

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No. 2014-000246

RECEIVED

MAY 29 2015

SC Court of Appeals

South Carolina Department of Consumer Affairs.....Respondent,

v.

Entera Holdings, LLC and Entera Work Comp Solutions, LLC,.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 24, 2015.

May 26, 2015



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QUESTIONS PRESENTED

- ISSUE I The agency letter of August 21, 2015 does not constitute a final agency decision.
- ISSUE II That service of the original document in this matter has never been completed pursuant to the South Carolina Rules of Civil Procedure.
- ISSUE III The Court of Appeals in its determination, failed to reach the issue presented above in Issue I.

STATEMENT OF THE CASE

This matter comes before the court upon the petition of Petitioner, Entera Holdings, LLC and Entera Work Comp Solutions, LLC (hereinafter Entera) regarding the dismissal of Entera's complaint and request for hearing before the Administrative Law Court.

The original letter from the Department of Consumer Affairs dated August 21, 2013 was received by the undersigned on August 29, 2013. Entera responded to that letter objecting to the findings requesting a re-determination or a personal meeting as required by the letter, on September 6, 2013. The 30th day after receipt of the August 21 letter was September 28, 2013, however, this was Saturday and pursuant to the rules of the Administrative Law Court, the request for hearing was not due until Monday, September 30th. On Monday, September 30. Having not gotten a response to its September 6 letter, Entera filed a petition for hearing with the South Carolina Administrative Law Court.

Subsequently, the Department of Consumer Affairs (hereinafter Department) filed a petition for dismissal of the hearing request on the grounds that the same was not timely. In that petition the Department submitted a receipt from Federal Express that the letter in question was delivered to the Greenville, South Carolina office of Federal Express on Friday, August 23, 2013. After Entera filed its return to the motion the Department was allowed to supplement its motion with an additional receipt allegedly showing the document was received by an individual at the law offices of Constangy Brooks and Smith, who was no longer employed. However, the undersigned did not receive actual notice of the letter of the Department until August 29, 2013, as noted above.

The letter sent to Entera and the undersigned by the Department specifically states that in order to comply with the determination in the letter, it was necessary to contact the department, not the Administrative Law Court, within 30 days after receipt of the letter. Entera actually complied with the final paragraph of the order with a formal objection on September 6,

2013, well within the 30 days mandated by the terms of the letter itself. Entera believes the last paragraph of the letter altered the terms of the agency's decision, and even if it did not that it should have been treated as a motion for re-consideration of the decision, staying the time for a hearing request to the ALJ.

The matter was then assigned to the Honorable Deborah Brooks Durden, Administrative Law Judge, who dismissed the request for hearing on November 26, 2013. Entera then timely filed a motion for reconsideration which Judge Durden failed to respond to or address. Therefore, pursuant to the Rules of the Administrative Law Court her order became a final order on January 5, 2014. Entera then timely appealed to the Court of Appeals which entered an opinion on March 4, 2015. Petitioner timely moved for reconsideration which was denied on April 24, 2015. This Petition follows.

ARGUMENTS

ISSUE I - The agency letter of August 21, 2015 does not constitute a final agency decision. While the Petitioner is fully relying on this Court to review issues II and III, this is the primary and novel issue on which this Petition stands.

The issue is when a *state* agency gives specific instructions to an entity which they regulate, and the regulated entity specifically follows those instructions, can the state agency then rely on prior language in order to issue a civil fine upon a regulated body.

Specifically, page 7 of the letter from Elliott F. Elam, Jr., deputy director of the South Carolina Department of Consumer Affairs states "if you fail to respond to this decision within 30 days of your receipt of this letter, the Department will provide notice of this decision to your client companies absent a showing that you have done so...please contact me as soon as possible." (ROA p. 20) On September 6, 2013, Petitioner sent a letter as required by the agency letter making a formal objection to the findings of August 21, 2013 and noting that the Petitioner fully objected to the findings, requesting that the findings be reconsidered and

requesting a meeting on the matter. (ROA p. 32) (See ROA p.13 regarding prior attempts to with the Agency).

The Petitioner believed it had fully complied with the requirements of the letter based on the final paragraph, quoted above. It is clear that Section 1-23-380 (1) allows all parties to request a rehearing/redetermination. The plain language of Section 1-23-380 (1) indicates that the legislature by including the phrase "if a rehearing is requested" intended to allow motions for rehearing before all administrative agencies. Rhame v. Charleston County School District (Op. No. 27516 filed April 22, 2015). Section 1-23-380 is "entitled judicial review upon exhaustion of administrative remedies." Petitioner would contend, as noted by Justice Kittridge in Rhame "The plain and common sense interpretation envisions an extensive view of exhaustion of potential remedies before the agency and thus promotes judicial economy and avoids unnecessary appeals." A timely request for rehearing falls squarely within the remedies envisioned under Section 1-23-380. Rhame. See also the Wooford v. Ngo 548 U.S. 81 (2006).

Second, because the agency itself added the language, which it now contends Petitioner misinterpreted, the language of the letter of August 21st should be viewed in a light most favorable to Petitioner.

As a general rule, in civil law, ambiguities in documents which are subject to more than one interpretation are construed against the drafter. See, e.g. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997) This principal clearly applies to governmental agencies. Id.

Petitioner, therefore, contends (1) the language of Mr. Elam's letter of August 21, 2013 was ambiguous and subject to more than one interpretation, the interpretation derived by the Petitioner, that the first step in exhausting administrative remedies required a letter of objection, which Petitioner accomplished well within the 30 day limit provided by Mr. Elam; (2) That the letter of Petitioner of September 6, 2013 constituted a request for rehearing as

defined by Rhame and, therefore, all subsequent orders should be vacated and the matter remanded to the agency to comply with the requirements of Section 1-23-380 (1).


ISSUE II - That service of the original document in this matter has never been completed pursuant to the South Carolina Rules of Civil Procedure. Petitioner herein continues to believe the State of South Carolina and its administrative agencies should be held to the same standard as all other potential litigants in the state. There is no authority anywhere in any court rules for service of what are purported to be legal papers by any other method other than the United States Postal Service. While the procedure of the South Carolina Court rules may be archaic, nonetheless, the judicial agencies of South Carolina, including, this Court continue to require service by U.S. Mail and will not accept service by Federal Express or UPS. To Petitioner's belief, there is a novel question of law having never been ruled on by this Court. It is therefore submitted that the court should allow full briefing on this issue on the ground that the agency determination has never been properly served, and service has, therefore, never been accomplished.

ISSUE III - The Court of Appeals in its determination, failed to reach the issue presented above in Issue I. The Court in its Opinion believed that because the words "final agency decision" were capitalized that somehow their decision became legally correct. The Court should review the record in this matter and realize the Petitioner requested multiple meetings with the agency and that these meetings were denied or never occurred. Further, the Petitioner would request the Court to allow full briefing in light of the letter of August 21, 2013 because Mr. Elam called his decision a staff decision rather than an agency decision as required under the South Carolina Administrative Procedures Act.

IT IS THEREFORE RESPECTFULLY SUBMITTED that the determination of the Court of Appeals, Opinion No. 2015-UP-102 of March 4, 2015 was incorrect and that Court should

grant this Petition primarily under the Rhame decision which was issued subsequent to the decision of the Court of Appeals in the matter and (1) allow full briefing of the issues or (2) issue an Order remanding the matter back to the agency for compliance with Court Rules and Section 4-23-380.

DATED: 5/26, 2015

By: 
David Hill Keller, Esq.
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Constangy, Brooks, Smith & Prophete, LLP
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I, Sally Drawdy, say that I am the legal assistant for David H. Keller, attorney for Appellants Entera Holdings, LLC and Entera Work Comp Solutions, LLC with CONSTANGY, BROOKS, SMITH & PROPHETE, LLP in Greenville, South Carolina; and on the 26th day of May, 2015, a copy of the Appellants Petition for Writ of Certiorari was mailed in sealed envelopes, postage prepaid, along with a certificate of service on opposing counsel and a certificate of counsel to the following person(s) at the following addresses:

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
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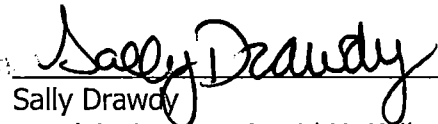
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