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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court
APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge
Dock. No. 07-ALJ-04-00517-AP

Order (S.C. Ct. App. filed July 20, 2017)

Fred Gatewood, #289775..... Petitioner,

v.

South Carolina Department of Corrections..... Respondent.

Court of Appeals Appellate Case No. 2017-001552

Supreme Court Appellate Case No. 2017-002119

REPLY TO RETURN TO PETITION
FOR A WRIT OF CERTIORARI

Pursuant to SCACR 242(g), Fred Gatewood (inmate) submits this reply to the Department of Corrections' (SCDC) return to petition for writ of certiorari.

QUESTION PRESENTED

SCDC does not present a counter-statement of the question presented (SCACR 242(f) (SCDC Return, p. 1).

COUNTER-STATEMENT OF THE CASE

Inmate contends SCDC's counter-statement violates SCACR 242(d)(3)'s requirements to be concise and contain facts material to the question presented. The counter-statement is 9½ pages long, while the entire return is 22½ pages. Thus, the counter-statement is not concise. It is also non-factual and argumentative by its gratuitous criticism of inmate's statement of the case and argument (Return, pp. 3, 5-7, 10-11); and counter arguments (Return, pp. 5-6, 7-8, 10-11). Inmate submits the Court should disregard these portions of the counter-statement.

SCDC states Adkins and Wicker did not hold inmates could file prevailing wage grievances and appeal to the ALC (Return, p. 3). Inmate respectfully disagrees. Initially, inmate contends this statement is not material to the question presented (SCACR 242(d)(3)). On the merits, Adkins, et al. v. SCDC 360 S.C. 413, 602 S.E. 2d 51, 55 (S.C., 2004) stated, "..we hold inmates may file an inmate grievance to protest DOC's failure to pay wages in accordance with the mandatory statutory provisions".

And, in Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 56, 58 note 1 (S.C., 2004) the Court stated "..we hold the DOC's failure to pay in accordance with the statutes is reviewable by the ALJ". In note 1, the Court stated its holding was limited and not to be viewed as "expanding" the ALJ's jurisdiction in

any other circumstance.

SCDC states Adkins and Wicker did not open the door for inmates to file pay claims with SCDC, but merely confirmed that inmates already had that right (Return, p. 5). Inmate disagrees. Initially, inmate contends this statement is not material to the question presented (SCACR 242(d)(3)). On the merits, in Wicker, 602 S.E. 2d at 58, for the first time the Court found the prevailing wage statute creates an interest encompassed by the Fourteenth Amendment's protection of liberty and property which may not be denied without due process. Due process, in turn, required a hearing and judicial review (Al-Shabazz v. State 527 S.E. 2d 742, 750 (S.C., 2000)).

Thus, Adkins and Wicker granted grievance and appeal rights to satisfy these due process requirements. Since the basis for the Court's decisions was the new due process finding, inmates did not have these rights before Adkins and Wicker.

SCDC states its July 13, 2017 "filing" with the ALC was not its response to Gatewood's ALC petition for attorney fees, but merely a "mechanism" to strike Gatewood's filings (Return, p. 10). Inmate disagrees. Initially, inmate contends this statement is not material to the question presented (SCACR 242(d)(3)). On the merits, SCDC's response is entitled, "The Department's Response to Gatewood's Filings Dated June 30, 2017 and Its Motion to Strike Gatewood's Filings Dated June 30, 2017" (App. p. 20). Moreover, the response covers over 12 pages, while the motion to strike covers less than 2 pages (App. pp. 23-36). The opening paragraphs state SCDC "..provides its response to the three (3) filings dated June 30, 2017.." and "..also moves this Court..to strike Gatewood's three (3) filings dated June 30, 2017" (App. p. 20).

Moreover, in the July 13 response SCDC argued its application of the 15 day filing deadline for "incident" grievances was grounded on a reasonable basis in law and fact, and did not reflect a "will to win" (App. pp. 30-31). A reasonable basis in law and fact is the test for determining "substantial justification" under §15-77-300 (Layman, et al. v. State of South Carolina, et al. 376 S.C. 434, 658 S.E. 2d 320, 326 (S.C., 2008)). Concerning SCDC's "will to win", in addition to contesting liability for 13 years, inmate notes the Court of Appeals' characterization of SCDC's reliance on the filing deadline for "incident" grievances as "arbitrary and capricious" (Ackerman, et al. v. SCDC 415 S.C. 412, 782 S.E. 2d 757, 762 (S.C. App., 2016)).

ARGUMENT

A. SCDC contends the ALC is not the forum to litigate inmate's claims because under Wicker and Al-Shabazz, the ALC sits exclusively in an appellate capacity to review SCDC final decisions for these claims (Return, p. 11). First, inmate contends this argument is not relevant to the question presented, whether the ALC remand order was appealable under Charlotte-Mecklenburg Hosp. v. DHEC (SCACR 242(f) (Return shall include "argument on each question")).

On the merits, Al-Shabazz did not concern inmate pay claims, as inmates had no wage grievance/appeal rights when that case was decided in 2000. Moreover, Wicker did not address whether ALC review jurisdiction was exclusively appellate. Here, the ALC acquired jurisdiction to reconsider inmate's entitlement "...to costs, attorney's fees, pre-judgment interest, and post-judgment interest..." by the Court of Appeals' opinion remand in Gatewood v. SCDC, 785 S.E. 2d at 613, and the June 2, 2017 Court of Appeals' remittitur to the ALC (Inmate's Petition, p. 2; App. p. 5). Inmate's entitlement to ALC reconsideration of

attorney fees is also required by §15-77-300, 1985 version (Petition, p. 4).

Finally, ALC Rule 2(E) states the definition of "contested case" includes hearings "required by due process" or "otherwise provided by law". As earlier stated, Wicker, 602 S.E. 2d at 58 note 1, granted ALC appeal rights in these cases as a requirement of due process. And, "the court" considers attorney fees in state action cases under §15-77-300. Thus, ALC review constitutes a "contested case" under ALC rules. In addition, the ALC can have both appellate and contested case jurisdiction (J. Toal, Appellate Practice in South Carolina, 3d Ed., 2016, p. 74).

SCDC states the ALC's jurisdiction in this matter is animated by ALC Rule 51 and notes, stating the rules in Section V are the exclusive rules of procedure for appeals from final SCDC decisions (Return, pp. 12-13). Initially, inmate contends this argument is not relevant to the question presented (SCACR 242(f)). On the merits, the instant matter is not on appeal from a final decision of SCDC. Inmate's decision and appeal to the ALC occurred in 2007 (Petition, p. 1; App. pp. 41-45; Gatewood v. SCDC, 785 S.E. 2d at 604-605, summarizing Gatewood's SCDC 2007 grievance final decision and ALC appeal). Inmate requests the Court to take judicial notice of all the final decisions and ALC appeals in the Supreme Court's records in SCDC's petition for certiorari in Ackerman, et al. v. SCDC Sup. Court App. Case No. 2016-000829, beginning in Appendix volume 3, page 1311, and ending in volume 10, page 4276.

Instead of being on appeal from a final decision of SCDC, the instant case is on appeal from the Court of Appeals' remand to the ALC to reconsider inmate's entitlement to costs, attorney fees, and pre and post-judgment interest (Gatewood v. SCDC, 785 S.E. 2d at 613; App. p. 5). Thus, ALC Rule 51 does not

apply here. Even if it did, inmate contends it would not trump the Court of Appeals' remand, which is jurisdictional, directing the ALC to reconsider costs, attorney fees, and interest. See petition, pages 5-6.

SCDC states the ALC would not deprive inmate of his mode of trial because the ALC remand would hold in abeyance the determination of attorney fees pending outcome of SCDC proceedings on remand regarding Gatewood's and Ackerman, et al.'s pay claims (Return, p. 14). First, the remand stated the matter was being held in abeyance because the determination of attorney fees encompasses several factors, including the "beneficial results obtained", citing §15-77-300(B) (2016) (App. p. 6). However, as discussed in the petition, pp. 10-11, the §15-77-300(B) factors do not apply in these cases.

As to the proceedings on remand to SCDC, SCDC reiterates the arguments it made to the ALC, which are addressed in the petition, pp. 7-8. In sum, the remand to SCDC causes, in addition to a time delay, a different mode of trial in terms of the adjudicating forum (SCDC instead of the ALC, as the Court of Appeals directed), and in terms of the issues to be determined (processing grievances on the merits again and calculating back wages, instead of reconsidering inmate's entitlement to costs, attorney fees and interest, as the Court of Appeals directed).

SCDC states a final result in inmate's favor does not yet exist, and the ALC properly remanded to SCDC (Return, p. 14). Initially, inmate contends this argument is not relevant to the question presented (SCACR 242(f)). On the merits, the ALC remanded to SCDC "...for processing as set forth in Gatewood v. S.C. Dep't of Corr., 416 S.C. 304.." (App. p. 6). Thus, the ALC purports to follow Gatewood by its remand. However, if the ALC did so, it would

perform the duties the Court of Appeals directed it to do, that is, reconsider Gatewood's entitlement to costs, attorney fees, and pre and post-judgment interest (Gatewood v. SCDC, 785 S.E. 2d at 613; App. p. 5).

Moreover, SCDC itself apparently believes a final result in Gatewood's favor exists. In its July 25, 2016 petition for certiorari, page 15, SCDC stated in part:

If the rulings by the Court of Appeals on the second, third, and fourth issues from its decision stand, SCDC would owe back wages to Gatewood for the labor he provided..If the ruling by the Court of Appeals on the sixth issue from its decision stands, SCDC faces the prospect that it would also owe Gatewood, as the **prevailing party** on the second, third, and fourth issues, monies attributable to interest, costs, and attorney's fees.

(Gatewood v. SCDC Appellate Case No. 2016-001221, SCDC Pet. for Cert., p. 15)

B. SCDC states Gatewood conceded in the July 13, 2017 petition for mandamus that the ALC remand is "probably interlocutory and not immediately appealable", and inmate purposefully did not include this in the petition (Return, p. 15-16). The July 14, 2017 notice of appeal footnote summarized the petition for mandamus contention that the remand is probably interlocutory and not immediately appealable under Charlotte-Mecklenburg Hosp., and also stated it was possible the Court may distinguish Charlotte-Mecklenburg Hosp. based on circumstances here which were not addressed in that case (App. pp. 8-9). Moreover, the notice of appeal is summarized in the petition statement of the case, page 2, and is contained in the Appendix, pages 8-10.

Pursuant to SCACR 242(d)(4), the petition for certiorari shall contain a ".direct and concise argument in support of the petition". And, SCACR 217 allows a party to ".argue against precedent in the brief..". Here, the question presented is whether the Court of Appeals erred in deciding the ALC re-

mand was not appealable under Charlotte-Mecklenburg Hosp. (Petition, p. 1). In the petition argument, inmate stated at page 3, "(T)he Court of Appeals should have decided that Charlotte-Mecklenburg Hosp. Auth. v. DHEC is distinguishable, and the ALC's remand order was appealable." In support, inmate contended for the various circumstances which distinguish this case from Charlotte-Mecklenburg Hosp., the precedent being argued against (Petition, pages 3-6).

The ALC remand order is either appealable or not. Only this Court can say with final authority. If the Court relies solely on those circumstances which our case and Charlotte-Mecklenburg Hosp. share in common, the remand order is probably interlocutory. However, if the Court considers the circumstances here which were not addressed in Charlotte-Mecklenburg Hosp., it is possible the Court may find the remand to be appealable.

C. SCDC contends the Court should not consider the argument as to whether Charlotte-Mecklenburg Hosp. is distinguishable, citing Smith v. Tiffany 419 S.C. 548, 799 S.E. 2d 479, 484 note 3 (S.C., 2017) and First Sav. Bank v. McLean 314 S.C. 361, 363, 444 S.E. 2d 513, 514 (S.C., 1994) (Return, pp. 18-20). In those two cases, appellants failed to provide argument or legal authority. Also, there is no indication that those cases were reviewed on certiorari.

In Mazloom v. Mazloom 392 S.C. 403, 709 S.E. 2d 661 (S.C., 2011), the Court did review on a writ of certiorari. The Court relied on SCACR 242(d)(2) to decide a portion of the question was not preserved for review. That rule states, "(O)nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented.."

Here, inmate contends the notice of appeal footnote raised the question, or

subsidiary question (SCACR 242(d)(2)), that "...it is possible the Court may distinguish Charlotte-Mecklenburg Hosp. based on other circumstances here which were not addressed in that case" (App. p. 9). Further, inmate contends that the Court of Appeals addressed the issue in its July 20, 2017 order dismissing the appeal as interlocutory pursuant to Charlotte-Mecklenburg Hosp. (App. p. 3). Finally, the issue was raised in the petition for rehearing (App. pp. 11, 13-15).

D. SCDC contends the ALC remand is not a final order under Charlotte-Mecklenburg Hosp., §1-23-610(A)(1), or other statutes (Return, p. 21). The petition contends Charlotte-Mecklenburg Hosp. is distinguishable, and for that reason the ALC remand was appealable. The circumstances distinguishing our case from Charlotte-Mecklenburg Hosp. are discussed in the petition, pages 3-6.

Inmate further notes that Charlotte-Mecklenburg Hosp., 387 S.C. at 266, is clear that §1-23-610(A)(1) is the governing statute in these cases.

E. SCDC contends no novel question of law exists under SCACR 242(b)(1) because, as in Charlotte-Mecklenburg Hosp., this Court has adjudicated suits concerning whether an ALC order was interlocutory (Return, p. 22). However, SCDC does not address the specific contention that the appealability of an ALC remand which conflicts with a previous Court of Appeals remand to the ALC, may present a novel question of law (Petition, pp. 6-7).

SCDC contends the Court of Appeals' dismissal of the appeal conforms to, rather than conflicts with, a prior decision of the Court, namely Charlotte-Mecklenburg Hosp., under SCACR 242(b)(3) (Return, p. 22). However, SCDC does not address whether the dismissal conflicts with Williford v. Downs and other cases holding that a mode of trial denial is immediately appealable (Petition,

p. 6).

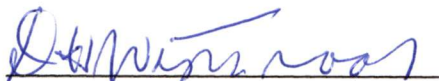
SCDC contends that no constitutional issues are animated under SCACR 242 (b)(4) by the Court of Appeals' dismissal (Return, pp. 22-23). However, SCDC does not address whether the dismissal conflicts with Wicker's guarantee of due process (Petition, p. 7).

Finally, in its argument SCDC only briefly discussed several of the petition arguments (Return, pp. 12-14, 18-19). As to the petition considerations governing review, SCDC did not even address the considerations that the "beneficial results obtained" 2010 amendment to §15-77-300 cannot apply due to the rule against retroactivity of statutes, violation of due process, and impairment of contracts (Petition pp. 10-11).

CONCLUSION

For the reasons stated in the petition and this reply, inmate requests the Court to grant the petition for a writ of certiorari, or in the alternative, to consider the petition as an application for mandamus to the ALC to reconsider Gatewood's entitlement to costs, attorney fees, and pre and post-judgment interest.

Respectfully submitted,



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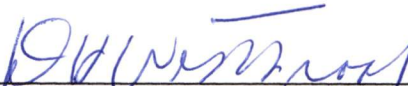
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PROOF OF SERVICE

I certify that I have served petitioner's Reply to Return to Petition For a Writ of Certiorari on the S.C. Department of Corrections by depositing a copy of it in the U.S. Mail, postage prepaid, on December 5, 2017, addressed to its attorney of record, Lake Summers, Esquire, of Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Suite 200, Columbia, SC 29201.
December 5, 2017.


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