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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

Dock. Nos. 07-ALJ-04-00444-AP, 07-ALJ-04-00445-AP, 07-ALJ-04-00446-AP,  
07-ALJ-04-00447-AP, 07-ALJ-04-00448-AP, 07-ALJ-04-00449-AP,  
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\* Docket No. 07-ALJ-04-00826-AP is probably assigned to an unrelated case.  
See June 8, 2012 letter to the ALC with copy to the Court of Appeals. The  
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Order caption, line 6, and has not yet been deleted by the Court of Appeals.

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Rodney Elliott, #251337, Henry Rivers, #219118.....Appellants,

v.

South Carolina Department of Corrections.....Respondent.

Appellate Case No. 2012-210588

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REPLY BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

The Department of Corrections (SCDC) accepts the Statement of Issues made by Appellants (inmates) in their Amended Initial Brief (Inmates' Brief, 1-2; SCDC Brief, 1). Therefore, inmates contend SCDC is bound by those issues (Lanford v. West Oakwood Cemetery Addition 75 S.E. 2d 865, 867 (S.C., 1953); S.C. Juris. (1992), App. & Error, §93). This reply brief will address SCDC's points under the issue number and in the order presented in inmates' brief.

## STATEMENT OF THE CASE

SCDC notes inmates did not appeal the ALC August 5, 2011 order denying their May 23, 2011 motion to supplement the ALC record with documents they have designated for this Court's record, and SCDC has filed a motion to strike (SCDC Brief, 7, n. 9). Inmates contend the ALC order was not appealable, and they presented these documents to the ALC in their motion and in their September 13, 2011 ALC Level Two brief, as to be described in their response to the motion to strike (Inmates' 5-23-11 ALC motion to supplement with Exhibits 1 and 2 (with proposed documents); 9-13-11 ALC brief with Appendices 1 and 2 (with proposed documents); R. pp. 4278-4498, 4636-5062).

## ARGUMENT

1. **The Adkins and Wicker decisions created new grievance and appeal remedies for inmates' pre-existing right to prevailing wages.**

SCDC analogizes its denial of inmates' grievances to its denial in Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ-04-00781-AP, Aug. 13, 2001 (SCDC Brief, 15, n. 28). In Wicker, SCDC contended Wicker's grievance was not even grievable (Inmates' Brief, 7). Here, SCDC takes the opposite position (SCDC Brief, 16).

SCDC contends there is no evidence of an appellant filing a step 1 grievance before September 22, 2004 or of such grievance being summarily dismissed by SCDC or appealed to the ALC (SCDC Brief, 16, n. 31). Inmates respectfully disagree, and refer to the 2004 step 1 of appellant Darrell Williams which discusses his 2001 step 1 dismissed by the ALC for "want of jurisdiction" (Inmates' Brief, 8; Darrell Williams' 9-22-04 step 1; Williams' 1-11-01 step 1 and SCDC response; Williams' 6-26-01 step 2 and SCDC final decision; and 12-5-01 ALC dismissal; R. pp. 10, 305, 308, 4115).

SCDC makes various contentions about McNeil and Sullivan (SCDC Brief, 17-21). These matters are addressed in inmates' brief, pp. 8-9, 22, 24-25, 45-47.

SCDC contends that although the ALC apparently dismissed Willie Ingram's appeal in light of McNeil, Ingram demonstrates inmates could still file grievances for wages (Willie Ingram, #83404 v. SCDC Dock. No. 01-ALJ-04-00190-AP, Op. 1-2, Oct. 23, 2001; SCDC Brief, 22). Inmates contend the relevant issue is whether SCDC treated such grievances as grievable. See inmates' brief, 7-8.

SCDC contends the ALC March 10, 2011 order, p. 9, correctly concluded that neither Adkins nor Wicker created new grievance or appeal remedies (SCDC Brief, 22). However, the ALC order, p. 8, did not even mention the most important language in Wicker, 602 S.E. 2d at 58, n. 1, concerning new appeal remedies: "We note that our holding today is extremely limited and is not to be viewed as **expanding** the jurisdiction of the ALJD in any other circumstance".

SCDC contends Wicker did not suggest SCDC was immune from prison industries pay claims prior to Adkins/Wicker (SCDC Brief, 26). Inmates first contend SCDC's own final grievance decisions indicate to the contrary (e.g., Ackerman

step 2 final decision, p. 1; R. p. 1311):\*

The South Carolina Supreme Court, in two opinions it issued on August 23, 2004, **first determined that you could file a grievance** by which to protest any provision of the "prevailing wage" statutes that applied to the prison industries project in which you participated. These opinions are Adkins, et al. v. SCDC and Wicker v. SCDC.

Second, inmates contend the ALC and Supreme Court have also indicated Adkins and Wicker created new grievance rights for these claims. In Darrell Williams, #219730 v. SCDC Dock. No. 04-ALJ-04-00613-AP, Aug. 10, 2005, Order of Remand, the ALC stated:

The holding in Wicker granting inmates the right to file a grievance for back wages is founded upon the premise that the right to prevailing wages under S.C. Code App. §24-3-430 (Supp. 2003) is a protected property interest for which an inmate in (sic) entitled to due process.

And, in Torrence v. SCDC 646 S.E. 2d 866, 869 (S.C., 2007), the Court stated that Adkins held that while inmates had no private right of action, they were:

not without a remedy because Wicker allowed them an avenue of relief through the inmate grievance system..The clear rule emerging from the Adkins and Wicker cases is this.. the DOC's internal grievance procedure, with recourse to the Administrative Law Court, is the appropriate way to have a prisoner's wage claim adjudicated.

SCDC contends Adkins and Wicker recognized that SCDC grievance policy was not a "novel mechanism" for inmates to contest "conditions" which affect them (SCDC Brief, 26). Inmates contend that, while the grievance policy was not new, allowing wage claims to be grieved under that policy was new. It was new because inmates' statutory right to prevailing wages was not recognized as a "property" interest protected by due process until Wicker (602

\* Inmate's grievance document is typical of others in the manner indicated.

S.E. 2d at 58). Inmates contend this new due process protection was the basis for the Adkins holding providing a grievance remedy for prevailing wage claimants (Adkins, 360 S.C. 413, 419, 602 S.E. 2d 51, 55).

Finally, inmates note an appellee's failure to respond to an argument can amount to a conclusion that the lower court ruled incorrectly (First Union Nat. Bank v. FCVS Comm. 469 S.E. 2d 613, 617 (S.C. App., 1996). For issue 1, inmates contend SCDC failed to respond to these arguments:

(1) SCDC's summary dismissal of prevailing wage claims before Adkins/Wicker violated the due process requirement for a "meaningful" hearing (Logan v. Zimmerman Brush Co. 102 S. Ct. 1148, 1159 (1982) (Inmates' Brief, 8).

(2) The logical interpretation of Wicker, 602 S.E. 2d at 58, n. 1 ("..our holding..is not to be viewed as expanding the jurisdiction of the ALJD in any other circumstance") is that it expanded ALC jurisdiction to cover prevailing wage claims (Inmates' Brief, 10).

**Respondent SCDC's New Issue 1. Our Supreme Court's decisions in Adkins and Wicker apply retrospectively, and they cannot apply both retrospectively and prospectively (SCDC Brief, 23).**

SCDC presents the issue of prospective vs. retrospective application of Adkins/Wicker (SCDC Brief, 23-27). However, this issue is not listed in inmates' Statement of Issues on Appeal, which SCDC accepts (Inmates' Brief, 1-2; SCDC Brief, 1). Therefore, inmates contend SCDC is bound by those issues, and the Court should not consider this new issue (Lanford v. West Oakwood Cemetery Addition 75 S.E. 2d 865, 867 (S.C., 1953); S.C. Juris. (1992), App. & Error, §93).

SCDC contends Adkins and Wicker cannot apply both retrospectively and

prospectively (SCDC Brief, 23). This argument was not ruled upon by the ALC, and inmates contend it is not preserved for review (ALC 3-10-11 order, 9; R. p. 43 ; J. Toal, Appellate Practice in South Carolina, Second Edition, p. 58; Wilder Corp. v. Wilke 330 S.C. 71, 497 S.E. 2d 731, 733 (S.C., 1998).

On the merits, inmates contend Adkins and Wicker apply retrospectively to all past, present and future cases. As a rule, court decisions are applied retroactively to all civil matters that have not reached final judgment (20 Am Jur 2d (2005), Courts, §152). Decisions are said to be presumptively retrospective (Id, §150). Decisions applied prospectively govern operative facts occurring after the decision, while retrospective decisions apply to all past, present and future cases (Id, §§150-151).

In South Carolina, decisions creating new substantive rights have only prospective effect. Decisions creating new remedies to vindicate existing rights are applied retrospectively. And, prospective application is required when liability is created where none formerly existed (J. Toal, Appellate Practice in South Carolina, Second Edition, p. 291, citing, Davenport v. Cotton Hope Plantation 333 S.C. 71, 87, 508 S.E. 2d 565, 574 (S.C., 1998).

As to SCDC's contention that Adkins and Wicker cannot apply both retrospectively and prospectively (SCDC Brief, 27), inmates respectfully disagree. Inmates contend retrospective decisions like Adkins and Wicker normally apply to all past, present and future cases (20 Am Jur 2d (2005), Courts, §150). Inmates further contend if SCDC did not agree that Adkins/Wicker applied to past and future claims, it would probably still be arguing that inmates' claims are not grievable since they were filed after Adkins/Wicker were decided.

2. Inmates' grievances concern policies/procedures under §13.9 of SCDC Grievance Policy because of their express language and substance, Adkins/Wicker, and notices of appeal, and there was no time limit to file under §13.9.

SCDC cites the ALC opinion that inmates' interpretation of "policies/procedures" is overly broad (SCDC Brief, 28). Inmates contend the ALC used the wrong definition, and hence the ALC's conclusion is wrong. The ALC noted inmates appear to argue that "policies/procedures" means any act or method of proceeding in an action (ALC 7-26-12 Sec. Amend. Order, 6-7; R. pp. 158-159). In fact, that definition was for the term "procedure" as defined in the dictionary (Inmates' Brief, 12). Inmates contended "policies/procedures" in §13.9 means "SCDC wage policy" (Inmates' Brief, 14). Inmates contend this definition is sufficiently narrow to avoid public policy concerns.

SCDC notes the ALC adopted SCDC's interpretation of "policies/procedures", as follows (SCDC Brief, 29):

The approved guidelines for handling the agency's day to day operations as well as statements expressing the basic expectations of conduct for agency staff and inmates. More formally stated, the terms "policies" and "procedures" constitute agency directives deemed by the responsible agency officials as "necessary to preserve internal order and discipline, and to maintain institutional security in the prison."

Inmates note this definition is not the agency's definition, but one obtained, apparently by SCDC's counsel, from departments of corrections in other states (SCDC ALC Supp. Level Two Brief, p. 2, n. 5; R. p. 5117). Even so, inmates contend SCDC's definition is not inconsistent with the 1998 SCDC/WTI contract, discussed at pp. 12-13 of inmates' brief (1998 contract; R.p. 720).

SCDC contends inmates failed to address the ALC's ruling that (1) public policy calls for application of some limitations period to these claims, and (2) because the 15 day filing limitation in §13.1 of grievance policy is the only limitations period in that policy, it must be the period applicable (SCDC Brief, 30). Inmates contend the first point is partially addressed in inmates' brief, p. 19. In addition, inmates note the courts should not impose a limitations period where, if the 15 day rule would otherwise apply, it was tolled or some other legal principle prevented its application.

The second SCDC point is inconsistent with SCDC's position that inmates could have filed a pre-Adkins/Wicker grievance since it was a §7.1 grievable issue involving "Department policies/procedures, directives or conditions which directly affect an inmate" (SCDC Brief, 15-16; Griev. Pol. §7.1; R. p. 685). However, a §13.1 grievance, which concerns "incidents", is most probably a §7.2 or 7.3 grievable issue involving "actions" between inmates or staff and inmates (Griev. Pol. §§7, 13.1; R. pp. 685, 687).

SCDC contends the ALC correctly ruled that, under §13.1, inmates must file grievances within 15 days of when SCDC informed them of their wage, and this ruling is consistent with public policy and Wallace v. Burbury 305 F. Supp. 2d 801 (N.D. Ohio, 2003) (SCDC Brief, 31). This point is partially addressed in inmates' brief, pp. 20, 41-42.

In addition, inmates note that "public policy" properly cognizable by the courts is that derivable by clear implication from constitutions, statutes and judicial decisions (Black's Law Dictionary, Revised Fourth Edition,

p. 1318; Brown v. American Ry. Express Co. 128 S.C. 428, 123 S.E. 97-98). Inmates contend the ALC's ruling that inmates had to file within 15 days of when SCDC informed them of their wage, is not consistent with public policy as contained in the ALC's prior decisions (James Wright, #200123 v. SCDC Dock. No. 06-ALJ-04-00114-AP, Op. 3, Apr. 28, 2006 ("Therefore, appellant was required to file a grievance within 15 days of the Department's failure to pay him the wages owed"); Angelo McKelvie, #105696 v. SCDC Dock. No. 06-ALJ-04-00116-AP, Op. 3, Apr. 28, 2006 (same ruling as Wright); and Delane Terrell, #234582 v. SCDC Dock. No. 06-ALJ-04-00120-AP, Op. 3, Apr. 28, 2006 (same ruling as Wright).

SCDC contends inmates' attempt to distinguish Wallace v. Burbury by relying on principles from Ledbetter v. Goodyear Tire & Rubber Co. 127 S. Ct. 2162, 2174 (2007) were not raised in the ALC and inmates are barred from raising them now (SCDC Brief, 31-32). Inmates contend they did substantially raise this matter in the ALC. A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear the **argument** has been presented on that ground (J. Toal, Appellate Practice in South Carolina, Second Edition, pp. 57-59, citing State v. Russell 345 S.C. 128, 546 S.E. 2d 202, 205 (S.C. App., 2001).

In the ALC, inmates contended they complied with §13.1 by filing within 15 days of a term of employment and should be paid for that term, or at a minimum for the 15 days preceding the step 1 file date (Inmates' ALC Level Two Brief, 23, 26 and reply brief, 11-12; R. pp. 4658, 4661, 5107-5108). The ALC ruled against inmates in its order (ALC Sec. Amend. Order 7-26-12, 27; R. p. 179).

In this Court, inmates' eighth argument stated: Section 13.1 did not require filing within 15 days after inmates' initial pay date, and they complied with §13.1 by filing during a term of employment or for the previous 15 days work. (Inmates' Brief, 39). Inmates distinguished Wallace on the basis that inmates' is a continuous claim involving multiple causes of action arising with **each pay check**, drawing on similar principles discussed in Ledbetter (Inmates' Brief, 42).

Inmates contend that arguing in the ALC and this Court for a minimum back pay for 15 days is substantially the same as arguing in this Court that inmates' claim is a continuing claim involving multiple violations each time an illegal pay check is issued, which in inmates' case was every two weeks (Exh. D to Darrell Williams' Sept. 22, 2004 step 1; e.g., Exh. F for F. Ackerman; R. pp. 732, 1304).

If this Court believes the issue was not preserved, inmates incorporate by reference in this reply brief their initial brief argument, pp. 41-43, as a proper attempt to distinguish Wallace as discussed in SCDC's brief, pp. 31-32 (J. Toal, Appellate Practice in South Carolina, Second Edition, 215).

For issue 2, inmates contend SCDC failed to respond to these arguments:

(1) "Policies/procedures" in §13.9 means SCDC wage policy (Inmates' Brief, 14).

(2) These were not "incident" grievances under §13.1, but grievances "concerning policies/procedures" under §13.9 for the reasons stated in inmates' brief (Inmates' Brief, 12, 15-19).

**Respondent SCDC's New Issue 2. Although not stated as a separate issue, SCDC contends the ALC correctly ruled that applying the §13.1 filing deadline avoids the public policy problems of requiring SCDC to defend stale claims (SCDC Brief, 30).**

Stale claims is not listed in inmates' Statement of Issues on Appeal, which SCDC accepts (SCDC Brief, 1). Again, inmates contend SCDC is bound by inmates' Statement of Issues and this Court should not consider this issue (Lanford v. West Oakwood Cemetery Addition 75 S.E. 2d 865, 867 (S.C., 1953); S.C. Juris. (1992), App. & Error, §93).

On the merits, the ALC in its order mentioned the five year period between some inmates' starting work and filing grievances, and stated that, "(C)learly, the passage of five years could significantly affect the Department's ability to defend the Appellants' claims" (ALC 7-26-12 Sec. Amend. Order, 7-8; R. pp. 159-160). Inmates contend the ALC's opinion is affected by error of law and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record (S.C. Code §1-23-610(B)).

In the ALC, SCDC raised laches and contended that many inmates filed grievances over six years after starting work, and this delay "..was unreasonable and obviously prejudices its interests" (SCDC ALC Level Two Brief, 14; R. p. 5079). In their ALC reply brief, inmates cited Historic Charleston Holdings, LLC v. Mallon 673 S.E. 2d 448, 456 (S.C., 2009), for the elements a party must show to prove laches: unreasonable delay by the complaining party resulting in prejudice to the party asserting laches. Inmates contended SCDC never raised laches at the agency level, and had not shown why the delay was unreasonable or how SCDC was prejudiced (Inmates'

ALC Level Two Reply Brief, 2-3; R. pp. 5098, 5099).

In King v. James 694 S.E. 2d 35, 41-42 (S.C. App., 2010), this Court stated a stale demand is one that has remained unasserted for a long time, one that is first asserted after an unexplained delay of such great length as to render it difficult for the court to ascertain the truth and do justice, or as to create a presumption against the validity of the claim or presumption that the claim has been abandoned or satisfied.

A laches defense must be pleaded in the trial court or it is waived (Wright v. Craft 372 S.C. 1, 20-21, 640 S.E. 2d 486, 497 (S.C. App., 2006). A delay may be reasonable if the party does not raise a claim due to unfavorable law but brings suit after the law changes (27 Am Jur 2d (1996), Equity, §170). Laches connotes negligence and opportunity to have acted sooner (Chambers of S.C., Inc. v. County Council for Lee County 434 S.E. 2d 279, 281 (S.C., 1993). Laches usually requires proof of actual prejudice, which must be particularized and not conclusory (27 Am Jur 2d (1996), Equity, §§181, 185).

Inmates' class action (2002) was filed less than three years after most inmates started work (1-29-02 Sum/Complt.; SCDC 9-6-11 spreadsheet; R. pp. 212, 4602). Most grievances were filed in September 2004 within five weeks of the Adkins/Wicker decisions (SCDC 9-6-11 spreadsheet; R. p. 4602). Thus, inmates contend these claims were not unasserted (King v. James).

As to the delay being unexplained, SCDC obviously knew of inmates' class action it was defending. SCDC also knew it considered wage claims non-grievable prior to Adkins/Wicker, and the ALC excluded those claims from its appeal jurisdiction. Inmates contend the delay was not unexplained (Id).

Finally, SCDC has made no showing the delay rendered it difficult for the courts to do justice for lack of evidence or witnesses, or to create any of the presumptions discussed in King v. James.

Regarding laches, as to waiver, SCDC did not mention the delay in most step 1 responses (e.g., Ackerman step 1 response; R. p. 1298). In step 2 final decisions, SCDC stated the time period from starting work to filing grievances with no mention of prejudice (e.g., Ackerman final dec.; R. p. 1312). SCDC did not allege laches or stale claims until the ALC proceedings (SCDC ALC Level Two Brief, 14; R. p. 5079). Thus, inmates contend SCDC waived laches and stale claims as a defense (Wright v. Craft).

Concerning unreasonableness of delay, in the ALC SCDC made the conclusory allegation that a "...six (6) year delay was unreasonable" (SCDC ALC Level Two Brief, 14; R. p. 5079). In this Court, SCDC did not mention unreasonableness of delay (SCDC Brief, 30, n. 52). Moreover, inmates have discussed in their briefs the pre and post-Adkins/Wicker law regarding grievability and appealability of these claims, and grievance filings within weeks of those decisions. Inmates contend SCDC has not shown the delay was unreasonable.

Regarding prejudice, in the ALC SCDC again made the conclusory allegation that the delay "...obviously prejudices its interests" (SCDC ALC Level Two Brief, 14; R.p. 5079). In this Court, SCDC states what inmates say about prejudice, but fails to state how SCDC believes it was prejudiced (SCDC Brief, 30, n. 52). Inmates contend SCDC has failed to show that it was prejudiced.

3. There was reasonable cause under §13.9 not to file within the original time frame because inmates had no wage grievance and appeal rights before Adkins/Wicker, and even if inmates had such rights, they were effectively barred from exercising those rights, and there was no time limit to file under §13.9 after Adkins/Wicker.

For issue 3, inmates contend SCDC failed to respond to these arguments:

- (1) Inmates' claims were unaccrued before Adkins/Wicker (Inmates' Brief, 22).
- (2) Inmates' grievances contain adequate notification of reasonable cause, and a request for waiver was not necessary in these circumstances (Inmates' Brief, 23).

4. SCDC's application of §13.1 violated due process because it cut off inmates' claims before they accrued and denied inmates a meaningful opportunity to file grievances and obtain judicial review before the bar took effect.

For issue 4, inmates contend SCDC failed to respond to these arguments:

- (1) Inmates' claims did not accrue until Adkins/Wicker (Inmates' Brief, 26).
- (2) Application of §13.1 to pre-Adkins/Wicker claims denied inmates of a meaningful opportunity to file and appeal under Logan v. Zimmerman Brush Co. 102 S. Ct. 1148, 1159 (1982) (Inmates' Brief, 26).

5. SCDC waived §13.1 because §13.9 and step 1 instructions were inconsistent with an intention to rely on §13.1, SCDC did not raise §13.1 until step 2 appeals, and SCDC considered these grievances on the merits before invoking §13.1.

SCDC contends §13.9 and step 1 instructions are not inconsistent with SCDC's intent to apply §13.1's deadline, as inmates' argument only makes sense if their wage claims constituted policies/procedures grievances and then SCDC improperly applied the 15 day deadline (SCDC Brief, 34, n. 60). Inmates respectfully disagree, and contend their argument only makes sense if the Court believes these were "incident" grievances and §13.1 applied (Inmates' Brief, 27-28). Waiver is not a possibility for a §13.9 grievance "concerning policies/procedures" since that provision has no time limit.

SCDC contends nothing in grievance policy or step 1 instructions suggested inmates' claims constitute "policy" issues and a grievance presenting such issues is exempt from filing deadlines (SCDC Brief, 35). This point is partially addressed in inmates' brief, pp. 28-29. In addition, inmates note that §13.9 and step 1 instructions, with their language "concerning policies/procedures" and "policy grievances at any time", respectively, do suggest these claims constitute "policy" issues and are exempt from filing deadlines.

SCDC contends, by inmates' argument, SCDC waived the right to assert the 15 day deadline before inmates' right to prevailing wages accrued (SCDC Brief, 35, n. 63). Inmates' respectfully disagree, as they contend SCDC's waiver arose when inmates filed grievances in September 2004 since it is the wording and substance of those grievances which triggered the inconsistency between §13.9 and step 1 instructions, and SCDC's intent to raise §13.1 "for grievances such as these" (Inmates' Brief, 29).

SCDC contends the ALC correctly determined that SCDC's step 1 responses are not final decisions and the Warden could only make recommendations, but not award back pay, interest, costs and attorney fees (SCDC Brief, 36-37, n. 67). This point is partially addressed in inmates' brief, p. 29. In addition, inmates contend the Warden's step 1 decision was final if not appealed, as inmates must check a blank on the step 1 indicating they accept the Warden's "decision" and consider the matter "closed", or they wish to appeal (e.g., Ackerman step 1; R. p. 1297).

Moreover, the Warden's step 1 response states that, "...I again deny your grievance..." (e.g., Ackerman step 1 response; R. p. 1299). Finally, grievance policy §13.3 states the Warden issues a "decision" to the step 1 (Griev. Pol., §13.3; R. p. 687).

As to the Warden's right to award back pay, Grievance Policy allows the Warden to grant restitution/monetary reimbursement without additional approval up to the monetary limits of SCDC policy/procedure OP-22.03 (Griev. Pol., §10 Note, R. p. 686). And obviously, the Warden could deny back pay, etc., which he did for all inmates (e.g., Ackerman step 1 resp.; R. p. 1299).

SCDC cited the ALC opinion that the Warden could not waive defenses (SCDC Brief, 38). Inmates first contend the Warden's waiver authority is irrelevant since waiver is asserted herein by operation of law (Inmates' Brief, 28-32). Further, the matter of SCDC raising defenses is partially addressed in inmates' brief, p. 31.

In addition, the Warden raised these defenses in step 1 responses:

Inmates' hourly rate is incorrect; Adkins/Wicker did not order inmates to file grievances, or require payment of overtime or wages at the rates stated in Darrell Williams' grievance; Inmates were not WTI's employees; denial of class grievance recognition; and denial of interest, costs and attorney fees (e.g., Ackerman step 1 response; R. p. 1298). Inmates contend if the Warden could raise defenses, he should be deemed capable of waiving them by operation of law.

SCDC contends Friends of Potter Marsh v. Peters 371 F. Supp. 2d 1115 (D. Alaska, 2005) supports the ALC's ruling (SCDC Brief, 38). This point is partially addressed in inmates' brief, p. 29. In addition, Friends of Potter Marsh noted the agency's draft assessment of environmental impact had no legal effect (371 F. Supp. 2d at 1119). Here, inmates contend the Warden's step 1 decision did have legal effect and the matter was "closed" if inmate failed to appeal (e.g., Ackerman step 1; R. p. 1297).

SCDC contends inmates do not question the ALC's reliance on Friends of Potter Marsh's rule that an agency can modify its decisions (SCDC Brief, 39). Inmates contend the Federal Highway Administration's process in that case has little bearing on the workings of SCDC's inmate grievance policy where, as noted, the Warden's step 1 response is final and legally effective if not appealed.

SCDC cites the ALC's reliance on Pace v. DiGuglielmo 544 U.S. 408 (2005) in support of its position that SCDC did not waive the filing deadline in the 32 step 1 responses and 136 step 2 final decisions which raised the deadline and considered the merits (SCDC Brief, 40). Inmates contend that,

because Pace concerned a post conviction petition in state court, it is distinguishable and the Ross v. County of Bernalillo 365 F 3d 1181, 1186 (CA 10, 2004) decision, which involved a prison acceptance and consideration on the merits of an inmate grievance, is more analogous to our case.

SCDC contends inmates' argument that SCDC waived §13.1 because it denied their grievances on procedural and substantive grounds, is without merit due to the ALC's 2001 decision in Wicker (SCDC Brief, 15, n. 28). Inmates respectfully disagree, as waiver was not an issue in Wicker.

SCDC contends the argument that the ALC overlooked inmates' two primary grounds for merits consideration waiver is based on materials not in the record, the ALC did not rule on or consider these arguments, and the issue is not preserved for review (Inmates' Brief, 30-32; SCDC Brief, 41). Inmates contend, with respect to the first ground overlooked, the 153 step 1 responses which failed to plead §13.1 and were also merits decisions, these 153 step 1 responses are in the ALC record, and the record designated for this Court (e.g., Ackerman step 1 response; R. p. 1298; ALC Rec., 936).

As to the second ground, SCDC's merits consideration of inmates' Amendment/Exhibits to grievances before invoking §13.1, some 150 Amendments are also in the ALC record, and record designated for this Court (e.g., Ackerman Amendment; R. p. 1300; ALC Rec., 938). Further, SCDC's spreadsheet in the ALC record, also designated for this Court's record, contains some 180 Amendments noted as having been filed (SCDC 9-6-11 spreadsheet; R. p. 4602; ALC Rec., 1). Finally, inmates' Statement of the Case summarizes Amendment filings in April 2007, while SCDC's Statement is silent on the matter (In-

mates' Brief, 3; SCDC Brief, 1-5). Compare, SCACR 208(b)(2) (If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case).

As to the ALC not considering or ruling on these matters, ordinarily where a party raises an issue but it is never ruled upon by the trial court, and the party fails to file a motion to alter or amend the judgment, the issue is not preserved for review (J. Toal, Appellate Practice in South Carolina, Second Edition, pp. 58-59, citing, S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters 347 S.C. 333, 554 S.E. 2d 870, 875 (S.C. App., 2001)).

Here, the ALC proceedings were governed by ALC Rules 63 and 65, which state the ALC's decision is final and motions for reconsideration will not be considered. There is no provision in the ALC Special Appeals rules for filing a motion to alter or amend judgment. Inmates contend they did all they could to preserve this issue by arguing the two overlooked grounds for merits consideration waiver in their ALC Level Two Brief, pp. 13-16 (Inmates' ALC Level Two Brief, pp. 13-16; R. pp. 4648-4651).

For issue 5, inmates contend SCDC failed to respond to the above discussed overlooked grounds for merits consideration waiver except to present their preservation argument.

**6. SCDC was estopped from raising §13.1 by equitable estoppel.**

SCDC contends inmates do not identify any aspect of Strickland v. Strickland 375 S.C. 76, 650 S.E. 2d 465 (S.C., 2007) that is inconsistent with RWE Nukem Corp. v. ENSR Corp. 373 S.C. 190, 644 S.E. 2d 730 (S.C., 2007) or misapplied to their case (SCDC Brief, 42, n. 74). Inmates contend this point is partially addressed in inmates' brief, p. 34. In addition, inmates note Strickland did not involve estoppel to plead the statute of limitations, but a claim for past due alimony barred by equitable estoppel (Strickland, 650 S.E. 2d at 471-472).

SCDC contends inmates misinterpreted the filing deadline, and no evidence exists that inmates or counsel ever asked SCDC whether a prevailing wage claim constituted an "incident" or policy grievance (SCDC Brief, 43, n. 76). Inmates contend they did not misinterpret §§13.1 and 13.9, but SCDC incorrectly applied §13.1 to their claims. Counsel cannot speak for inmates, but does not recall asking SCDC the above stated question.

**7. Inmates complied with §13.1 because it was tolled by their class action and they filed grievances no later than 15 days after the class action remittitur filing date or within 45 days of notice posting under the 2005 order.**

SCDC cites the ALC opinion that tolling inmates' claims would require the ALC to conclude inmates were justified in relying on their class action to protect their rights (SCDC Brief, 45). Inmates point to the class action opinion in Darrell Williams, et al. v. SCDC, et al. 641 S.E. 2d 885, 888 (S.C., 2007), where a dissenting justice would have held defendants subject to inmates' suit claims under the Payment of Wages Act, §41-10-10 et seq.

Inmates contend this demonstrates they were justified in relying on the class action to protect their rights.

For issue 7, inmates contend SCDC failed to respond to their argument that, for inmates who had not filed grievances by April 6, 2007, they had until December 4, 2008 to file pursuant to the 2005 Circuit Court order (Inmates' Brief, 37).

8. Section 13.1 did not require filing within 15 days after inmates' initial pay date, and they complied with §13.1 by filing during a term of employment or for the previous 15 days work.

SCDC contends the ALC's ruling that inmates had to file within 15 days of the alleged "incident", meaning the date when SCDC informed them of their wage rate, was consistent with public policy and Wallace v. Burbury 305 F. Supp. 2d 801, 806 (N.D. Ohio, 2003) (SCDC Brief, 31, 48, n. 85). This point is addressed in inmates' brief, pp. 41-42, and herein at pp. 7-8.

SCDC contends inmates' attempt to distinguish Wallace by relying on principles from Ledbetter v. Goodyear Tire & Rubber Co. 550 U.S. 618, 637 (2007) was not raised in the ALC and cannot be argued in this Court (SCDC Brief, 31-32, 48, n. 85). This point is addressed herein at pp. 8-9.

9. If §13.1 required filing within 15 days after initial pay date, inmates complied with §13.1 because it was tolled while inmates were barred, or effectively barred, from grieving and appealing prevailing wage claims before Adkins/Wicker, and after those decisions recognized such rights, inmates filed grievances within 15 days after the Adkins/Wicker remittitur file date.

SCDC contends inmates' position that Adkins and Wicker did not become final until 15 days after filing of the remittitur, conflicts with Ludwick

v. This Minute of Carolina, Inc. 337 S.E. 2d 213, 216 (S.C., 1985) and Davenport v. Cotton Hope Plantation 508 S.E. 2d 565, 574 (S.C., 1998) (SCDC Brief, 14, n. 25). First, inmates contend Adkins/Wicker were final on the date the remittitur was filed in Circuit Court, not 15 days thereafter (Inmates' Brief, 44).

Second, inmates contend Ludwick and Davenport are not analogous to our case, since they concerned applying appellate court decisions retrospectively or prospectively, not the issue of when final disposition of appellate decisions occurs.

For issue 9, inmates contend SCDC failed to respond to these arguments:

(1) That SCDC, in its final decisions, acknowledged observing the remittitur rule in this case (Inmates' Brief, 45).

(2) That §13.1 is not a "statute of creation" under Knight Pub. Co. v. U.S.C. 367 S.E. 2d 20, 22 (S.C., 2007) (Inmates' Brief, 19-20, 45).

(3) That ALC prevailing wage appeals were barred prior to Adkins/Wicker because, in addition to McNeil, only in Wicker was inmates' right to prevailing wages held to be a property interest protected by the due process clause (Inmates' Brief, 46).

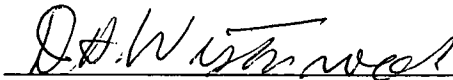
(4) That SCDC, if ordered to pay back wages, could seek contribution from WTI for inmates' claims (Inmates' Brief, 47).

#### CONCLUSION

Inmates respectfully request reversal of the ALC order; rulings on each issue as summarized in inmates' Amended Initial Brief, pp. 48-49, based on

the applicable standard of review stated in that brief at pp. 7, 11, 21, 26-27, 33, 35, 39, and 44, and in this reply brief at p. 10; and remand to the ALC for briefing on the merits as to all grievances.

Respectfully submitted,



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