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JUN 12 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 13-ALJ-17-0554-CC

Appellate Case No. 2015-000514

Hugh Allen Palmer.....Appellant,

v.

Richland County Assessor,.....Respondent.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

Malane S. Pike
S.C. Bar No. 4469
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White Rock, SC 29177
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Attorney for Respondent

Respondent, Richland County Assessor, pursuant to Rule 240(e) of the South Carolina Appellate Court Rules (SCACR), respectfully submits this Return to Appellant's Petition for Rehearing. The Respondent submits that the Appellant's arguments are flawed and respectfully submits the following arguments for the Court's consideration.

I. BACKGROUND

By Order dated May 18, 2015, this Court granted the Respondent's Motion to Dismiss based upon the Appellant's failure to timely file its Notice of Appeal. The Appellant then filed a Petition for Rehearing alleging that this Court misconstrued the Rules of Procedure for the Administrative Law Court (RPALC). The Respondent hereby responds to Appellant's Petition for Rehearing.

II. LEGAL ARGUMENTS

A. S.C. Code Ann. §1-23-650(C) (Supp. 2014) and Rule 69, RPALC state that cases before the ALC are to be conducted in accordance with the RPALC exclusively. Since the RPALC has no rule allowing a Motion for Rehearing in Contested Cases, the time period to appeal to the South Carolina Court of Appeals was not tolled by the filing of Appellant's Motion for Rehearing.

By the authority of S.C. Code Ann. § 1-23-650 (Supp. 2014), the legislature saw fit to allow the ALC to promulgate its own rules of procedure. The legislature further decreed that hearings before the ALC must be conducted exclusively in accordance with those rules. The RPALC does not specifically allow for a Motion for Rehearing nor does it adopt all of the South Carolina Rules of Civil Procedure (SCRCP). If §1-23-650(b) were to be construed to require the ALC to adopt the SCRCP, there would be no purpose in the language allowing the ALC to promulgate its own rules. Instead, a more

reasonable and harmonious interpretation is that the SCRCP are meant to fill the gaps, if such exist.¹ Rule 68, RPALC makes this point clear. It reads as follows:

The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules.

In the case at hand, there were no questions that the Appellant's Motion to Alter or Amend could not resolve. Notably, the Appellant made no arguments regarding why a Motion to Alter or Amend could not resolve his issues and/or why the ALC should use its discretion per Rule 68, RPALC, to allow a rehearing. In fact, its request for rehearing only consisted of two sentences as follows: (See Respondent's Motion to Dismiss at p. 27)

To the extent that the Court does not reverse its decision as a matter of law based upon the evidence before it, Petitioner requests a new hearing to more fully address the issue of changed conditions as ultimately articulated by Respondent at the hearing. Petitioner is also willing to reconvene for the purpose of determining the question of Respondent's contempt or sanctions.

The issue of "changed conditions" was discussed in the Appellant's Motion to Alter or Amend at pages 6 through 9. (See Respondent's Motion to Dismiss at pp. 22-25) Also, the issues of "contempt" and "sanctions" were discussed in the Appellant's motion at pages 10 through 11. (See pp. 26-27 of Respondent's Motion to Dismiss). Thus, the facts and the arguments were identical in both motions. Further, these issues were stated

¹ The case of Adams v. Westinghouse SRS, (Unpublished Opinion), 2009 WL 9529409, interprets the language "consistent with" in Section 1-23-650(B)(1) to mean that the Rules of Civil Procedure are "gap fillers" and the ALC is to determine when such gap fillers are needed. The Respondent acknowledges that this case has no precedential value but is including such as information to be used in whatever manner the Court deems appropriate.

in pre-trial documents, fully discussed at the hearing, and ruled on by the ALC.² These facts and circumstances present no good reason for the exercise of Rule 68, RPALC discretion. Moreover, the lack of any arguments regarding why the ALC's discretion should be imposed to allow a Motion for Rehearing demonstrates that the motion was totally without merit and probably frivolous per S.C. Code Ann. §15-36-10 (2005).

In conclusion, the filing of a motion not provided by the RPALC and without merit under the discretionary authority of Rule 68, RPALC, should not be used to stay the time period for appeal to this Court.

B. The ALC's action in recharacterizing Appellant's Motion for Rehearing in accordance with its substance and effect as a Motion for Reconsideration was proper and supported by case authority. As such, there was no need for an additional ruling on Appellant's Motion for Rehearing. The ALC's deemed denial of the Motion for Reconsideration pursuant to Rule 29(D), RPALC was sufficient.

Per Judge McLeod's letter to both counsel in this matter, dated March 6, 2015, he deemed the Appellant's Motion for Rehearing to be improper and treated such as a Motion for Reconsideration, which was then deemed denied pursuant to Rule 29(D), RPALC. (See Respondent's Motion to Dismiss at p. 49). The court may treat a motion based upon its substance and effect as opposed to how it is captioned by the party. Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E. 2d 548, 549 (1970); Standard Fed. Sav. & Loan Assn. v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991). It is the substance of the relief requested that matters regardless of the form in which the request for relief is framed. Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002). Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 27,

² The issues of contempt and sanctions became moot when the ALC rendered a decision in favor of the Respondent. However, the raising of these issues in the Appellant's Motion to Alter or Amend and the judge's deemed denial per Rule 29,RPALC preserved these issues for appeal.

609 S.E.2d 506, 510 (2005). Since there was no provision for a Motion for Rehearing before the ALC and insufficient grounds for the exercise of discretion pursuant to Rule 68, RPALC, Judge McLeod properly recharacterized the motion as one provided under the RPALC. The above case authority demonstrates that such action by the ALC was appropriate.

The Appellant knew or should have known that the RPALC did not allow for a Motion for Rehearing. In fact, its only available avenue for such a motion was via the Court's exercise of discretion in Rule 68, RPALC. Thus, when the Appellant's Motion to Alter or Amend was deemed denied by the passage of time, this should have at least warranted an inquiry by the Appellant to the ALC with regard to the status of its Motion for Rehearing. The Appellant made no such inquiry until it received a tax bill several months later.

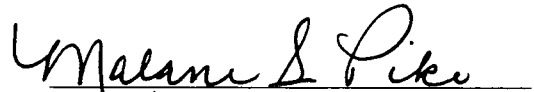
The Appellant's Notice of Appeal to the Court of Appeals was filed over three months after the time for appeal had expired.³ Failure to file a notice of appeal within the thirty day time frame divests the appellate courts of subject matter jurisdiction and results in dismissal of the appeal. USAA Property and Cas. Ins. Co v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791,795 (2008); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999). The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice. *Id.*, Elam v. S.C. Dept of Transportation, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004).

³ The thirty (30) day time period for appeals to the Court of Appeals is found in S.C. Code Ann. §1-23-610 (Supp. 2014) and Rule 203(b)(6), SCACR.

II. CONCLUSION

For the reasons set forth above as well as those stated in the Respondent's Memorandum in Support of Motion to Dismiss and Respondent's Reply to Return to Motion to Dismiss, the Respondent respectfully requests that this honorable Court uphold its previous order dismissing the Appellant's action as untimely.

Respectfully submitted,

A handwritten signature in black ink that reads "Malane S. Pike". The signature is written in a cursive style and is positioned above a horizontal line.

Malane S. Pike
S.C. Bar No. 4469
PO Box 729
White Rock, SC 29177
(803) 622-1493
Attorney for Respondent

Columbia, South Carolina
June 12, 2015

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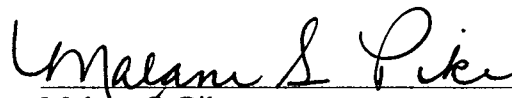
Richland County Assessor,.....Respondent.

PROOF OF SERVICE

I, Malane S. Pike, hereby certify that I have mailed, postage prepaid, by first class mail, a copy of the Respondent's Return to Petition For Rehearing in the above referenced matter to the following:

Matthew J. Myers, Esquire
Sweeny Wingate & Barrow P.A.
Post Office Box 12129
Columbia, SC 29211

this 12th day of June, 2015


Malane S. Pike
Attorney for Respondent

MALANE S. PIKE

Attorney at Law

Post Office Box 729 White Rock, South Carolina 29177 (803) 622-1493

June 12, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

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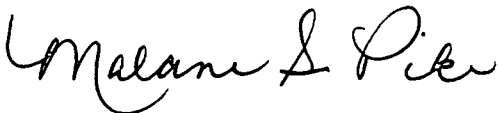
SC Court of Appeals

Re: Hugh Allen Palmer v. Richland County Assessor
Case No 2015-000514

Dear Ms. Kitchings:

Enclosed for filing is the Respondent's Return To Petition For Rehearing in the above-referenced matter along with six copies of same. Also enclosed is a Proof of Service of Respondent's Return.

Very truly yours,



Malane S. Pike
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Attorney for Respondent

Enclosures

cc: Matthew J. Myers