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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.: 2015-000514

Hugh Allen Palmer.....Appellant,

v.

Richland County Assessor .....Respondent.

APPELLANT'S REPLY TO RESPONDENT'S RETURN

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules (SCACR), Hugh Allen Palmer (Appellant) hereby submits this Reply to the Return of the Richland County Assessor (Respondent). These follow Appellant's Motion for Rehearing of the Court's order dated May 18, 2015, which in turn dismissed Appellant's appeal on different grounds than raised in the Respondent's Motion to Dismiss the same.

The Court's basis for dismissing Appellant's appeal from the South Carolina Administrative Law Court (ALC) was that ALC Rule 29(D) automatically denied Appellant's motion for rehearing 30 days after the Respondent's response to the same, and that Appellant subsequently failed to appeal the automatic denial within 30 days thereafter. In contrast, however, both Appellant and Respondent agree that ALC Rule 29(D) does not apply to Appellant's motion for rehearing: "The RPALC does not specifically allow for a Motion for Rehearing ...." (Resp.'s Return p. 1.)

Instead, Respondent continues to argue that the ALC Rules do not allow for a motion for rehearing whatsoever (*id.*), which argument the South Carolina Supreme Court has recently negated by virtue of its holding in *Rhame v. Charleston County School District*, 2015 WL 1814019 (April 22, 2015), *reh'g denied* June 4, 2015 (holding that the South Carolina Administrative Procedure Act provides for a right to request a rehearing). Accordingly, if Appellant has a right to request a rehearing, and ALC Rule 29(D) by its own language does not address rehearing requests, then Appellant's appeal was timely because he appealed within 30 days of the ALC's dismissal of the motion for rehearing. *See* Rule 203(b)(6), SCACR.

Appellant has discussed the foregoing necessary legal conclusion at length in his Motion for Rehearing, and has also discussed various rules of construction supporting Appellant's right to appeal this matter in pages 16 through 19 of his Return to Respondent's Motion to Dismiss. Therefore, Appellant would simply crave reference to the same and only address the new arguments raised in Respondent's Return.

Respondent first argues that, because the ALC Rules do not specifically address motions for rehearing of a contested case, it was within the ALC's discretion whether to grant Appellant's motion for rehearing or not by way of ALC Rule 68. (Resp.'s Return, pp. 1-3.) However, Respondent has set a false premise since ALC Rule 31 already provides that an ALC decision "may be appealed as provided by law," and therefore incorporates the laws that provide for a non-discretionary right to rehearing such as S.C. Code Ann. § 1-23-380(1). Therefore, there is no need for discretionary "gap fillers" from the South Carolina Rule of Civil Procedure as Respondent suggests.

More importantly, the South Carolina Supreme Court's recent decision confirms that the right to request a rehearing is not discretionary, but instead comes directly from the South Carolina Administrative Procedure Act (APA). *Id.* (relying on S.C. Code Ann. § 1-23-380(1)). Accordingly, even if there were an ALC Rule to the contrary, which there is not, such rule could not serve to divest Appellant of the right to request a rehearing as provided by the APA. *See also* S.C. Code Ann. § 1-23-650(B) (authorizing the promulgation of ALC Rules that are "(1) consistent with the rules of procedure governing civil actions in courts of common pleas; and (2) not otherwise expressed in Chapter 23, Title 1"); *Heath Hill v. S.C. Dept. of Health & Envtl. Contr. and SCE&G*, Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666 *11 (Dec. 9, 2010) (citing section 1-23-650(B) and stating "an ALC rule may not alter the provisions of a statute.").

Furthermore, even if the ALC had discretion to disallow a motion for rehearing, which it does not, such purported discretion was never expressed to Appellant so that he could respond accordingly.[1] Obviously, it would deprive Appellant of due process if his motion for rehearing, and therefore his right of appeal, could be denied based on a judge's discretion without any notice to Appellant. In fact, there would be little need for a court of appeals if it were otherwise, since few judges would expose their decisions to appellant review if they could simply be made in secret to avoid scrutiny.

Respondent next suggests that Appellant provided no basis for his motion for rehearing, and generally seeks to cast the motion in a negative light. As Appellant has noted previously, the standing order of the ALC in this matter required the parties to

[1] It may be noted that Appellant did appeal with all due haste after the Respondent first shared its position that Appellant had no right to request a rehearing.

provide "a detailed statement of the law which supports the requested action, including statutory and/or case citations....Generic references to the general common statutory or regulatory law will not be deemed an adequate response." (ALC Order dated Nov. 21, 2013, p. 1.) In contrast, however, Respondent did not present the single *pro se* decision that it and the ALC ultimately relied on until the hearing itself, after which time Appellant found several other decisions, not provided by Respondent in possible violation of Rule 3.3(a)(2) of the South Carolina Rules of Professional Conduct, that provided overwhelming support for the Appellant's legal position now under appeal.

Accordingly, Appellant had a clear basis, if not an actual obligation of judicial courtesy, to file a motion for rehearing so that the ALC could consider the additional precedent that was not before it rather than simply filing an appeal that might overturn that judge's decision. More importantly, however, there is simply no legal requirement that a motion for rehearing needs to have a separate basis from a motion to alter or amend as Respondent suggests. It should go without saying that a litigant may plead either or both motions in the alternative if they so desire, and that is all Appellant sought to do here, again in part, out of courtesy to the Court.

Respondent next argues the ALC deemed Appellant's motion for rehearing as a motion for reconsideration, that such alleged action was proper and, accordingly, that Appellant's deemed motion for reconsideration was automatically denied by ALC Rule 29(D). Though this argument conflicts with Respondent's fundamental argument that Appellant had no right to request a rehearing in the first place, the logic of the alternate argument is also flawed for several independent reasons.

First, while a court may construe a motion based on its substance rather than its title, this is done only to conform a particular pleading to the relevant procedure before the court, and is typically done in order to save a litigant from running afoul of the rule at issue. However, courts do not merge motions that the rules of procedure allow to be pled in the alternative into a single motion, and certainly not without notice to the movant, nor would a court apply the rule of construction to deny a litigant an important legal right when simply construing the litigant's motion as written would preserve the right.

The cases cited by Respondent bear out the foregoing principles. *See, e.g., Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 26-29, 609 S.E.2d 506, 509-11 (205) (construing plaintiff's improper successive motion for new trial as a motion for reconsideration, which therefore preserved plaintiff's right to appeal). Coincidentally, one case cited by Respondent actually involves Respondent's county doing the very thing now complained of by Respondent. *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) ("The County's subsequent motion for a new trial or, alternatively, for reconsideration, was denied. This appeal follows.").

Here, Appellant's motion for rehearing was properly pled as an alternative to his motion to alter or amend, and there was therefore no basis to construe the former as the latter. In addition, Respondent filed a pleading in response to both of Appellant's alternate motions that, while disagreeing with the substance of Appellant's motions, expressed no disagreement with Appellant's right to file them nor confusion over the manner in which Appellant presented them. To now suggest that Appellant's motion for rehearing was, in substance, merely an *additional* motion to alter or amend and devoid of an independent procedural identity is pure revisionism.

Finally, Appellant received no notice that his properly pled motion for rehearing was allegedly being retroactively "deemed" a motion to reconsider, or that Respondent would argue the same, until after the deadline to file an appeal of a motion for reconsideration had already passed under ALC Rule 29(D) and Rule 203(b)(6), SCACR. Once Appellant did have that notice, he filed his appeal with all appropriate haste and, had there still been time, certainly would have filed an appeal of the motion to alter or amend in order to circumvent Respondent's attempts to avoid the substantive issues.

Respondent's final arguments are that Appellant should have known that the ALC rules did not allow for a motion for rehearing, and that Appellant should have otherwise inquired as to the status of the motion for rehearing sooner. (Resp.'s Return p. 4.) To these, Appellant would simply note that the former is impossible since motions for rehearing are, in fact, allowed by the APA, *Rhame v. Charleston County School District*, 2015 WL 1814019 (April 22, 2015) *reh'g denied* June 4, 2015, and the latter is irrelevant for several reasons.

First, Appellant has no obligation to manage a judge's work load, and judicial deference would suggest not attempting to do so. Second, Respondent has given no reason to believe it would have "excused" Appellant's allegedly late appeal if Appellant had checked in with the judge sooner. Third, Respondent gave Appellant absolutely no notice that Respondent took issue with the propriety of a motion for rehearing, even though filing a response to the same. Moreover, it is hypocritical to blame Appellant for the present controversy where Respondent could have simply exercised common professional courtesy by inform Appellant of its objections to its motion, rather than waiting until after the deadline to appeal the motion to alter or amend had expired.

In conclusion, Respondent notes that a timely appeal is a jurisdiction issue, which is correct. What respondent misses, however, is that (1) Appellant had a right to file a motion for rehearing, regardless of whether Appellant also files a motion to alter or amend, (2) Appellant's motion for rehearing was not an actual or "deemed" motion for reconsideration and therefore automatically denied by ALC Rule 29(D), and (3) the ALC never otherwise ruled on Appellant's motion for rehearing until its March 6, 2015 Notice of Cancellation of Motion Hearing. Accordingly, pursuant to Rule 203(b)(6), SCACR, Appellant's March 11, 2015 Notice of Appeal was a timely appeal of the ALC's decision to deny Appellant's motion for rehearing.

Based on the foregoing and prior pleadings submitted to the Court, Appellant respectfully requests that the Court would withdraw its Order in this matter dated May 18, 2015 and issue an order denying Respondent's motion to dismiss the appeal.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply to Respondent's Return on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 19, 2015, addressed to its attorney of record, Malane S. Pike, Esquire, P.O. Box 729, White Rock, S.C. 29177.

June 19, 2015

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June 19, 2015

Reply to: Main Office

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SENT VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South

RE: Hugh Allen Palmer, Appellant v. Richland County Assessor, Respondent
Appellate Case No.: 2015-000514
Our File: 2393-4791

Dear Ms. Kitchings:

Please find enclosed an original and seven copies of Appellant's Reply to Respondent's Return in this matter, along with an original and one copy of a Proof of Service of the same.

Please return one stamped copy of each in the envelope provided, and file the remainder. By copy hereof, Respondent's counsel is being served with a copy of the same.

Thank you for your assistancé, and please do not hesitate to contact me if you have any questions. With warm regards, I remain,

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

Matthew J. Myers

Enclosures

cc: Malane S. Pike, Esquire
Hugh Allen Palmer