

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE COURT OF APPEALS
The Honorable John D. Geathers

RECEIVED

Case No. 2015-000514

OCT 14 2015

S.C. Supreme Court

Appellate Case No. 2015-001756

Hugh Allen Palmer.....Petitioner,

v.

Richland County Assessor,.....Respondent.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Has the Petitioner (Palmer) provided valid reason to issue a Writ of Certiorari in this case?
- II. Did the Court of Appeals properly grant the Respondent's ("Assessor") Motion to Dismiss based upon Palmer's failure to serve timely notice of appeal within thirty (30) days of the Administrative Law Court's (ALC) denial of its "Motion to Alter or Amend or for a Rehearing" pursuant to Rule 29(D) of the South Carolina Rules of Procedure of the Administrative Law Court (SCRPALC)?
- III. Did the Court of Appeal's decision abridge Palmer's right to judicial review under the South Carolina Constitutional or due process, or violate public policy?

STATEMENT OF THE CASE

This Petition emanates from a motion made following the decision in a contested case hearing before the ALC in a county property tax matter. The property tax matter was heard before the Honorable John D. McLeod and a decision was issued in the matter on September 11, 2014 upholding the Assessor's reappraisal of certain properties owned by Palmer. (App. 16-21)

On September 22, 2014, Palmer filed a motion with the ALC captioned "Notice of Motion And Motion To Alter Or Amend Or For A Rehearing". (App. 22-33) This motion was made pursuant to Rule 59, SCRPC and Rule 68, SCRPALC.¹ (App. 22) Palmer's motion did not mention Rule 29(D) SCRPALC regarding motions for reconsideration in

¹ Palmer's motion requested that the ALC consider an appraisal prepared by an appraiser that was listed in his Prehearing Statement as a witness but did not appear at the hearing and also requested that the ALC consider legal authority not presented at the hearing. Palmer presented no case law in support of his position at the hearing.

contested cases although such was clearly applicable. On October 2, 2014, the Assessor filed a response to Palmer's motion, addressing, *inter alia*, the issue of the Motion for Rehearing in the manner in which it was requested (i.e. as a discretionary matter pursuant to Rule 68, SCRPALC). Judge McLeod treated Palmer's motion as Motion for Reconsideration pursuant to Rule 29(D), SCRPALC, and declined to act on the motion. His inaction was deemed a denial of the motion on November 3, 2014 pursuant to Rule 29(D)(2), SCRPALC. (App. 34-43)

Pursuant to Rule 29(D)(4), SCRPALC, the time for appeal was stayed by Palmer's timely motion for reconsideration. However, since no order was filed regarding the motion, the appeal period began to run thirty days from the date the motion was deemed denied. In the case at hand, the thirty days began to run on November 3, 2014 and expired on December 3, 2014. Palmer did not file a Notice of Appeal during this time period.

On or about early January, 2015, the Assessor closed its file on this property tax appeal and certified its value to the county auditor. Richland County mailed a property tax bill to Palmer on February 3, 2015. This action prompted a conversation between Palmer and the Assessor whereupon Palmer was informed that the Assessor considered the case to be closed based upon Palmer's failure to file a notice of appeal by December 3, 2014.

Palmer, via letter dated February 11, 2015, requested that Judge McLeod rule on his motion for rehearing. (App. 44) On February 19, 2015, Judge McLeod responded by scheduling a hearing on the issue of whether the ALC rules provided for a Motion for Rehearing. Such hearing was scheduled for March 18, 2015. (App. 50) In a subsequent email on March 3, 2015, Palmer asserted that a hearing was unnecessary and requested that the judge either grant or deny his motion for rehearing. (App. 52) Judge McLeod

responded on March 6, 2015 with a Notice of Cancellation of Motion Hearing cancelling the March 18, 2015 hearing and a letter to counsel. (App. 53-54) The letter informed the parties that Palmer's Motion for Rehearing was deemed improper and was considered as a motion for reconsideration under Rule 29(D), SCRPALC. As such, it was deemed denied thirty (30) days after filing. (App. 54)

Palmer filed a Notice of Appeal with the Court of Appeals on March 11, 2015, over three months after his appeal period had expired. (App. 55) On March 23, 2015, the Assessor filed a Motion to Dismiss and a Memorandum in Support of Respondent's Motion to Dismiss on the basis that the Court of Appeals had no jurisdiction to hear the case due to Palmer's failure to timely file its Notice of Appeal. (App. 1-55) On April 1, 2015, Palmer filed a Return to Respondent's Motion to Dismiss asserting that the ALC had not responded to its Motion for Rehearing until March 6, 2015. (App. 56-75) The Assessor filed Respondent's Reply to Return to Motion to Dismiss on April 8, 2015 asserting that the filing of a motion not provided in the SCRPALC does not stay the time limit to appeal. (App. 76-85)

By Order dated May 18, 2015, the Court of Appeals granted the Assessor's Motion to Dismiss based upon Palmer's failure to timely file its Notice of Appeal. (App. pps. 90-91) On June 2, 2015, Palmer filed a Petition for Rehearing alleging that the Court of Appeals misconstrued the SCRPALC. (App. 92-97) On June 12, 2015, the Assessor filed its Return to Petition for Rehearing asserting that the ALC had acted properly and the Court of Appeals decision was correct. (App. 100-105) On June 19, 2015, Palmer filed its Reply to Respondent's Return. (App. 108-114)

On July 24, 2015, the Court of Appeals issued an order denying Palmer's Motion for Reconsideration. (App. 115) Palmer then filed this Petition for Writ of Certiorari on September 14, 2015.

ARGUMENT

I. Palmer has not provided any valid reason to issue a writ of certiorari in this case.

Rule 242, SCACR, provides a list of five items to indicate the character of reasons which will be considered in determining whether to grant a writ of certiorari. Each of those items will be addressed below as they relate to this matter.

(1) Novel Questions of Law

There are no novel questions of law in this matter. S.C. Code Ann. §1-23-650(C) (Supp. 2014) and Rule 69, SCRPALC, provide that the SCRPALC governs once the ALC has jurisdiction of a case. The SCRPALC does not specifically provide for a Motion for Rehearing but its judges do have discretionary authority to use the SCRCP, pursuant to Rule 68, to resolve questions not otherwise addressed in the rules. In this case, there was no reason to exercise discretionary authority in that the Motion for Reconsideration, pursuant to Rule 29(D), SCRPALC, provided Palmer an appropriate remedy and Palmer made no arguments as to why Judge McLeod should exercise his discretion to allow a Motion for Rehearing. Notably, Palmer did not mention Rule 29(D) in his Motion to Alter or Amend or for a Rehearing even though he has argued in subsequent filings that a motion to alter or amend is the same as a motion for reconsideration. It is also notable that Palmer, knowing that he had filed one motion which was the equivalent of a motion for reconsideration that could be denied by the passage of time along with an alternate

motion which was not specifically provided for in the SCRPALC, did not contact the ALC after the thirty day decision period had elapsed to determine the status of his motion for rehearing. All of this suggests that his failure to file a timely Notice of Appeal was an oversight and not a novel question of law.

(2) Dissent in the Decision of the Court of Appeals

There is no evidence that there was any dissent in the decision of the Court of Appeals. All three judges who considered this matter, Chief Judge John Few, Judge John Geathers (former Administrative Law Judge), and Judge Jasper Cureton, were of the same mind on the issue presented.

(3) Court of Appeals Decision Conflicting with Prior Supreme Court Decision

The Court of Appeals decision dismissing this case does not conflict with any prior Supreme Court decision. Although Palmer relies on Rhame v. Charleston County School District, 412 S.C. 273, 772 S.E. 2d 159 (2015) for the proposition that Motions for Rehearing are allowed in the ALC, that decision interprets S.C. Code Ann. §1-23-380(1) (Supp. 2014) which is expressly not applicable to the ALC per S.C. Code Ann. §1-23-310(2) (Supp. 2014). The corollary of §1-23-380(1) for the ALC is found in S.C. Code Ann. §1-23-610(A) (Supp. 2014). Notably, the language of §1-23-380(1) specifically addresses the issue of rehearings while the language of §1-23-610(A)(1) does not. Since the reasoning of the Rhame decision centered around the clear and unambiguous language of §1-23-380(1), which specifically references motions for rehearing, the result in the Rhame decision would not be the same if analyzing §1-23-610(A), which makes no mention of motions for rehearing. Thus, if one applies the

reasoning in Rhame to the matter at hand, the Court of Appeals decision in Palmer is consistent with Rhame.

Further, the ALC, through its rules of court, has a method of correcting its own mistakes via Rule 29(D), SCR PALC, Motion for Reconsideration and via Rule 68, SCR PALC, discretion to utilize SCRPC for questions not otherwise addressed. Thus, the ALC has rules in place to prevent the evils being corrected in the Rhame case.

(4) Involves Substantial Constitutional Issues.

This matter does not involve substantial constitutional issues. Further, the constitutional issues raised by Palmer have not been properly raised in this matter. Although Palmer attempts to raise a South Carolina constitutional issue and a due process issue in his Petition for Writ of Certiorari, those issues were not specifically raised before the Court of Appeals nor did the Court of Appeals rule on those issues. The South Carolina constitutional issue has never been mentioned in any of Palmer's previous filings. Palmer fleetingly mentions due process in his Return to Motion to Dismiss (App. 74) and in his Petition for Rehearing (App. 97) but never raises such as an issue for the Court of Appeals to determine. Accordingly, these issues cannot now be raised pursuant to Rule 242(d)(2), SCACR .

(5) Involves Federal Question where Court of Appeals Conflicts with United States Supreme Court.

This is not applicable to the case at hand.

While the reasons set forth in SCACR Rule 242(b) are not all-inclusive, no special or important reason exists to justify the Court reviewing this matter, and Palmer offers no grounds other than its disagreement with the decision.

II. The Court of Appeals' decision that the procedural aspects of this case should be governed by the SCRPALC, and more specifically Rule 29(D), SCRPALC, is well reasoned in light of the facts of this case and is grounded by South Carolina statutory law and common law.

The South Carolina Administrative Procedures Act empowers the ALC to adopt rules governing practice and procedure before it. (S.C. Code Ann. §1-23-650(B) (Supp. 2014)). It requires that the ALC's rules be consistent with the rules of procedure governing civil actions in the Court of Common Pleas and not otherwise expressed in Chapter 23, Title 1. It further provides that "all hearings before an administrative law judge must be conducted **exclusively** in accordance with the rules of procedure promulgated by the Court pursuant to this section". (S.C. Code Ann. §1-23-650(C) (Supp. 2014)). Emphasis added.

In compliance with the above statute, the ALC adopted the rules that are currently known as SCRPALC. These rules are consistent with the SCRCPP but do not adopt every rule found in the SCRCPP. Wholesale adoption of the SCRCPP is not required. If §1-23-650(B)(1) were to be construed to require such, there would be no need for the ALC to have rules independent of the SCRCPP. This Court has consistently held that it will not construe a statute in a way which renders it meaningless. See Ranucci v. Crain, 409 S.C. 493, 763 S.E.2d 189 (2014); Doe v. South Carolina Department of Social Services, 407 S.C. 623, 757 S.E.2d 712 (2014); State v. County of Florence, 406 S.C. 169, 749 S.E.2d 516 (2013); Barton v. South Carolina Department of Probation, Parole and Pardon Services, 404 S.C. 395, 745 S.E. 2d 110 (2013); Tempel v. South Carolina State Election Com'n, 400 S.C. 374, 735 S.E.2d 453 (2012); Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 727 S.E.2d 418 (2012).

However the ALC has been conscientious in its efforts to promulgate rules that promote judicial economy and promote fairness to all parties. To this end, it promulgated Rule 68, SCRPALC, to give its judges the discretion to implement other rules contained in the SCRCP to resolve questions not addressed in its rules.

In the case at hand, Palmer's motion was captioned "Notice of Motion and Motion to Alter or Amend or for a Rehearing" and he requested such under Rule 68, SCRPALC and Rule 59, SCRCP. The relief requested was the same with either motion. Palmer was requesting that the judge consider evidence and authority that was not presented at the hearing, namely certain case authority that was not presented at the hearing and an appraisal of the subject property which was in his possession prior to the hearing and listed in his prehearing statement.

With regard to the Motion to Alter or Amend, it is obvious that this motion was provided for in Rule 29(D), SCRPALC, rather than Rule 68, SCRPALC and the ALC treated it as such. With regard to the Motion for Rehearing, such is not specifically provided for in the SCRPALC and Palmer made no arguments as to why the judge's discretion should be used to allow it. In fact, its request for a new hearing consisted of two sentences as follows:

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 and sanctions. (App. 32) ²

²Pursuant to Palmer's Prehearing Statement, the issue of "changed conditions" was known to him at least as far back as the hearing before the Richland County Board of Assessment Appeals. Further, the issue in the ALC hearing was "changed conditions", thus Palmer was asking for a second bite at the apple.

The assessor provided additional case authority to the Court and to Palmer at the hearing. Palmer never requested a continuance of the hearing in order to consider the case authority presented by the Assessor, and notably, he provided no case authority to support his position at the hearing. Thus, Palmer made the post hearing motions at issue to provide evidence and authority that should have been provided at the hearing. The judge properly recharacterized the motion as a Motion for Reconsideration under Rule 29(D), SCRPALC, since there were no arguments made as to why his discretion to allow a Motion for Rehearing should be exercised and the circumstances did not indicate that the questions presented could not otherwise be handled by a Motion for Reconsideration. A court's authority to recharacterize a motion according to its substance and effect as opposed to its caption is well grounded in case law. See 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). See also Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 27 609 S.E.2d 506, 510 (2005) where the Court recharacterized a motion for new trial as a motion for reconsideration.

The issue of whether a motion for rehearing is otherwise required by the Administrative Procedures Act for contested cases before the ALC has been indirectly dealt with in the case of Rhame v. Charleston County School District, *supra*. In that case, this Court held that by including the language "if a rehearing is requested" in S.C. Code Ann. §1-23-380(1) (Supp. 2014), the legislature intended to allow motions for

rehearing before administrative agencies that are governed by the Administrative Procedures Act (APA). The administrative agencies governed by §1-23-380 are defined in S.C. Code Ann. §1-23-310(2) (Supp. 2014) as “each state board, commission, department, or officer, **other than the legislature, the courts or the Administrative Law Court**, authorized by the law to determine contested cases”. Emphasis added. Thus, §1-23-380 is not applicable to the ALC.³ However, the legislature enacted a corollary to this section for the ALC in S.C. Code Ann. §1-23-610 (Supp. 2014), leaving out any mention of a rehearing. The pertinent portion of this statute reads as follows:

(A)(1) For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. *Id.* at ___, 772 S.E.2d at 160. When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Id.* at ___, 772 S.E.2d at 160. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. *Id.* at ___, 772 S.E.2d at 160.

By putting the language “if a rehearing is requested” in §1-23-380 but not in §1-23-610, the legislature was evidencing its intent to give the ALC full authority to adopt its own rules pursuant to the terms of S.C. Code Ann. §1-23-650 (Supp. 2014). After the

³ Palmer incorrectly asserts that the ALC is an agency for purposes of §1-23-310(2) and §1-23-380. (Petitioner for Writ of Certiorari, p.6)

changes mandated by Home Medical Systems v. South Carolina Department of Revenue, 382 S.C. 556, 677 S.E. 2d 582, (2009), the SCRPALC currently provides for issue preservation and error correction via the Motion for Reconsideration. However, if the current rules do not meet the needs of the parties in a particular matter, the judge can utilize his discretion to invoke other rules from the SCRCP. Palmer was essentially requesting a rehearing such that he could produce evidence and authority that were readily available to him at the time of the first hearing, but which he failed to produce. To invoke the SCRCP in this matter would have been an abuse of discretion.

Finally, Palmer cites the proposition that statutes regarding taxation must be construed in favor of the taxpayer. Alltel Communications, Inc. v. South Carolina Dept. of Revenue, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012). He then argues that since this matter concerns a property tax protest, the Court of Appeals decision is tantamount to construing taxation statutes against the taxpayer, Palmer. Palmer is correct in his recitation of the rule of statutory construction, but is incorrect in stating that it should be applied to him in this instance. The matter for which a Writ of Certiorari is being requested is a procedural matter involving the SCRPALC and the South Carolina Administrative Procedures Act, not a tax matter. The Court of Appeals recently interpreted this rule of construction to mean that the statute should define who shall be taxed in order to be given this favorable taxpayer construction. Mitul Enterprises, L.P. v. Beaufort County Assessor, 410 S.C. 430, 434, 764 S.E. 2d 720,722 (2014). Clearly, such is inapplicable to the issues for which this Writ of Certiorari is requested.

III. Palmer's South Carolina Constitutional rights to judicial review nor his right to due process have been abridged or violated by the decision of the Court of Appeals in dismissing his action for lack of jurisdiction. Further, the Court's decision does not violate public policy.

It should first be noted that Palmer has not preserved these issues for this court's review. Rule 242(d)(2), SCACR, states that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court". A review of Palmer's Return to Motion to Dismiss in the Court of Appeals and his Petition for Rehearing indicate that there was never any mention of his South Carolina Constitutional rights being violated.

With regard to the due process issue he now raises, such was only mentioned in one sentence in his Return to Motion to Dismiss in the explanation of his argument that the rules of construction support the availability of a motion for rehearing. (App. 74) The same is true of the Petition for Rehearing where due process was again only mentioned in one sentence. (App. 97)

With regard to the public policy issue that he now raises, a review of his Return to Motion to Dismiss reveals a paragraph discussion of public policy concerns. (App. 73-74) However, the issue of public policy is not mentioned in his Petitioner for Review. Rule 242(d)(2), SCACR requires that it be addressed in both documents.

From the above, it is clear that these issues were not raised as required by Rule 242(d)(2), SCACR and should not be subject to review by the Court.

Even if such issues were appropriate for review by this Court, these issues are without merit. There were procedures via statutes and court rules allowing

Palmer to have his issues heard in a meaningful manner. Palmer had a fair hearing before the ALC, although he was not pleased with the result. By affidavit, he admits that he then sought remedies under Rule 68, SCR PALC for the stated reason that he wanted the ALC to have the opportunity to review several decisions he had not provided at the hearing and he didn't want his motion to be subject to automatic denial. (App. 98) Thus, he thought by captioning his motion under a different rule that he could manipulate the SCR PALC so as to avoid "the automatic denial", despite the fact that the substance of his motion was a motion for reconsideration.

Palmer's perceptions of Rule 29(D), SCR PALC are very misguided. Such is not an "automatic denial". Palmer's motion fully reargued all issues brought up at the hearing and provided the additional authority that he wanted the court to review. (App. 22-33) Those were considered by the ALC and the ALC had every opportunity to alter or amend its decision based on Palmer's filings if such was warranted. The ALC found that it was not warranted and it recharacterized the motion according to its substance as a Motion for Reconsideration. It then allowed the thirty day period to expire without taking action. Because of Palmer's attempts to manipulate the SCR PALC, he missed the deadline for filing an appeal and now wants to claim that this is a violation of his constitutional right to have this matter heard. Such argument is ludicrous. A similar issue has been dealt with in the case of Theisen v. Theisen, 382 S.C. 213, 676 S.E.2d 133 (2009). Appellants failed to file a Petition for Formal Testacy within the eight month statute of limitations and claimed that the application of the statute of

limitations to them violated their due process rights. The court held that the application of the statute of limitations did not deprive Appellants of due process. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 223, 676 S.E.2d at 139 (citing S.C. Dep't of Soc. Servs. v. Beeks, 325 S.C. 243,246, 481 S.E.2d 703,705 (1997)). The appellant had that opportunity and did not avail themselves of it. The same is true with Palmer. For this reason, there is also no violation of S.C. Const. Art I, §22 or of public policy.

This court has consistently held that service of a Notice of Appeal is a jurisdictional requirement, and the Court has no authority to extend or expand the time in which the Notice of Appeal must be served. Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeal, 340 S.C. 57, 530 S.E. 2d 383 (2000); Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.C.2d 772 (2004); Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985). Accordingly, Palmer's appeal should be dismissed.

CONCLUSION

For the reasons set forth above, the Assessor respectfully asserts that this Court should not issue a writ of certiorari in this case.

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The Honorable John D. Geathers

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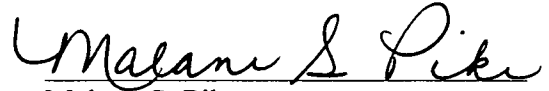
PROOF OF SERVICE

I hereby certify that I have served the Respondent's Return to Petition for Writ of Certiorari on the Petitioner, Hugh Allen Palmer by depositing a copy of it in the United States Mail, postage prepaid, on October 14, 2015, addressed to his attorneys of record as follows:

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Signature to Follow on Next Page

Respectfully submitted,

A handwritten signature in black ink that reads "Malane S. Pike". The signature is written in a cursive style with a horizontal line underneath the name.

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