Health

[13] The ALC attempts to mitigate this deficiency and skirt its judicial obligation to make specific factual findings of the Department's *willful* disobedience merely by acknowledging "that direct evidence of a willful intent to disregard a court order frequently doesn't exist." (R. p. 80 - Order, p. 19). But in this case, there was neither direct nor indirect evidence of willful intent.

and Envtl. Control, Docket No. 14-ALJ-07-0332-CC at *3 (S.C. Admin. Law Ct. Nov. 5, 2014)."[14] However, in this case, rather than acknowledging the plain meaning of S.C. Code Annotated Section 1-23-600(H)(2) as well as the importance of maintaining the status quo until rendering a decision, Judge Lenski held the Department's failure to immediately initiate permit revocation proceedings in 2017 was a demonstration of willful disobedience and that the Department had "no justifiable explanation for its inability to comply" with the 2005 Consent Order.[15] (R. p. 81 - Order, page 20). This was an error of law.

When Mr. Hook requested a contested case on March 17, 2017 asking, "this court to enforce its order and require DHEC to revoke the permit and require the removal of the dock" (R. p. 172), the automatic stay provision sprang to life and precluded the Department from taking any action to revoke the Patterson dock permit and compel removal of the dock. Consequently, had the Department initiated permit revocation proceedings prior to a final decision and required the dock to be taken out, the Department would have been acting contrary to the automatic stay statute.

Importantly, S.C. Code Ann. Sec. l-23-600(H)(4) gave Mr. Hook the option to file a Motion to lift the automatic stay, thereby freeing the Department to pursue revocation of the

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[14] This statement about the purpose of the automatic stay preserving the status quo can be found at page 5 of Judge Lenski's June 7, 2019 *Order Granting Respondent Stevens Towing Company's Motion To Lift Stay* in Gregg Karolcyk and Gayle Karolcyk, et al. v. SCDHEC and Stevens Towing Company (Docket No. 18-ALJ-07-0241-CC). (R. p. 55).

[15] As previously stated, when evaluating the ALC's assertion that the Department provided "no justifiable explanation for its inability to comply" or "no evidence of any legitimate effort … to comply with the Consent Order," it is crucial keep in mind the context of the national economy prior to the automatic stay that went into effect in March 2017 per S.C. Code Annotated Section 1-23-600(H)(2). As previously mentioned, after the February 9, 2005 *Consent Order* was issued, neither of the two prior owners attempted to build a dock. During the timeframe of the Great Recession, Lot 9 remained undeveloped for *more than nine and a half years* after the litigation was completed for Docket No. 03-ALJ-07-0105-CC. Finally, on August 29, 2014, Mr. Patterson submitted a dock permit amendment application and then began construction of his dock in November 2014.

erroneous permit, but he chose not to file such a Motion. Accordingly, the Department was compelled to abide by the ban revoking the Patterson amended permit.

D. The Department did not act willfully in that until there is a final decision, there are competing interests under the 2003 and the 2005 Orders.

As set forth above, the South Carolina Supreme Court in Spartanburg County Dep't of Social Services quotes Black's Law Dictionary in defining willfulness as "done voluntarily and intentionally with the specific intent to do something the law forbids, or with *the specific intent to fail to do something the law requires* to be done." Spartanburg County, 296 S.C. 79, 370 S.E.2d 872. In this case, the Department was not willfully disobedient. There were two conflicting Court Orders at issue and the Department needed final resolution before acting on a permit revocation.

II. The ALC erred in ignoring the competing interests of parties to the 2003 and the 2005 Orders.

The Department raised to the ALC the dilemma of the eleven property owners or their successors in title on the opposite side of Parrot Creek who successfully litigated the original Dock Master Plan General Permit to their satisfactory conclusion[16] in what the ALC appropriately described as a "protracted contested case." (R. p. 64, Order, page 2). Even today, these eleven property owners or their successors in title may have a legally-enforceable expectation that the Patterson dock will remain in its currently-built location in conformity with the conclusion of that un-appealed litigation.[17]

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[16] Docket No. 03-ALJ-07-0105-CC.

[17] On page 6 of Judge Anderson's November 13, 2003 *Final Order and Decision* (which was approved by the South Carolina Coastal Zone Management Appellate Panel on May 28, 2004), he found that "[t]he dock permitted on Lot 9 now extends at an angle within the view corridor for Lot 10, but the walkway for this dock has been reduced from 595' to 200' thereby warranting the crossing of the extended property lines." (R. p. 280).

Consistent with that expectation, when Ford Development's 2004 permit amendment application (to realign and extend the Patterson dock from 200 feet to 556 feet) went out on Public Notice (R. p. 423, - Exhibit A to *Department's Motion to Reconsider*), three of the eleven property owners (prior litigants) from the opposite side of Parrot Creek submitted comment letters objecting to changing the alignment and length of the Lot 9 (Patterson) dock so as to "un-do" the results of their lawsuit. (R. p. 424 - Exhibit B to *Department's Motion to Reconsider*). In particular, Doug and Janet Patterson (no known relation to Mr. Phillip Patterson) stated in their letter that "[c]onsiderable time, and money has been spent on the present plan and in the end, this is the plan that was approved by the Administrative Law Judge and the O.C.R.M. board." (R. p. 424). They successfully litigated their ALC case to conclusion and their rights should have been considered before it was determined that they will *not* receive the benefit of their hard-fought victory. In light of Mr. Phillip Patterson's well-stated arguments in his *Motion for Reconsideration* (R. p. 405), the Department argued that was the time to take a step back, hold this case in abeyance, and provide the property owners on the opposite side of Parrot Creek with notice and an opportunity to be heard. Rule 19(a), SCRCP imposed on the ALC a duty to take this course of action, but the lower Court failed to comply with this directive. This was error of law. Specifically, the ALC failed to join the three property owners[18] (prior litigants) from the opposite side of Parrot Creek who submitted the above-referenced comment letters objecting to changing the alignment and length of the Lot 9 dock in an effort to protect the outcome of their lawsuit.

Rule 19(a), SCRCP states that

> "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be*

> *joined as a party* in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims *an interest relating to the subject of the action* and is so situated that the disposition of the action in his absence may (i) as a practical matter *impair or impede his ability to protect that interest* or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, ***the court shall order that he be made a party.***" (Emphasis added).

These property owners have a claim of "an interest relating to the subject of the action" and the ALC's failure to join these property owners "impair[ed] or impede[d their] ability to protect that interest." Rule 19(a), SCRCP. As such, the ALC's failure to join these property owners was reversible error.

Beyond the competing rights of the parties to the 2003 Order as well as the potential liability for ignoring S.C. Code Ann. § 1-23-600(H)(2), the Department also faced the additional dilemma of potential SCTA liability per S.C. Code Ann. § 15-78-60(12)[19] in initiating removal of the Patterson dock after notification from Mr. Hook but before a final decision on the merits of his (Mr. Patterson's) compelling *res judicata*, collateral estoppel and standing arguments.

With so many potential pitfalls of pursuing removal of the Patterson dock, the Department's approach regarding the resolution of the *res judicata*, collateral estoppel and standing arguments and the Department's equitable arguments cannot reasonably be characterized as *willful* or otherwise acting with "the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law."

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[19] S.C. Code Ann. § 15-78-60(12) subjects the State of South Carolina to tort liability for exercising its licensing powers in a grossly negligent manner. Specifically, this statute covers "licensing powers or functions including, but not limited to, the … suspension or revocation of or failure … to issue, … suspend, … or revoke any permit …"

Spartanburg County, 296 S.C. at 79 (1988). Rather, the Department believed that the most prudent path forward was to await a final and fair resolution of this matter.

III. The ALC erred by depriving the Department of fundamental elements of due process regarding compensatory contempt awards.

"Although there are no technical requirements for procedural due process, certain elements *must* be present, including: '(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; (4) the right to confront and cross-examine witnesses.'" John M. McIntyre & Silver Oak Land Mgmt., LLC v. Sec. Comm'r of S.C., 425 S.C. 439, 449, 823 S.E.2d 193, 198 (Ct. App. 2018) (*citing*, In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)). (Emphasis added).

In this case, the Department was deprived of all of the above-referenced elements of due process regarding Mr. Patterson's compensatory contempt award.

A. Lack of Adequate Notice and Opportunity for a Hearing

Prior to the December 6, 2017 Motion Hearing, the Department was given no notice whatsoever from either Mr. Patterson or the Court that the issue of compensatory contempt damages was an issue this Court would consider. See, Abbott v. Gore, 304 S.C. 116, 119, 403 S.E.2d 154, 156 (Ct. App. 1991) (due process requires that a litigant be placed on notice of the issues which the court will consider to afford the litigant an opportunity to be heard). *Nine months after the Motion Hearing,* the ALC first mentioned during a conference call that he was considering awarding compensatory contempt damages.[20] Neither Mr. Patterson nor his counsel requested compensatory contempt damages in his Prehearing Statement (R. p. 113) or Return to Petitioner's Motion to Enforce Consent Order. (R. p. 192). Nonetheless, without an

[20] During that August 22, 2018 Court-initiated conference call, when Mr. Patterson's counsel heard the Court state that it would be awarding attorney's fees to Mr. Hook, Mr. Chris Holmes (Patterson's counsel) then requested attorney's fees *for the first time.*

evidentiary hearing, the ALC awarded compensatory contempt damages to Mr. Patterson of its own accord. In contempt proceedings, a party must be given clear notice of what is being sought. State ex rel. Love v. Howell, 285 S.C. 53, 54-55, 328 S.E.2d 77, 78 (1985) (where a party argued for civil contempt, the trial court erred in treating the matter as one for criminal contempt). Had the Department been given any notice prior to the December 6, 2017 Motion Hearing that the ALC was contemplating awarding compensatory contempt damages to Mr. Patterson, the Department could have, for example, subpoenaed Mr. Patterson to appear at the Motion Hearing and then cross-examined him for comparative negligence purposes about the dock restrictions found in the *First Amendment to Declaration of Covenants, Conditions and Restrictions for Belle Terre* as well as the 2005 Consent Order (and modifications to the Lot 9 dock alignment) that is referenced in those Restrictive Covenants. (R. pp. 27-29 - Exhibit 2 to 2005 Consent Order). The Department could have also requested documents and conducted other discovery on Patterson's real estate closing for the property to ascertain whether Patterson had either actual or constructive notice of the 2005 Consent Order. Additionally, the Department could have called the Department Project Manager to testify that he issued the permit amendment without any knowledge of the 2005 Consent Order; not in willful defiance of it. Without notice, however, the Department was unable to explore any defenses against Patterson it may have had, and/or to present evidence pertaining to willfulness or any other issue connected to an award of compensatory contempt damages to Mr. Patterson or to Mr. Hook.

B. Right to Introduce Evidence and Cross-Examine Witnesses

Even after the ALC mentioned *sua sponte* (and for the first time) during the August 22, 2018 Court-initiated conference call that it would consider an award of compensatory contempt

damages to Mr. Patterson, the ALC never provided the Department an opportunity to present evidence or cross-examine witnesses. Instead, the Court only requested supplemental briefing from all counsel addressing whether or not the ALC has authority to order the Department to reimburse Mr. Patterson for the labor and materials for the construction of his dock. From the ALC's perspective during the August 22, 2018 conference call, the factual question of Departmental willfulness was not even an issue. Rather, the ALC's only question was the scope of his authority to award compensatory contempt damages.

The Department was substantially prejudiced financially by this deprivation of due process. Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987) ("A demonstration of substantial prejudice is required to establish a due process claim").

The ALC erred by depriving the Department of these fundamental elements of due process.

IV. It is legal error to award compensatory contempt damages to Mr. Phillip Patterson, because a compensatory contempt award is limited to the *complainant's* expenses only and Mr. Patterson was not a complainant.

In Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982), the South Carolina Supreme Court established the parameters or limits of those who qualify to receive compensatory contempt. Specifically, the Court held that "[c]ompensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order. The goal is to indemnify the plaintiff directly for harm the contemnor caused ..." Id., 277 S.C. at 386. This definition specifies that damages are available to the plaintiff only. compensatory contempt awards should be limited to the *complainant's* expenses only. Therefore, the award should not have been extended to respondent's parents." Id., 277 S.C. at 387. (Emphasis in original).

Here, because the complainant is Mr. Hook, Mr. Patterson is not entitled to a compensatory contempt award.

V. The ALC erred by failing to address the applicability of the South Carolina Tort Claim's Act's "exclusive remedy" provision per S.C. Code Ann. § 15-78-200.

A monetary award against the Department for damages based on negligence can only be maintained under the South Carolina Tort Claims Act and is not properly a part of a contested case before the ALC.[21] The relief granted against the Department in the Order is in reality an award of damages for agency action claimed to be negligent. Damages are either cognizable under the South Carolina Tort Claims Act or cannot be awarded at all. On page 10 of the *Motion to Enforce Consent Order*, opposing counsel asserts that "[t]he financial responsibility for tearing down and replacing the dock at Lot 9 may rest with the Department since the *Department was negligent* in executing its duty to Respondent." (R. p. 170). As mentioned earlier, at the December 6, 2017 Motion Hearing, the ALC spoke in language that can only be characterized as Departmental negligence (i.e., "*nobody* necessarily intended" to be out of compliance with the 2005 Consent Order; "*the Department made an error by providing the wrong information to Mr. Patterson, who then acted on that*" and the October 3, 2014 permitting decision was "*just a mistake was made at the Department*, and everything that went forward from there was based on this error" - R. p. 501, Transcript Page 50:8 to 50:21). (Emphasis added).

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[21] "The ALC has no authority to decide civil matters or to award monetary damages in cases." Randolph R. Lowell, *South Carolina Administrative Practice & Procedure*, Second Edition, p. 152 (citing Smith v. S.C. Budget & Control Bd., 06-ALJ-30-0688-CC (April 25, 2007) (ALC is not the proper forum for breach of fiduciary duty or misrepresentation claims); Coneross Concerned Citizens v. S.C. Dep't of Health & Envtl. Control, 05-ALJ-07-0462-CC (Sept. 6, 2006) (ALC is not the proper forum to pursue a nuisance claim)).

The ALC (in reliance on Curlee v. Howle, *supra*) acknowledged that compensatory contempt is a money award to cover injuries. (R. p. 80 - Order, p. 19).[22] But here the award is against a state agency. A compensatory award against a state agency for injuries is manifestly a tort claim within the purview of S.C. Code Ann. § 15-78-200 and is not permissible. The South Carolina Tort Claims Act states that "[n]otwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." The General Assembly passed the South Carolina Tort Claims Act in 1986 (Act No. 463) and so the "exclusive and sole [tort] remedy" limitation of S.C. Code Ann. § 15-78-200 would take precedence over a prior 1982 Supreme Court opinion involving a Family Court Order (i.e., Curlee v. Howle, *supra*).

To the extent compensatory damages are issued against an agency of the State of South Carolina other than pursuant to the South Carolina Tort Claims Act, sovereign immunity is not waived. S.C. Code Ann. § 15-78-20(b) declares the public policy and states:

> "[t]he General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. *The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in Section 15-78-70(b).*" (Emphasis added).

S.C. Code Ann. § 15-78-20(f) further declares that

> "The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting

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[22] "Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order." Id. at 386, 287 S.E.2d at 919.

> within the scope of official duty, *must be liberally construed in favor of limiting the liability of the State.*" (Emphasis added).

Our appellate courts have affirmed this liberal construction in favor of limiting state liability. See Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) ("Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability."); Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990); Staubes v. City of Folly Beach, 331 S.C. 192, 500 S.E.2d 160 (Ct. App. 1998), aff'd, 339 S.C. 406, 529 S.E.2d 543 (2000); Rakestraw v. S.C. Dep't of Highways and Public Transp., 323 S.C. 227, 473 S.E.2d 890 (Ct. App. 1996).

While counsel for the Department is unaware of any state appellate authority directly addressing this issue of compensatory contempt damages and state sovereign immunity, the Eighth Circuit has addressed compensatory contempt damages in the context of *federal* sovereign immunity in McBride v. Coleman, 955 F.2d 571 (8th Cir.), cert. denied, 121 L. Ed. 2d 32, 113 S. Ct. 65 (1992). In that case, the court wrote:

> "[t]he government argues strenuously that sovereign immunity precludes an award against the government of compensatory damages, indistinguishable from those that might be awarded in a contract or tort action, *in a civil contempt proceeding*. This is a weighty argument, and we regard it very seriously. It does strike us as being a dubious proposition that by filing a contempt motion a claimant can be positioned to recover an unlimited amount of compensatory damages from the United States without being bound by the strictures of either the Tucker Act or the Federal Tort Claims Act, which are express (but carefully limited) waivers by the United States of its sovereign immunity with respect to contract and tort claims. Absent an express waiver of sovereign immunity, money awards cannot be imposed against the United States. See United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 2965, 77 L. Ed. 2d 580 (1983); Block v. North Dakota, 461 U.S. 273, 280, 103 S. Ct. 1811, 1816, 75 L. Ed. 2d 840 (1983). See also Barry v. Bowen, 884 F.2d 442, 443-44 (9th Cir. 1989) (holding that district court's award of monetary sanctions for contempt violated the sovereign immunity of the United States, but also reversing on other grounds). There does not appear to be any express waiver of sovereign immunity applicable to this case. We therefore have grave doubts that the contempt power

can be carried as far as it has been carried against the United States in the present litigation." Id., 955 F.2d at 576-77.[23] (Emphasis added).

Counsel for the Department asserts that the same principles that preclude the award of compensatory contempt damages under the Federal Tort Claims Act should properly apply to the Department as a South Carolina state agency.

CONCLUSION

The undersigned Counsel acknowledges that the Department made mistakes in administering the Permit for Lot 9. Without diminishing that acknowledgment in any way, for the reasons stated herein, the ALC erred in awarding attorney's fees to Mr. Hook and Mr. Patterson and also erred in awarding $46,936.00 to Mr. Patterson for tort damages. "[C]ontempt is an extreme measure and the power to adjudge a person in contempt is not to be lightly asserted." Hawkins v. Mullins, 359 S.C. 497, 499, 597 S.E.2d 897, 898 (Ct. App. 2004). Finding a litigant in contempt "should be used sparingly and with caution, having at all time due

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[23] While the South Carolina Tort Claims Act provides the avenue for compensation based on tortious conduct by a State agency, S.C. Code Ann. § 15-77-300 likewise provides the avenue for the award of attorney fees against a State agency in *civil actions* (i.e., a contested case before the ALC is not a civil action). In McDowell v. S.C. Dep't of Soc. Services, 304 S.C. 539.405 S.E.2d 830 (1991) the Supreme Court held that, when analyzing the propriety of awarding attorney fees, "we ... look to the agency's position in litigating th[e] case to determine whether it is one which has a *reasonable basis in law and fact."* Id., 304 S.C. at 542, 405 S.E.2d at 832. (Emphasis added). In other words, even if the award of attorney fees were permissible at the ALC, the decision to award or not award attorney fees would *not* be based on the Department's underlying permitting decision that gave rise to the issues presented at the December 6, 2017 Motion Hearing. Rather, the decision to award or not award attorney fees would be based on whether DHEC took a reasonable "litigation position" at that hearing. Given the fact that there were two parties with opposing rights involved, the Department had no option other than to be a party to the action and the Department's position urging this Court to invoke it's discretionary authority under Rule 60(b)(5), SCRCP was "a reasonable [litigation position] bas[ed] in law and fact." Id., 304 S.C. at 542, 405 S.E.2d at 832. That Rule states that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from [an] ... order ... for the following reasons: ... *it is no longer equitable that the judgment should have prospective application."* (Emphasis added). Under the facts of this case, asking the Court to exercise its discretionary authority was both reasonable and equitable. For these reasons, an award of such attorney fees would be improper.

regard for one's constitutional rights…" Fagan v. Timmons, 224 S.C. 286, 287, 78 S.E.2d 628, 628 (1953); see also McCall v. McCall, 303 S.C. 452, 452, 401 S.E.2d 193, 194 (Ct. App. 1991) ("[a] determination of contempt should be imposed sparingly…"). Additionally, the ALC erred in ignoring the competing interests of parties to the 2003 and the 2005 orders.

The Department respectfully requests that the Court of Appeals reverse the ALC Order.

Respectfully submitted,

Bradley D. Churdar, SC Bar # 12829
Associate General Counsel
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405
Tel: (843) 953-0213
Fax: (843) 953-0201
Email: churdabd@dhec.sc.gov

Attorney for Respondent
South Carolina Department of Health and Environmental Control

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