

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case Number 2015-001561

Jeffrey D. Allen, on behalf of Jane Doe,.....Appellant.

vs.

South Carolina Budget and Control Board,
Employee Insurance Program,.....Respondent.

**RESPONDENT'S RETURN TO APPELLANT'S MOTION TO FILE SUPPLEMENTAL
REPLY BRIEF**

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ATTORNEYS FOR THE RESPONDENT

I. BACKGROUND

On March 4, 2105, the South Carolina Supreme Court, in a 4 to 1 decision, reversed the Administrative Law Court (“ALC”) on a matter of statutory interpretation related to whether or not S.C. Code Ann. § 38-71-46 applied to insurance benefits under the State Health Plan. The Court also found that Petitioner was not entitled to class action relief against the State Health Plan. See Allen v. SC Pub. Employee Benefit Authority (PEBA), 411 S.C. 611, 769 S.E.2d 666 (2015).

On remittitur from the Allen v. PEBA decision, Petitioner moved for an award of attorney’s fees pursuant to the state action statute, S.C. Code Ann. § 15-77-300 (2015), which provides for an award of reasonable attorney’s fees in cases involving state action if the court finds that the agency acted without substantial justification in pressing its claim, and if there are no special circumstances that would make an attorney’s fee award unjust.

On June 17, 2015, the ALC issued an Order denying the Motion for Attorney’s Fees. This order is the one currently on appeal.

II. DISCUSSION

A. **Appellant’s Motion To Supplement Its Reply Brief With Information and Arguments Contained In an October 2015 Report Should Be Denied Because The Information Was Not Contained In The Record Before The ALC, Nor Was It Ruled On By The ALC.**

Appellant moves that it be allowed to supplement its reply brief to include information and arguments from a report Appellant received October 11, 2015 concerning the upcoming October 2015 open enrollment for the State Health Plan. However, the information that Appellant seeks to supplement its brief with was not even in existence when the ALC issued its order and therefore was not included in the record before the ALC. A fact which is outside of the record should not be considered by the appellate court. S.C. App. Ct. R. 210; Davis v. Davis, 356

S.C. 132; 588 S.E.2d 102 (2003). Because the information that Appellant seeks to supplement its brief with was not included in the record before the ALC, it would be improper to allow Appellant to supplement its reply brief to include references to information outside of the record.

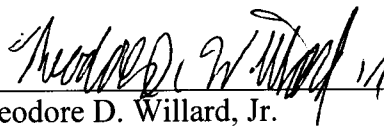
Additionally, because Appellant is attempting to raise an argument on appeal not brought to the ALC's attention, the issue is not properly preserved. See Madison v. Babcock Ctr., Inc., 371 S.C. 123, 144, 638 S.E.2d 650, 661 (2006) (holding arguments not presented to nor ruled upon by trial court are not preserved for appellate review); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); State v. McKnight, 352 S.C. 635, 646-47, 576 S.E.2d 168, 174 (2003) (issue must be raised to and ruled upon by trial court to be preserved for review); Morris v. Anderson County, 349 S.C. 607, 611 n.4, 564 S.E.2d 649, 651 n.4 (2002) (noting “[i]t is well-settled that appellants cannot raise new arguments or change their grounds between trial and appeal.”); State v. Whitten, 375 S.C. 43, 47, 649 S.E.2d 505, 507 (Ct. App. 2007) (finding an appellate court is limited by appellate rules that allow the court to consider only the precise question that was before the trial judge and ruled upon by him or her); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (noting “[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review,” and until the trial court considers the matter and makes a ruling, an appellate court is unable to find error).

Finally, an argument made in a reply brief cannot present an issue to the appellate court if the issue was not addressed in the initial brief. See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) (“The partners make several new arguments relating to

estoppel and ratification in their reply brief. However, these arguments are not properly before this Court because an appellant cannot make new arguments for reversal in a reply brief.”) Here, Appellant’s initial brief makes no mention of the information Appellant seeks to include in its reply brief. Therefore, Appellant’s request to supplement its reply brief is improper and should be denied.

III. CONCLUSION

For the foregoing reasons, Appellant’s motion to supplement its reply brief should be denied.



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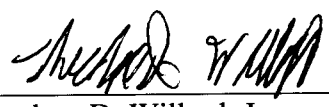
vs.

South Carolina Budget and Control Board,
Employee Insurance Program... Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Appellant's Motion to File Supplemental Reply Brief on Appellant by depositing a copy of the same in the United States mail, postage prepaid, on October 23, 2015, addressed to his attorneys of record, John A. Massalon, Wills Massalon & Allen, LLC, Post Office Box 859, Charleston, South Carolina, 29402 and Terry E. Richardson, Jr., Richardson Patrick Westbrook & Brickman, LLC, Post Office Box 1368, Barnwell, South Carolina, 29812.

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October 23, 2015

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

Re: Jeffrey D. Allen v. SCBCB
Appellate Case No. 2015-001561
Our File No.: 294962

Dear Ms. Kitchings:

Enclosed for filing, please find an original and seven (7) copies of the Respondent's Return to Appellant's Motion to File Supplemental Reply Brief, along with the Proof of Service of the Respondent's Return to Appellant's Motion to File Supplemental Reply Brief in the above-referenced matter. Please provide a clocked copy to our Courier delivering these documents to you.

If you have any questions, please do not hesitate to contact me.

With kind regards,

Very truly yours,

MONTGOMERY WILLARD, LLC



Theodore D. Willard, Jr.

TDW/lcb

Enclosures
cc w/ encl:

John A. Massalon, Esq.
Terry E. Richardson, Jr., Esq.
Stephen R. Van Camp, Esq.