# The South Carolina Court of Appeals

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September 18, 2020

Phillip Patterson
627 Parrot Point Drive
Charleston SC 29412

Re: Richard Hook v. SCDHEC
Appellate Case No. 2019-001282

Dear Mr. Patterson:

The Court is in receipt of your Respondent's Final Reply Brief. The South Carolina Appellate Court Rules do not provide for the filing of a brief in reply to appellant's reply brief. If you wish for your final brief to be considered, a motion will need to be served and filed. No further action will be taken on your filing, and it is being returned to you.

Very truly yours,

CLERK

cc: Mary Duncan Shahid, Esquire
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Bradley David Churdar, Esquire

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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Appeal from the Administrative Law Court

Honorable S. Phillip Lenski, Administrative Law Judge

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Appellate Case No. 2019-001282

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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

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# Respondent Phillip Patterson's

# *Final Reply Brief of Respondent*

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Counsel for Hook continually misrepresents and misinterprets the issues in their arguments against prior adjudication, and also prospective application as it applies to DHEC's Rule 60b(5) motion. Consistently, throughout these proceedings, counsel for Hook has labeled the issue as the length or the angle of the Lot 9 dock in their arguments. However, the issue to be considered in this proceeding, and all former proceedings involving the Lot 9 dock, are not simply the length or angle of the dock. The issues are the environmental impacts of the Belle Terre DMP and how the facts and laws relate to those environmental impacts. For instance, the facts and laws in the 2003 contested case proved Ford and OCRM had addressed the cumulative negative impacts from the construction of 27 docks on Parrot Creek and sufficient safeguards had been taken to avoid these impacts. The entire 2003 case was based on, and centered around, numerous environmental impacts. The James Island Public Service District, and the other concerned citizens that joined the case, did not litigate the length or angle of any of the docks in the Belle Terre DMP. They sued to protect the environment and make sure OCRM and Ford Development took all possible safeguards to avoid adverse impacts to the environment surrounding Parrot Creek.

**Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009). In reaching this conclusion, the court held "the identity of the subject matter of the two suits rests not in their forms of action or the relief sought, but rather, in the combination of the facts and law that give rise to a claim for relief." Id. at 10, 677 S.E.2d at 218.(emphasis added)**

The form of action in the 2005 consent order is the realigning of the Lot 9 dock and lengthening of the walkway. This form of action gives rise to the claim of an increase in the amount of shading which results in an increase in the adverse impacts of the Belle Terre DMP beyond what was mandated by the 2003 Final Order. The Lot 9 dock was previously shortened to reduce the shading. The 2003 Final Order clearly relies on this prior shortening of the Lot 9 dock as proof OCRM and Ford had taken all possible safeguards to avoid adverse impacts to the environment in the creation of the Belle Terre DMP (R. p. 6, November 13, 2003 *Final Order and Decision*, page 6). When the Lot 9 dock was lengthened by the 2005 consent order, it increased the shading, and went directly against the prior settlement. The 2005 Consent Order reversed the 2003 ruling through utilization of an unnecessary quid pro quo, made possible by an adverse inference[1], and worst of all, ignored the rules of the court, thereby depriving the Petitioners from the 2003 case, who objected to this stupefying double-back, their right to be heard.

1976 South Carolina Code of Laws Unannotated Updated through the end of the 2003 Session; **Section 48-39-150(A)(9)**

(A) In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

[1] The 2005 Consent Order falsely claims DHEC needed to limit amendments to the Belle Terre DMP (R. p. 22 February 9, 2005 *Consent Order of Dismissal*, page 2). No such limitation was necessary as the regulations and the 2003 Final Order clearly limited such amendments.

**Page 2 of 2003 Final Order;** (R. p. 2, November 13, 2003 *Final Order and Decision*, page 2).

**ISSUES RAISED;**

10) Whether OCRM considered the cumulative, long-range negative effects of this project;

11) Whether the developer used safeguards to avoid these negative effects

**Page 6 of the 2003 Final Order;**

***"The 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".***[2] (emphasis added) (R. p. 6, November 13, 2003 *Final Order and Decision*, page 6).

**Page 9 of the 2003 Final Order;**

"Recent scientific findings demonstrate that ***shading of the marsh grass*** is the **only negative environmental impact** resulting from dock construction." (emphasis added) (R. p. 9, November 13, 2003 *Final Order and Decision*, page 9).

**Page 10 of the 2003 Final Order**

"Ford's subdivision plans also to a great extent deter potential ***negative impacts resulting from the shading of marsh grass.***" (emphasis added) (R. p. 10, November 13, 2003 *Final Order and Decision*, page 10).

**Page 10 of the 2003 Final Order;**

"I, therefore, find that the potential for adverse environmental consequences arising from the construction of these twenty-seven (27) docks was given appropriate consideration by OCRM." (R. p. 10, November 13, 2003 *Final Order and Decision*, page 10).

In the 2003 case, the Final Order defined the issues and confirmed Ford, and OCRM, had sufficiently addressed the impacts of the Belle Terre DMP. More specifically, as it relates to these matters, Ford and OCRM reduced the

[2] When the Lot 9 walkway was reduced it lowered the impact of shading. Therefore, ***it was for this reason***, the reduction "warranted" crossing of the extended property lines.

environmental impacts of shading by combining the dock walkways on Lots 1-7, reducing six walkways to three (Lot 6 has no dock), and realigning the dock on Lot 9, reducing the length, thereby reducing the shading, thereby reducing the environmental impacts. The Petitioners in the 2003 case excluded these docks, ***with their reduced walkways***, from their appeal because they were satisfied with the 2003 Final Order's conclusion that Ford and DHEC had taken sufficient safeguards to avoid the negative environmental impacts of ***these particular docks***.

Now that the issues have been properly defined, we can apply them to Hook's arguments. Were there competing interests in the 2003 and 2005 Orders? The answer is clearly yes. The 2005 Consent Order increased the impacts of the Belle Terre DMP by increasing the length of the Lot 9 walkway, which increased the negative impact of shading. This action reversed the safeguards applied by OCRM and Ford in the creation of the Belle Terre DMP and gave Ford the ***new right*** to increase the adverse environmental impact of the Belle Terre DMP.

Properly defined issues also give rise to prospective application in the 2005 consent order and support for DHEC's Rule 60b(5) argument. The 2005 Consent Order gave Ford permission to realign and lengthen the dock on Lot 9 which ultimately allows an increase in the environmental issue of shading to the Belle Terre DMP. This was a new right for Ford. Ford did not have the right to increase the impacts of the Belle Terre DMP before the 2005 Consent Order was signed. Interestingly, they were given this new right in exchange for a supposed new right offered to DHEC in a quid pro quo that enabled DHEC to limit amendments to the

DMP (R. p. 22 February 9, 2005 *Consent Order of Dismissal*, page 2). However, DHEC already had the ability to limit the exact amendment Ford sought. Regulation 30-12(A)(2)(d): "Docks and piers should use the least environmentally damaging alignment" and Regulation 30-12(A)(3)(b): "Amendments to the general permit must be keeping with the spirit of the original dock master plan to the maximum extent feasible". Fords request directly violated both of these regulations and was also in violation of the 2003 Final Order. There was no need for a quid pro quo.

Now that the mistake has been made in DHEC authorizing the construction of the wrong dock, the balance of equity is whether DHEC is to violate their public creed by destroying the marsh through removal and replacement of the existing dock, or Hook's investment is to be "damaged" by losing the ***right*** to increase the impacts of the DMP granted by the 2005 Consent order so as not to have a neighbor's dock in his view. The balance of equities clearly lies with DHEC upholding their commitment to the environment and the citizens of the State of South Carolina over Hook's unsubstantiated claim[3]. The lower court should have granted DHEC's Rule 60b(5) motion in this matter.

Finally, Counsel for Hook incorrectly asserts the former Petitioners from the 2003 case who wrote letters of objection to Fords request to reverse the agreed upon alignment of the Lot 9 dock (R. p. 424, 425, 426, May 28, 2019 *DHEC's Motion to Reconsider with exhibits* Exhibit B) had to ask to be notified when Ford

[3] Hook never demonstrated through evidence how his investment is damaged by the current alignment of Lot 9's dock.

escalated the amendment request to a contested case (page 24 Hook's Initial Brief of Appeal), ***"DHEC's regulations provide a method for interested parties to receive notice from DHEC so that they may continue participation in proceedings."***. However, Counsel for Hook did not cite the regulation to which they referred. Therefore, at this point, this is merely conjecture by counsel.

McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473, 475 (1933) ***("[S]tatements of fact appearing only in argument of counsel will not be considered.");*** S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted) ***("Arguments made by counsel are not evidence.").***

Nevertheless, the ALJ Court has its own rules pertaining to matters brought before the court. We can all agree that the rules of the court supersede any regulation from the Department when it comes to matters before the court. The rules for the Administrative Law Judge Division, at the time, clearly specify "***any individuals known to the agency who have objected to the issuance of a permit*** *or license* ***be provided in the transmittal form."***

**RULES OF PROCEDURE FOR THE ADMINISTRATIVE LAW JUDGE DIVISION (2004)**

**Rule 12. Notification of Division by Agency of Contested Case.** The agency requesting a contested case hearing or receiving a notice of a contested case from a party shall notify the Division within five (5) working days of the receipt of the request for a contested case hearing by completing and forwarding to the Division a transmittal form, ***and serving a copy on all parties***, containing the following information (emphasis added)

**Note to 1997 Amendments**

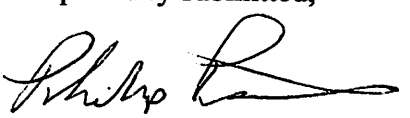
Rule 12 has been amended to add paragraph D., which requires that the names, addresses, and telephone numbers ***of any individuals known to the agency who have objected to the issuance of a permit or license be provided in the transmittal form.*** The rule has been further amended to specify the procedure to be followed if the agency fails to forward the transmittal form to the Division within five working days as required by the first paragraph of Rule 12. (emphasis added)

Had these individuals been provided in the Agency Transmittal Form (R. p. 85, January 10, 2005 *Agency Transmittal Form* page 2) as required by the rules, they would have been served and therefore notified. There was no need for the letter writers to ask for notification had the rules had been followed.

## CONCLUSION

The 2005 Consent Order was an illicit work around to the 2003 Final Order. The quid pro quo was a spurious farce that was utilized to rob the 2003 Petitioners of their hard-fought victory. The rules of the ALJ court were ignored. The 2003 Petitioners were denied their right to be heard. The 2005 Consent Order should be thrown out.

Respectfully submitted,



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September 17, 2020

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