

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph King Anderson, III, Judge  
Case No. 2012-212844

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,

**RECEIVED**

JAN 30 2014

**SC Court of Appeals**

Respondent.

---

**APPELLANTS' MOTION FOR CERTIFICATION BY THE SUPREME COURT  
OR REINSTATEMENT BY THE COURT OF APPEALS AND INTERPLEADER**

---

Pursuant to Rules 204(b) & 260(a), SCACR, and S.C. Code §14-8-210(b), Appellants respectfully move for certification by the Supreme Court and/or reinstatement of this appeal. The documents pertinent to this Motion are attached as an Exhibit.

First, this matter has three (3) issues of "first impression". Further, the appeal seeks a determination of legal principles which are of major importance to the bench and bar, as may be seen hereafter. In addition, the case involves disputed income tax issues that impact every state citizen (a significant public interest). Finally, given the foregoing (among other reasons), it is inequitable and prejudicial to reward Respondent DOR's eight (8) month delay, of a non-specific demand for dismissal, granted well after appeal perfection. Ex. pp. 1-2, 5. On information and belief, this case is appropriate for certification by the Supreme Court and, in any event, there is good cause for reinstatement of this appeal. Appellants were denied rehearing by Order dated January 23, 2014, which was received by the undersigned on January 27, 2014. Ex. p. 6.

## I. Issues of First Impression/Important Legal Principles/Public Interest

### Preface

This case raises no less than three (3) novel issues: (A) S.C. Code §1-23-650(B) (requiring Administrative Law Court (“ALC”) consistency with the rules used in the Court of Common Pleas) has never been subjected to the scrutiny of any appellate court; (B) State Constitution Article V, §4A and S.C. Code §14-3-90 have never been reviewed at this level to determine and define whether the ALC is empowered to apply but disregard major provisions of any Rule established by the Supreme Court; and (C) DOR’s Motions and appeal dismissal were both solely based on S.C. Code §12-60-3370, which has been the subject of only a single published opinion involving fines and video games. On that occasion, our Supreme Court determined the statute to be inapplicable.

Regrettably, there is no controlling case or precedent regarding the statutes above or Article V, §4A upon which Appellants, DOR, the Court of Appeals, the Orders issued herein, future litigants, lower courts, or the state bar can rely and be enlightened. For that reason alone, and there are others listed herein, it is respectfully submitted that this case should be certified by the Supreme Court or reinstated by the Court of Appeals.

### Argument

(A) S.C. Code §1-23-650(B) allows the Administrative Law Court (“ALC”) to “adopt” or “approve” and “promulgate” (to make widely known, officially and publicly) rules for itself. S.C. Code §1-23-650(B)(2). However, those rules must be “consistent with the rules of procedure governing civil actions in courts of common pleas”. S.C. Code §1-23-650(B)(1).

The ALC has never adopted a rule providing for Summary Judgment. To the date hereof, aside from a single mention regarding fees (ALC Rule 71D(1)), the ALC Rules are totally bereft of even a reference to “Summary Judgment”. Nonetheless, very early (42 days) after case filing below DOR filed and served a Rule 56, SCRCPP, Motion for Summary Judgment. R. p. 45.

Resort to the Rules of Civil Procedure is not automatic in the ALC. With no adopted and promulgated "Summary Judgment" rule, the tribunal could have refused to consider DOR's Rule 56 Motion altogether. Instead, the tribunal voluntarily chose to entertain it.

Notably, the motion advanced by DOR specifically invoked Rule 56, SCRPC and its text demanded that the tribunal apply that Rule. (R. p. 45, lines 13-14; p. 79, lines 7-8). Even more noteworthy, as a significant part of its Motion, and in complete contradiction of Summary Judgment by any court, DOR admitted that it had totally disregarded Appellants' discovery requests. (R. p. 51). Nonetheless, an abject refusal to allow discovery, in combination with a Summary Judgment demand, rendered DOR's discovery non-disclosure "moot", according to the tribunal. Ex. p. 3.

The decision to countenance a Summary Judgment Motion, standing alone, was not error. "The South Carolina Rules of Civil Procedure **may** ... be applied" by the tribunal. Rule 68 ALC (emphasis added). However, in so doing, with no Summary Judgment rule of its own, the ALC Rules default to Rule 56, SCRPC, with all its nuances, protections, and appellate interpretations. Moreover, Rule 56 is cited by the tribunal in the Order under appeal (R. pp. 3, 8), thereby fully conceding the applicability of Rule 56, SCRPC.

However, Rule 68 ALC does not provide for the picking and choosing of only some provisions of a Rule of Civil Procedure to the exclusion or complete disregard of other provisions and protections of that same rule and the cases construing it. To the absolute contrary, practice and procedure before the tribunal "must be consistent with the rules of procedure" used in the Courts of Common Pleas. S. C. Code §1-23-650(B)(1). As may be seen from Appellants' Brief, the Reply Brief, and the Record on Appeal, the tribunal did pick and choose the Rule 56 provisions it applied. It also failed to allow the protections of that Rule and the cases construing it, including but not limited to a patently pre-mature grant of Summary Judgment to a party refusing to allow discovery.

There is currently no appellate case that approves, rejects, or even addresses that tribunal conduct in passing. This appeal, in part, brings that issue to the appellate level for the first time.

(B) In a related area, aside from rules adopted and promulgated for use only in the ALC, trial court Rule-making and modification authority appears restricted to the Supreme Court, with passive approval by the General Assembly. Those restrictions are found in the language of the state Constitution (Article V, §4A) and again in state statute (S.C. Code §14-3-950).

Here, the misapplication of Rule 56 by the tribunal was tantamount to Rule amendment. It disregarded the Rule 56 timeframes for return and reply and (without prior announcement) set its own; it failed to preserve standard discovery rights (Rule 21A ALC, specifically applying “Rules 26-37, SCRCF”); it held no Summary Judgment hearing but did not notify the parties that it would hold no hearing; it ignored the decades-old and often repeated mandate that written or oral argument of counsel is not to be considered evidence supportive of Summary Judgment and awarded the DOR requested Summary Judgment based solely on the written argument of DOR counsel; among other defects.

It seems clear that the ALC has no authority to restrict, amend or modify the Rules of Civil Procedure. Regrettably, no case on that point has risen to the appellate level until this case. Respectfully, such conduct deserves appellate review by the author of those Rules, making this case a proper one for Certification by the Supreme Court.

(C) DOR relied exclusively on S.C. Code §12-60-3370 as authority for its Motion before the Court of Appeals (Ex. p. 2) and the Order ensuing therefrom (Ex. p. 5). To be applicable, that statute specifically requires that the tribunal calculate and determine an amount. A logical extension of that legislative thought would be that the tribunal reveal that sum in its directive.

In that context, it is noteworthy that DOR did not seek post-Summary Judgment tribunal clarification or specificity. DOR did not raise the “determination” issue in its initial or final brief.

More currently notable, the DOR Motion for Dismissal did not contain a single dollar figure. The Motion did not refer to a single sentence of either tribunal Order. DOR did not attach a copy of any page of either tribunal Order to its Motion. Ex. p. 2.

DOR did not cite a figure because DOR could not cite a figure: the tribunal did not announce a sum in the ruling/directive sections of either of its two (2) Orders. Ex. pp. 3-4. Consequently, the Order of July 12, 2013 (Ex. p. 5) ventured outside the four (4) corners of the Motion, *sua sponte* listed an amount, and granted relief for which DOR did not qualify pursuant to the very statute (S. C. Code § 12-60-3370) upon which the Motion and Order solely relied.

Disregarding the propriety or impropriety of using a *sua sponte* finding to support the dismissal of an appeal, which deserves similar scrutiny, it is noteworthy that S.C. Code §12-60-3370 has never been the subject of an appellate opinion in the income tax context. In the only appellate precedent, a DOR case involving video games and fines, the Supreme Court determined that statute to be totally inapplicable.

As a consequence, state citizens and their attorneys are entitled to be absolutely certain as to what amounts have been “determined to be due” by a tribunal and to be assured that any ensuing appeal is not inhibited or fatally harmed by tribunal or DOR neglect. Precision is required in other areas of law (eg. mortgage appeal bonds), and certification by the Supreme Court and appellate clarity would be of value to every citizen and attorney appearing in the ALC.

#### Section Summary

Our appellate courts have never scrutinized a ruling of the ALC under the plain language of §1-23-650(B)(1) or analyzed the required Common Pleas Rule consistency. Similarly, there has never been a precedential §12-60-3370 appellate analysis in the income tax context.

More importantly, the ALC (an agency of the executive branch) eviscerated a Rule of Civil Procedure and, thereby, substituted its own policy and procedure for that of the Supreme Court (judicial) and, at least peripherally, the General Assembly (legislative). Aside from readily apparent Article 1, §8 separation of powers issue, such conduct demonstrates a disregard of Article V, §4A and S.C. Code §14-3-950. Respectfully, these three “first impression” issues cry out for elucidation of the bench, bar, and public by the Supreme Court and, therefore, Certification of this case.

## II. Inequitable Dismissal/Abandonment/Waiver/Reinstatement

### Preface

The tribunal awarded Summary Judgment to DOR on July 26, 2012. Appellants sought reconsideration, relief, and amendment pursuant to Rules 52, 59 and 60, SCRCR. Denial of Appellants' Motion was entered and received on August 21, 2012.

This Notice of Appeal was served on August 22, 2012. Ex. p.1. No expression of concern was forthcoming from DOR and the settlement of the Record and the briefing schedule ensued.

Fully eight (8) months later, with no consultation or contact, DOR filed and served its Motion for Order of Dismissal. The four (4) corners of that Motion make no reference to any dollar figure. Ex. p. 2. Venturing outside the four corners of the Motion for a figure, *sua sponte*, dismissal was granted nearly a year after appeal initiation and only after all appellate duties and filings, short of oral argument, were completed. Ex. pp. 1, 5.

### Argument

By the time DOR sought dismissal, Motions had been heard, Initial Briefs had been filed and served by all parties, the Record on Appeal had been subject to Motion and settled, and the time for preparing, binding, filing and service of the Record on Appeal was imminent. Arguably, DOR abandoned and waived its claim, if any it had, over the eight (8) month period. Ex. pp. 1-2.

Further, during the pendency of the DOR Motion, no deadline was suspended. The Record on Appeal was compiled, bound, filed and served and all final Briefs were bound, filed and served. Short of oral argument, both parties' appellate duties were complete.

Upon Appellants' receipt of the Order of July 12, 2013 (Ex. p. 5), a rehearing was sought. During the pendency of Appellants' Petition for Rehearing, DOR filed yet another/renewed Motion for Order of Dismissal. Just like the first, the second Motion made no reference at all to a figure "determined to be due" by the tribunal nor did it cite a page or section of either tribunal Order. Referring only to the first Order of the Court of Appeals (Ex. p. 5), for the first time DOR

listed a dollar amount by parroting the *sua sponte* figure of that Order, only. Nonetheless, it was also granted via a second Order. Consequently, a second Petition for Rehearing was sought. It was denied last week and received by the undersigned today. Ex. p. 6.

### Section Summary

DOR was egregiously tardy with its non-specific and, arguably, invalid Motion. Ex. pp. 1-2. It can reasonably be found that DOR abandoned and/or waived any right to its Motion for Dismissal during its eight (8) month delay. Appellants further assert that dismissal after all document duties and costs expenditures have been completed and nearly a year into the appeal (Ex. p. 5) is grossly inequitable. Due to the longterm delay of what should have been a threshold demand from DOR, if valid at all, to condition reinstatement upon payment of a figure absent from the tribunal directives and the DOR Motion itself (Ex. pp. 2-4) compounds the injustice to Appellants and rewards DOR's lack of diligence if this matter is not Certified or reinstated.

### III. Interpleader/Deposit with the Clerk

Appellants have reiterated their view that the tribunal made no determination sufficient to invoke or apply S. C. Code § 12-60-3370 and that this appeal was not proper for dismissal. Ex. pp. 2-4. Nonetheless, and although all amounts claimed by DOR remain hotly contested, Appellants understand the ruling of the Court of Appeals dated July 12, 2013. Ex. p. 5.

However, as hopefully made clear on the foregoing pages, this case contains novel and significant issues about which no precedent is found. Respectfully, it is a case that should be heard and deliberated upon by the appellate courts of the state, thereby warranting Certification by the Supreme Court. Rule 204(b), SCACR; S.C. Code §14-8-210(b). That scrutiny should not be confounded solely by the absence of a small disputed sum.

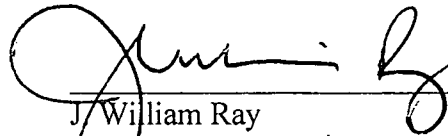
Consequently, Appellants also move that these Courts accept the attorney's trust check in the exact amount stated in the Order of July 12, 2013, and Appellants further move that the Supreme Court order such check to be delivered to the custody and control of The Honorable Daniel

E. Shearhouse pending Certification by the Supreme Court and a final Order. S.C. Code § 18-9-150.  
A copy of that check, made payable to the SC Supreme Court or Court of Appeals, is attached hereto. Ex. p. 7.

### Conclusion

WHEREFORE, due to the several "first impression" issues arising; the absence of bench and bar instructional precedent; the attendant Constitutional questions; and DOR's prejudicial failure to timely request/notify/demand/move/petition for payment or bond (if any right it truly possessed and had not waived at such a late date) until this appeal was virtually finalized for oral argument; Appellants respectfully request that this appeal be Certified by the Supreme Court or, in the alternative, reinstated by the Court of Appeals, and that the Court assuming control hereof take custody of the original of Ex. p. 7 as a stakeholder until all matters raised in this appeal are determined with finality.

Respectfully submitted,



J. William Ray  
700 East North Street  
Greenville SC 29601-3013  
(864) 313-5332  
PRO SE/ATTORNEY FOR APPELLANTS

January 27, 2014

**Appellants' Motion Exhibit, Page 1 of 7**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph King Anderson, III, Judge

Case No. 2012-ALJ-17-0221-CC

John Ray and Sherry Ray,

Appellants,

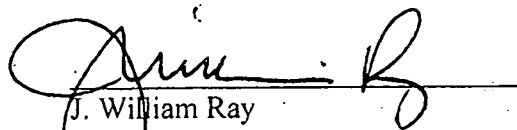
v.

S.C. Department of Revenue,

Respondent.

NOTICE OF APPEAL

The Appellants appeal the Orders of the Honorable Ralph King Anderson III, Judge of the Administrative Law Court. The Order dated July 26, 2012 was received by counsel for the Appellants on July 30, 2012. On August 3, 2012, the Appellants filed and served a Motion to Reconsider, Grant Relief and Set Aside Order. By Order dated August 21, 2012 and received by the undersigned via email, only, on August 21, 2012, the Court denied the Appellants' Motion. This appeal ensues.



J. William Ray  
P. O. Box 8535  
Greenville SC 29604-8535  
(864) 313-5332  
ATTORNEY FOR THE APPELLANTS

August 22, 2012

Other Counsel of Record:  
Benjamin J. Tripp  
P. O. Box 12265  
Columbia, SC 29211  
ATTORNEY FOR THE RESPONDENT

RECEIVED  
AUG 24 2012  
SC Court of Appeals

Appellants' Motion Exhibit, Page 2 of 7

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
The Honorable Ralph King Anderson, III  
Administrative Law Judge

Case No. 12-ALJ-17-0221-CC  
Appellate Case No. 2012-212844

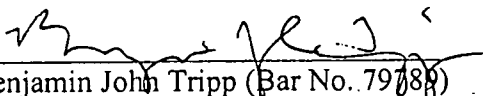
John Ray and Sherry Ray, ..... Appellants,

v.

South Carolina Department of Revenue, ..... Respondent.

RESPONDENT'S MOTION FOR ORDER OF DISMISSAL

In accordance with Rule 240(e), SCACR, the Department moves for an order of the Court dismissing this appeal. S.C. Code Ann. § 12-60-3370 (Supp. 2011) required the Rays to post a bond for the taxes determined to be due by the ALC before filing this appeal. After due diligence, the Department understands that the Rays have not posted a bond with this Court or the ALC. Accordingly, the Department requests that the Court dismiss this appeal.

  
Benjamin John Tripp (Bar No. 79788)  
Counsel for Litigation  
Sean G. Ryan (Bar No. 76585)  
Managing Counsel for Litigation  
Milton G. Kimpson (Bar No. 7917)  
General Counsel for Litigation  
Harry T. Cooper, Jr. (Bar No. 1383)  
Executive Deputy Director

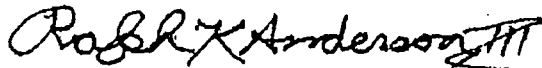
RECEIVED

APR 2 2013

ORDER

THEREFORE, IT IS HEREBY ORDERED that: (1) the Department's Motion for Summary Judgment with respect to both the tuition tax credit issue and the estoppel issue is GRANTED; and (2) the Department's Motion to Extend the Deadline for Discovery Responses is Moot.

IT IS SO ORDERED.



Ralph K. Anderson, III  
Chief Administrative Law Judge

July 26, 2012  
Columbia, South Carolina

**Rule 52, SCRPC**

The Rays' motion under Rule 52, SCRPC should be denied because the rule does not provide grounds to invalidate a judgment or order. The rule specifically requires a judge trying a case without a jury to record its findings of fact and conclusions of law, and it allows a party to move for the court to amend its findings in a judgment:

**(a) Effect.** In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

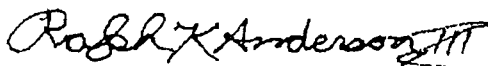
**(b) Amendment.** Upon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

The purpose of the rule is to ensure that an appellate court has a sufficient basis in the record to evaluate a trial court's application of the law. In re Treatment & Care of Luckabaugh, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). "This requirement is merely directory and provides no basis for invalidating a judgment." Borg Warner Acceptance Corp. v. Darby, 296 S.C. 275, 279-80, 372 S.E.2d 99, 101-02 (Ct. App. 1988) (citing Pawley's Island Civic Ass'n v. Johnson, 292 S.C. 208, 355 S.E.2d 541 (Ct.App.1986)). Accordingly, Rule 52, SCRPC, does not provide a means for the Rays to seek reconsideration and setting aside the Court's order.

**ORDER**

**THEREFORE, IT IS HEREBY ORDERED** that the Rays' Motion to Reconsider, Grant Relief and Set Aside Order is **DENIED**.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Ralph K. Anderson, III  
Chief Administrative Law Judge

August 21, 2012  
Columbia, South Carolina

**The South Carolina Court of Appeals**

John Ray and Sherry Ray, Appellants,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2012-212844

---

**ORDER**

---

Respondent has filed a Motion for Order of Dismissal requesting that this Court dismiss the instant appeal for Appellants' failure to comply with section 12-60-3370 of the South Carolina Code (Supp. 2012). That statute provides, in pertinent part, "Except as otherwise provided, a taxpayer shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge before appealing the decision to the court of appeals."

We find in the order from which appeal is taken, the Administrative Law Court determined Appellants owed Respondent \$850, plus interest, for an improperly refunded tuition credit toward their 2008 income taxes. We further find Appellants have provided no evidence they either paid Respondent or posted a bond in the amount of \$850 prior to filing this appeal. Respondent's motion is hereby held in abeyance. Within ten days, Appellants shall provide this Court with confirmation, either that they have paid Respondent the principal amount of the disputed tax, \$850, or that they have posted bond in that amount pending the resolution of their appeal. Appellants' failure to comply with this order will result in the dismissal of this appeal.

  
FOR THE COURT

Columbia, South Carolina

**FILED**

*JF* 7/12/13

The South Carolina Court of Appeals

John Ray and Sherry Ray, Appellants,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2012-212844

RECEIVED  
JAN 27 2014

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. B. Wells J.

John D. DeLoach J.

Joseph W. Cusseton A.J.

Columbia, South Carolina

2014 1/23/14

Appellants' Motion Exhibit, Page 7 of 7

J. WILLIAM RAY  
GREENVILLE, SC

A PROVIDER OF SYNOVUS FINANCIAL SERVICES

67-66-532

01-27-14

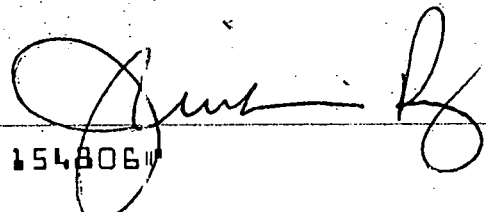
PAY TO THE ORDER OF Supreme Court or Court of Appeal

\$\*\*\*850.00

Eight Hundred Fifty & 00/100 \*\*\*\*\* DOLLARS

Supreme Court or Court of Appeal

MEMO  
Rays v. DOR; Interpleader



⑈00018492⑈ ⑆053200666⑆363543154806⑈

J. WILLIAM RAY

Supreme Court or Court of Appeal

Rays v. DOR; Interpleader

01-27-14

\$\*\*\*850.00

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph King Anderson, III, Judge

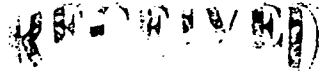
Case No. 2012-212844

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,



JAN 30 2014

**SC COURT OF APPEALS**

Respondent.

PROOF OF SERVICE

I do hereby certify that a copy of Appellants' Motion for Certification of the case by the Supreme Court or Reinstatement in the above captioned case has been duly served on Respondent by placing a copy in an envelope, with adequate prepaid postage affixed thereto, addressed as shown below, and properly depositing such copy in the United States Mail on the date below.

Aaron M. Scheuer, Esquire  
Attorney for Respondent S.C. Department of Revenue  
P. O. Box 12265  
Columbia, SC 29211

J. William Ray  
700 East North Street  
Greenville SC 29601-3013  
(864) 313-5332  
PRO SE/ATTORNEY FOR APPELLANTS

January 27, 2014