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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Court Judge

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Appellate Case No. 2020-001689
Case No. 2020ALJ300064AP

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South Carolina Technical College System, ..... Appellant,

v.

Carla Jackson and South Carolina
Department of Administration, ..... Respondents,

Of Whom, Carla Jackson is the..... Respondent.

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**REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING**

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The Respondent Carla Jackson has filed her return to the Petition for Rehearing filed by the Appellant South Carolina Technical College System ("SCTCS"). SCTCS replies as follows:

**I. The Administrative Law Court erred in finding that the Respondent's appeal of her termination was covered by the State Employee Grievance Procedure Act, and in finding as a result that the State Employee Grievance Committee and the Court had subject matter jurisdiction over the Respondent's grievance appeal.**

The Appellant SCTCS contends that the Administrative Law Court ("ALC") erred in its remand to the State Employee Grievance Committee for additional fact-finding on a jurisdictional issue and in then applying the substantial evidence standard of review. Relying on

this Court's decision in *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993), SCTCS points out that "jurisdictional facts" are different from other non-jurisdictional facts – a distinction that this Court has overlooked or misapprehended. As the case law fully supports, "jurisdictional facts" are the sole province of the court to decide and are not left to the jury nor any other factfinder to determine, whether that factfinder is a lesser tribunal or not, including the State Employee Grievance Committee.

In her return, Carla Jackson argues in a conclusory manner that *Chew* is "inapplicable to this case." Jackson does not support her assertion with any legal analysis whatsoever. Previously, she attempted to distinguish *Chew* only as being a workers' compensation case, which presents no meritorious or credible distinction at all. It bears pointing out that the rule of law articulated in *Chew* is not limited in its application to workers' compensation cases. It is well settled that any court determining the existence of subject matter jurisdiction is authorized to determine "jurisdictional facts" on its own accord and by a preponderance of the evidence. By way of recent example, in *Swicegood v. Thompson*, 431 S.C. 130, 847 S.E.2d 104 (Ct. App. 2020), *vacated in part and affirmed in result*, 435 S.C. 63, 865 S.E.2d 775 (2021), this Court applied the same rule from *Chew* in a family court appeal where the court's subject matter jurisdiction was at issue. This Court explained that a court "has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." 847 S.E.2d at 108. Thus, this Court erred in declining to apply the well-settled rule from *Chew* and other cases granting the power to decide "jurisdictional facts" to the court as a matter of law and not to another factfinder.

In addition, Jackson's reliance on the case of *State v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011), is misplaced. As SCTCS has pointed out, *Oxner* is inapposite and not controlling. In *Oxner*, the Supreme Court ruled that the appellant was required to request the circuit court to

*reconsider* its subject matter jurisdiction ruling before appealing the order finding an absence of subject matter jurisdiction. Thus, in *Oxner*, the issue was whether a Rule 59(e) motion was required when a particular jurisdictional ruling was made in the lower court and an issue had been raised but not ruled upon. This case presents a much different scenario. Here, this Court concluded that the Appellant has raised an issue *for the first time on appeal*, and it is in that instance that Rule 59(e) has no application and SCTCS should not be precluded based on well-established precedent from raising a new subject matter jurisdictional issue for the first time on appeal. In her return, Jackson does not refute SCTCS's analysis showing that this Court's reliance on *Oxner* is misplaced.

Moreover, in this context, the reliance on *Oxner* is also at odds with another longstanding rule of law holding that the "lack of subject matter jurisdiction in a case may not be waived." *Johnson v. South Carolina Dept. of Probation, Parole, and Pardon Services*, 372 S.C. 279, 641 S.E.2d 895, 897 (2007). Yet, that is exactly what this Court ruled – that SCTCS waived its challenge to the Committee's subject matter jurisdiction on remand.

In sum, the ALC's remand to the Committee for jurisdictional fact-finding was in error, as was its subsequent "review" of the Committee's finding under a substantial evidence standard after remand. This Court then added to that error by finding the issue of subject matter jurisdiction was waived and hence not preserved for appeal and by also applying the substantial evidence standard of review rather than a preponderance of evidence standard as required by law for issues of subject matter jurisdiction.

## II. The Administrative Law Court erred in refusing to hear the merits of the Appellant's appeal that Denmark Technical College had valid reasons to terminate the Respondent and there was substantial evidence in the record to support that termination decision.

As discussed in its briefs and the petition for rehearing, SCTCS relies on this Court's decision in *Bobo v. Marshane Corp.*, 302 S.C. 86, 394 S.E.2d 2 (Ct. App. 1990), in which this Court held that an appeal from an administrative agency remains pending in the court sitting in an appellate capacity while that court awaits agency compliance with a remand order. In her return, Jackson claims that *Bobo* was "mistakenly cited" and attempts to distinguish *Bobo* by simply arguing that *Bobo* is a "factually distinct case" because it is a workers' compensation case. However, that presents only a meaningless distinction. The rule of law applied in *Bobo* should apply *to any court sitting in an appellate capacity* where a remand to *any* agency is deemed necessary for the appellate court to address the appeal pending before it. This is not unique to workers' compensation law. It applies to all appeals under the Administrative Procedures Act, including the case at bar.

Moreover, this Court's attempt to distinguish *Bobo* is legally incorrect. Contrary to this Court's ruling, the circuit court in *Bobo* did not formally or informally "retain" or reserve jurisdiction. In fact, the word "jurisdiction" does not appear in the *Bobo* decision. Instead, this Court in *Bobo* states as its holding that "[t]he appeal … remains pending in the circuit court while it awaits the commission's compliance with the order of remand." *Bobo*, 394 S.E.2d at 4. This Court in *Bobo* also cited with favor the case of *Driscoll v. McAlister Brothers*, 294 Pa. 169, 144 A. 89 (1928) for the proposition that "an appeal was still pending in the court of common pleas where the court pursuant to statute remitted the record to the Workmen's Compensation Board for more specific findings under the Workmen's Compensation Act." *Id*. On rehearing, the Court is respectfully request to apply the holding from *Bobo*.

Nonetheless, even if *Bobo* is correctly deemed "inapplicable here," SCTCS presented an alternative argument which was not considered or addressed by this Court. SCTCS did not waive the issues on appeal raised in its 2018 appeal. As SCTCS points out, its Notice of Appeal filed after remand made it clear that SCTCS intended to raise the pre-remand issues asserted in the 2018 appeal. The purpose of a notice of appeal is to provide notice of the orders or issues being appealed. As the notice of appeal clearly reflects, SCTCS intended to incorporate all issues from the 2018 appeal in the 2020 appeal. Notably, Jackson does not refute SCTCS's argument that this alternative position was not addressed by this Court in its opinion. Secondly, Jackson does not dispute that the Notice of Appeal provided notice to her and to the ALC that SCTCS intended to raise the pre-remand issues asserted in the 2018 appeal. Respectfully, this issue should not have been overlooked and is worthy of being addressed on rehearing.

## CONCLUSION

Based on the foregoing discussion, the Appellant South Carolina Technical College System respectfully renews its request that the Court rehear its decision in this case and reverse the orders of the Administrative Law Court and remand with directions that the Respondent's grievance be dismissed for lack of jurisdiction. In the alternative, the Appellant seeks a remand for consideration of the merits of its appeal that Denmark Technical College had valid reasons to terminate the Respondent and there was substantial evidence in the record to support that termination decision.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

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South Carolina Technical College System, ..... Appellant,

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Carla Jackson and South Carolina
Department of Administration, ..... Respondents,

Of Whom, Carla Jackson is the..... Respondent.

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**CERTIFICATE OF SERVICE**

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Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Petitioner, does hereby certify that service of the **Reply Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 1st day of July 2024 as follows:

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July 1, 2024

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***Via Email Only***
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: South Carolina Technical College System v. Carla Jackson
Appellate Case Number: 2020-001689
ALC Number: 20-ALJ-30-0064-AP
Our File Number: 79.20391

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended April 24, 2024), please find enclosed for filing the **Reply Memorandum in Support of Petition for Rehearing** in the above referenced matter. In accordance with Section (d)(1) of this same Order, I am hereby serving copies on all counsel of record.

If you have any questions, please advise.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: Warren V. Ganjehsani, Esquire *(w/ Enclosure, Via Email Only)*
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