IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Honorable Benjamin H. Culbertson
Circuit Court Judge

Appellate Case No. 2011-192812

Court of Appeals' Opinion No. 27237, Filed March 27, 2013

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.*

APPELLANTS TOMMY W. BERRY, SR. AND JO S. BERRY'S REPLY TO RESPONDENT'S RETURN

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FACTUAL AND PROCEDURAL BACKGROUND

The matter before the Court is an appeal from the lower court's dismissing an action brought under S. C. Code Ann. § 48-39-180 (2008) on the ground that Appellants failed to exhaust all administrative remedies. (R. p. 7, ¶ 2).

On March 28, 2011, the lower court granted the Respondent's Motion to Dismiss under Rule 12(b)(1), SCRCP, on the ground that Appellants failed to exhaust all administrative remedies. (R. p. 7, ¶ 2).

On April 12, 2011, Appellants filed a Motion to Reconsider, pursuant to Rules 52 and 59, SCRCP, to vacate the lower court's Order and requested a hearing on the matter. (R. pp. 299–318). The lower court denied Appellants' Motion to Reconsider April 19, 2011, and declined to hold a hearing or receive additional argument on the matter. (R. p. 8).

On May 17, 2011, Appellants filed a Notice of Appeal with the South Carolina Court of Appeals in accordance with Rule 203(b)(1), SCACR. (R. pp. 319–22). Thereafter this appeal was transferred to the Supreme Court on August 29, 2012.

This Court issued a published opinion on March 27, 2013 affirming the circuit Court's decision. Tommy W. Berry, Sr. and Jo S. Berry v. South Carolina Department of Health and and Environmental 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 71)(hereinafter the "Opinion").

On April 9, 2013, Appellants filed a Petition for Rehearing. In response, the Respondent filed a Return to Appellants' Petition for Rehearing on April 19, 2013.

ARGUMENTS IN REPLY TO RESPONDENT'S RETURN[1]

A. Appellants are not precluded from raising and preserving for review factual points overlooked and misapprehended by the Court which caused the Court to incorrectly determine that the Appellants' plat (survey) depicts "the replacement bulkhead being built ... just underneath the cantilevered portion of the house" as argued by the Respondent in its return. Respondent's contention is misplaced, and contrary to the plain and ordinary meaning of Rule 221(a), SCACR.

Respondent's argument that the Appellants are unable to challenge any overlooked, misapprehended factual points, mistakenly, found by the Court in the Opinion is misplaced for the following reasons. First, Rule 221(a), SCACR provides in pertinent part, "[a] petition for rehearing ... shall state with particularity the points supposed to have been overlooked or misapprehended by the Court." Rule 221(a), SCACR (emphasis added). "In interpreting the language of a court rule, [the Supreme Court] appl[ies] the same rules of construction used in interpreting statutes." Green By and Through Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907(1994)(citations omitted). Therefore, the words of Rule 221(a) must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. See Lewis Truck Lines, Inc., supra. A clear reading of this rule does not limit a petitioner's request for a rehearing to only points of law of overlooked, and misapprehended by the Court, but also applies to challenges to overlooked or misapprehended factual points. See Rule 221(a), SCACR. Second, any overlooked, misapprehended findings of fact made by this Court in this Opinion cannot be "reheard, reconsidered, or relitigated" in the circuit court or ALC unless timely raised by the Appellants and ruled on by this Court. See Prince v. Beaufort Memorial Hosp., 392 S.C. 599,

[1] The Appellants' incorporate by reference all arguments, previously, made in their Final Brief, and Reply Brief.

606, 709 S.E.2d 122, 126 (Ct .App. 2011)("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form.")(quoting Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App.1996)). Third, if the Appellants are presented with an opportunity to tell their side of the story in either the circuit court or before the ALC, the Respondent's counsel will clearly object to any argument made by Appellants' counsel inconsistent with the Court's finding of fact that Appellants' plat (survey) depicts "*the replacement bulkhead being built ... just underneath the cantilevered portion of the house.*" Tommy W. Berry, Sr. and Jo S. Berry v. South Carolina Department of Health and and Environmental 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 71).

Further, based on the Court's incorrect reading of the Simms' plat as to location of replacement bulkhead, the Appellants will not be able to challenge their alleged square footage violation of the critical area or the amount of the civil penalty in the amount of Fifty-Four Thousand and No/100 ($54,000.00) Dollars owed to DHEC–OCRM. This unduly prejudices the Appellants because some of the alleged square footage violation of the critical area which determines the amount of their fine are based on erroneous findings of fact and conclusions of law made by Sean M. Briggs which are not supported by the department's approved surveys and other drawings included in the Record on Appeal. (Appellants' Petition for Rehearing pp. 12-12). Accordingly, the Appellants respectfully request this Court to modify or amend its opinion to simply show the location of the replacement bulkhead as a factual allegation made by the Respondent. (R. p. 112; R. p. 324).

B. Respondent incorrectly contends in its Return the Appellants' appeal/complaint to the DHEC Board and later to circuit court only challenged the factual and legal basis for the issuance of the Administrative Order, and not the Administrative Order of Revocation.

1. Appellants' appeal to the DHEC Board challenged the legal and factual basis for the issuance of the Administrative Order of Revocation.

Respondent claims that the Appellants' appeal to the DHEC Board only challenged the factual and legal basis for the issuance of Administrative Order, and not the Administrative Order of Revocation. Respondent's assertion is misplaced, and contrary to the substantial evidence in the Record on Appeal based upon the following reasons.

First, the Appellants filed a request for a final review conference with the DHEC Board on May 11, 2010 regarding the department's decision to revoke their critical area permit. Specifically, the Appellants' request for a final review conference included a nine (9) page general statement of grounds challenging the factual and legal basis for department's revocation of their permit, and the relief requested. (Appellants' Petition for Rehearing p. 21). Additionally, on or before May 12, 2010, the Appellants forwarded a "copy of the department's decision and action under review" which included: (1) the cover Letter to the Appellants dated April 27, 2010, signed by Sean M. Briggs as Enforcement Project Manager, (2) the Administrative Order of Revocation, P/N OCRM-07-509, and (3) the Administrative Order O7M-012S (with Attachments) to Lisa Lucas Longshore, Clerk of the Board as part of Appellants' request for a final review conference regarding the revocation of their critical permit. (Appellants' Petition for Rehearing p. 21; R. p. 62-91). The Respondent acknowledged in its Return that "the facts are not at issue" about Appellants

forwarding a copy of the Administrative Order of Revocation to DHEC Board on or before May 12, 2010. (Respondent's Return p. 10).

Second, the DHEC Board's decision on June 10, 2010 to affirm the department's ***" initial staff decision referenced as: "Docket No. 10-RFR-49-Decision dated April 27, 2010, to issue Administrative Order 07M-012S/Administrative Order of Revocation regarding the unauthorized fill and bulkhead installed the tidelands critical area"*** was an acknowledgment by the Board that the Appellants had properly challenged both the Administrative Order and Administrative Order of Revocation. (Appellants' Petition for Rehearing p. 21; R. pp. 338-339). For example, the Board's letter to the Appellant dated June 14, 2010, provides in pertinent part as follows:

> Dear Tom Berry,
>
> > **RE: Docket No. 10-RFR-49-Decision dated April 27, 2010 to issue Administrative Order 07M-012S/Administrative Order of Revocation regarding the unauthorized fill and bulkhead installed the tidelands critical area. (emphasis added).**
>
> The S. C. Board of Health and Environmental Control decided on June 10, 2010, not to conduct a Final Review Conference **on the above referenced matter**. (Appellants' Petition for Rehearing p. 22; R. pp. 338-339).

Accordingly, based on foregoing reasons and analysis of the supporting evidence in Record on Appeal, the DHEC Board had actual notice that the Appellants were challenging the Administrative Order of Revocation's factual and legal basis for revoking the Appellants' critical area permit.

2. *Appellants' complaint to the Circuit Court challenged the legal and factual basis for the issuance of the Administrative Order of Revocation.*

Respondent claims that the Appellants' complaint to the circuit court only challenged the Administrative Order and not the Administrative Order of Revocation. This assertion is without merit and contrary to the substantial evidence in the Record on Appeal for the following reasons.

First, it is undisputed that Appellants' Complaint incorporated by reference the Respondent's Administrative Order of Revocation which is attached to their Complaint as an exhibit. (Appellants' Petition for Rehearing p. 14;R. pp. 61-64). See Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); see also, Brazell v. Windsor, 682 S.E.2d 824, 384 S.C. 512 (2009) (A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading). (Appellants' Petition for Rehearing p.14).

Second, the Administrative Order incorporates by reference the Order of Revocation based on its expressed language in paragraph 10 which provides in pertinent part, "*[t]he Permit was suspended on August 2, 2007, and has been revoked* ***in accordance with the attached order of revocation.***" (Appellants' Petition for Rehearing p. 21;R. p. 17, ¶ 10) In support of Appellants' reference argument, Briggs' cover letter dated April 27, 2010 evidences this intent by stating, "please comply with the requirements of this Order as outlined on page six and seven. Should you choose to appeal ***this Order***, you must do so within 15 days of receipt by the following the enclosed instructions. ***This Order shall become final as written if a proper request is not filed within (15) days of the mailing of this order.***" (R. p. 13)(Emphasis added). This explains why the Order of Revocation dated April 20, 2010 was mailed together with the Administrative Order O7M-012S dated April

26, 2010. (R. p. 13). Further, the Respondent does not assert in its return that the Order of Revocation is not incorporated into the Administrative Order as argued by the Appellants. (Respondent's Return p. 4).

Third, the Appellants' Complaint directly challenges the factual and legal basis for the issuance of the Respondent's Order of Revocation and the revocation of their permit based in part upon the following particulars:

- "The reasons and grounds for this judicial review are that the [Respondent's] decision and findings set forth in its order[s]sic, attached hereto and marked as Exhibit A are not authorized by law and are not supported by the competent, material, and substantial evidence on the whole record." (Emphasis Added). (R. p. 44).

- The Appellants directly challenged the issuance of the Administrative Order of Revocation by seeking judicial review under S. C. Code Ann. § 48-39-180 (1976) in paragraph 7 of complaint. This section provides: *"[a]ny applicant whose permit application has been finally denied, revoked, suspended or approved subject to conditions of the department* ... may file a petition in the circuit court having jurisdiction over the affected land for a final review of the department's action "de novo." (Emphasis added). (R. p. 45).

- The [Appellants], also, asserted "that their new vinyl bulkhead as constructed according to the approved plans, drawings, and specifications attached to their critical area permit." (Emphasis added). (R. p. 48).

- Further, "the [Appellants'] asserted] the following affirmative Defenses, including, but not limited to, that no valid claim exists against them under Rule 12(b)(6), SCRCP, that [Respondent] failed to meet its burden of Proof, ... and that Governmental Estoppel applies against [Respondent] in prosecuting this case based on the acts omissions of it agents, employees, and representative in permitting the [Appellants'] new vinyl bulkhead[.]" (R. p. 58).

Accordingly, Appellants argue that if they are challenging the factual and legal basis for revocation of the critical area permit as described above, then they are also objecting to the Order of Revocation even if they do not mention it by name in their appeals to the DHEC

Board and circuit court. See Mortgage Loan Co. v. Townsend, 156 S.C. 203, 152 S. E. 878 (1930)(The Court reaffirmed the well-recognized rule that the plaintiff need not characterize the facts stated in his pleading, or give his cause of action a name). Based on this rule as reaffirmed by this Court in Mortgage Loan Co. v. Townsend, supra, Appellants argue that it is not necessary to mention the Order of Revocation by name in their appeal/complaint, if they have objected in writing to all findings of fact and conclusions of law supporting its issuance by the department. (R. pp. 48-60). Pleadings are to be liberally construed "to do substantial justice to all parties." Rule 8(f), SCRCP; Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S. E. 2d 584 (1994).

Fourth, the Appellants mainly rely on the decision of McMaster v. Strickland, 322 S.C. 451, 472 S. E. 2d 623 (1996) as authority for their argument that their complaint, also, challenged and objected to the Respondent's Administrative Order of Revocation. In McMaster v. Strickland, supra., the plaintiff asked only for specific performance and "such other or further relief as the Court deems just and proper." 322 S.C. 451, 454, 472 S.E.2d 623, 625 (1996). Nonetheless, the special referee awarded plaintiff monetary damages. Id. at 452,472 S.E.2d at 624. On appeal, the defendant argued the special referee erred in awarding plaintiff relief not requested in his pleadings. Id. at 454, 472 S.E.2d at 625. This Court upheld the special referee's award of monetary damages because the factual allegations of the complaint supported such an award and because the complaint contained a prayer for general relief. Id at 455,472 S.E.2d at 626(emphasis added). In reaching this conclusion in McMaster v. Strickland, supra., this Court relied heavily on the case of Mortgage Loan Co. v. Townsend, 156 S.C. 203, 152 S. E. 878 (1930) for its holding that "[i]f the facts alleged are broad enough to warrant relief, it matters not how narrow the specific prayer may be *if*

the bill contains a prayer for general relief." Id. at 225, 152 S. E. at 886 (emphasis added).

Here, like Townsend, and McMaster, the Appellants' complaint contains a prayer for general relief. For example, the prayer provides, "grant the [Appellants] such other and further relief as the Court may deem equitable, just and proper." (Appellants' Petition for Rehearing pp. 18-19;R. p. 60). As such, the Appellants' prayer for general relief would, also, include relief from Respondent's Administrative Order of Revocation based on the reasoning of Townsend and McMaster. (Emphasis added). (R. p. 60).

Furthermore, the Respondent's reliance on the case of Davis v. Monteith, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986) for the holding that the Court "will not write into the complaint allegations not presented" is misplaced, and is factually distinguishable from the instant case for the following reasons. First, in construing the Appellants' Complaint there are many allegations or inferences challenging the factual and legal basis for the revocation of their critical area permit resulting from the issuance of Respondent's Order of Revocation while in Monteith this Court found "no allegations or inferences" were raised by Davis as the former purchaser in his pleadings that the three (3) acres of land (known as the old Monteith School Property) was fraudulently sold to a third party. Id. at 182, 345 S.E.2d at 727. Second, Appellants' Complaint incorporates the Order of Revocation as part of the "whole complaint" where the Davis' complaint failed to incorporate any documents evidencing that the old Monteith School Property was fraudulently sold to a third party. Id. See, Rule 8(f), SCRCP.

Accordingly, based upon the foregoing reasons and analysis of the supporting evidence in Record on Appeal, the Appellants' complaint to the circuit court *also* challenged

the Administrative Order of Revocation's factual and legal basis for revoking the Appellants' critical area permit.

C. Respondent incorrectly asserts in its Return that the Administrative Order is not the final agency decision and the Order of Revocation is not intermediate. Respondent's assertions are not supported by the substantial evidence of Record on Appeal.

Respondent's claim that the department's Administrative Order is not the Final Agency Order is without merit and contrary to the substantial evidence in the Record on Appeal.

"Generally, only final judgments are appealable." Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996). "Final Judgment" is a term of art denoting the deposition of all issues in the action. Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina, p.86 (2d ed. 2002)(citations omitted). A final judgement must:

> dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined. In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings.

Good v. Hartford Acc. & Indem. Co., 21 S.E.2d 209, 212 (1942). If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment. Good Id. at 32, 21 S.E.2d at 209. When there is a final judgment, and a party timely files its notice of intent to appeal from that judgment, this court may review any intermediate order necessarily affecting the judgment not earlier appealed. Lancaster v. Fielder, 305 S.C. 418, 409 S.E.2d 375 (1991).

Here, the Order of Revocation is just an intermediate order because it contains no findings of facts, and cites no regulations or statutory authority explaining the basis for the department's revocation of the Appellants' critical area permit. The Administrative Order 07M-012 incorporates by reference the Order of Revocation based on its expressed language in paragraph 10 which provides, "*[t]he Permit was suspended on August 2, 2007, and has been revoked* ***in accordance with the attached order of revocation***." (R. p. 17, ¶ 10) Further, the Appellants argue that when the DHEC Board affirmed the initial staff decision in its letter dated June 14, 2010, the Order of Revocation became a part of the Administrative Order 07M-012S pursuant to S.C. Code Ann. § 44-1-60(F) (2002) which provides:

> [i]f the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, ***the staff decision becomes the final agency decision***.

Both orders merged into one ***final agency decision*** which the Appellant directly challenged in their action in circuit court under S.C. Code Ann. § 48-39-18(2008)(Emphasis added). (Appellants' Petition for Rehearing p. 7). Further, the department's initial staff decision is characterized as: ***Docket No. 10-RFR-49-Decision dated April 27, 2010, to issue Administrative Order 07M-012S/Administrative Order of Revocation regarding the unauthorized fill and bulkhead installed the tidelands critical area,*** which support Appellants' contention that both orders merged into one ***final agency decision*** after the DHEC Board affirmed the department's initial staff decision and Orders pursuant to S.C. Code Ann. § 44-1-60(F) (2002). (R. pp. 338-339).

Based on Good and the Record on Appeal, the Administrative Order O7M-012S is the department's Final Agency Order. (R. p. 12-41). Accordingly, pursuant to the reasoning of Lancaster v. Fielder, supra., this Court can review the Order of Revocation as an intermediate order even though (allegedly) not earlier appealed.

D. Respondent incorrectly contends in its Return that the Appellants' "clerical error" argument is untimely and not preserved for appellate review. This contention is not supported by the substantial evidence of Record on Appeal.

Respondent's contention that the "clerical error" argument of the Appellant was not timely is misplaced for the following reasons:

- that it is uncontroverted that neither the Respondent nor circuit court raised the issue that the Appellants had failed to perfect their appeal by not specifically challenging the Order of Revocation in their appeal to the DHEC Board. (Respondent's Return p. 13) (Appellants' Petition for Rehearing p. 8).

- that Appellants' counsel was never questioned by the Court in oral argument about their alleged failure to challenge the Order of Revocation in the appeal to the DHEC Board. (Appellants' Petition for Rehearing p. 27).

- that Respondent acknowledged in its return that "the facts are not at issue here" that the Administrative Order of Revocation was included in Appellants' appeal to DHEC Board by way of reference on or before May 12, 2010. (Respondent's Return p. 10).

- that Appellants' counsel only filed counsel's affidavit with their Petition for Rehearing to show that Lisa Lucas Longshore, Clerk of the DHEC Board had acknowledged receipt of the Administrative Order 07M-012S/Administrative Order of Revocation dated April 27, 2010 from Appellants by stamping: "RECEIVED S.C. DEPT OF HEALTH & ENVIRONMENTAL CONTROL 2010 MAY 12 AM 9:58 OFFICE OF THE COMMISSIONER CHIEF OF STAFF CLERK OF SCDHEC BOARD. (Appellants' Petition for Rehearing p. 21).

- the DHEC Board's decision on June 10, 2010 to affirm the department's ***initial staff decision referenced as: Docket No. 10-***

RFR-49-Decision dated April 27, 2010, to issue Administrative Order 07M-012S/Administrative Order of Revocation regarding the unauthorized fill and bulkhead installed the tidelands critical area was an acknowledgment by the Board that the Appellants had properly challenged both the Administrative Order and Administrative Order of Revocation. (Appellants' Petition for Rehearing p. 22; R. pp. 338-339).

- that Appellants assert by challenging/denying all of the department's findings of fact and conclusions of law in their written response to: (1) its Admission Letter dated July 25, 2007; (2) its Notice of Intent to Revoke letter dated August 2, 2007; and (3) its Administrative Order 07M-012S/Administrative Order of Revocation dated April 27, 2010,they have more than adequately challenged and raise a claim either to Order of Revocation. (Appellants' Petition for Rehearing pp. 3-8).

Based on the foregoing reasons and analysis, that Respondent has not been unduly prejudiced by the Appellants' "clerical error" argument. The Appellants, respectfully, request the Court to reconsider modifying its Opinion based on the decision of Weatherford v. Price, 340 S.C. 572,577-578, 532 S.E.2d 310, 313 (Ct. App. 2000) which holds that if the the party's omission is of a clerical nature only and the Court has jurisdiction to hear the appeal Id. In Weatherford v. Price, the Client did not "technically" appeal from the trial court's original order by referring to it in the Notice of Appeal, however the Client did attach a copy of the order to the Notice. Under these circumstances, the Court of Appeals found that the party's omission is of a clerical nature only and jurisdiction existed to hear the appeal). Id. See, Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina, pp. 116-117 (2d ed. 2002). (Appellants' Petition for Rehearing p. 24).

Here, the Appellants' counsel alleged omission of misidentifying or mislabeling both the administrative orders as one Order, like the Appellant in Weatherford v. Price is of a clerical nature since its undisputed that Appellants' counsel attached a copy of both Orders

with their appeal to the DHEC Board, and further, the Respondent can claim no prejudice. Id. at 577-578; 532 S.E.2d at 313. (Appellants' Petition for Rehearing p. 24).

CONCLUSION

This Honorable Court should reconsider its Opinion via either a rehearing, or by modifying or amending its Opinion to show: (1) that Simm's plat depicts the replacement bulkhead being built along a portion of the Appellants' northern property line, (2) that the Appellants' Complaint filed in the circuit court specifically challenges the basis for the issuance of the Administrative Order of Revocation, (3) that the Appellants' appeal to the DHEC Board specifically challenges the basis for the issuance of the Administrative Order of Revocation, and (4) by reversing the Order of the lower Court granting the dismissal of the Appellants' Complaint for the above stated reasons.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served copies of the Reply to Respondent's Return in the above captioned appeal on the following individual by U. S. Mail, Certified Return Receipt Requested with sufficient postage affixed, addressed as follows:

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