

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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

**RECEIVED**

**Sep 17 2020**

**Appellate Case No.: 2019-001282**

**SC Court of Appeals**

Richard J. Hook,

Respondent,

v.

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

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

**FINAL BRIEF OF RESPONDENT  
RICHARD J. HOOK**

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## **I. STATEMENT OF ISSUES ON APPEAL**

In accordance with Rule 208(b)(2) of the South Carolina Appellate Court Rules the Respondent, Richard J. Hook (“Hook”) adopts the Appellant’s Statement of Issues on Appeal.

## **II. STATEMENT OF THE CASE**

This appeal arises from an action originally commenced by Hook, *pro se*,<sup>1</sup> seeking to enforce a Consent Order between Appellant South Carolina Department of Health and Control (“DHEC” or the “Department”) and the previous owner and developer of a waterfront lot now owned by Hook, Ford Development Company (“Ford”). The waterfront lot at issue is Lot 10, one of several waterfront lots in a subdivision located on James Island, in Charleston County, South Carolina, known as Belle Terre. Belle Terre was developed in and around 2002 by Ford. On January 21, 2003, Ford obtained a permit from DHEC authorizing construction of 27 docks on waterfront lots in Belle Terre, including Lot 10, and an adjacent lot, Lot 9, currently owned by Respondent Philip Patterson (“Patterson”).<sup>2</sup> The construction of a dock on Lot 9 by Patterson is the subject of this case. R. p. 534 (Belle Terre Permit).

Hook commenced the underlying action on March 30, 2017, seeking a determination that DHEC issued a permit to Patterson and authorized construction of the dock in disregard of a Consent Order, approved by the Administrative Law Court on February 5, 2005, R. p. 21 (Consent Order) which is a Final Order and Decision of the

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<sup>1</sup> Hook retained counsel after the action was initiated with the Administrative Law Court.

<sup>2</sup> The Belle Terre permit obtained by Ford was referenced by DHEC as P/N 2002-1E-316-P thru 2002-1E-321-P, 2002-1E-322-P thru 2002-1E-341-P & 2002-1E-434-P.

Administrative Law Court, binding on DHEC. The Consent Order resolved a contested case that arose when DHEC denied Ford Development's application to modify the authorization issued for construction of a dock on Lot 9. In submitting his request, Hook utilized the form "Request for Contested Case Hearing" provided by the ALC, attaching a letter to the Court stating, in part, "[u]pon discovering the issuance of a dock permit and construction of the dock, I am requesting this Court to enforce its order and require DHEC to revoke the permit and require the removal of the dock which is in violation of the order of this court and reconstructed as ordered in the [Consent] Order."

On October 17, 2017, Hook retained undersigned counsel who filed a Motion to Enforce the 2005 Consent Order. R. p. 161. On October 25, 2017, the lower court issued a Notice of Hearing setting a hearing on the motion for December 6, 2017. On November 10, 2017, Patterson filed a Return to the Motion to Enforce the 2005 Consent Order. R. p. 192. On November 13, 2017, DHEC filed its Return to Petitioner's Motion To Enforce Consent Order, R. p. 239, asking the lower court to exercise its discretion, pursuant to Rule 68, SCALC, to apply Rule 60(b)(5), SCRPC to the Consent Order to allow the dock to remain in place as constructed. DHEC also alleged Hook's Motion to Enforce Settlement triggered the South Carolina Tort Claims Act as the sole and exclusive remedy available to Hook.

On November 17, 2017, Hook filed a Reply to Returns Filed by Respondent DHEC and Respondent Patterson to Petitioner's Motion to Enforce, R. 311, asserting 1) DHEC's Return was not timely filed, 2) DHEC's Rule 60(b)(5) Motion was likewise not timely, 3) neither *res judicata* nor collateral estoppel was asserted as a defense to Ford's case by DHEC even though it had participated fully in the case as well as all negotiations that led

to the Consent Order entered by the Court, 4) the Consent Order had no prospective application so was outside of the scope of Rule 60(b)(5), SCRPC, and 5) principles of equity do not support setting aside the Consent Order.

In response to Hook's arguments, on November 30, 2017, DHEC filed a South Carolina Administrative Law Court ("SCALC") Rule 19A Motion, R. 344, requesting an Order allowing DHEC's previously filed Rule 60(b)(5) Motion to be heard on the same date all parties were already scheduled to be before the court for the Motion to Enforce, December 6, 2017.

The hearing on the Motion to Enforce was held as scheduled. The lower court did not foreclose any argument on the Rule 60(b)(5) Motion and further allowed the parties to submit additional information for the Court's consideration after the hearing.<sup>3</sup> Hook's counsel filed Supplemental Information in Response to DHEC's Rule 60(b)(5) Motion, R. p. 347, pursuant to the Court's instruction. While no live witnesses appeared at the hearing, the affidavit originally filed by Hook as an exhibit to his Motion to Enforce Consent Order was accepted into the record by the lower court at the hearing.<sup>4</sup> R. p. 188 (Affidavit).

On August 22, 2018, all parties participated in a conference call initiated by the ALC. During the call, Judge Lenski advised the parties of the Court's intent to issue an Order enforcing the Consent Order and awarding Hook attorney's fees, as first requested by Hook in the Motion to Enforce. Again, the lower court provided all parties the opportunity to provide legal authority addressing the impact of the lower court's intended

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<sup>3</sup> See Hearing Trans. p. 6, l. 13-p. 7, l. 4, R. pp. 457-458.

<sup>4</sup> Supplemental briefs were filed after the hearing by counsel for each party on December 18, 2017. R. p. 347.

ruling on Patterson, and agreed to consider argument as to whether costs incurred by removal of Patterson's dock, which the lower court found was warranted pursuant to the Consent Order, were compensable.<sup>5</sup> On September 28, 2018, all parties submitted briefs in response to the lower court's request. R.pp. 389, 393, 400.

On May 3, 2019, the lower court issued an Order Granting Petitioner's [Respondent Hook's] Motion to Enforce the Consent Order and Denying Respondent DHEC's 60(b)(5), SCRPC Motion. R. p. 30. On May 23, 2019, Patterson filed a Motion to Alter or Amend Judgement under Rule 59(e) R. p. 405, and requested the lower court reconsider the Order. Both DHEC and Hook filed returns to this Motion. R. pp. 436, 440.

Thereafter, on May 28, 2019, DHEC filed its own Motion to Reconsider. R. p. 408. On June 3, 2019, DHEC filed a Return to Respondent Patterson's Motion to and Supplement to Department's Motion to Reconsider. R. p. 436. On June 7, 2019, Hook filed a Return to Respondent DHEC's Motion to Reconsider. R. p. 440.

On July 2, 2019, the lower court issued its Amended Order Granting Petitioner's Motion to Enforce the Consent Order and Denying Respondent DHEC's 60(b)(5), SCRPC Motion ("Amended Final Order"). R. p. 62. On July 31, 2019, DHEC filed its Notice of Appeal. Hook received DHEC's Initial Appellate Brief on December 4, 2019. Hook's Initial Brief is timely filed pursuant to extensions requested by undersigned counsel, with the consent of DHEC and Patterson.

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<sup>5</sup> This is outlined in Petitioner's [Respondent Hook's] Response to Court's Request for Information Regarding Petitioner's Attorney's Fees, R. p. 400, filed September 28, 2018.

### III. STATEMENT OF FACTS

In 2004, Hook expressed interest in purchasing Lot 10 and was presented with the information accompanying the initial application for the permit filed by Ford to obtain the Belle Terre Permit. R. p. 534. Importantly, the application proposed a 595' dock for Lot 9 extending directly from Lot 9. As depicted in the application drawings, the "dock corridor"<sup>6</sup> for Lot 9 was proposed as extending directly out from Lot 9 so that the dock would not cross in front of or otherwise impact the view from the adjacent lot to Lot 9, Lot 10.

Prior to the issuance of the Belle Terre Permit, Ford submitted to DHEC an Exhibit entitled "Attachment A" to the Belle Terre Permit, which depicted different placement of a shorter dock relative to Lot 9. This alternative placement allowed for a shorter dock. Instead of extending directly from Lot 9, however, the alternative placement proposed a dock crossing behind, and fully in the view of, Lot 10. R. p. 561 (Exhibit 6, Supplemental Information). The Belle Terre Permit ultimately issued with authorization of the depiction in Attachment A, meaning that a dock constructed on Lot 9 would extend directly behind and be in the full view of Lot 10. Notably, however, the Belle Terre Permit also established a second dock corridor for Lot 9, meaning that there were actually *two* locations identified in the Permit as appropriate for placement of a dock to serve Lot 9. The second dock corridor would accommodate a longer dock extending directly behind Lot 9 with no impact on Lot 10. Based on the Permit, the longest authorized dock for Belle Terre was for Lot

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<sup>6</sup> Dock corridors are permitted to be depicted on dock master plans to identify waterfront property. S.C. Code Ann. Regs. 30-12(53). A DMP may include designated corridors differing from upland property line extensions. Id. Waterfront property is generally defined as upland sites where a straight-line extension of both, generally shore perpendicular, upland property lines reaches a navigable watercourse within 1000' of the marsh critical line. Id.

7, measuring 758' in length.<sup>7</sup> The alternate corridor established for Lot 9 was 595', which is much shorter than the aforementioned dock.

It is undisputed that at the time Hook was presented with the initial application made by Ford, he had no knowledge of challenges already made to the Belle Terre Permit. Specifically, the Belle Terre Permit had been challenged in a contested case before the Honorable Ralph King Anderson, III, Chief Judge, Administrative Law Court styled James Island Public Service District, et al. v. DHEC and Ford Development, Docket No. 03-ALJ-07-0105-CC (2003). This case was filed by James Island Public Service District ("JIPSD") and eleven owners of properties across the water from Belle Terre.

JIPSD's participation in the case ended pursuant to a stipulated dismissal filed following the hearing of the contested case and prior to the submission of Proposed Orders. The Stipulation of dismissal, in which all parties consented to JIPSD's withdrawal, was filed on September 23, 2003. Judge Anderson issued a Final Order and Decision on November 13, 2003 upholding the Belle Terre Permit in its entirety. R. p. 1.

On December 16, 2003, the eleven property owners appealed Judge Anderson's Final Order and Decision to the South Carolina Coastal Zone Management Appellate Panel ("CZMAP"). But, the property owners narrowed their appeal to docks on Lots 12 through 23. The CZMAP issued its order on May 28, 2004, affirming in its entirety the Final Order and Decision of the ALC. R. p. 19 (Final Administrative Order CZMAP)<sup>8</sup>.

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<sup>7</sup> The Permit authorized docks for several other lots longer than 595' including Lot 1 (651'), Lot 2 (620'), Lot 3 (617'), Lot 4 (643'), and Lot 5 (672'). R. p. 534.

<sup>8</sup> The CZMAP was rendered ineffective with the adoption of S. C. Code Ann. 44-1-60 (2006 Act No. 387) which established uniform procedures for appeals from DHEC decisions.

In reliance on the original application he had reviewed, Hook made an agreement with Ford to purchase Lot 10. After the agreement, Hook became aware of the dock alignment actually authorized in the Belle Terre Permit. At that point, Hook advised Ford he no longer had interest in purchasing Lot 10 unless the location of the dock for Lot 9 was restored to its position as depicted in the initial Belle Terre Permit application.

In order to consummate the sale of Lot 10 to Hook, Ford submitted a Request to Amend the Belle Terre Permit to DHEC, to restore the alignment for the Lot 9 dock to the one originally proposed in the initial application. On December 13, 2004, DHEC denied Ford's proposed permit amendment.

On January 5, 2005, Ford filed a contested case challenging the denial of the proposed permit amendment for re-alignment of the Lot 9 dock.<sup>9</sup> Hook had been informed of the contested case by Ford and was subsequently told by Ford that DHEC had agreed to resolve the contested case by way of a Consent Order.<sup>10</sup> After that, Petitioner Hook purchased Lot 10 from Ford on January 12, 2005

On February 9, 2005, Ford and DHEC executed a Consent Order resolving Ford's contested case, in which it was agreed any dock to be constructed at Lot 9 would be the longer dock placed within the second dock corridor authorized for Lot 9, which would not impact Lot 10. R. p. 26 (Exhibit 1 to Consent Order). In addition, the Consent Order included a requirement that Ford "seek no further amendments to this Permit, with the exception of amendment requests seeking construction of handrails, boatlifts, or roofs at

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<sup>9</sup> The case, Administrative Law Court Docket No. 05-ALJ-07-0031-CC, was assigned to the Honorable Ralph King Anderson, III.

<sup>10</sup> Hook confirmed this fact through testimony submitted in the Affidavit in Support of the Motion to Enforce. R. p. 188.

individual docks.” R. p. 22. Ford agreed to bind future owners with this requirement by filing a “First Amendment to Declaration of Covenants, Conditions, and Restrictions for Belle Terre.” R. p. 23.

The Consent Order was presented by Ford and DHEC to the ALC and finalized by signature of the Honorable Ralph King Anderson, III. The Consent Order specifically directed DHEC to amend the Belle Terre Permit as indicated in a drawing attached to the Consent Order, which showed the alignment of the Lot 9 dock as depicted in the initial Belle Terre application.

Ford fully complied with his obligation under the Consent Order by recording the Amended Declaration of Covenants, Conditions, and Restrictions and binding all future owners at Belle Terre to limitations on permit modifications.

Four years later, in 2009, Lot 9 was the subject of foreclosure. The lot was sold at auction in 2010. On August 30, 2010, the individual authorization for Lot 9, permit number (P/N) 2002-1E-322-P, was assigned by Branch Banking & Trust Company, foreclosing lender, to Wesley J. Patterson. R. p. 590 (Deed). On October 18, 2011, P/N 2002-1E-322-P was transferred from Wesley J. Patterson to Jessica B. Patterson. Jessica B. Patterson currently co-owns Lot 9 with her husband, Respondent Phillip Patterson (“Patterson”). R. p. 580 (Deed).

On August 29, 2014, Patterson submitted a Request to Amend a Minor OCRM Critical Area Permit to DHEC seeking to add a roof to the pierhead and a 12.5’ x 12.5’ four-pile boatlift to P/N 2002-1E-322-P (the “Patterson Amendment”). Patterson’s amendment request was limited to items specified as allowable in the Amended Declaration of Covenants, Conditions, and Restriction. R. p. 565. On October 3, 2014,

DHEC issued P/N 2002-1E-322-P authorizing the requested roof and boatlift, with the boatlift placed floodside of the pierhead. Accordingly, DHEC enjoyed the benefit conveyed to it under the Consent Order. DHEC then violated the Consent Order by indicating the *incorrect* location for construction of the dock at Lot 9, utilizing the corridor that extended across Lot 10. R. p. 568.

Patterson completed construction of his dock at Lot 9 by the end of 2014. R. pp. 368, 343 (Placard/Compliance Memo, Exhibits 15, 16 Supplemental Information). Hook, who lives in Lexington County, did not discover the dock until 2017, when he went by Belle Terre to see his lot (Lot 10) during a visit to Charleston. While Hook has owned Lot 10 since 2005, he has not yet developed it. Hook initiated the underlying action, challenging the construction of the dock, shortly after he discovered its existence. Hook does not dispute public notice was made of the construction of Patterson's dock. Hook does dispute having ever received the notice. Even if he had received it, nothing in that notice would have given Hook any reason to believe the Consent Order, of which he was fully aware, was not to be followed or that Patterson's proposed amendments were for a noncompliant dock. R. p. 367 (Public Notice.)

#### **IV. ARGUMENT AND CITATION OF AUTHORITY**

##### **STANDARD OF REVIEW**

In an action at law without a jury, this Court's review extends only to the correction of errors of law.<sup>11</sup> The character of an action is determined by the main purpose of the

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<sup>11</sup> Grant v. State, 395 S.C. 225, 228, 717 S.E.2d 96, 98 (Ct.App.2011).

complaint.<sup>12</sup> As will be explained below, Hook maintains the position that the underlying action, which he instituted by a request to the ALC to enforce a Consent Order, is an action for the construction of an unambiguous written contract and is, thus, an action at law.<sup>13</sup> Additional rules governing the construction of contracts are stated in the case of Gamble, Givens & Moody v. Moise, 288 S.C. 210, 341 S.E.2d 147 (Ct.App.1986), as follows:

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. Williams v. Teran, Inc., 266 S.C. 55, 21 S.E.2d 526 (1976); Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962). The parties' intention must, in the first instance, be derived from the language of the contract. Superior Automobile Insurance Co. v. Maners, 261 S.C. 257, 199 S.E.2d 719 (1973). If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Blakely v. Rabon, 266 S.C. 68, 221 S.E.2d 767 (1976); Fryar v. Currin, 280 S.C. 241, 312 S.E.2d 16 (Ct.App.1984). Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945).

Id. at 215, 341 S.E.2d at 150.

#### **A. Summary of Appellant's Argument.**

DHEC asserts the ALC erred as a matter of law in applying remedies unsupported by law and fact in the Amended Final Order issued on July 2, 2019. DHEC also asserts the ALC made a willfulness finding against it in support a finding of contempt without providing opportunity for DHEC to offer documentary evidence on the issue. Thus, DHEC further asserts the ALC's Order should be reversed because:

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<sup>12</sup> Jacobs v. Service Merchandise Co., Inc., 297 S.C. 123, 127 375 S.E.2d 1, 4 (Ct. App. 1988), *citing* Alford v. Martin, 176 S.C. 207, 180 S.E. 13 (1935).

<sup>13</sup> Id. *citing* Texcon, Inc. v. Anderson Aviation, Inc., 284 S.C. 307, 326 S.E.2d 168 (Ct.App.1985); J.T.M. Co., Inc. v. Vane, 283 S.C. 512, 323 S.E.2d 794 (Ct.App.1984).

- 1) DHEC's actions did not rise to the level of willful disobedience,
- 2) requiring removal and replacement of the dock ignores competing interests of the Final Order from the 2003 case and the Consent Order,
- 3) the compensatory contempt award to Patterson was improperly extended to a non-complainant, and
- 4) the South Carolina Tort Claims Act is the exclusive remedy provision applicable to these facts.<sup>14</sup>

Clearly, DHEC is attempting to recast its disregard for the Consent Order as the product of the careless conduct of a single employee in its effort to avoid the consequences of its failure to comply with the Court's Order. DHEC's spurious argument is that its failure to comply with the Court's Order somehow constitutes a tort that should be addressed under the S.C. Tort Claims Act. This is a substantial mischaracterization of DHEC's violation of the Consent Order, which it negotiated with Ford and submitted to the ALC for entry into the record. In its initial brief, DHEC blames the assigned Department Project Manager of being *unaware* of the 2005 Consent Order.<sup>15</sup> However, DHEC's conduct should be accurately acknowledged as a blatant violation of the Consent Order, which specifically states, *on its face*, that its terms and conditions are incorporated, by reference, into the Special Conditions enumerated on the Belle Terre Permit, R. p. 21 and that it effectively modified the Permit as indicated in the drawing attached to the Consent Order.<sup>16</sup> There must be a reason, though DHEC has failed even to attempt to provide one, as to its abject refusal to comply with the Court's Order.

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<sup>14</sup> Department's Initial Brief, p. 11.

<sup>15</sup> Department's Initial Brief, p. 6 (emphasis added).

<sup>16</sup> See Exhibit B to the Consent Order, p. 3.

DHEC appears to be claiming it was blindsided by the hearing conducted by the lower court, that it was provided no notice that the lower court might allow evidence to be introduced, which, in DHEC's view, converted the proceeding to a "contested case hearing" rather than a motion hearing. This is simply unbelievable and incorrect. DHEC was served with Hook's Motion to Enforce in accordance with the rules of the Administrative Law Court and SCRPC. Since an Affidavit containing Hook's testimony was appended to his Motion to Enforce as an exhibit, DHEC clearly received the Affidavit and should have assumed Hook's intent to present the Affidavit to the lower court at the hearing. DHEC could have submitted an Affidavit in rebuttal with its Return to [Hook's] Motion to Enforce, but failed to do so. In short, DHEC clearly was notified of Hook's testamentary evidence. Despite that fact, DHEC chose not to respond with any affidavit in rebuttal and further chose to present its argument to the lower court at the hearing on December 6, 2017 without any evidence to provide an explanation for the Department's conduct. R. p. 452 (Hearing Trans.).

**B. The ALC made no error and followed valid South Carolina law in ordering removal of Patterson's dock and awarding attorney's fees to Hook under the theory of compensatory contempt.**

The ALC has the authority to enforce its own Orders through the power of contempt. See S.C. Code Ann. 1-23-600 (each law judge of the Administrative Law Judge Division has the same power at chambers or in open hearing as do circuit court judges.) DHEC must be charged with fully understanding this, because *it has previously requested the ALC to find certain petitioners who have failed to comply with terms of a Consent*

*Order in contempt, to order to accomplish compliance.*<sup>17</sup> In the Final Order in issued in the case, after citing the aforementioned statutory authority, Judge Geathers also cited to State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct.App.1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999) (quoting In re Terry, 128 U.S. 289, 303 (1888)) (“The power to punish for contempt is inherent in the nature and constitution of a court. It is not a power derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers.”)

The South Carolina Supreme Court has discussed the contempt power of South Carolina courts:

...The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgements, orders and writs of the courts, and consequently to the due administration of justice. McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979); State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955) ... Contempt results from the willful disobedience of an order of the court, and before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based. Edwards v. Edwards, 254 S.C. 466, 176 S.E.2d 123 (1970); Bigham v. Bigham, 264 S.C. 101, 212 S.E.2d 594 (1975).<sup>18</sup>

In Cheap-O’s, the Court of Appeals further explained the development of compensatory contempt.

In Ex Parte Thurmond, 1 Bailey 605 (1830) we stated that when an individual right is directly involved in a contempt proceeding, the court has the power to order the contemnor to place the injured party in as good a situation as he would have been if the contempt had not been committed, or to suffer imprisonment. In Lorick & Lowrance v. Motley, 69 S.C. 567, 48 S.E. 614

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<sup>17</sup> Robert J. Fields and Summerville Business Center v. DHEC, Docket No. 00-ALJ-07-0372-CC, 2001 WL 790083 (June 22, 2001).

<sup>18</sup> Cheap-O’s Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 606, 567 S.E.2d 514, 519 (2002), *cert denied as improvidently granted*, 356 S.C. 616 (Nov. 24, 2003), *citing* Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982).

(1904), we held that a contemnor may be required to pay damages suffered by reason of his contemptuous action or suffer imprisonment. The defendant was ordered to pay to the plaintiff the value of the trees he had destroyed in disregard of the court's order. When ... property of an individual is taken or destroyed in contempt of the court's order, those interested have a right to ask of the court its restoration poor payment of its value at the hands of the offender, and the court requires such restoration as part of the punishment. 48 S.E. at page 615.”<sup>19</sup>

“A determination of contempt ordinarily resides in the sound discretion of the trial judge.”<sup>20</sup> “In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order.”<sup>21</sup> “Once the movant makes a prima facie showing by pleading an order and demonstrating noncompliance, the burden shifts to the respondent to establish his defense and inability to comply.”<sup>22</sup>

Hook takes no exception to the rule of South Carolina law establishing that contempt as resulting from willful disobedience of a court order and that before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which contempt is based. The ALC's finding of contempt is justified in this case because the well-settled definition of willfulness encompasses more than just a voluntary and

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<sup>19</sup> Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 606-607, 567 S.E.2d 514, 519 (2002), *cert denied as improvidently granted*, 356 S.C. 616 (Nov. 24, 2003) (emphasis as in original).

<sup>20</sup> Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 606, 567 S.E.2d 514, 519 (2002), *cert denied as improvidently granted*, 356 S.C. 616 (Nov. 24, 2003), *citing* State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct.App.1994).

<sup>21</sup> Floyd v. Floyd, 365 S.C. 56, 74, 615 S.E.2d 465, 475 (Ct.App.2005) *citing* Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct.App. 2004) (*citing* Eaddy v. Oliver, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct.App.2001)), *overturned on other grounds by* 2008 S.C. Acts 211, §1 (adding section 62-2-110 to the South Carolina Code, providing communications between a lawyer and a fiduciary are subject to the attorney-client privilege unless waived by the fiduciary, even if fiduciary funds were used to compensate the lawyer).

<sup>22</sup> Floyd, at 74, 615 S.E.2d at 475, *citing* Eaddy, 345 S.C. at 42, 545 S.E.2d at 832.

intentional act with specific intent.<sup>23</sup> The definition also identifies willful acts as “those done 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.*”<sup>24</sup> “Disobedience of a Court’s lawful or valid Order, Judgment, or Decree is such interference with the administration of justice as to constitute ‘contempt ...’”<sup>25</sup>

In Cheap-O’s, the Court of Appeals upheld the lower court’s finding of contempt, citing to the court’s Order that stated, in part, “... Mr. Cloyd acknowledged on the record the validity of the settlement amount. He simply has made no legitimate efforts to comply even though he admittedly had the power to comply at least in part ... I find and conclude that the excuses provided by Mr. Cloyd for his noncompliance are baseless ...”<sup>26</sup> This convinced the Court of Appeals of the validity of the ruling of the circuit court judge holding Cloyd in contempt. “The evidentiary record justifies the contempt finding. Clearly Cloyd is in contempt of court.”<sup>27</sup>

This case is factually similar to Cheap-O’s. In this case, DHEC participated in the underlying action and negotiated the Consent Order that ultimately resolved the case. Importantly, DHEC has never denied the validity of the Consent Order. DHEC has

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<sup>23</sup> Cheap-O’s Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 607, 567 S.E.2d 514, 520 (2002), *cert denied as improvidently granted*, 356 S.C. 616 (Nov. 24, 2003).

<sup>24</sup> Cheap-O’s Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 608, 567 S.E.2d 514, 520 (2002), *cert denied as improvidently granted*, 356 S.C. 616 (Nov. 24, 2003), *citing* Spartanburg County Dep’t of Social Services v. Padgett, 296 S.C. 79, 82-83, 370 S.E. 2d 872, 874 (1988).

<sup>25</sup> Long v. McMillan, 226 S.C. 598, 609, 86 S.E.2d 477, 482 (1955).

<sup>26</sup> Cheap-O’s Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 608, 567 S.E.2d 514, 520 (2002), *cert denied as improvidently granted*, 356 S.C. 616 (Nov. 24, 2003).

<sup>27</sup> Id.

enjoyed the benefit of the Consent Order in that Belle Terre property owners are limited by restrictive covenants in the scope of amendment they can seek for the individual docks.

Because DHEC cannot deny the validity of the Consent Order, it attempts to minimize its failure to comply with it with the vapid excuse that the Project Manager assigned to the review of Patterson's application was simply unaware of it. It must be recognized in this case, like in Cheap-O's, DHEC unquestionably possessed the unfettered power to comply with the Consent Order but, apparently, simply made no legitimate effort to do so, whether such is construed as ensuring the Consent Order was properly placed in the agency's permitting file upon the Court's entry of it, or that the procedural history of the Permit was thoroughly reviewed by the Project Manager and supervisors before the Patterson Amendment was approved.

The ALC's Order thoroughly discusses the clear and specific acts undertaken by the Department to avoid compliance with the Consent Order and to attempt justification of that choice.<sup>28</sup> What DHEC has never provided is a reasonable explanation or excuse for the alleged ignorance of its Project Manager of the Consent Order. "A good faith attempt to comply with [a] court's order, even if unsuccessful, does not warrant a finding of contempt."<sup>29</sup> DHEC cannot even claim a good faith attempt to comply with an Order

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<sup>28</sup> See Order Granting Petitioner's Motion to Enforce the Consent Order and Denying Respondent DHEC's 60(b)(5). SCRC Motion, pp. 14-19, R. pp. 43-48.

<sup>29</sup> Abate v. Abate, 377 S.C. 548, 554, 660 S.E.2d 515, 519 (Ct.App.2008) (holding father's failure to give child medication during summer visitation, despite court's order to do so, did not warrant a finding of contempt because father made a good faith effort to comply with the order so that his disobedience was not willful); Burnell v. Burnell, 359 S.C. 361, 365-66, 597 S.E.2d 24, 26-27 (Ct.App.2004) (finding the family court erred in holding mother in contempt because mother made a good faith effort to comply with joint custody order); see also State v. Spare, 374 S.C. 264, 270, 647 S.E.2d 706, 709 (Ct.App.2007) (finding trial court erred in revoking probation for failure to pay restitution because probationer was making progress, albeit slow, toward paying

to which it consented and that it signed. There was just no attempt by DHEC to comply with the Order at all, apparently at the time the Consent Order was entered - either by ensuring that the Consent Order was appended to the Permit or that the Permit was revised – or at the time of submission of the Patterson Amendment – by thoroughly reviewing the Permit history while reviewing Patterson’s application. These are willful failures to comply. Moreover, it is inarguable the *agency* must be charged with knowledge of all Agreements or Orders into which its counsel or staff enter or those to which its counsel or staff consent during a permitting process. Allowing the agency to disclaim knowledge of agreements it has made, because of a problem created by the agency itself in keeping track of its own agreements, would obviate the application process.

While DHEC would like to place all blame on a single Project Manager, it ignores the fact that policies and procedures outlining appropriate file maintenance were apparently lacking on an agency level. Additionally, DHEC’s weak excuse disregards its own hierarchy involving supervisors who oversee work performed by Project Managers and, often, render final decisions in complicated applications. This case, which involved a modification of an initial dock master plan after submission, extensive litigation through an appeal, then a subsequent request to modify permits that followed a second litigation ultimately settled by Consent Order, is a prime candidate for a supervisor’s review. The overriding point is that DHEC not only failed to comply with the Consent Order, as the law requires, but also clearly violated the Consent Order’s specific terms and conditions requiring incorporation of the Consent Order into the Special Conditions enumerated on

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his restitution obligation, which negated the trial court’s finding that probationer willfully failed to comply with order).

the General Permit and amendment of P/N 2002-1E-322-P as indicated in the drawing attached to the Consent Order. R. p. 21.

Cheap-O's further establishes the authority of a court to award attorney's fees under a compensatory contempt theory to reimburse the party for the costs it incurs in forcing a non-compliant party to obey a court's orders.<sup>30</sup> "Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order ... Included in the actual loss are the costs of defending and enforcing the court's order, including litigation costs and attorney's fees."<sup>31</sup> As such, the compensatory contempt theory was an additional and appropriate avenue by which the ALC could award attorney's fees to Hook. Hook's primary purpose in requesting enforcement of the Consent Order was removal of Patterson's dock from the unauthorized location of its construction and its placement where it should have been built in accordance with the Consent Order. The ALC determined enforcement of the Consent Order is accomplished by removal of the existing dock on Lot 9. Consequently, the ALC ordered DHEC undertake removal of the dock, reimburse Patterson's dock building costs (labor and materials) and attorney's fees, along with reimbursement of Hook's attorney's fees.

Hook requested an award of attorney's fees in the initial filing made after commencement of this case, his Motion to Enforce. R. pp. 161, 400 (Motion and Response to Court's Request for Information). The ALC is authorized by SCALC Rule

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<sup>30</sup> Cheap-O's, 350 S.C. at 609, 567 S.E.2d at 520, *citing* Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (Ct.App.2001).

<sup>31</sup> Cheap-O's, 350 S.C. at 609, 567 S.E.2d at 520, *citing* Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (Ct.App.2001), Curlee v. Howle, 277 S.C. 377, 386-87, 287 S.E.2d 915, 919-920 (1982).

72 to impose sanctions in an amount commensurate with attorney's fees. Further related to Hook's attorney's fees, the ALC has interpreted Rule 72 and has applied S.C. Code Ann. § 15-77-300, Allowance of Fees, to consideration of fee awards.<sup>32</sup> Based upon DHEC's undisputed disregard of the Consent Order, the fee award is justified. Further, fees are justified under the standard set in S.C. Code Ann. § 15-77-300:

In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust ...

An award of attorney fees under the state action statute is within the court's discretion.<sup>33</sup> The decision to award or deny attorney's fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute.<sup>34</sup> An abuse of discretion occurs when the conclusions of the trial court either are controlled by an error of law or are based on unsupported factual conclusions.<sup>35</sup> Similarly, the specific amount of

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<sup>32</sup> See *York County, et al. v. DHEC and C&D Mgmt. Co., LLC*, 2017 WL 1095610 (Case No. 07-ALC-0178-CC) (2017).

<sup>33</sup> *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

<sup>34</sup> *York County at 4, citing McMillan v. S.C. Dept. of Agriculture*, 364 S.C. 60, 76, 611 S.E.2d 323, 331 (Ct. App. 2005), *reversed*, 382 S.C. 212, 670 S.E. 368 (2008) (holding of lower court was reversed after change in position by Respondents).

<sup>35</sup> *Id., citing Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001).

attorney's fees awarded pursuant to a statute authorizing reasonable attorney's fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.<sup>36</sup> R. p. 400 (Response to Court's Request for Information).

Hook takes no position on DHEC's arguments regarding compensatory damages awarded by the ALC to Patterson.<sup>37</sup> On page 20 of its Amended Order, the ALC clarifies the conduct of DHEC upon which its finding of contempt was based: lack of any evidence of any legitimate effort by DHEC to comply with the Consent Order, and no justifiable explanation for its inability to comply, as well as the lack of even an allegation of a good faith effort to comply with the Consent Order. As noted in the Court's order, if permitting activity had been pursued immediately after the Consent Order was entered, there may have been some action by DHEC that could have been cited as evidence of its conduct undertaken to comply with the order. Notwithstanding that fact, as has already been explained, the failure by DHEC to follow the Consent Order was willful.<sup>38</sup>

DHEC could have submitted evidence in an effort to at least explain its failure to comply with the Consent Order, but simply failed to do so. It was certainly aware of the affidavit submitted by Hook in support of the first filing made in the case, Petitioner's Motion to Enforce. DHEC clearly had notice of the affidavit testimony and knew, or should have known, it would be discussed at the hearing on the motion and that it would become part of the record. At a minimum, DHEC could have offered an affidavit to rebut that

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<sup>36</sup> York County at 4, *citing Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

<sup>37</sup> Appellant's Initial Brief, Section III, pp. 23-25.

<sup>38</sup> Appellant's Initial Brief, p. 13.

evidence. Moreover, it indisputably understood it could have used the opportunity to submit evidence in support of its entire position.

**C. Appellant has failed to establish the Automatic Stay Provision of S.C. Code § 1-23-600(H)(2) was, or should have been, applicable to this case.**

DHEC has also incorrectly asserted the automatic stay provision of S.C. Code Ann. 1-23-600(H)(2) was, or should have been, applicable to this case, at least in part, to distinguish Cheap-O's on its facts. However, no automatic stay was applicable here, because by the plain language of subsection H of the statute, application of the automatic stay is limited to timely requests for contested case hearings. While Hook may have made his initial submittal to the ALC under cover of a Request for Contested Case Hearing Form, the letter he referenced in the form submitted to initiate the case unambiguously stated his purpose for submission was to request enforcement of the Consent Order by the ALC.<sup>39</sup> Hook did not need revocation of the permit issued to Patterson in order to justify removal of the dock on Lot 9. An order for removal could have been issued solely to enforce the Consent Order. Although the Consent Order amended the Permit, it is a wholly separate document from the Permit. Hook attached the Consent Order to his letter as “the agency decision” and checked the box on the Request Form confirming the attachment. Hook was not represented by counsel when he undertook initiation of this case. However, because he was well aware of the prior proceedings before the ALC regarding the subject dock, he understood that he had to return to that tribunal in order to revisit the Consent Order entered by the Court.

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<sup>39</sup> Petitioner's Motion to Enforce Consent Order with Incorporated Memorandum, Exhibit A, R. p. 171.

Unfortunately, however, there is no clear path provided in the ALC Rules or instruction on the ALC website for how to have a Consent Order of Dismissal enforced. Nonetheless, the Court analyzed the issue and addressed it appropriately as an action to enforce its prior order.

DHEC has not cited to any authority showing how or why the automatic stay provision could be applicable to Hook's Request for Enforcement of the Consent Order, nor does DHEC establish how the provision "sprang to life" at any point, as claimed in its brief. Because Hook believed he was requesting enforcement of an existing, valid Order when he submitted his letter to the ALC, he had no understanding that use of the form would give rise to an erroneous conclusion that he was requesting of a contested case. Likewise, as a *pro se* party, he did not appreciate the procedural difference between a request for contested case and a request to enforce the consent order, which would be made in the form of a motion. As such, DHEC's assertion that Hook "chose not to file a motion to lift the automatic stay" is incorrect.<sup>40</sup> Hook made no such choice, and, in fact, the automatic stay was not applicable to Hook's action.<sup>41</sup>

As the ALC noted, DHEC failed to take any steps to remedy its noncompliance even after the filing of the Motion to Enforce the Consent Order brought the entire situation to the attention of the DHEC.<sup>42</sup> As such, the ALC correctly held the Department's failure to comply with the Consent Order rose to the level of contempt, following Cheap-O's and cases cited therein.

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<sup>40</sup> Appellant's Initial Brief, p. 19.

<sup>41</sup> The undersigned did not file notice of appearance as counsel for Hook until July 17, 2017, more than ninety days after Hook submitted his letter to the ALC and initiated this case.

<sup>42</sup> Amended Final Order, p. 20, R. p. 81.

**D. The ALC did not ignore any competing interests of the 2003 and 2005 Final Orders.**

SCDEHC and Patterson have made many attempts through the multiple briefs filed during the course of this case to mischaracterize the purposes and outcomes of the contested cases filed in 2003 and 2005 regarding the dock permits issued to Ford for the Belle Terre subdivision.

The 2003 case was the initial challenge to the permits.<sup>43</sup> Several issues were raised by the parties during the hearing and the Final Order and Decision of the ALC reviews lengths of all docks authorized in the Permit.<sup>44</sup> As observed in the Order, the authorized lengths range in length from 25' to 758'.<sup>45</sup> With regard to the dock at Lot 9, the ALC noted the shorter corridor was approved in the Belle Terre Permit and further noted the reduction in length from 595 to 200 justified the "crossing of extended property lines of Lot 10." R. p. 6. Importantly the developer (Ford) owned Lot 10 at the time and allowed the significant extension over the property line of Lot 10. The ALC's findings and conclusions may have been very different if the owner of Lot 10 had objected to the placement of the Lot 9 dock extending across Lot 10's water frontage.<sup>46</sup>

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<sup>43</sup> Mr. and Mrs. Douglas Patterson, Mr. and Mrs. Charles Christen, Jr., Mr. and Mrs. Douglas Springer, Mr. and Mrs. Glenn Young, Mr. and Mrs. David Francer and Mr. Alan Tanenbaum v. DHEC and Ford Development, Docket No. 03-ALJ-07-0105-CC (November 13, 2003). James Island Public Service District was also a Petitioner but withdrew its Petition and agreed to a Stipulated Dismissal after the hearing held on the matter on August 5 and 6, 2003 but prior to the submission of Proposed Orders. See Final Administrative Order issued by Judge Ralph King Anderson III, November 13, 2003 (Exhibit B to Dept.'s Return to Motion to Enforce).

<sup>44</sup> See Final Order issued by the ALC R. p. 1.

<sup>45</sup> See Final Order, R. p. 5. See also CZMAP Order R. p. 19.

<sup>46</sup> "No docks, pierheads or other associated structures will be permitted closer than 20 feet from extended property lines with the exception of joint use docks shared by two adjoining

The 2003 Final Order was appealed by the parties to CZMAP. While the initial appeal was pending, Petitioners narrowed their appeal to the docks on Lots 12 through 23, completely excluding the dock on Lot 9.<sup>47</sup>

The approved, 200' length was the issue Ford attempted to address through the subsequent request to amend the Belle Terre Permit, following Hook's interest in purchasing Lot 10. After DHEC denied the request, Ford Development Corp. v. DHEC, Docket No. 05-ALJ-0031-CC was timely filed on January 5, 2005 to challenge DHEC's denial of Ford's request to amend P/N 2002-1E-322-P to change the dock alignment. The case was assigned to the Administrative Law Judge who presided over the initial contested case hearing. DHEC did not challenge Ford's filing of the case at the time, participated fully in all the negotiations of the Consent Order, and signed the Consent Order that was accepted and made of record by signature of the Honorable Ralph King Anderson, III, thereby ending the matter. It was a fair and balanced resolution of the matter as DHEC obtained a benefit from the Consent Order with regard to the agreement to limit modifications and bind future property owners through Amended Restrictions.

In its brief, DHEC now asserts the ALC erred in failing to join three property owners who had participated in the 2003 case pursuant to SCRCP 19(a). DHEC focuses on these specific owners based on their submission of comment letters objecting to Ford's request for amendment of the Belle Terre Permit. DHEC's brief cites to the letters attached as Exhibit B to the Department's Motion to Reconsider, submitted in 2004. DHEC's brief does not mention that the property owners failed to ask for any notification

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property owners. However, the Department may allow construction closer than 20 feet or over extended property line where there is no material harm to the policies of the Act.

<sup>47</sup> See CZMAP Final Administrative Order, R.p. 19.

of DHEC's decision on Ford's request for a contested case and never attempted intervention<sup>48</sup> when Ford filed its contested case related to the dock at Lot 9. Moreover, to the extent that either DHEC or Patterson have argued that environmental harm will result from authorizing the longer length for Patterson's dock, it must be understood that 595' is well below the length of the longest dock authorized by the Permit. In fact, there are five docks approved at lengths longer than 595' and these docks were excluded by the eleven property owners from their appeal of the Permit to the CZMAP. In other words, the property owners apparently had no concern with the length of these docks.<sup>49</sup>

Aside from citing to Rule 19(a), SCRCP, DHEC cites no legal authority to support its position that the ALC should have joined the 2004 commenting property owners to this case. As previously discussed, this case arose from a request by Hook for the enforcement of a valid consent order with which DHEC failed to comply. This case was filed fourteen years after the comment letters (as mentioned above) were sent. There is no evidence the property owners previously involved still have any interest in the dock length or alignment. DHEC's regulations provide a method for interested parties to receive notice from DHEC so that they may continue participation in proceedings. In the absence of any information showing a failure by DHEC to abide by these regulations, this Court must assume that in 2004-2005 DHEC followed its regulatory procedures.

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<sup>48</sup> S. C. Code Ann. Regs. 30-2(E) requires that "any persons wishing to receive notice of the initial decision on a permit application shall notify the Department within this comment period." S.C. Code Ann. Regs. 30-6 (B) requires that "the Department shall notify in writing all interested persons that have submitted written comments" if an appeal is filed. Such notification includes information about the appeal to facilitate intervention for interested parties. These regulations have been amended over the years but despite changes in form, the substance has remained consistent with the goal of providing notice of administrative appeals and an opportunity to intervene to interested parties.

<sup>49</sup> R. p. 20 (Lots 1-5 excluded from review by the SCZMAP).

Finally, DHEC's characterization of the 2003 and 2005 Orders as "competing" is flawed. Rather, the 2005 Order took extraordinary steps to effectuate the 2003 Order by requiring property restrictions that limited permit amendments. DHEC had no ability to control or limit amendments until it negotiated the *quid pro quo* contained in the 2005 Order. In addition, the 2005 Order contains the following:

"No other permit amendment requests will be accepted for processing by OCRM unless the applicant can demonstrate either 1) material and substantial changes to Parrot Creek or the Belle Terre property since the time of issuance of the General Permit or 2) consistency with the spirit and intent of the original General Permit. The spirit and intent of the Original General Permit was to reduce the potential for adverse cumulative impacts arising from the construction of 27 docks on Parrot Creek and any request that contravenes OCRM's efforts to reduce cumulative impacts will not be accepted or considered by OCRM."

This language far exceeds the controls provided to DHEC when it simply administers its regulations. In short, this part of the Consent Order demonstrates a consistency of interests between the 2003 and 2005 Orders, not competing interests. R. p. 22.

**E. The ALC did not err in not considering S.C. Code Ann. § 15-78-200 because it is not applicable to this case.**

S.C. Code Ann. § 15-78-200 addresses the exclusive and sole remedy for torts committed by an employee of a governmental entity while acting in the scope of the employee's official duty. Most simply stated, this statute does not apply to this case because DHEC's failure to comply with the Consent Order and subsequent failure to provide any remedy for the noncompliance was not the result of a tort. Rather, it is clear DHEC's deficiencies resulted from its overt failure to have appropriate procedures in place to ensure proper filing of documents within its own files. When confronted with its

reprehensible conduct, DHEC then purposefully refused to undertake any corrective action to remedy the very significant problem it created.

DHEC provides no authority to support its mischaracterization of Hook's case as a negligence action. In fact, South Carolina authority establishes the Consent Order was enforceable as an unambiguous contract. "In South Carolina jurisprudence, settlement agreements are viewed as contracts."<sup>50</sup> "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court."<sup>51</sup> "In South Carolina jurisprudence, settlement agreements are viewed as contracts. ... The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."<sup>52</sup>

Because a consent order is considered a contract, the rules governing enforcement of a contract were applicable. It is well-settled under South Carolina contract law that a third-party beneficiary, such as Hook in the case *sub judice*, may enforce a contract specifically made for that party's benefit. "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person."<sup>53</sup>

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<sup>50</sup> Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (2009).

<sup>51</sup> Nichols Holding, LLC v. Divine Capital Group, LLC, 416 S.C. 327, 785 S.E.2d 613 (2016).

<sup>52</sup> Abel v. DHEC and Pawleys Island Community Church, 419 S. C. 434, 798 S. E. 2d 445 (2017) (internal citations omitted); *see also* Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

<sup>53</sup> Bruning v. DHEC, 418 S.C. 537, 552, 795 S.E.2d 290, 298 (Ct.App.2016), *citing* Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct.App.1994).

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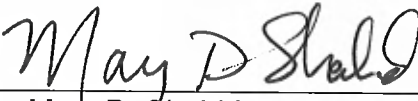
In this case, the Consent Order merely changed the alignment of a single dock included in the dock master plan to the alignment the Permittee, Ford, originally proposed. Ford requested the change at the behest of Hook and in representation of his interests. Entry of the Consent Order agreed upon by DHEC and Ford did not change any of the liabilities or rights conferred by the permit at issue. A clear benefit of the Consent Order, however, is that it provides a mechanism for DHEC to limit requests for modifications of the docks authorized in the Belle Terre Permit, whereas prior to the Consent Order there was no mechanism to limit modification requests. Regardless, DHEC had a duty to enforce its permit and the ultimate Permittee had a duty to comply with all terms and conditions. These circumstances did not change when the parties entered the Consent Order.

### **CONCLUSION**

Wherefore, Richard Hook respectfully requests that the Administrative Law Court's Final Order and Decision Granting Petitioner's Motion to Enforce the Consent Order and Denying Respondent DHEC's 60(B)(5), SCRPC Motion be affirmed in all respects.

Respectfully submitted,

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