

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

Edward W. Miller,

Appellant

v.

South Carolina Public Employees Benefit Authority,  
South Carolina Retirement Systems,

Respondent

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SC Court of Appeals

Appeal from the Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge

Unpublished Opinion No. 2018-UP-074  
Heard October 4, 2017 - Filed February 7, 2018

**APPELLANT'S PETITION FOR REHEARING**

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In its *per curiam* Opinion, (“Opinion”), filed in the instant case on February 7, 2018, the Court of Appeals, (“Court”), affirmed the Administrative Law Court’s, (“ALC’s”) order granting summary judgment in favor of Respondent. Pursuant to SC Appellate Court Rules 221, 240 and 242, Appellant hereby petitions this Court for a rehearing of his appeal, on the grounds detailed below.

The appellant will explain with particularity each item which the Court of Appeals overlooked or misapprehended in the above referenced opinion as required by Rule 221. Additionally, the Appellant asserts that even if the Court of Appeals was not in error on the items discussed below, the appropriate remedy for this Court’s ruling recognizing the ALC erred in failing to find the existence of a fiduciary duty, would be to remand the case for an evidentiary hearing on these issues rather than affirming and dismissing it in full. As a result, the Appellant prays that this Court rehear this matter and remand this case for a full evidentiary hearing.

Appellant asserts the Court of Appeals overlooked or misapprehended the law in the following items as listed in the opinion #2008-UP-074.

**1. This Court, in the first paragraph of its Opinion, correctly held that the ALC erred in failing to hold that Respondent owes fiduciary duties to Appellant; this Court, however, erred in affirming the ALC’s grant of summary judgment finding, without a full, factual record required for proper adjudication, that there had been no breach of Respondent’s fiduciary duties to Appellant.**

In South Carolina jurisprudence, it is well-established that the existence of a fiduciary relationship, and attendant fiduciary duties, is a question of law. The determination of whether a breach of fiduciary duties has occurred, on the other hand, is a question of fact. *Turpin v. Lowther*, 404 SC 581, 745 SE2nd 397 (S.C. 2013); *Vortex Sports and Entertainment, Inc. v. Ware and Associates, Inc.*, 378 SC 197, 662 SE 2<sup>nd</sup> 444 (S.C. Ct. App. 2008). In this case, the ALC did not reach the issue of whether Respondent had breached its fiduciary duties to Appellant because the ALC did not recognize, as this Court has, that Respondent was a fiduciary. Though this court has correctly held that Respondent is a fiduciary, this court incorrectly held that there had been no breach of the fiduciary duty by Respondent without a full, factual record before the Court.

Alternatively, it is uncontested that this appeal arises from the ALC Court's adjudication of Appellant's claims for breach of fiduciary duty by Respondent. Thus, this case is one in equity. This Court may, therefore, find facts, *de novo*, according to its own view of the preponderance of the evidence. *S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (S.C. 2011). In this case, however, there is **no** factual record available for review of an action in equity by this Court. Due to the lack of adequate factual record for review, Appellant submits that the finding of this Court that there was no breach of fiduciary duty is unsupported by any factual record from the ALC.

This Court's error should be corrected by remanding this case to the ALC for the development of a full factual record to determine whether Respondent breached its fiduciary duties owed to Appellant.

**2. In the second Paragraph of the Opinion, this Court held that Appellant was a "part-time" employee and therefore cannot establish unequal treatment of like situated beneficiaries; however, there is nothing in the Record on Appeal with which to compare that designation which would substantiate that ruling; the sole basis for the Court's ruling was an assertion made by counsel for Respondent elicited during oral argument; in relying in the Opinion on the unsubstantiated assertion by counsel for Respondent, this Court has denied due process to Appellant, in violation of SC and US Constitutions.**

The Record on Appeal is replete with significant evidence that Appellant's designation as a part-time employee was only nominal and for clerical, administrative purposes. The actual work performed was identical to that performed by Joe Watson, who received full-time earned service credit. This undisputed fact is found in the Record on Appeal in three separate affidavits, which are ignored in the Opinion of the Court.

Reference to the audiotape of the oral argument of this case will show that one of the Panel Judges asked counsel for Respondent if Joe Watson's application (which is not in the Record on Appeal) was identical to Appellant's application. Counsel for Respondent replied that Watson's application did not contain a part-time designation and was treated differently. This assertion cannot be found in any material contained in the Record on Appeal. That the Judges had to reach outside the Record on Appeal and elicit unsubstantiated "testimony" from counsel

for Respondent to form the basis of the Court's decision establishes the following:

1. There was a scintilla of evidence and, therefore, a genuine triable issue of fact about the similarity and/or difference between Appellant's treatment and Watson's treatment, which was not in the Record on Appeal of this case;

2. The Court based its affirmation of the ALC's Order on a fact which was not in the Record on Appeal but which was disclosed at oral argument by counsel for Respondent, which establishes that the ALC Trial Court's Order was not founded on adequately established fact(s);

3. The answer by counsel for Respondent to the Judge's question violates the Respondent's statutory duty of confidentiality owed to Watson, exemplifies Respondent's failure to understand its fiduciary duties owed to beneficiaries (Watson in this instance), and demonstrates the Respondent's willingness to violate its fiduciary duty to the Appellant in handling Appellant's application to purchase additional retirement coverage;

4. Admittedly, Appellant's application job description was "part-time," however it is undisputed Appellant and Watson had the same caseload and same employment requirements. Respondent's reliance on this superficial difference between Watson and Appellant violates Respondent's fiduciary duty to look past the superficial and to treat Appellant with full good faith and fair dealing as a fiduciary, and the mandatory requirement of equal treatment of like-situated beneficiaries;

5. This Appellate Court's reliance on unsubstantiated evidence, not in the Record on Appeal in this case, which formed the basis for its decision herein, violates Appellant's constitutional right of due process during this stage of the proceeding;

6. Because this Court has violated Appellate Rules by reaching outside of the Record on Appeal, Appellant now informs the Court that he has, since the initiation of this Appeal, become aware of another judicial member, similarly situated to Appellant and Watson, who has been treated similarly to Watson by being allowed to purchase full-time earned service credit, further emphasizing the unequal and disparate treatment given to Appellant, and the Respondent's failure in exercising its fiduciary duties.

Based on the foregoing, Appellant seeks the remand of this case to the ACL Trial Court to establish a full, proper record for adjudication of the parties' positions.

**3. In the third Paragraph of the Opinion, this Court, while correctly holding that Respondent was a fiduciary, incongruously held that the ALC properly declined to rule that Respondent was equitably estopped from asserting a timeliness bar to Appellant's application for additional retirement coverage; this Court erred in failing to recognize that had Respondent made proper and timely disclosure to Appellant, then Appellant would have made a timely application for additional retirement coverage.**

The Court overlooks three matters in this regard:

Initially, at oral argument this Court recognized that this case presents a **novel issue of law** in South Carolina jurisprudence: whether or not a "discovery rule" should apply, under these circumstances, to toll the running of the time limitation which would allow Appellant to pursue the relief sought herein. The Court, however failed to address this seminal issue in its opinion. As a practical matter, Respondent may well have not been consciously aware of the Watson case when it made its inequitable determination in 2002 with respect to Appellant. However, Respondent did possess that knowledge as the sole, and statutorily confidential, custodian of that information. It is undisputed that Appellant neither knew of nor had any access to that information, which resulted in the unequal treatment of like-situated beneficiaries. This conundrum presents the quintessential dilemma, involving important constitutional, statutory and common law rights, which can only be remedied by the imposition of a relevant discovery rule.

Second, the Respondent is a fiduciary. Respondent's fiduciary duty requires that it not simply sit mute. Rather the Respondent owes its primary, affirmative duty of vigilance and care for the beneficiaries of the retirement system of which the Respondent is the legislatively-created trustee. By affirming the ALC's Order this Court allows the Respondent to circumvent its fiduciary duties by availing itself of the use of an equitable defense to avoid its unequal treatment of a beneficiary. It is to this Court that Appellant has come seeking the enforcement of equitable, fiduciary principles on Respondent's management of the retirement system. In the Opinion, this Court held that Appellant had not made timely application for the purchase of additional coverage in the retirement system. Respondent, as a fiduciary, failed to make full disclosure to Appellant that other parties had previously, under identical circumstances, been allowed to purchase additional coverage in the retirement system. Respondent's failure to disclose, as required by Respondent's fiduciary duty, under these circumstances invites the

application of equitable estoppel to correct Respondent's gross violation of Respondent's fiduciary obligations of fair dealing, full disclosure, and honesty in fact.

Finally, the Record on Appeal demonstrates that, at no time, did Respondent comply with its fiduciary duty of disclosing that Appellant had a right to purchase additional retirement coverage. Only during the litigation of this case did Respondent acknowledge Watson's purchase of additional retirement coverage under circumstances similar to Appellant's. As a result, it is **uncontested** that the Appellant had neither knowledge nor notice to form any constructive knowledge of Mr. Watson's purchase. As a result, Appellant could not have known he had a claim for full-time earned service credit or that the claim had been denied for these retirement benefits. See *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (S.C. 2009), holding a "waiver is a voluntary and intentional abandonment or relinquishment of a **known right**." 384 S.C. at 480, 682 S.E.2d at 807. The Court overlooks the fact that one can only surrender a **known right**.

For these reasons, Appellant urges this Court to remand this case with instructions to the ALC to establish a full record on which to enforce fiduciary and constitutional duties owed to Appellant by Respondent.

**4. In the fourth Paragraph of the Opinion, this Court held that the parties voluntarily submitted "undisputed and stipulated facts and joint exhibits" which justified the ALC granting summary judgment; however, Respondent conceded that the parties differed in interpretation of the facts before the ALC; the existence of disputed inferences reasonably drawn from a common factual record constitutes the presence of a scintilla of evidence of genuine, triable issues of fact which precludes granting of summary judgment.**

It is axiomatic that a summary judgment cannot be granted where there is a scintilla of evidence that gives rise to a genuine, triable issue of fact. Where there is dispute as to the inferences from the facts in the record, then summary judgment cannot be granted. *Nelson v. Charleston County Parks and Recreation*, 362 S.C. 1, 3, 605 S.E.2d 744, 746 (S.C. Ct. App. 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.")

As referenced above, the Record on Appeal is replete with material facts which are in

dispute. Respondent acknowledged in its brief herein, that it disputes, not only the facts of the case, but the reasonable inferences which may be drawn therefrom. This case is not ripe for a decision made pursuant to the strict and harsh rule of Summary Judgment. The ALC erred in failing to require the parties to fully develop a complete evidentiary record when making its decision.

In its opinion, this Court failed to address, with any specificity to allow for further appellate review, the incomplete evidentiary record below, the clearly delineated disputed facts and the clearly delineated disputed inferences reasonably drawn from those facts.

Because there is a scintilla of evidence which defeats summary judgment in this case, the case should be remanded for trial, or for development of a full factual record.

**5. In the fifth Paragraph of the Opinion, this Court incorrectly held that it was not error for the ALC to rely on an unscheduled, unrecorded telephone call, in part, for the ALC's Order, but that it was permissible for the ALC to reject other communications made during the telephone call; Appellant asserts that such judicial procedure is unconstitutional and warrants appellate correction to establish proper protocol for telephonic judicial conferences with litigants and counsel.**

That the telephone call was unscheduled and unrecorded presents three errors which need correction:

First, Respondent asserts that the alleged agreement between counsel and the ALC Trial Judge during the telephone call constituted a "settlement" of certain procedural issues. By issuing an Opinion which upholds the ALC's finding that the parties agreed to a "settlement" on the telephone without any record or publication in open court violates Rule 43(k) of the SCRPC.

Rule 43(k) of the South Carolina Rules of Civil Procedure provides no agreement between counsel shall be binding unless reduced in writing and entered into the record or "unless made in open court and noted upon the record." The purpose of Rule 43(k) is:

[T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character.

*Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 495, 458 S.E.2d 533, 535 (S.C. 1995) (quoting 83 C.J.S. *Stipulation* § 4 (1953)); see also *Motley v. Williams*, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (S.C. Ct. App. 2007) (stating the application of Rule 43(k) will help avoid disputes regarding the terms of settlement). The policy behind Rule 43(k) applies to the telephone call: there is a dispute as to the scope of the parties' settlement of issues, made in an unrecorded teleconference. As set forth, *supra*, the terms and validity of the parties' unrecorded agreement must be settled at the trial court level, rather than take up valuable appellate court time.

The second issue posed by this Court's affirmation of the ALC's use of an unrecorded telephone conversation between the Court and counsel is constitutional: the procedural propriety of the granting of summary judgment by the ALC rests on the contents of an unrecorded judicial telephonic hearing. At the heart of the notion of "due process" rests the right to appear and to be heard. ALC's use of an unrecorded telephone conversation between the Court and counsel is unconstitutional: The failure of notice and to make a record alone requires a new trial. 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, Section 22 and *Adams v H.R. Allen, Inc*, 397 S.C. 652, 726 SE.2d 9 (S.C. Ct. App. 2012). A denial of the right to appear and to be heard, without a recorded agreement by Appellant, does not comport with the "fundamental fairness" of due process as guaranteed to Appellant by US Constitution, Amendment V and SC Constitution Article 3. Appellant suggests that the ALC's reliance on a telephonic hearing, enforced against Appellant without a record, does not comport with the constitutional requirements. *supra*. Appellant asserts that there should be specific guidelines for participation in telephonic hearings between a court and counsel and litigants, to protect the constitutional rights of all parties.

Finally, the Court of Appeals finds that the ALC "neither accepted evidence nor heard arguments of the parties during the call." The Court of Appeals overlooks or misapprehends that this is the exact injury that the Appellant suffered. The Motion to Alter or Amend was the time to raise these issues and allow the ALC to address the issue of a breach of a fiduciary duty and other issues raised. With the complete failure to give notice, conduct a legitimate hearing or

create a record, the Appellant was unfairly and wrongfully prevented from pursuing and protecting his rights.

Appellant asserts that this error should be corrected by remanding the case to the ALC to develop a full and proper record on which the ALC might properly rule.

## CONCLUSION

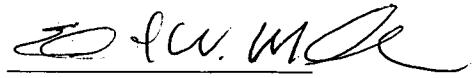
Respondent owes two kinds of duties to Appellant. First, Respondent owes fiduciary duties of good faith, fair deal and, and full disclosure to Appellant. Second, Respondent as a state agency, owes constitutional duties of due process and equal protection of the law to Appellant. The ALC and the opinion of this Court have failed to properly correct Respondents' breaches of fiduciary and constitutional duties.

Additionally, and for purposes of further appellate review as may be necessary, Appellant requests specific rulings on the specific issues raised in Appellant's briefs and in this Petition for Rehearing. Further, Appellant asks for rulings from this Court, *inter alia*, on whether there is, or is not, a scintilla of evidence in the Record on Appeal which proves or disproves Respondent's breach of fiduciary duty and whether Respondent has breached its fiduciary duty by failure to disclose material facts to Appellant.

Based on the foregoing, Appellant asks this Court to reverse the Opinion to require Respondent to sell additional coverage in the retirement program, as it did for Watson, or, in the alternative, to remand this case to the ALC Trial Court to develop a full factual record for the proper constitutional and statutory adjudication of Appellant's claims.

Date:

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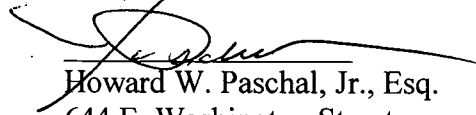
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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No.: 2015-002228

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

SC Court of Appeals

Edward W. Miller

Appellant,

V.

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

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served a copy of the Appellant's Petition for Rehearing on all parties in this matter by depositing the same in the United States Mail, postage paid, and addressed as follows:

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SC ID No.: 3978  
Appellant

Dated: \_\_\_\_\_

3/6/18

**Edward W. Miller**  
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March 6, 2018

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SC Court of Appeals

RE: Edward W. Miller v. SCPEBA  
Appellate Case No. 2015-002228

Dear Ms. Allen:

Enclosed please find the original and six copies of Appellant's Petition for Rehearing, as well as the Certificate of Service on opposing counsel.

With kind regards, I am

Yours very truly,



Edward W. Miller

Cc: Justin R. Werner, Esquire  
SCPEBA  
P.O. Box 11960  
Columbia, South Carolina 29211-1960

EDWARD W. MILLER, JUDGE  
**The Circuit Court of the Thirteenth Judicial Circuit**  
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305 EAST NORTH STREET  
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