

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Judge

Appellate Case No. 2012-212844

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,

Respondent.

BRIEF OF APPELLANTS

RECEIVED

NOV 28 2012

SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

- I. Consideration of Summary Judgment was premature.
- II. Rule 56, SCRCP, procedures were disregarded in violation of S.C. Code §1-23-650(B)(1).
- III. The tribunal disregarded the mandated standards for Summary Judgment.
- IV. Abuse of discretion: *sua sponte* conclusions and “tone and tenor”.
- V. Abuse of Discretion: *sua sponte* time limits and disregard of the rules of construction.

STATEMENT OF THE CASE

The pro se Appellants are individual citizens of the state. The S. C. Department of Revenue (“DOR” or “the Respondent”) is a state agency. DOR’s demands of the Appellants began in late 2009. What followed was nearly three (3) years of DOR demands, misfeasance and malfeasance, moving targets, misrepresentation, disappearing DOR employees, and dilatory conduct. Eventually, DOR provided the most recent of its “determinations” and a Contested Case was filed with the Administrative Law Court by the Appellants.

Even in that forum, DOR continued “hiding the ball”. More regrettably, as may be seen hereafter, the Administrative Law Court gave its approval and imprimatur to such misconduct. This appeal necessarily followed.

STATEMENT OF FACTS/PROCEDURAL TIMELINE

Throughout **2008**, due to an early-recession liquidation of investment assets,
the Appellants cautiously overpaid quarterly estimated state tax payments. (R. p.).

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In **2009**, a refund from the significant overpayment, exceeding \$7,000.00, properly ensued. (R. p.).

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Within two (2) weeks of that refund, on **December 11, 2009**, a DOR employee (“Revson”) demanded copies of confidential education records under threat of monetary assessment. (R. p.).

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On **January 19, 2010**, the Appellants promptly complied. Included in that package were statements directly from the Medical University of South Carolina (“MUSC”). Notably, and accurately, neither form had checked the pre-printed box labelled “Checked if a **graduate** student” (emphasis added).

(R. p.).

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On **January 22, 2010**, DOR mailed its official determination, tax Assessment, and a demand for civil penalty and interest. One option on the preprinted form was the assertion that DOR only now makes – but the determination did not assert that claim. Instead, DOR asserted that a Tuition Tax Credit was being denied ONLY because the Appellants were “claiming graduate school”. No other reason was stated and the Appellants proceeded on that sole determination. (R. p.).

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On **January 26, 2010**, the Appellants noted to DOR that no dependent of theirs had attended graduate school during the year under review, that they had not “claim[ed] graduate school”, and questioned the penalty and interest in light of their \$7,000.00 overpayment. (R. p.).

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By letter dated **February 2, 2010**, DOR asserted the interest to be “Federally mandated”, that DOR had “no authority over” it, and included the thinly veiled threat of “other [possible] penalties”. (R.

p.).

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On **February 5, 2010**, the puzzled Appellants requested a copy of the Federal mandate. (R. p.).

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Within days, with no indication of the source or sender, the Appellants received partially censored copies of three (3) state statutes. No Federal statute, regulation, ruling, policy, or case was ever provided. (R. p.).

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In **April of 2010**, with time expiring, the Appellants filed an appeal/dispute contesting to the DOR determination/assessment. (R. p.).

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Despite such appeal/dispute, there followed a course of conduct by DOR including prevarication (grossly negligent misrepresentation), misfeasance (threats to file a tax lien), and malfeasance (interception of a subsequent refund) as it struggled to justify its conduct. (R. p.).

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In **November, 2010**, despite notice and knowledge of the ongoing appeal/dispute and in the midst of an exchange of communications regarding an in-person appeals conference, DOR unlawfully intercepted the 2009 tax refund of the Appellants. (R. p.).

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In furtherance of DOR required dispute/appeal procedures, by DOR employee (“Stokes”) letter dated **March 28, 2011**, an in-person conference was scheduled for April 27, 2011 at the location of DOR’s choosing -- a specifically stated DOR Office address. (R. p.).

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Timely arrival on **April 27, 2011** revealed that the address provided by Stokes had been abandoned by DOR for over six (6) months prior to that date. (R. p.).

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The undersigned finally found the undisclosed hearing location. The conference then proceeded and, in contravention of its own procedures (entitlement to a “conference with the person who

denied your refund claim”), neither Revson nor Stokes appeared. Instead, in partial excuse for its prior conduct, DOR claimed that it had terminated Revson. (R. p.).

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Moreover, DOR represented to the Appellants that, if no further notice arrived from DOR counsel within 60-90 days after the **April 27, 2011** conference, the Appellants should consider the dispute concluded without further demands or proceedings. (R. p.).

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With no contact, after four (4) months, the Appellants closed their file. Much of the records and notes from the history of the underlying matter were stripped from the file and it was archived and stored in **mid-September, 2011**. (R. p.).

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On **April 13, 2012**, it became apparent that the Respondent had mislead the Appellants once again. On that date, a wholly new “determination” arrived from DOR. (R. p.).

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In early **May 11, 2012**, the Appellants timely filed and served their pro se signed Request for a Contested Case Hearing citing some facts and the applicability of “no less than” judicial estoppel, in pari delicto, laches, waiver, etc.. That filed submission was signed by a party. (R. p.).

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Also on **May 11, 2012**, pursuant to Rules 33 and 34, SCRCF, and Rule 21 of the Administrative Law Court, the Appellants served Standard Interrogatories and minimal document production requests. (R. p.).

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In the Interrogatories, the Appellants specifically requested location information regarding the allegedly terminated Revson and copies of any statements from him and Stokes. (R. p.).

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On **May 23, 2012**, a Notice of Case Assignment was issued. (R. p.).

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During the remainder of **May** and most of **June 2012**, not a single Interrogatory answer was provided, not a shred of documentation was produced, and no extension of time was requested. No protective order was sought by DOR, no objection was addressed to discovery, no claim of privilege was made, and no pre-Motion consultation ensued. (R. p.).

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On **June 19, 2012**, the Appellants filed and served the required Statement with the Administrative Law Court. It noted, among other things, that the Appellants would argue no less than Estoppel, Judicial Estoppel, Estoppel by silence, laches, in pari delicto/unclean hands, gross negligence under the state Tort Claims Act, and DOR's failure to comply with DOR's own published procedures. That filed submission was signed by a party. (R. p.).

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Included therein was a listing of no less than thirty (30) "currently known" documents favoring the Appellants. (R. p.). Notably, included in that statement was a clearly stated notation that discovery had already been served, that no responses had been forthcoming for more than thirty (30) days, and that discovery motions and subpoenas might prove necessary. (R. p.).

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On that same date, the pro se Appellants made it clear that they intended to call no less than two (2) employees of DOR, including Stokes and the allegedly terminated Revson. (R. p.).

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Moreover, for immediacy and simplicity of communication, an email address was provided for the undersigned. (R. p.).

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On **June 25, 2012**, exactly forty-five (45) days following service of discovery requests with the Request for Contested Case Hearing by the Appellants, arguably the date responses were first due (Rule 33(a) and 34(b)), the undersigned received a loose leaf, unstapled, unstamped document. It bore the title Motions for Summary Judgment and to Extend Deadline for Discovery Responses.

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The document bore no evidence of filing nor did it include proof of service (to date, despite request, DOR has refused to provide a filed/stamped copy of such document).

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The DOR Motion was unsupported by any Affidavit or authentication and bore no signature other than that of DOR's counsel.

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DOR specifically, and accurately, noted that its Motion was brought pursuant to "Rule 56, SCRCPP", it conceded that discovery was due and, without prior consultation, requested an order extending time from the tribunal.

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On **July 7, 2012**, the undersigned notified the Administrative Law Court and counsel for DOR of his anticipated **July 27-31, 2012** absence. (R. p.).

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Oddly, on **July 26, 2012**, the tribunal issued its Order granting Summary Judgment. As of that date, the underlying Contested Case was a scant seventy-six (76) days (2 ½ months) old. (R. p.).

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On **July 27, 2012**, the undersigned personally reviewed all mail prior to his departure.

The Order was not delivered on July 27, 2012. It was, instead, received thereafter at

some time during the **July 28-31, 2012** notified absence of the undersigned. (R. p.).

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The Order under appeal was retrieved from the P. O. Box of the undersigned, and was reviewed for the first time upon his return on the evening of **July 31, 2012**. (R. p.).

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On **August 3, 2012**, the Appellants filed and served their Motion for Reconsideration. (R. p.).

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On **August 8, 2012**, via email only, the tribunal requested that the Appellants' Motion for Reconsideration be forwarded via email in WORD format.

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By order dated **August 21, 2012**, the Appellants' Motion was denied. A copy was provided to the undersigned, by email only, on that same date. (R. p.).

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This appeal was filed on **August 24, 2012**, less than thirty (30) days after issuance of the Summary Judgment Order. (R. p.).

STANDARD OF REVIEW

The Administrative Law Court may adopt and must promulgate rules which are “consistent with the rules of procedure governing civil actions in courts of common pleas”. S.C. Code §1-23-650(B)(1). "Summary judgment should be granted only where it is perfectly clear that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law." *Wortman v. Spartanburg*, 310 S.C. 1, 425 S.E.2d 18 (1992). Further, "... summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (multiple internal citations omitted). Moreover, because summary judgment is a “drastic” conclusion, even where the state is a party, a court should be very cautious. *Madison v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006); *Baughman*. Those rulings are exactly congruent with South Carolina’s policy favoring a trial on the merits as opposed to any disposition on technicalities, and this precept applies even where DOR seeks to exploit such a technicality. *Micronics, Inc. v. South Carolina Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct.App.2001).

Even if ripe for adjudication and even if properly before a tribunal, both of which remain denied, the court must construe all evidence and inferences arising therefrom against the moving party. *Davis v. Piedmont Engineers, Architects and Planners, P.A.*, 284 S.C. 20, 324 S.E.2d 325 (Ct.App. 1984). Summary judgment is improper “even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). The standards for summary judgment in an administrative matter do not differ. “South Carolina Administrative Practice and Procedure” (Randolph R. Lowell, editor, 2d Ed. 2008).

Finally, it is established and confirmed that “[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.” *S.C. Nat’l Bank v. S.C. Tax Comm’n*, 297

S.C. 279, 376 S.E.2d 512 (1989); *Alltel Communications, Inc. v. South Carolina Dept. of Revenue*, ___ S.C. ___, 731 S.E.2d 869 (2012). All such questions of law may be reviewed and decided at the appellate level with no deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

RELIEF SOUGHT

When examined in the light of the foregoing mandates and for the following reasons, the Order under appeal is error-ridden and improper. Respectfully, the ruling and the Order under appeal should be vacated/reversed and this matter remanded to the Administrative Law Court with a directive requiring DOR's prompt and proper discovery answers and disclosures and trial on the merits only after discovery is appropriately completed.

ARGUMENT

I. Consideration of Summary Judgment was premature

Prior to reaching the level of the Administrative Law Court, DOR functions as investigator, evaluator, prosecutor, adjudicator, and decision enforcer of its own claims (even when engaged in grossly negligent conduct, such as is described in the record). At no point during that required administrative process is discovery allowed to a taxpayer. Instead, demands for evidence are exclusively in the purview of DOR. (R. p.). Only upon arrival at the Administrative Law Court, is discovery by a taxpayer allowed. ALC Rule 21.

To be timely, all such discovery must be completed within 90 days of the Notice of Assignment. ALC Rule 21A. Since Requests to Admit are limited in number, depositions are allowed, but are subject to the same overall time limit. Clearly, tardiness is deadly, even to the diligent Appellant.

Consequently, the Appellants promptly served standard Interrogatories and Requests for Production at the first opportunity. (R. p.). Regardless, DOR chose to ignore those discovery requests. Instead, the only response thereto was DOR's Summary Judgment Motion dated nearly forty-five (45) days after the Appellants' service of discovery requests. (R. p.).

It is noteworthy that DOR required nearly seventeen (17) months to conclude its internal review and its unjustifiable tactics. (R. p. ; pp. 5-7, supra). Then, DOR required twelve (12) full months following the in-person conference to formulate and submit the most recent of its several varied positions. (R. p. ; p. 7, supra). Yet, as of the date Summary Judgment was awarded, the underlying Contested Case was only seventy-six (76) days old; the Notice of Case Assignment was barely sixty (60) days old; DOR's Motion itself, as dated (a filed/stamped copy has been refused, despite request, by DOR) was scarcely thirty (30) days old. In fact, the rush to Summary Judgment even pre-dated the ninety (90) days specifically set aside for discovery completion by nearly thirty (30) days. (R. p.).

The motion advanced by DOR conceded on its face that the Appellants' discovery requests had been received. It confirmed to the tribunal that DOR's time for responding had expired. Tacitly, but accurately, DOR conceded that it had requested no extension of time and confirmed a lack of pre-Motion consultation with the Appellants. More importantly, the motion expressly admits that DOR had not disclosed at all and, as part and parcel thereof, DOR sought to delay its admitted duty. (R. p.).

DOR willfully chose not to engage in discovery. That is its prerogative.

However, just as clearly, the Appellants pursued full disclosure. DOR disregarded the discovery rights of the Appellants, thereby intentionally handicapped and prejudiced them, and sought to evade compliance with pertinent ALC Rules and Rules 33 and 34, SCRCF, in regards to

minimal disclosures to the Appellants. Regrettably, and in error, the Order under appeal approved and, by rewarding DOR, endorsed those tactics.

DOR's discovery stonewalling, alone, rendered consideration of Summary Judgment premature. Summary judgment "must not be granted" at any time before the parties to the action have had a full and fair opportunity to gather relevant facts and develop the record. *Baughman*. To reiterate, DOR conceded and the Order under appeal confirmed that discovery requests were timely served, that the deadline for response had passed, and that each/every/all Interrogatory Answers and document disclosures had been refused. (R. p.). In complete and total disregard of the Appellants' discovery rights and all applicable precedent, via the "drastic remedy" of Summary Judgment (*Baughman*), the Appellants were denied the very information required and the minimal means to adequately respond to the Summary Judgment Motion.

Even beyond the ambit of Summary Judgment, the seminal cases are remarkably consistent in their mandate for discovery. "The **entire thrust of the discovery rules involves full and fair disclosure ...**". *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct.App. 1997). "The **rights of discovery** provided by the Rules give the trial lawyer the **means to be prepared** for trial. **Where these rights are not accorded, prejudice must be presumed** and, unless the party who has failed to submit to discovery can show a lack of prejudice, **reversal is required.**" *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct.App. 1987). (All emphasis added).

Section Summary

No objection to discovery was submitted by DOR. No protective order was sought. No assertion of privilege was advanced. No request for extension of time was made. No pre-Motion consultation ensued. The Rule 33 and 34, SCRPC, deadline for responses had passed but the ALC Rule deadline for overall discovery completion had not expired. Yet, not a single iota of information was provided by DOR. Under applicable precedent, prejudice to the Appellants must be presumed.

Downey. Also pursuant to pertinent law, Summary Judgment was premature. *Baughman*. In finding summary judgment was premature, the *Baughman* Court took careful note that, like here, the plaintiffs "were not dilatory in seeking discovery ...". *Id.* Summary Judgment at the stage of the underlying case and under these circumstances existing is proscribed. Respectfully, the Order under appeal should be reversed and the case remanded.

II. Rule 56 procedures were disregarded in violation of S.C. Code §1-23-650(B)(1)

The Administrative Law Court is free to adopt rules for itself by majority approval. S.C. Code §1-23-650(B)(2). Nonetheless, all such ALC rules must be fully "consistent with the rules of procedure governing civil actions in courts of common pleas". S.C. Code §1-23-650(B)(1). Aside from a single mention regarding fees (ALC Rule 71D), the ALC Rules do not address "Summary Judgment".

Therefore, it appears that the tribunal may have avoided the demand of DOR altogether by refusing to accept a Rule 56, SCRPC, motion. However, "[t]he South Carolina Rules of Civil Procedure may ... be applied" in the Administrative Law Court. ALC Rule 68. (Notably, ALC Rule 68 does not provide for the picking and choosing of only some provisions of a South Carolina Rule of Civil Procedure to the exclusion or complete disregard of other text in that same rule). The unfiled motion advanced by DOR specifically invokes Rule 56, SCRPC and, consequently, it demands that the tribunal apply that Rule. (R. p.). Moreover, Rule 56 and various cases construing portions of that Rule are extensively cited by the tribunal in the Order under appeal (R. p.), thereby conceding its "applicability". ALC Rule 68.

However, here, although the tribunal fully grounded the Order under appeal in Rule 56, SCRPC, it allowed none of the rights and protections specified for a non-moving party under that Rule and its appellate interpretations. For example, Rule 56(c) states "[t]he adverse party may serve opposing affidavits not later than two days before **the hearing**", clearly affording the non-moving

Appellants a precisely measurable response deadline. Here, no other deadline for the Appellants' response was otherwise noted. Here, no notice of hearing was given. Here, no hearing was held. Here, no notice that a hearing was not to be held was provided. Moreover, here, DOR provided no evidence of the filing of its motion (a refusal which persists to date). Instead, the first notice that Summary Judgment was actually before the tribunal and under consideration was the receipt of the Order under appeal during the Appellants' previously announced absence.

Section Summary

The tribunal chose to accept a Summary Judgment Motion. It chose to liberally cite Rule 56, SCRCF. However, as to the Appellants, it applied Rule 56 in name only. The tribunal improperly disregarded all procedures, denied protections, and ignored pertinent appellate court interpretations of that Rule. In so doing, the tribunal sought to excuse, but only compounded, its error by improperly citing portions of ALC Rule 19A. (From the research of the undersigned, it appears that no other Judge of the Administrative Law Court has interpreted ALC Rule 19A in the same way). Rule 19A, if it applies at all here (which is denied, (R. p.), pp. , infra), by the statements and conclusions of the Order under appeal, is simply not "consistent with the rules of procedure ... governing the courts of common pleas". §1-23-650(B)(1). Reliance upon it by the tribunal was an error of law.

As a consequence of no less than the foregoing failures by the tribunal, the Appellants were denied the protections of Rule 56 and the cases construing it (cf. Standard of Review, supra, and the foregoing paragraphs). Pursuant to the conduct described, respectfully, it was error (and an abuse of discretion, pp. , infra) to summarily conclude this matter.

III. The tribunal disregarded the mandated standards for Summary Judgment

Here, DOR provided no **evidence** to support its Motion. In determining whether any triable issues of fact exist, the **evidence** must be viewed in the light most favorable to the non-moving party. *Turner v. Milliman*, 392 S.C. 116, 708 S.E.2d 766 (2011) (all emphasis added).

In contrast, and in error, the tribunal cited and then misapplied *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct.App. 1997). Noting, with emphasis in the Order under appeal, that it must consider **all** of the evidence (R. p.), the tribunal failed to note the very next sentence of that opinion: “ ... statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court [as evidence] in determining whether a genuine issue of material fact exists.” *Higgins*. That general rule is decades old in South Carolina jurisprudence. *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473 (1933) (“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered [as evidence]”). Yet, only that DOR attorney written statement, i.e. non-evidence, was before the tribunal.

For purpose of argument only, let us suppose that the DOR Motion did qualify as evidence. If so, such evidence was self-contradictory and non-conclusive, thereby favoring the Appellants. (R. p.). “In the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.” *S.C. Nat’l Bank; Alltel Communications*). Here, the party-signed submissions of the pro se Appellants provided more than a scintilla of evidence favoring the non-moving party (*Turner*). Moreover, there is a dispute, as to the inferences and conclusions to be drawn from such “evidence” *Brockbank*. Therefore, once again, Summary Judgment was not proper.

Here, DOR had refused all discovery, so depositions, answers to interrogatories, and admissions were all absent. Here, DOR submitted no affidavit and no document or factual authentication. Here, the Order under appeal is fully, and erroneously, based on a written statement

by the DOR attorney only, despite the clear admonition that such is “not evidence and should not be considered”. *Higgins*. The only **evidence** of record (R. p.) favored the pro se Appellants.

Finally, summary judgment is not to be granted, even when there is no dispute as to evidentiary facts, if there is dispute as to the inferences and conclusions to be drawn from those facts. *Brockbank*. Consequently, even if the written statements of DOR counsel could possibly be considered admissible evidence (which remains denied), the Motion itself, the signed pro se Appellant documents of record (R. p.) and the Order under appeal confirm and establish that there are disputed inferences and conclusions to be drawn from such “evidence”. Nothing more was required to deny Summary Judgment: a mere scintilla of evidence is sufficient to proscribe summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

Section Summary

As a consequence of no less than the foregoing, the Appellants have been refused the protections of the Rules and appellate rulings and were thereby denied due process in the face of the over-whelming power of the state. Pursuant to the conduct described in the foregoing pages and hereafter, respectfully, it is an abuse of discretion to summarily conclude this matter.

IV. Abuse of discretion: *sua sponte* conclusions, and “tone and tenor”

A. Errors of fact, conclusions, and awards in the Orders

It has been noted earlier in this brief that the tribunal abused its discretion by failing to require DOR compliance with the rules of discovery (*supra*, pp.) and disregarding the protections and procedure of Rule 56, SCRPC (*supra*, pp.). Here, regrettably, it must also be noted that the Order under appeal even goes even further by assuming facts not in evidence and basing conclusions and its award thereon. Improperly, parts of the Order under appeal contain a “tone and tenor” of advocacy rather than that of impartial and objective review, analysis, and ruling. The following list is not exclusive, but noteworthy.

First, footnote 3 to the Order under appeal reproduces a portion of text and, completely *sua sponte*, proceeds to a totally unsupported finding that was advanced by no one: “The Medical University of South Carolina is a graduate school”. (R. p.). That assertion is found nowhere in the Summary Judgment Motion. It is not found in the record before the tribunal. In fact, that erroneous conclusion is clearly contradicted by MUSC’s own documents. (R. p.). Moreover, that finding is palpably false: “More than 2,400 students in six colleges (Dental Medicine, Graduate Studies, Health Professions, Medicine, Nursing, and Pharmacy) study for degrees at the **baccalaureate**, masters, doctoral, and other professional levels.” *Mission Statement*, MUSC Board of Trustees, January 8, 2008 (emphasis added). (R. p.).

As justification for its erroneous and unfounded *sua sponte* finding, the tribunal later conceded “this Court **assumed**” (emphasis added) that wholly fallacious conclusion to be true. (R. p.). Even in the absence of opposition, a tribunal cannot properly assume findings and assume conclusions to support its rulings. The “tone and tenor of the trial judge's remarks” in the Order under appeal (R. p.) and elsewhere (R. p.) appear biased and, thereby, constitute an abuse of discretion. *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994).

B. Inapplicable assertions

As may be seen elsewhere herein (pp. , *infra*), the time limits for “hearing” motions do not apply to “pre-hearing” motions and, more specifically, do not modify the protections of Rule 56, SCRCP, and are improperly inconsistent therewith. However, the tribunal went further, to other unsubstantiated findings.

In its final Order, again *sua sponte*, the tribunal asserts that the underlying case “was set for trial”. (R. p.). First, even if so, like its Summary Judgment review, no notice of trial had been given by the tribunal. Further, if so, that means that the underlying case was set for trial before discovery

was complete, before the time limits of ALC Rule 21A had expired, and even before the tribunal had ruled on the DOR demand for a discovery time extension.

In addition, the tribunal, again *sua sponte*, felt it necessary to note that the Appellants never filed a Motion to Compel discovery. (R. p.). Clearly, the prospect for a Motion to Compel was raised by the Appellants. (R. p.). Moreover, on the day the Summary Judgment Motion was received by the undersigned, the deadline for response had barely arrived (Rules 33(a) and 34(b), SCRCF), a fact admitted by DOR. (R. p.). Further, DOR sought to delay discovery responses and, in the absence of failure to respond or evasive answers, exactly like Summary Judgment, a Motion to Compel was premature. Rule 37(a), SCRCF. Finally, it is perfectly logical that, had the non-disclosure of DOR persisted, the Appellants may have tactically opted for a Motion in Limine (R. p.) as opposed to seeking to compel discovery. Regardless, the *sua sponte* reference to a motion not yet ripe for review compounds the “tone and tenor” appearance of bias referenced above.

C. Mischaracterizations

Much of the Order Denying Reconsideration to the Appellants is lifted directly from the tardy and untimely (pp. , *infra*) return to motion of DOR. (R. p.). Many sections are lifted verbatim from that response with little if any modification aside from substituting “Rays” for “taxpayers”. (R. p.). Consequently, where DOR mischaracterized, the tribunal accepted and approved that impropriety.

For brevity, a single example must suffice. At page 5 of that Order (R. p.), the tribunal finds that the Appellants labored under a “misapprehension [regarding] Rule 19” and then liberally sprinkles the first two sentences of that same paragraph with an assertion of that to be an “excuse”.

Aside from DOR’s own misapprehension, described at pages 23-24 hereafter, that concept was nowhere raised in the Summary Judgment Motion, the Summary Judgment Order, or the Motion to Reconsider. (R. p.). To the complete contrary, the Appellants argued that Rule 19A

simply did not apply here. (R. p.). In the Order under appeal, DOR claimed the misapplication of a Rule by the tribunal to be a “misapprehension” by the Appellants. The tribunal injudiciously adopted that advocative text in its final Order to again breach the “tone and tenor” directive of *Pace*.

Finally, the Order under appeal also mischaracterizes the estoppel issues raised by the Appellants. While conceding that the Appellants asserted numerous failings and gross negligence in the performance of the ministerial duties of the DOR, the Orders disregard all such issues and the non-exclusive authority listed in the Appellants’ pre-hearing statement and the record to conclude that only general estoppel is raised. Yet, under the facts of this matter, no less than judicial estoppel, estoppel by silence, collateral estoppel, laches, and *in pari delicto* apply. (R. p. ; pp. , supra).

DOR’s Motion addressed only general estoppel. First and foremost, the Appellants did not limit their assignments of DOR error and misconduct to estoppel. (R. p.). Further, the Appellants did not restrict their estoppel assertions to general estoppel alone (R. p.), although it has been applied to agencies and political subdivisions for no less than three (3) decades. *Oswald v. Aiken County*, 281 S.C. 298, 315 S.E.2d 146 (Ct.App.1984); *Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 674 S.E.2d 181 (Ct.App.2009); *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010).

In addition, the Order under appeal limits its consideration of estoppel to a single ministerial duty that was negligently executed early in the administrative process. (R. p.). The record is replete with further misconduct by DOR for which estoppel in all of its various forms applies, the most recent being scarcely a year ago. (R. p.).

For example, and contrary to the findings and conclusions of the Order, no less than judicial estoppel and collateral estoppel apply (in addition to general, generic, equitable estoppel) to bar DOR’s most recent “determination”. Those inferences are supported by the signed filings of the pro

se Appellants, were properly before the tribunal, and are in the record. (R. p.). Moreover, it is abundantly evident, if not overtly conceded, that DOR ratified and adopted all such wrongdoing as its own. (R. p.).

Moreover, the Appellants have asserted other improprieties, ambiguities, inferences, evidentiary disputes, statute violations, procedural disregard, intentional delays, willful misdirection, misconstructions, and other dispositive failures by DOR which appear in the record. (R. p.). Improperly and erroneously, the tribunal disregarded all such defenses and assertions, and the disputed conclusions and inferences flowing therefrom, in its rush to judgment.

Section Summary

"An abuse of discretion occurs when the trial court's ruling is based on ... error[s] of law." (*State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011)) and also when "tone and tenor of [a tribunal's] remarks" do not meet the high standard required of Judges. *Pace*. Further, the failure to consider discovery factors such as failure to disclose, burden of proof, and clear prejudice demonstrates a failure to exercise discretion. Such a failure to exercise discretion "amounts to an abuse of discretion." *Samples*. Among the misapplications of Rule 56, SCRCPP, discovery disregard, and the other matters earlier cited, the paragraphs of this argument describe additional errors and abuse. Respectfully, any, and certainly all, militate in favor of reversal and remand.

V. Abuse of Discretion: *sua sponte* time limits & disregard of the rules of construction

A. Application of inapplicable time constraints and the "Plain Language Rule"

The tribunal concedes that it is bound by the rules of statutory construction and the Order under appeal confirms that a plain reading or the "plain language" rule applies. (R. p.). That Order further cites and acknowledges the propriety of a Rule 56, SCRCPP, analysis of the DOR Motion, the only Rule cited in the Motion. Then, the Order under appeal reversibly departs from both standards.

Rule 56, SCRCF, and its required protections are addressed elsewhere herein (pp. , supra). Instead of the detailed text of Rule 56, the Summary Judgment Order relies on a small portion of the text of ALC Rule 19A dealing exclusively with “motions pertaining to the hearing”. Notably, Rule 19A was not broached in the DOR Motion but, once again, arose only *sua sponte*. (R. p.). That misplaced reliance, regrettably, must be addressed here as well.

To briefly reiterate, Summary Judgment Motions are not addressed in the Rules of the Administrative Law Court except as to the fees section of Rule 71. So, one must look elsewhere for guidance. ALC Rule 68. Notably, while ALC Rule 68 does allow a judge of that court to utilize a Rule of the Appellate Court or a Rule of Civil Procedure, nowhere does it provide that the tribunal can pick and choose which provisions or components of an individual Rule it wishes to apply.

Quite properly, the DOR Summary Judgment Motion relied upon Rule 56, SCRCF. It did not suggest that any portion of that Rule be pared off. (R. p.). Moreover, the tribunal readily and also properly cited Rule 56, initially, in the Order under appeal. The specific text and explicit timeframes of Rule 56 and the standards as applied by the Courts are addressed elsewhere (pp. , supra) and need not be repeated here.

However, the tribunal, once more fully *sua sponte*, broached ALC Rule 19A and used its inapplicable “hearing” motion constraints to inappropriately modify Rule 56, SCRCF, and deny its protections to the Appellants. Unlike the detailed provisions of Rule 56, Rule 19A contains four (4) short sentences.

The tribunal erroneously and fully relied upon the final two sentences of 19A: “All **motions pertaining to the hearing** shall be filed not later than ten (10) days before the hearing date, unless otherwise ordered by the administrative law judge. Any party may file a written response to the motion [**pertaining to the hearing**] within ten (10) days unless the time is extended or shortened by the administrative law judge.” (Emphasis added). The time limit, which clearly applies to “hearing”

motions, is eminently logical. Clearly, by a simple plain reading in context, the ALC Rules require that “hearing” motions be submitted for Court consideration ten (10) days in advance of “the hearing”. Simple math reveals that any opposition thereto must be made by the “hearing” date, i.e., some ten (10) days after the “hearing” motion. ALC Rule 19A.

However, by the initial sentences of that same Rule, those deadlines do not apply to “pre-hearing” motions. Again, ALC Rule 19A states: “All **pre-hearing motions** shall be written, contain the caption of the case and the title of the motion, the contested case docket number assigned by the Court and the name and address of the person preparing it. The motion shall also state the grounds for relief and the relief sought.” (Emphasis added). No time limit is stated.

With both DOR and the tribunal citing Rule 56, SCRCF, the Appellants argued below and reiterate here that the provisions of Rule 56 apply. (R. p.). Those arguments were improperly disregarded. (R. p.).

Even if Rule 19A can possibly be construed to modify Rule 56, a plain reading construction of 19A reveals that the improperly applied deadline for response imposed upon “hearing” motions, does not apply to “pre-hearing” motions – such as Summary Judgment Motions. Moreover, if ALC Rule 19A can be interpreted as the Order under appeal suggests (research by the undersigned found no other Administrative Law Court that has applied Rule 19A to achieve the appealed result), it is clearly inconsistent with Rule 56, SCRCF, and cannot be sustained under §1-23-650(B)(1).

Consequently, no deference should be afforded to the interpretation of the tribunal because it is contrary to the “plain language” of Rule 56 and contrary to §1-23-650(B)(1), and it thereby constitutes an error of law. Where the plain language of statute or Rule is contrary to the agency's interpretation, the Court will reject that interpretation. *Media General Communications, Inc. v. S.C. Department of Revenue*, 388 S.C. 138, 694 S.E.2d 525 (2010). Respectfully, to deny the Appellants any discovery, full disclosure, and the means to prepare a Summary Judgment defense and trial

itself based upon an inapplicable rule and, regardless, its inapplicable time constraints was an abuse of discretion and a reversible error of law.

B. Provisions cannot be added or deleted – or disregarded

In addition to the plain language rule of construction, other rules apply. A corollary to the South Carolina plain language rule is that words (for example, the protections and time provisions of Rule 56) cannot be added to or removed from a statute or rule and “the [tribunal] has no right to look for or impose” a different interpretation. *Paschal v. State Election Comm’n.*, 317 S.C. 434, 454 S.E.2d 890 (1995).

Here, the tribunal imposed the time limits of Rule 19A regarding “hearing motions” to a “pre-hearing” Summary Judgment Motion. It attempts to excuse that error by erroneously claiming that trial had been set before the Order under appeal had been issued. (R. p.). However, no notice had been issued and none was provided to the Appellants to date, in any form or fashion. Interestingly, were that assertion accurate, the tribunal had set the trial less than ninety (90) days after case initiation (May 11, 2012 to July 26, 2012 (R. p.)) and nearly thirty (30) days prior to the expiration of ALC Rule 21 discovery rights (May 23, 2012 to July 26, 2012 (R. p.)).

The misconstruction of Rule 56 by the tribunal, serving to disregard and impose inconsistent limits on the Rule’s application, where the rule-promulgating Supreme Court did not, is simply forbidden. S.C. Code §1-23-650(B)(1).

C. If there are truly contradictions, it was the tribunal’s duty to reconcile them

Also as noted before, Rule 56, SCRCP, was cited as controlling by DOR in its Motion and by the tribunal in the Order under appeal. Relief was sought and awarded under that Rule (ALC 19A’s pre-hearing provision lists no relief, and none was sought thereunder nor was that rule even broached by DOR). (R. p.).

Further, where possible, when rules or statutes appear inconsistent or in conflict, it is a tribunal's duty to reconcile them. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992). Clearly, read in its proper plain language "pre-hearing" context, Rule 19A does not contradict the time limits set by Rule 56. However, if an inconsistency in Rules 56 and 19A actually does exist, the much more detailed "common pleas" Rule 56, SCRCP, clearly controls. S.C. Code §1-23-650. It was an error of law and abuse of discretion to rule otherwise.

D. Details are superior to a lack of details

A final example is the rule of construction that the more specific directive (rule, statute, etc.) will prevail over the more general. "[W]here two provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails." *Mikell v. County of Charleston*, 386 S.C. 153, 687 S.E.2d 326 (2009). Clearly, Rule 19A is general and non-restrictive as to ANY time limits in regards to pre-hearing motions. It speaks to such motions generically and it lists no evidence requirements. In short, Rule 19A provides only scrivener's instructions as to pre-hearing motions.

In stark contrast, Rule 56, SCRCP, lists time restraints for motion initiation (30+ days), minimums for service (10+ days), response time (2+ days), reply time, support requirements (admissible evidence), and numerous other details. Clearly, the comprehensive Rule 56, SCRCP, takes precedence over ALC Rule 19A – even without the acquiescence to the terms of Rule 56 demonstrated in the Motion and the Order under appeal. (R. p.).

Section Summary

Here, the tribunal felt the need to raise the issue of construction *sua sponte*. It then interpreted ALC Rule 19A as inconsistent with Rule 56, SCRCP. Based on that misperceived inconsistency, the tribunal proceeded to apply Rule 19A to restrict Rule 56, to the non-moving

Appellants' prejudice and detriment in violation of every ordinary rule of construction and S.C. Code §1-23-650(B)(1). Doing so was an error of law and an abuse of discretion.

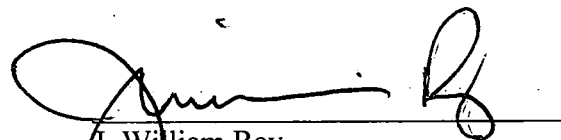
CONCLUSION

The only thing “perfectly clear”, *Wortman*, is that material facts remain in dispute and the prompt and diligent Appellants were denied discovery. The Order under appeal exactly contradicts South Carolina’s policy favoring a trial by attempted disposal of the underlying case on a technicality and, even then, on an invalid and misconstrued technicality. Even if ripe for Summary Judgment review, which remains denied, the tribunal completely disregarded the ambiguities, conclusions, and inferences arising from the evidence that contradict and/or impeach its ruling.

Simply and respectfully stated, the Order under appeal was improperly issued and the mistake was compounded upon the tribunal’s pre-Appeal reconsideration. Both Orders rest upon improper procedure and errors of law, causing undeniable prejudice to the Appellants, and contain errors of fact and conclusions contrary to reliable, probative, and substantial evidence in the record. Regrettably, both engage in abuses of discretion and violate the standards required of the Courts. Consequently, the award of Summary Judgment was grossly pre-mature and is otherwise improper.

Respectfully, the Order under appeal should be vacated, the decision reversed, and this case remanded to the Administrative Law Court with a clear directive that proper discovery responses be required of DOR within a reasonable time thereafter and that pre-hearing procedures and a final hearing in this matter move forward in the ordinary course.

Respectfully submitted,



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November 26, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Judge

Appellate Case No. 2012-212844

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue, et al.

Respondent.

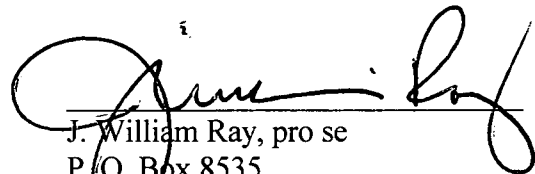
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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants hereby certifies that this Brief complies with Rule 211(b), SCACR.



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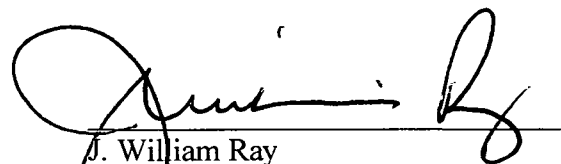
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PROOF OF SERVICE

I, J. William Ray, do hereby certify that a copy of the initial Brief of Appellants in the above captioned case has been duly served on the Respondent by placing the same in an envelope, with adequate prepaid postage affixed thereto, addressed as shown below, and properly depositing such copy of it in the United States Mail.

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