THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Appellate Case No.: 2015-002228

Deborah Brooks Durden, Administrative Law Judge
Case No. 14-ALJ-30-0539-CC

Edward W. Miller — Appellant,

V.

South Carolina Public Employee Benefit Authority,
South Carolina Retirement Systems, — Respondent.

BRIEF OF APPELLANT

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Appellant

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STATEMENT OF THE CASE

This case arises from Appellant's August 7, 2014 letter, to Respondent, requesting formal review of Respondent's December 2002 determination of the amount of public service credit which Petitioner was eligible to purchase in the Judges and Solicitors Retirement System (hereinafter JSRS or System) for his employment with the Greenville County Public Defender Office (R. pp. 60-62). In his letter to Respondent, Appellant asserted that he should be allowed to purchase an additional 15 months of earned service credit at the cost in effect in 2003 (R. p. 61). By Final Agency Determination No. 14-015, Respondent found that Appellant's request for review of the December 2002 Determination was not timely filed and Appellant's request would, therefore, not be granted (R. pp. 70-75). Appellant sought a review of the Final Agency Determination in a contested case proceeding before the South Carolina Administrative Law Court. Appellant filed a Request for Contested Case Hearing with the ALC on November 20, 2014 (R. p. 16).

By way of letter, dated May 2, 2015, the parties submitted Appellant's claim to the ALC (R. p.17). Therein the parties agreed to waive an evidentiary hearing and submit the matter to the ALC for decision as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties. The ALC issued an Order Granting Respondent's Motion for Summary Judgment, dated August 24, 2015 (R. pp. 6-12). On September 2, 2015, in re-

sponse to that Order, Appellant filed a Motion to Alter or Amend (R. pp. 49-50). On September 23, 2015, the ALC sent an email scheduling a "teleconference" with the parties (R. pp. 47-48); this telephonic communication was held on September 24, 2015. On September 28, 2015, the ALC issued its Order Denying Appellant's Motion to Alter or Amend (R. pp. 1-5). In the Order the ALC refers to the September 24, 2015 telephonic communication and called it a "telephonic hearing" and recited alleged comments made by the Petitioner as partial basis for the ruling (R. p 2). Appellant initiated an email chain requesting a transcript of the "telephonic hearing" (R. pp. 44-46). Appellant expressed concern that there had been no notice given to him that the September 24, 2015 communication was to be a *hearing* (R. pp. 44-46). The ALC acknowledged that no record of any type was made from the September 24, 2015 communication. (R. p. 44-46)

On October 27, 2015, Petitioner filed a Notice of Appeal with the South Carolina Court of Appeals. In compliance with Appellate Court Rules, Appellant continued to seek a transcript of the September 24, 2015 "telephonic hearing" (R. pp. 40-43). On December 2, 2015, the Clerk of the ALC formally acknowledged to the South Carolina Court of Appeals, that no transcript of the "telephonic hearing" was made and, consequently no record of the "telephonic hearing" exists (R. p. 39).

STATEMENT OF FACTS

Appellant is an active member of the JSRS. Appellant has more than 13 years of earned service credit and 16 years of purchased service credit in the System. Appellant's membership in the System commenced on September 3, 2002, when he was seated as a Circuit Court Judge, after his election to that position by the South Carolina General Assembly in May of 2002. Prior

to election to the Circuit Court, Appellant was employed as an assistant Public Defender with the Greenville County Public Defender Office between May 1986 and June 2002. Appellant also maintained a full private law practice during that period.

In July 2002 Appellant began the process of purchasing public service credit for his work with the Greenville County Public Defender Office. Appellant acquired earned service credit, in 2003, for two different time frames of Public Defender work. Appellant purchased earned service credit for his employment as an assistant Public Defender for the period of April 1980 to June 1981 (R. p. 57, 79, 81). This determination of earned service credit is not in dispute in this case. Appellant also sought to purchase earned service credit for employment with the Public Defender Office for the time frame from May, 1986 to June, 2002 (hereinafter the "disputed time frame"). On the forms provided by Respondent to Appellant to purchase service credit, Appellant's service during the disputed time frame was characterized as "part-time" service and was computed at a value of 60% of full-time employment (R. pp. 54-56). Respondent determined that Appellant was eligible to purchase 9 years, 8 months, and 5 days of public service credit in JSRS based on Appellant's employment with the Greenville County Public Defender Office during the disputed time frame (R. pp. 58-59). Appellant purchased all of this allowed earned service credit on August 1, 2003 (R. pp. 79-82). As a result of the 2003 earned service credit purchase, Appellant had purchased a total of 10 years, 11 months and 5 days of earned service credit at a cost of $49,639.77 (R. p. 79-82). It is also not disputed that, in December 2005, pursuant to a change in the law, Appellant was allowed to purchase an additional 5 years and 25 days at a cost of $55,487.27 (R. pp. 76-78).

The dispute in this matter centers on the failure of Respondent to allow Appellant to purchase 100% of the earned service credit for the disputed time frame at the purchase price in effect at the time of the original purchase.

From July 1981 and throughout the disputed time frame, Greenville County utilized a unique, hybrid method of providing indigent criminal defense services. The former office staff of full-time assistant Public Defenders was replaced, in July 1981, with private attorneys (R. pp. 60-69). These private attorneys handled a full-time indigent defense caseload on a contract basis, in addition to their private law practices (R. p. 60-69). Appellant handled one of these indigent defense caseloads throughout the disputed time frame. Greenville County contracted with, and provided funding for, all of these private attorneys except for Appellant, whose employment was with the Greenville County Public Defender Office, funded by the state (R. pp. 61, 63, 65, 69). There was no material difference between Appellant's state-funded employment and the Greenville County-funded indigent defense contract attorneys for purposes of this appeal. Appellant's contract indigent defense caseload was equal to the caseloads carried by full-time assistant Public Defenders prior to the initiation of the hybrid contract system in 1981 (R. pp. 61, 63, 65, 67, 69).

The Greenville County Public Defender Office, operating on a tight financial budget, designated Appellant as a part-time employee (even though he performed full-time service) so that no employment benefits or tax consequences would attach to this employment (R. pp. 62, 65). The part-time designation also allowed Appellant to operate his private law practice concurrently with the indigent defense contract (R. pp.62, 64, 65, 67).

In the record of this case, it is undisputed that another member of the System (former Thirteenth Circuit Solicitor and Circuit Court Judge, Joe Watson) handled one of these hybrid,

full-time indigent caseloads from 1982 until 1985, in addition to his private law practice (R. p. 63-64). It is undisputed that the work performed by this other member [hereinafter Watson] was identical to the work performed by Appellant which is the subject of the dispute in this matter. It is further undisputed that Respondent found Watson eligible to purchase and allowed him to purchase these three years of service as full-time earned service credit for purposes of the System's retirement benefits (R. p. 64). It is undisputed that Respondent, in failing to allow Appellant to purchase the disputed 15 months of earned service credit, is treating identically situated members (Appellant and Watson) disparately and unequally.

Appellant did not learn of this unequal treatment of like-situated beneficiaries until the Spring of 2014 when he initiated this case through a letter request for review sent to Respondent (R. pp. 60-62). As the sole basis for denying Appellant's requested relief, Respondent relies on Appellant's failure to appeal, in 2003, the denial of full-time earned service credit for the disputed time frame. Respondent asserts that Appellant's current claims are barred by regulatory statutes of limitation through his failure to exhaust his administrative remedies in 2003 (R. pp. 27-33). Respondent ignores the fact that Appellant was unaware of Respondent's prior award of full-time earned service credit to Watson, who was an identically-situated beneficiary of the System, until 2014, at which time he initiated this claim. In 2002, Respondent ignored its fiduciary duty of full and timely disclosure of the material fact that another member of the System, Watson, had received full-time earned service credit for work identical to that claimed by Appellant.

I. THE ADMINISTRATIVE LAW COURT (hereinafter ALC) ERRED IN FINDING THAT RESPONDENT WAS NOT A FIDUCIARY OF APPELLANT AND DID NOT OWE APPELLANT FIDUCIARY DUTIES OF FULL AND FAIR DISCLOSURE OF MATERIAL FACTS.

It is axiomatic that Respondents are creatures of state legislative action, charged with observing fiduciary standards in the administration of the SC Retirement System, for the benefit of and in the best interests of System participants and beneficiaries. "[T]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). An undefined statutory term must be interpreted in accord with its usual and customary meaning. *Stretcher v. Lexington County Recreation Commission,* 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998). A trustee is defined as "[o]ne who holds legal title to property 'in trust' for the benefit of another person (beneficiary) and who must carry out specific duties with regard to the property. The trustee owes a fiduciary duty to the beneficiary." *See Black's Law Dictionary* 1514 (6th ed. 1990) (Citing *Reinecke v. Smith*, 289 U.S. 172, 53 S.Ct. 570 (1933)).

Section 9-1-1310(A), South Carolina Code of Laws, 1976, as amended, created the Respondents for the administration of the SC Retirement system:

> *A) The South Carolina Public Employee Benefit Authority and the State Budget and Control Board, or its successor, are* ***cotrustees*** *of the retirement system as "retirement system" is defined in Section 9-16-10(8) in performing the functions imposed on them by law in the governance of the Retirement System. Notwithstanding any other provision of law, any reference in law to the* ***trustee*** *of the Retirement System must be construed to conform to the* ***cotrusteeship*** *as provided in this subsection.* (emphasis added).

Section 9-16-40, South Carolina Code of Laws, 1976, as amended, provides, in part:

> *A trustee, commission member or other fiduciary shall discharge duties with respect to the retirement system:*
>
> *(1) solely in the interest of the retirement systems, participants, and beneficiaries;*

(2) for the exclusive purpose of providing benefits to participants and beneficiaries...
(4) impartially, taking into account any differing interests of participants and beneficiaries...

Section 9-16-10 (4), South Carolina Code of Laws, 1976, as amended, provides in part:

(4) "Fiduciary" means a person who:
(a) exercises any authority to invest or manage assets of a system.....

The duties of a fiduciary are composed of care, loyalty and good faith. *Menezes* v. *RL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 183 (2013). Similarly, it is well-established in the common law of South Carolina that a confidential, or fiduciary, relationship exists when one reposes a special confidence in another, so that the latter, in equity and in good conscience is bound to act in good faith, with fair dealing and with full disclosure with respect to the interest of the beneficiary. *FutureGroup II* v. *NationsBank*, 324 S.C. 89, 478 S.E.2d 45 (1996); *Guignard v. Atkins*, 282 S.C. 61, 317 S.E.2d 137, (Ct.App.1984); *Ramage v. Ramage*, 283 S.C. 239, 247, 322 S.E.2d 22, 28 (Ct.App. 1984)("A trustee is held to something stricter than the morals of the marketplace.").

Based on the statutory and common-law, *supra*, Respondent was obligated to treat Petitioner's application for earned service credit as trustee, charged with fair dealing, full and forthcoming disclosure, and good faith due from a trustee to a beneficiary.

The ALC Order, entitled "Order Granting Respondent's Motion for Summary Judgment," dated August 24, 2015, did not address Appellant's argument concerning Respondent's status as a fiduciary with respect to Appellant (R. pp. 6-12). Appellant again raised this issue in his Motion to Alter or Amend (R. pp. 49-50). Respondents, in their Reply brief submitted to the ALC, dated July 10, 2015, acknowledge the fiduciary relationship through their denial therein of a

breach of the duty (R. p. 36-38). The ALC Order Denying Petitioner's Motion to Alter or Amend, dated September 28, 2015, however, held that no fiduciary duty existed between Respondent and Appellant (R. p. 3). Totally ignoring the legislative intent evidenced in the plain wording of the relevant statutes, the ALC ruled that: "The Respondent did nothing to induce confidence on the part of its members that it was acting on their behalf..." (R. p. 3) The ALC further ruled that the Respondent did not owe a fiduciary duty of full and fair disclosure of material facts: "I conclude that PEBA did not owe a fiduciary duty to the Petitioner (*Appellant herein*) to advise him of the circumstances of other claimant's dealings with the agency" (R. p. 3). Respondent's nondisclosure of the material fact of the unequal treatment of beneficiaries resulted in significant prejudice to Appellant.

Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct.App.2004). South Carolina Code of Law section 9-1-320 mandates that beneficiaries' records are confidential. In 2002 at the time of the initial application to purchase earned service credit, Appellant had no way of knowing that a like-situated member (Watson) had been awarded full-time service credit for identical work as that claimed by Appellant. Respondents had full knowledge of the previous award and failed to disclose that Appellant's claim, based on the earlier treatment of Watson, was properly eligible for similar treatment and qualified for full-time earned service credit. Silence, where there is a duty to speak, when it is intended, or when it has the effect of misleading a party, may give rise to equitable estoppel. *Southern Land and Golf Co. Ltd. v. South Carolina Public Service Authority*, 311 S.C. 29, 34, 426 S.E.2d 748, 751 (1993).

II. THE ALC ERRED IN FAILING TO FIND THAT RESPONDENT

ENGAGED IN THE PRACTICE OF UNEQUAL TREATMENT OF LIKE-SITUATED BENEFICIARIES BY DENYING APPELLANT'S CLAIM, HAVING PREVIOUSLY GRANTED AN IDENTICAL CLAIM TO AN IDENTICALLY SITUATED BENEFICIARY.

Respondents are state-created managers of a state retirement system. In their management of the state retirement system, the acts of Respondents are acts of the State of South Carolina. In effect, administrative decisions are state actions which, in turn, must comport with the constitutional guarantee of equal protection of laws. *United States Constitution*, 14th Amendment, *South Carolina Constitution*, Article 1, § 3. *Kennedy* v. *SC Retirement Sys.*, 345 S.C. 339, 549 S.E.2d 243 (2001).

Appellant supplied Respondents with proof that, in an earlier case presenting identical facts, (the "Watson case"), Respondents granted full-time earned service credit to Watson (R. p. 64). A comparison of the Watson case and Appellant's case confirms that the Respondents have failed to meet the duties of their trusteeship by their diametrically inconsistent treatment of applicants presenting identical facts. By failing to consistently observe fundamental fairness in their administration of the retirement system, Respondents have, therefore, failed to observe their common-law duties of good faith and fair dealing owed to Appellant. *Lesesne* v. *Lesesne*, 307 S.C. 67, 413 S.E.2d 847 (Ct.App.1991); *Manning* v. *Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978); *Rodgers* v. *Herron*, 226 S.C. 317, 85 S.E.2d 104 (1954). **"Absolute equality of treatment to similarly situated beneficiaries is the hallmark of a qualified defined benefits pension plan."** *Kennedy,* 345 S.C. at 353, 549 S.E.2d at 254. (emphasis added*).*

Likewise, Respondents have failed to observe their statutory fiduciary duties to Appellant. In addition to the impartiality requirements of South Carolina Code of Laws §§ 9-1-1310, 9-16-10

and 9-16-40 cited above, § 9-1-290 speaks to rules and regulations being adopted by the governing Board of the System to prevent injustices and inequalities.

Appellant asks this Court to correct Respondents' failure to observe their fiduciary duties through their rejection Appellant's application for full-time earned service credit during the disputed time frame. *Duvall* v. *SC Budget and Control Board, et al.*, 377 S.C. 36, 41, 659 S.E.2d 125, 127 (2008) ("Retirement statutes should be liberally construed in favor of those to be benefitted and object sought to be accomplished."); *King* v. *SC Retirement Sys.*, 319 S.C. 373, 376, 461 S.E.2d 822, 823 (1995) ("By adopting the term 'earned service credit,' it is apparent that the legislature intended to give broader coverage than just for employees engaged in actual service.").

III. THE ALC ERRED IN FAILING TO RULE THAT RESPONDENT WAS ESTOPPED FROM ASSERTING A TIMELINESS BAR TO APPELLANT'S CLAIM BECAUSE OF RESPONDENT'S BREACH OF FIDUCIARY DUTY OF FULL AND TIMELY DISCLOSURE TO APPELLANT WHICH CAUSED APPELLANT'S DELAY IN FILING HIS CLAIM.

The ALC failed to address a central question of Appellant's claim: did Respondent's breach of fiduciary duty, through the 2002 failure of Respondent to inform Appellant of the circumstances of the "Watson Case," estop Respondent from claiming a failure of Appellant to timely administratively appeal the 2002 denial of full-time service purchase eligibility benefits to Appellant?

Had Respondent fulfilled its fiduciary duty to Appellant in 2002 by informing him of the circumstances of the "Watson Case," Appellant would have appealed Respondent's denial at that time and there would be no question of the timeliness of the 2014 claim. Respondent cannot now be allowed to profit from its 2002 violation of its legal and equitable duties to Appellant by claiming untimeliness, statutory or otherwise. Respondent cannot rely on a statutory time limita-

tion to deny Appellant's claim when its own misconduct concealed the "Watson Case" from Petitioner in violation of their fiduciary duties of disclosure and equal treatment of like beneficiaries. The undisputed fact that Appellant paid $55,487.27, in 2005, to purchase 5 years and 25 days (R. p. 76-78) (when in 2003 Appellant paid $49,639.77 to purchase 10 years, 11 months and 5 days (R. pp. 79-82)) demonstrates that Appellant would have purchased the disputed time in 2003 (at a much lower price) had he been properly informed of his right to make that purchase.

Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. *Moore v. Moore,* 360 S.C. at 251, 599 S.E.2d at 472. Silence, when it is intended, or when it has the effect of misleading a party, may raise an equitable estoppel. *Southern Land and Golf Co. Ltd.*, 311 S.C. at 34, 426 S.E.2d at 751. Respondents' silence in 2002 misled Appellant to believe he was not entitled to full-time service credit for the disputed time frame.

Collateral estoppel, also known as issue preclusion, operates to prevent the invocation of a timeliness bar. In the "Watson case" the earlier application for full-time earned service credit was granted. The "Watson case" presented the same facts and issues as presented by Appellant's application. Respondents are bound by the outcome of the "Watson case" which established a binding precedent for Appellant's application, under the applicable doctrine of collateral estoppel. "...*when an issue of fact or law* is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same claim or a different claim." *Catawba Indian Nation v. State* 407 S.C. 526, 536, 537, 756 S.E.2d 900 (2014), *S.C. Prop. & Ca. Ins. Guaranty Assoc.* v. *Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625 (1991); Re-

statement (Second) of Judgment, §§ 27-29 (1982). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Catawba Indian Nation,* 407 S.C. at 536-537, 756 S.E.2d at 908*; Carolina Renewal, Inc. v. S.C. Dep't of Transp.,* 385 S.C. 550, 554, 684 S.E.2d 779,782 (Ct.App.2009).

"While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." *Kunst v. Loree,* 404 S.C. 649, 653-654, 746 S.E.2d 360, 362 (Ct.App.2013); *Snavely v. AMISUB of S.C., Inc.,* 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct.App.2008).

In light of Respondents' earlier ruling in the "Watson case," which established a precedent for applications for full-time earned service credit under Appellant's circumstances, Respondents should be collaterally estopped from asserting that the Appellant failed to timely appeal the 2003 decision. Respondents have failed to show that the timing of the filing of Appellant's claim in this case has worked a prejudice or disadvantage to Respondents. Quite simply, in the absence of prejudice, the same case should produce the same outcome, regardless of the passage of time.

Appellant also argues that the doctrine of equitable estoppel applies to bar Respondents' use of a timeliness bar to deny Appellant's claim. Equitable estoppel arises where: (1) conduct by the party estopped amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. To claim an estoppel that bars Respondents reliance on a timeli-

ness bar, Appellant must demonstrate: (1) Appellant's lack of knowledge, and lack of access to knowledge, of the truth as to facts in question; (2) Appellant's reliance upon conduct of the party estopped; and (3) Appellant's prejudicial change in position. *Regions Bank v. Schmauch,* 354 S.C. 648, 674-675, 582 S.E.2d 432, 446 (Ct. App.2003). The application of equitable estoppel does not require an intentional misrepresentation. *Id* at 675,446.

Consistent with *Regions Bank*, Respondents (1) concealed the material fact of the "Watson case" from Appellant, despite their fiduciary duty of disclosure, (2) with the intention that Appellant act on that concealment by accepting Respondents offer of part-time credit, and (3) Respondents had knowledge of the true facts that the "Watson case" resulted in an offer of **full-time credit** to Watson, rather than the offer of **part-time credit** made to Appellant. Appellant lacked knowledge of the Watson case at the time of the 2003 application and, therefore, (1) Appellant could not have discovered those facts due to the confidential nature of Respondents files, (2) Appellant relied on Respondents conduct and accepted Respondents offer of part time earned service credit, and (3) Appellant suffered from a prejudicial change in position through the loss of full time earned service credit.

Appellant asserts that Respondents are collaterally and equitably estopped from relying on Appellant's alleged failure to act timely in appealing the Respondents 2003 determination. The Respondents' 2003 determination violated the fiduciary duty owed by Respondents to Appellant and caused Appellant's delay in pursuing his claim. Additionally, there can be no prejudice to Respondents by granting Appellant's claim. Appellant notes that his case presents a factual scenario which, due to the change of Greenville County's hybrid indigent defense system, is incapable of replication.

IV. THE ALC ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANT, DUE TO THE PRESENCE OF AT LEAST A SCINTILLA OF EVIDENCE IN THE RECORD PRESENTING GENUINE, TRIABLE ISSUES OF FACT.

In Respondents' May 5, 2015 letter to the ALC, Respondents informed the ALC that the parties had agreed to submit Appellant's claim to the ALC for decision as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties (R.p p. 17, 51-53). The ALC, *sua sponte,* ruled that it would decide this case as if it were submitted by way of cross motions for summary judgment, even though no such motions were ever filed by any party (R. p. 13-15).

The ALC bound itself to the standard of proof contained in Rule 56 of the South Carolina Rules of Civil Procedure which provides for the grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Rule 56(c) SCRCP.* The burden of demonstrating the absence of a genuine issue of material fact rests with the moving party. *Lord v. D&J Enterprises,* 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014); *Baughman v. Am.Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 64 (2004); *Miller v. Blumenthal Mills, Inc.,* 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct.App.2005). Summary judgment is a drastic remedy and should be cautiously invoked. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). **Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.** *Nelson v. Charleston*

County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004) (emphasis added).

In this case the ALC simply adopted the arguments of the Respondents and, in granting the Respondents summary judgment, found that Appellant was time barred because he did not exhaust his administrative remedies in 2003 by failing to appeal the denial of full-time earned service credit for the disputed time frame. The ALC, in its August 24, 2015 Order, refused to address any of the issues raised in Appellant's submissions (R. pp. 6-12). The ALC held that the parties had stipulated that there was no genuine dispute regarding the material facts "relevant to a decision in this case" (R. p. 8). The ALC never delineated what it considered to be the material facts "relevant to a decision." The ALC's Order did not address the issue of Respondents' fiduciary duty to Appellant, Respondents' breach of that duty, whether Respondents were estopped from asserting a timeliness bar, nor Respondents' unequal treatment of like-situated beneficiaries.

On September 28, 2015, the ALC issued its Order Denying Petitioner's Motion to Alter or Amend. The Order held that Respondents did not owe Appellant a fiduciary duty of full disclosure of material information, nor that Respondents were estopped from asserting a timeliness bar. In footnote 1 on page 2 of that Order, the ALC voiced a profound misunderstanding of the authority of the Court and of the posture in which this case was submitted for decision. The ALC held that the case must be decided either "on a motion for summary judgment or by conducting an evidentiary hearing" (R. p. 2). The ALC did not honor the parties' agreement that the case had been submitted to the ALC for final decision, as a matter of law, based on stipulations of fact, jointly submitted exhibits and memoranda of law. By their agreement, the parties conferred the role of law giver as well as fact finder on the ALC, thereby charging the ALC with

making a decision on the merits, based on the submissions of the parties and all inferences arising therefrom. On page 3, of its September 28, 2015 Order, the ALC held that, because the parties had not stipulated that a breach of fiduciary duty had occurred, such a finding was beyond the scope of the order issued by the ALC on August 24, 2015 (R. p. 3). On page 4, of its September 28, 2015 Order, the ALC held that, because there was no stipulated breach of fiduciary duty by Respondents, Appellant could not rely on Respondents' failure to disclose material information as a ground to estop Respondents from asserting a timeliness bar (R. p. 4). Further, the ALC never addressed the unequal treatment of similarly situated beneficiaries, even though this issue had been raised in Appellant's November 20, 2014 Request for Contested Case Hearing submitted to the ALC (R. p. 16). The ALC's reasoning for failing to address this fundamental issue is found in a post-Order email, dated September 30, 2015, in which the ALC stated that the Order did not address Appellant's "equal protection argument because to do so would require me to reach the merits of the case." (R. p. 41)

Despite the posture in which the case was submitted to the ALC for decision, the ALC decided the case by applying the summary judgment standard and, consequently, that is the standard to be used in this appeal. *Brockbank v. Best Capital Corp.,* 341 S.C. 372, 374 534 S.E.2d 688, 692 (2000).

While the stipulated evidentiary facts are not in dispute, there are numerous inferences which can be drawn from the stipulated facts and joint exhibits which show a genuine dispute as to material issues and facts. The jointly submitted letter of Joe Watson (R. pp. 63-64), which has never been disputed, establishes unequal treatment of like-situated beneficiaries. At a minimum, this Watson letter presents a *scintilla* of evidence to support Appellant's claims. The only reasonable inference from this letter is that Respondents were aware of the previously granted full-

time earned service credit, for identical work, at the time of Appellant's claim; that Appellant had no contemporaneous knowledge of the previous award; that Respondents made an offer to Appellant without full and fair disclosure to Appellant of this material fact; that Appellant relied on Respondents' offer, trusting in their fiduciary obligations of good faith, fair dealing and full disclosure; and Appellant acted on Respondents' offer resulting in prejudice to Appellant.

The only reasonable inference, from the fact that in 2005 Appellant paid a higher purchase price for less than one-half the amount of earned service credit as that paid in 2003 (Appellant paid more than double the 2003 price), is that had Appellant known of the "Watson case" he would have pursued the claim in 2003. A further inference from this fact is that Appellant cannot be said to have exhausted his administrative remedies in 2003 because he did not know they existed, as a result of Respondents' failure of full disclosure and breach of fiduciary duty.

From the above stated inferences, there is at least a *scintilla* of evidence that Respondents should be estopped from asserting a timeliness bar as a result of the Respondents' 2003 conduct; or that Appellant's claim did not arise until 2014 when he learned of the disparate and unequal treatment of like-situated beneficiaries.

V. THE ALC DENIED DUE PROCESS AND EQUAL PROTECTION TO APPELLANT BY CONDUCTING A HEARING WITHOUT FULL AND FAIR NOTICE TO APPELLANT AND WITHOUT PRESERVING A RECORD OF THE HEARING.

The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. *S.C. Const. Art. 1, § 22; Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). In *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 726 S.E.2d 9 (Ct.App.2012), the South Carolina Court of Appeals held that:

> Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. *China v. Parrott*, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278 (1968). However, the reconstructed record must allow for meaningful appellate review. *State v. Ladson,* 373 S.C. 320, 321, 644 S.E.2d 271,271 (Ct.App.2007). A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review. *Id.* at 325, 644 S.E.2d at 274. ... The South Carolina Constitution provides that in procedures before administrative agencies: No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard... *Art.1, § 22.*

In this case the ALC notified the parties, via email dated September 23, 2015, that the ALC would conduct a "teleconference" on September 24, 2015, to discuss Appellant's Motion for Reconsideration (R. pp. 47-48). In the ALC Order Denying Petitioner's Motion to Alter or Amend, dated September 28, 2015, the ALC declared on page 2 that a "telephonic hearing was conducted" (R. p. 2). At no time before or during the telephonic communication was the Appellant told that it was to be considered a "hearing." The ALC Order contained alleged comments attributed to the Appellant and the ALC made factual findings based on the alleged comments (R. p. 2). This Order has been published on the official website of the South Carolina Administrative Law Court. Appellant requested a copy of the transcript and the name of the court reporting service (R. p. 43). The ALC informed the Appellant that, not only was no transcript made of this unnoticed "telephone hearing," it is the regular practice of the ALC to conduct these types of hearings without a transcription. An email exchange between the ALC and the Appellant, dated from September 28, 2015 through October 2, 2015, confirms the ALC's regular practice of con-

ducting hearings without a transcription or record of any kind, thereby preventing any meaningful appellate review (R. pp. 44-46).

The Clerk of the Administrative Law Court confirmed in a letter, dated December 2, 2015, that the ALC has a standard practice of conducting telephone hearings without a transcription "unless a party requests one" (R. p. 39). A party cannot, however, know to request a court reporter for a hearing if the ALC does not give the party notice that the communication will be considered a hearing in a published Order. The ALC used the terms telephone conference and telephone hearing as if they were interchangeable. There is a significant and clear constitutional difference between a hearing and a conference. In litigation concerning private property rights, it is an unconstitutional violation of due process rights when a party is not given notice that a communication will be characterized, after the fact, as a hearing.

In this case, and as its regular practice, the ALC has violated Appellant's Due Process rights, guaranteed by the South Carolina Constitution Article 1, § 22, and by the Fifth and Fourteenth Amendments of the U.S. Constitution, through its failure to give Appellant notice of its intention to conduct a hearing in this pending contested case. The ALC's failure to give notice of a hearing, of any type, prevented Appellant from being heard in a meaningful way at the "unnoticed" hearing. The ALC's failure to keep a record of the proceeding prevents the South Carolina Court of Appeals from conducting a meaningful appellate review, all in violation of specific constitutional mandates.

CONCLUSION

For the reasons set forth above, Appellant urges this Court to reverse the rulings of the ALC in this matter and to grant Appellant the relief requested in his applications and petitions

previously submitted to the Respondents in the underlying administrative proceeding. In the alternative, Appellant requests this Court fully vacate all Orders and rulings of the ALC to date, and remand this case for an expedited hearing on the merits to address what Appellant has been wrongfully denied to date.

Respectfully Submitted,

Dated: April 7, 2016

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Appellate Case No.: 2015-002228

Deborah Brooks Durden, Administrative Law Judge
Case No. 14-ALJ-30-0539-CC

Edward W. Miller, Appellant,

V.

South Carolina Public Employee Benefit Authority,
South Carolina Retirement Systems, Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that he/she has served the Appellant's Final Brief, Appellant's Reply Brief, and the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 9, 2016, addressed to their attorney of record, Justin R. Werner, Esq., Post Office Box 11960, Columbia, South Carolina 29211-1960.

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