

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from the Court of Common Pleas
For Horry County

Honorable Benjamin H. Culbertson

Case No.: 2010-CP-26-6091

RECEIVED

APR 19 2013

S.C. Supreme Court

South Carolina Court of Appeals
Opinion No.

Tommy W. Berry, Sr. and Jo S. Berry,

Appellants,

v.

South Carolina Department of Health
and Environmental Control, Office of Ocean
and Coastal Resource Management,

Respondent.

DHEC'S RETURN TO APPELLANT'S PETITION FOR REHEARING

The Department respectfully requests that the Court deny Appellant's Petition for Rehearing (the "Petition") and as grounds, submits the following arguments in opposition to the Petition for Rehearing.

FACTUAL AND PROCEDURAL BACKGROUND

The matter before the Court is an appeal from the circuit court's order dismissing an action for lack of subject matter jurisdiction. Despite the Appellants' efforts to

persuade the Court to address arguments made on the merits of the case at this time, the merits are not before this court.¹

In April 2010, the Department issued Administrative Order 07M-012S (hereinafter “Enforcement Order”), assessing a civil penalty and requiring Appellants to submit a restoration plan to return the impacted area to its condition prior to the unauthorized activities referenced in the Order. Appellants sought review of the Enforcement Order by the South Carolina Board of Health and Environmental Control (hereinafter “Board”). The Board subsequently denied Appellants request for a Final Review Conference. On July 8, 2010, the Appellants brought an action in the Court of Common Pleas Fifteenth Judicial Circuit seeking judicial review of the Department’s Enforcement Order. On March 28, 2011, Appellants’ action was dismissed by the circuit court pursuant to Respondent’s Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction for bringing this action before the circuit court.

Appellant filed a notice of appeal to the Court of Appeals. Thereafter this Court transferred the matter to the Supreme Court on August 29, 2012 and subsequently issued a published opinion on March 27, 2013 affirming the Circuit Court’s decision. Tommy W. Berry, Sr. and Jo S. Berry v. S.C. Dep’t of Health & Env’tl. Control, Office of Ocean and Coastal Resource Management, Op. No. 27237 (S.C. Sup. Ct. filed March 27, 2013)(Davis Adv. Sh. No. 14 at 70 - 76 (hereinafter, the “Opinion”). Appellant filed a Petition for Rehearing on April 9, 2013.

¹ Appellants have filed an action in the ALC seeking a contested case hearing. The ALC action has been held in abeyance pending resolution of this appeal.

ARGUMENTS IN RETURN TO PETITION FOR REHEARING

Appellants assert that the Court overlooked, misapprehended, and erred finding that the Appellants' plat depicts the replacement bulkhead being built underneath the cantilevered portion of the house.

The matter before this Court is whether it was correct affirming the circuit court's decision to dismiss the Appellants' action due to a lack of subject matter jurisdiction. Appellants are attempting to dispute various facts and argue the merits of the Enforcement Order, seeking to discredit observations and findings of agency staff. (Appellants' Pet. for Rehearing at pp. 9-13). This is beyond the scope of the Motion to Dismiss for lack of subject matter jurisdiction. These allegations are not before the Court and would be better suited in the forum of the ALC in a contested case hearing. The Department sees no benefit in responding to these lengthy assertions at this stage, as it would be unhelpful to this Court in making its determination as to whether the circuit court erred in dismissing the Appellants' action.²

I. The Court did not overlook or misapprehend that the Appellants' complaint filed in Circuit Court only challenged the Enforcement Order and not the Administrative Order of Revocation (hereinafter "Revocation Order"), as asserted by the Appellant.

Appellants filed an action in circuit court seeking only judicial review of the Enforcement Order. This Court agreed with the lower court, finding that S.C. Code Ann. § 48-39-180 "does not confer jurisdiction on the circuit court to review administrative enforcement orders issued by DHEC, ... [because] ... such orders are administrative in nature and governed by the APA." Tommy W. Berry, Sr. and Jo S. Berry v. S.C. Dep't of

² In choosing not to respond to the Appellants' factual assertions, the Department is not conceding the merits of the Appellants' assertions.

Health & Env'tl. Control, Office of Ocean and Coastal Resource Management, Op. No. 27237 (S.C. Sup. Ct. filed March 27, 2013) (Davis Adv. Sh. No. 14 at 73).

Appellants' approach throughout their Petition for Rehearing is to argue the merits of the case and dispute the facts. However, the matter before this Court is whether the lower court correctly granted Respondent's Motion to Dismiss for lack of subject matter jurisdiction. Appellants argue that the Revocation Order was part of their complaint because it was incorporated by reference by way of an attachment to their complaint and therefore should be presumed to be part of the complaint as a whole. (Appellants' Pet. for Rehearing at p. 14). Appellants also argue that "pleadings are to be liberally construed". Despite Appellants' effort to convince the Court that it overlooked in its opinion that the Revocation Order was included in Appellants' complaint, the Court correctly addressed the issue finding there to be no "specific mention of or objection to the Revocation Order" made by Appellants. Remaining consistent with its previous ruling in Davis v. Monteith, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986) (ruling that it would not, "under the guise of liberal construction of the pleadings, write into the complaint allegations that are not presented."), the Court declared that it was "bound to hold Appellants to their complaint and lone challenge of the Enforcement Order". Berry at 74, Op. No. 27237.

The Court correctly addressed whether the lower court had subject matter jurisdiction, which is the issue here. Citing Hill v. S.C. Dep't of Health & Env'tl. Control, 389 S.C. 1, 17, 698 S.E.2d 612, 621 (2010), the Court agreed with the circuit court finding that S.C. Code Ann. § 48-39-180 did not apply to the Enforcement Order, which is governed by the Administrative Procedures Act. S.C. Code Ann. § 48-39-180 (2008)

and allows “[a]ny applicant whose *permit application* has been finally denied, revoked, suspended or approved...[to] obtain judicial review as provided in Chapter 23 of Title 1, or may file a petition in the circuit court having jurisdiction over the affected land.” S.C. Code Ann. § 48-39-180 (2008) (emphasis added).

S.C. Code Ann. § 48-39-180 (2008) clearly and unambiguously applies solely to permit *applications*. The statute does not contemplate the circuit court exercising jurisdiction over Enforcement Orders such as Administrative Order 07M-012S. Nonetheless, under the auspices of S.C. Code Ann. § 48-39-180 (2008), Appellants filed an action in circuit court seeking to overturn the Enforcement Order issued by the Department against the Appellants for filling in critical area without a permit. (Appellants’ Complaint at p. 16). (R. p. 59). In applying the clear and unambiguous words of S.C. Code Ann. § 48-39-180 (2008), the lower court correctly found that this statute does not apply to Enforcement Orders and subsequently that the circuit court lacked subject matter jurisdiction to entertain such an action. (R. p. 6).

The facts in Hill v. South Carolina Dept. of Health & Environmental Control are analogous to this action in that the petitioner in that case challenged the Department’s issuance of an Enforcement Order because “Hill had constructed a bulkhead in the tidelands critical area too far channelward and out of compliance with the issued permit.” Hill v South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 7, 698 S.E.2d 612, 615 (2010). Though the court’s decision in Hill involves a procedural analysis prior to the enactment of Act No. 387³, the court’s examination of S.C. Code

³ Act 387 streamlined the appeals process and created a uniform process for appeals of OCRM permitting decisions. In order to challenge an OCRM staff decision pursuant to Act 387, a person must first file a request for final review with the Board of Health and

Ann. §48-39-180 provides substantial guidance in actions such as this one, challenging an administrative enforcement order issued by the Department. In Hill, the court reasoned that the provisions of S.C. Code Ann. §48-39-180, “concern a landowner’s challenge to DHEC’s decision to deny a permit in the first instance, as well as to challenges by others who might be adversely affected by the granting of a permit application, such as neighboring landowners.” Id. at 16, 698 S.E.2d at 620. After analyzing the applicable statutes, the court determined “the circuit court erred in concluding this administrative enforcement matter should have been brought in the circuit court and that the ALJ did not have jurisdiction to conduct a contested case hearing to review the propriety of the Administrative Enforcement Order.” Id. at 16-17, 698 S.E.2d at 620. The court found that “review of the *agency’s* enforcement order and its imposition of a civil fine is an administrative matter that falls squarely within the ambit of a contested case as defined in the APA.” Id. at 17, 698 S.E.2d at 621. The Court concluded as follows:

“Hill sought to challenge DHEC’s Administrative Enforcement Order that imposed a civil fine and required relocation of the bulkhead *before* DHEC sought to enforce it by means of a civil suit in the circuit court. Thus, this was an administrative proceeding in which Hill sought to have the parties’ rights, duties, and privileges determined in a contested case hearing by the ALJ as provided by S.C. Code Ann. §1-23-600(B). Accordingly the ALJ had jurisdiction to hear this matter and the circuit court’s ruling to the contrary is in error.” Id. at 17-18, 698 S.E.2d at 621.

The Appellants are also once again attempting to argue on the merits of the case by making an *ultra vires* claim, asserting that the issuance of the Revocation Order was

Environmental Control; the next step is an administrative appeal in the form of a contested case at the ALC to review the final agency decision of DHEC with a right of judicial review directly to the Court of Appeals. The Supreme Court has long held that a circuit court’s review under S.C. Code Ann. § 48-39-180 is limited to a “substantial evidence” review; not a “de novo” review. Carter v. South Carolina Coastal Council, 281 S.C. 201, 203, 314 S.E.2d 327, 328 (1984).

beyond the Department's authority. While this is not a matter before the Court today, the Department maintains its absolute authority to issue an Enforcement Order (see 23 S.C. Code Ann. Regs. 30-8(F), "Pursuant to Section 48-39-170, the Department may issue administrative orders requiring persons to comply with any permit."). This Court accurately noted this provision in its recent opinion and again citing Hill, confirmed that matters brought under this procedure are administrative in nature, and therefore governed by the Administrative Procedures Act. Tommy W. Berry, Sr. and Jo S. Berry v. S.C. Dep't of Health & Env'tl. Control, Office of Ocean and Coastal Resource Management, Op. No. 27237 (S.C. Sup. Ct. filed March 27, 2013)(Davis Adv. Sh. No. 14 at 75). The Court reiterates that under the APA, persons aggrieved by a DHEC decision may challenge that decision by way of a contested case hearing before the ALC, which is the adjudicatory body in all contested cases involving DHEC (citing S.C. Code Ann. § 1-23-600(A) (Supp. 2012). Id. at 75. Accordingly, this Court correctly affirmed the lower court's ruling that it lacked subject matter jurisdiction and that "the ALC had exclusive jurisdiction to entertain Appellants' narrow challenge of the Enforcement Order and the circuit court lacked subject matter jurisdiction to hear Appellants' claim." Id. at 76, Op. No. 27237.

Even if the Court were to find merit in the Appellants' argument that the Department exceeded its authority to issue the Enforcement Order, the Appellants have failed to adequately raise and preserve this argument for appellate review. Before the Appellants even contemplated this appeal, they characterized their lawsuit in circuit court as "an action seeking judicial review of a Final Administrative Order and Decision." (Appellants' Complaint, Paragraph 1) (R. p. 44) (see also Appellants' Complaint,

Paragraph 27, “[t]he Berry’s object to DHEC-OCRM’s decision and findings set forth in its Administrative Order 07M-012S.”) (R. p. 53). Because the underlying basis of the Appellant’s circuit court action is indisputable, the lower court correctly applied S.C. Code Ann. §48-39-180 in concluding that this statute does not extend subject matter jurisdiction to the circuit court for an action challenging the Department’s issuance of an administrative enforcement order. (R. p. 6).

“[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration.” Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004). See Cudd v. John Hancock Mut. Life Ins. Co., 279 S.C. 623, 629, 310 S.E.2d 830, 834 (Ct. App. 1983) (citing Smith v. Smith, 264 S.C. 624, 216 S.E.2d 541 (1975) (“An issue not raised in the lower court cannot be presented for the first time on appeal; hence it may not be properly before us for decision”)); Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 243, 399 S.E.2d 779, 783 (1990) (citing Hoffman v. Powell, 298 S.C. 338 n. 2, 380 S.E.2d 821 n.2, (1989) (“As the claim was not raised below, it will not be considered for the first time on appeal”). “It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and rule upon by the trial court.” Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) (citing Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000), Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427.429 (1995)). Appellants even support these opinions and argue that an issue must be raised and ruled

upon by the lower court in order for it to be properly preserved for appeal (Appellants' Pet. for Rehearing at p. 25).⁴

“There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” South Carolina Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). Appellants have failed to meet the fundamental requirements of preserving their *ultra vires* argument for appellate review. *Ultra vires* was never raised by the Appellants in their Complaint or in argument in the lower court and appears for the first time in their Initial Brief to the Court of Appeals. Due to the untimely and unspecified submittal of Appellants' *ultra vires* claim, this court should not entertain such unpreserved claims. This Court correctly affirmed the lower court's decision in finding that Appellants did not challenge the Revocation Order in their complaint to the circuit court, which left the lower court without subject matter jurisdiction over the matter. Berry at 73, Op. No. 27237.

II. The Court did not overlook or misapprehend that the Appellants' Appeal to the DHEC Board only challenged the Enforcement Order and not the Revocation Order, as asserted by the Appellants.

Appellants again are attempting to dispute the facts of the case claiming that the Revocation Order was included in their appeal to the South Carolina Board of Health and Environmental Control (“Board”) by way of reference. (Appellants' Pet. for Rehearing at

⁴ Appellants assert that Respondents did not properly preserve the issue that Appellants did not specifically challenge the Revocation Order. This is addressed in Section IV below.

p. 21.) While the facts are not at issue here, the Court did not overlook this point and specifically addressed it when it noted that the “Appellants’ appeal to the Board and the circuit court encompassed *only* the Enforcement Order, as no specific mention of or objection to the Revocation Order was made.” Id. at 74, Op. No. 27237. The Court correctly acknowledged that DHEC issued two separate orders. A Revocation Order was issued on April 20, 2010 and a separate Enforcement Order (07M-012S) was issued by DHEC on April 26, 2010. Id. at 72, Op. No. 27237.⁵ Appellants sought review of the Enforcement Order by the Board (R. pp. 285-293). The Board subsequently denied Appellants’ request for a Final Review Conference. (R. pp. 294-296). Rather than contesting the case before the Administrative Law Court in accordance with the APA and as instructed by the Board (R. pp. 338-339), the Appellants brought an action in the Court of Common Pleas Fifteenth Judicial Circuit seeking judicial review of the Department’s Enforcement Order. (R. p. 42).

As explained in II above, when an issue is not properly preserved for appeal, the Court is not going to “write into the complaint allegations that are not presented”. Davis v. Monteith, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986). Appellants also argue for the very first time in their Petition for Rehearing that if Appellants’ counsel inadvertently left out the Revocation Order, it was a clerical error where no prejudice to the Respondent resulted. (Appellants’ Pet. for Rehearing at p. 23). In an effort to bolster this new argument, the Appellants improperly submitted with their Petition for Rehearing an Affidavit with enclosures. Rule 210(h), SCACR states that “the appellate court will not consider any fact which does not appear in the Record on Appeal.” This Court has not

⁵ As noted by the Court, these separate orders were mailed together to Appellants with a single cover letter dated April 27, 2010.

ordered supplementation of the Record on Appeal nor has the Department consented to allow Appellant to supplement the Record on Appeal as required by Rule 212, SCACR. Due to the untimeliness of this “clerical error” argument and the improper submission of supporting documentation, this court should not entertain either the argument or the new documentation.

Appellants argue that the Enforcement Order is a “final judgment” regarding the revocation of the permit and therefore the “Order of Revocation is only an intermediate order.” making it reviewable by this court. (Appellants’ Pet. for Rehearing at p. 24). Appellants rely on Lancaster v. Fielder, 305 S.C. 418, 409 S.E.2d 375 (1991), where the court of appeals dismissed the case because petitioners failed to appeal the final judgment.⁶ What appears to be of relevance to Appellant’s argument in Lancaster is that the court of appeals based its analysis on Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990) (citing S.C. Code Ann. § 14-3-330(1) (1976)), which stipulates when the Supreme Court shall have appellate jurisdiction for correction of errors of law and shall review upon appeal.

Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

S.C. Code Ann. § 14-3-330(1) (1976)

⁶ The S.C. Supreme Court affirmed the dismissal but only based on the finding that the trial judge did not abuse his discretion in granting respondent's motion to transfer. Lancaster v. Fielder, 305 S.C. 418, 409 S.E.2d 375 (1991).

The Department has the authority to revoke a permit and to enforce the provisions of the Coastal Tidelands and Wetlands Act. S.C. Code Ann § 48-39-50(H) and (I). Appellants' attempt to label the Enforcement Order as a "final judgment" and the Revocation Order as an intermediate order to that final judgment is misguided. If characterizing these two actions by DHEC as "final" or "intermediate" is even accurate (which the Department does not concede), then the Department would argue that they are both final decisions of the agency. See S.C. Code Ann. § 44-1-60(F). One does not necessarily rely on the other. The two orders are two distinct actions by DHEC that follow separate processes. An enforcement action can be brought against someone who has violated terms of a permit or if no permit, has violated the Act. In some instances when dealing with the violation of a permit, the permittee cooperates with DHEC and works to bring the violation into compliance with that permit. In that instance, DHEC would not necessarily revoke the permit. Conversely, a permit may be revoked without even initiating an enforcement action.

III. The Court did not overlook or misapprehend that neither Respondent's counsel, nor the trial judge had never raised and ruled on the issue that Appellants failed to perfect their appeal to the Board and the circuit court by not challenging the Revocation Order, as asserted by Appellants.

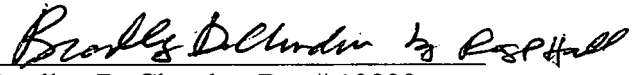
The Appellants claim that Respondents never raised the issue that the Appellants failed to perfect their appeal by not specifically challenging the Revocation Order and therefore the Respondents did not preserve the issue. The entire matter before the circuit court and this Court has been and is whether the circuit court had subject matter jurisdiction over the Enforcement Order, not the Revocation Order. Because Appellants only included a challenge to the Enforcement Order in their pleading (Appellants'

Complaint at p. 1, p. 10), the Respondent only addressed that issue in its Motion to Dismiss. (Respondents' Motion to Dismiss, Civil Action No. 2009-CP-26-5436). Respondent is not going to add objections or claims that Appellants did not even raise themselves. The subject matter jurisdiction determination and as argued by DHEC from the beginning, was made based on Appellants *only* challenging the Enforcement Order. In their own Statement of Facts, Appellants acknowledge that they "filed an Appeal of DHEC-OCRM's Administrative Order 07M-012S dated April 26, 2010" and that Order became the final agency decision pursuant to S.C. Code Ann. § 44-1-60(F). (Appellants' Complaint at p. 10). Moreover, their complaint specifically proclaimed that they objected to DHEC's decision and findings in its *Administrative Order*. (Appellants' Complaint at p. 10). There was nothing said about appealing the Revocation Order to the DHEC Board or objecting to the Revocation before the circuit court.

CONCLUSION

Based on the foregoing arguments, because this Court's Opinion did not misapprehend or overlook any of the issues on appeal, and because the Opinion properly affirmed the Circuit Court's decision, which did not contain error of law and which was supported by substantial evidence, the Department respectfully requests that the Court deny the Petition for Rehearing.

Respectfully submitted,



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April 19, 2013
Charleston, South Carolina

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PROOF OF SERVICE

The undersigned hereby certifies that s/he has this day served the *Department's Return to Appellant's Petition for Rehearing* as follows:

Via Hand Delivery

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
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Via U.S. First Class Mail

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Sandra R. Wessinger

April 19, 2013
Columbia, South Carolina